The Politics of Amnesty

by

Olivia Le Fort

Faculty of Law
McGill University
Montreal, Canada

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Abstract

Since Antiquity, the granting of amnesty to past atrocities has played a prominent role in political transitions. However, the moralized discourse of human rights that has emerged after the end of the Second World War has called for prosecutions in such cases. This study shows that granting individual amnesties to those responsible for past atrocities, as opposed to their prosecution, is a critical element in paving the way towards *homonoia* – harmony or concord – in a community that has been affected by civil strife. After having explored the origins of amnesty in Ancient Athens and its similarities with the amnesties granted by early modern European peace treaties and the South African Truth and Reconciliation Commission, the author argues that individual amnesty constitutes the only way of uncovering the truth about past atrocities. This is turn facilitates the forgiving of perpetrators and thus the achievement of *homonoia*. Moreover, individual amnesty, as mainly a political act, can nevertheless encompass considerations of justice, when the notion is not restricted merely to its punitive aspect.

Résumé

Depuis l'Antiquité, l'amnistie d'atrocités commises par le passé joue un rôle important lors de transitions politiques. Cependant, le discours « moralisé » des droits humains qui a fait son apparition depuis la fin de la Seconde Guerre Mondiale prône les poursuites pénales dans de tels cas. Cette étude montre que le fait d'accorder des amnisties individuelles aux responsables des atrocités, par opposition à des poursuites, constitue un élément crucial ouvrant la voie vers l'*homonoia*, un état d'harmonie ou de concorde, dans une communauté déchirée par une guerre civile. Après une exploration des origines de l'amnistie en Grèce antique et de ses similarités avec les amnisties accordées par les traités de paix de paix européens pré modernes et par la Commission de Vérité et Réconciliation établie en Afrique du sud, l'auteur affirme que les amnisties individuelles représentent la seule manière de découvrir la vérité quant aux horreurs du passé. Ceci a pour conséquence de faciliter le pardon des auteurs des crimes, et de ce fait la réalisation de l'état d'*homonoia*. En outre, l'amnistie individuelle, en tant essentiellement qu'acte politique, peut néanmoins inclure des considérations de justice, lorsque cette notion n'est pas strictement restreinte à sa fonction punitive.

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Let them solemnize an oath [...]
And let us bring about oblivion for the murder
Of their sons and kinsmen. Let them love one another
As before, and let there be abundant wealth and peace.[1]

(Homer, *The Odyssey*)

Introduction

The construction of 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"[2] constituted one of the greatest ambitions of the South African interim Constitution signed after the fall of apartheid. The image of a bridge does not stand for a break, but rather for a passage from the past to the future, a transformation. Political transformation is a major preoccupation of countries bled white by a civil strife or a bloody authoritarian regime as they attempt to achieve a political transition. The South African political elites decided to grant individual amnesties to perpetrators of "gross human rights violations" committed during the apartheid era in order to facilitate the building of the bridge. However, the institution of amnesty – and its "advantages" – had already been recognized well before South Africa's political transition.

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[1] Homer, *The Odyssey*, trans. by Albert Cook (New York: W.W. Norton & Company, Inc., 1974) at 334.
[2] *Constitution of the Republic of South Africa, 1993*, No. 200 of 1993, Epilogue.

Amnesty derives from the Greek word *amnestia*, which means forgetfulness or oblivion. From Antiquity to the end of the nineteenth century, amnesty enjoyed a primary role in many peace processes. After the end of the Athenian civil war in 403 BC, the democrats regained power and realized that amnesty was the sole possibility to reunify people alienated by *stasis* – civil strife – and to prevent it from breaking out again. Instituting a mechanism limiting legitimate desires of vengeance was of central concern.[3] The democrats concluded a political agreement granting amnesty and every citizen swore not to recall the past. From then on *stasis* was kept in the realm of oblivion. Forgetting was imperative in order to pass from the old state of *stasis* to the new state of *homonoia* – concord, harmony or consensus.

Several centuries later, amnesty as the oblivion of the past was still present in *droit public de l'Europe*, the early international law among European States. Peace treaties following the numerous European wars contained amnesty clauses that indicated the will of the parties to apply the principle of *tabula rasa* to past offences; the crimes were to remain unpunished and the damages due to war were not be compensated. As in Athens, granting amnesty was considered the only mechanism capable of achieving a sustainable peace and oaths were sworn to reinforce the process. By sinking the past into oblivion, the parties to a peace treaty attempted to avoid vengeance and humiliation and therefore to create a stable situation that would impede the reoccurrence of war. This practice was left aside after the First World War, a search for prosecution having replaced the necessity of forgetting. However, amnesty

[3] David Cohen, "The Rhetoric of Justice: Strategies of Reconciliation and Revenge in the Restoration of Athenian Democracy in 403 BC" (2001) 92 Arch. Europ. Sociol. 335 at 339 [Cohen, "Rhetoric of Justice"].

continued to be employed after civil wars.[4] Indeed, the Second additional Protocol to the Geneva Conventions authorizes the use of the mechanism in cases of internal conflict.[5]

The South African Truth and Reconciliation Commission is a recent and famous example of an institution established to assist a political transition. Interestingly, a number of its features can be traced back to ancient Athens.[6] Barbara Cassin, a French philosopher, argues that "[the Truth and Reconciliation Commission] is the political act, which like the Athenian decree of 403 BC, makes a cut [...], and charges itself with using evil, to transform the misfortunes, mistakes and suffering, to make *something good* out of them, notably a past on which to construct the "we" of a "rainbow nation"".[7] The Commission received the power of granting amnesty to individuals who would confess their political crimes before it, the rationale being to facilitate the passage from the apartheid regime to a new democratic state by publicly acknowledging the truth about past atrocities. The fathers of the Commission believed the truth to be the first path on the way to reconciliation. However a number of scholars and non governmental organizations specialized in the protection of human rights criticized the Commission for taking that approach.[8] They considered that the

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[4] Amnesty clauses have been employed in Albania, Algeria, Angola, Argentina, Burundi, Bhutan, Bolivia, Brazil, Bulgaria, Cambodia, Chad, Chile, Columbia, the Comoros, Croatia, Cyprus, Ecuador, El Salvador, Ghana, Haiti, Jordan, Mauritania, Mauritius, Nepal, Oman, Poland, Romania, Russia, Sierra Leone, South Africa, Spain, Sri Lanka, Syria, Serbian Republic of Yugoslavia, and Zaire. See Andreas O'Shea, *Amnesty for Crime in International Law and Practice*, (The Hague: Kluwer Law International, 2002) at 22.

[5] *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, 8 June 1977, 1125 U.N.T.S. 609, Art. 6 (5), [Protocol II].

[6] Barbara Cassin, "The Politics of Memory: How to Treat Hate" (2004) 16 African Journal of Philosophy 18 at 26-27; Philippe-Joseph Salazar, *An African Athens, Rhetoric and the Shaping of Democracy in South Africa* (London: Lawrence Erlbaum Associates, Inc., 2002) at 80-82.

[7] Cassin, *supra* note 6 at 27.

[8] See Naomi Roht-Arriaza, "Combating Impunity: Some Thoughts on the Way Forward" (1996) 59 Law & Contemp. Probs. 93. See on the obligation to prosecute: Diane F. Orentlicher, "Settling

amnesty that was granted by the Commission was contrary to international law, which arguably encompasses a duty to prosecute. Some declared that justice had been sacrificed in the name of truth.[9] The emphasis laid by the Truth and Reconciliation Commission on victims' rights was influenced by the moralized discourse of human rights that appeared after the establishment of the Nuremberg and Tokyo Tribunals.

These different historical examples illustrate the pursuit of an identical goal through opposed means: granting amnesty was supposed to facilitate the building or unifying of communities still divided by past misdeeds. In other words, amnesty was meant to achieve *homonoia* within a community either by forgetting the past or by uncovering the truth about it. Athenian and South African political elites, although they were separated by more than two thousands years, both chose to grant amnesty when faced with similar political and practical constraints. These constraints included the fact that former political elites were still very influential within the community even though they had abandoned power. Furthermore, the number of perpetrators and accomplices rendered prosecutions hardly feasible, and finally, the community was still highly divided by civil strife. Moreover, fears that war could break out at any occasion convinced the political leaders, in Ancient Athens, Post-Apartheid South Africa, and during the era of the *droit public de l'Europe*, to grant amnesties. Several legal scholars and activists have nevertheless called for the prosecution of past misdeeds even in the case of a political transition.

Accounts: The Duty To Prosecute Human Rights Violations of a Prior Regime" (1990-1991) 100 Yale L. J. 2537.

[9] Reed Brody, "Justice: First Casualty of Truth?" (30 April 2001), online: Human Rights Watch <http://www.hrw.org/editorials/2001/justice0430.htm>.

This study aims to show that granting individual amnesties to those responsible for past atrocities, as opposed to their prosecution, is a critical element in paving the way towards *homonoia* in a community that has been affected by civil strife, even though it cannot single-handedly achieve such a goal. The historical examples of Ancient Athens, Post-Apartheid South Africa and the early modern European peace treaties indicate the practical and political constraints that render prosecutions hardly feasible. Advocates of prosecutions who are influenced by the moralized discourse of human rights lay emphasis on victims' rights and not on the community's needs, even though responding to these needs is essential in achieving a political transition which is successful in that it brings *homonoia* within the community. The absence of prosecutions does not mean than justice is sacrificed. Indeed, as Jonathan Allen explains, justice is comprised of different aspects such as retribution, recognition, compensation, and sensitivity to injustice.[10] The three latter aspects were addressed by the South African Truth and Reconciliation Commission, which aimed to uncover the truth about past atrocities. This broader vision tempers the claim that justice is sacrificed by granting individual amnesties.

Since the establishment of international criminal tribunals and the subsequent trials of former political leaders responsible for atrocities, law plays an important role during political transitions. However, law still has limits in these cases in that it cannot achieve *homonoia* by itself, as forgiveness is necessary to achieve reconciliation or concord within a community. Indeed, Linda Ross Meyer affirms that forgiveness initiates the fundamental trust that makes community possible.[11] In a political transition, *homonoia* is made possible by the forgiveness not only of the victims but

[10] Jonathan Allen, "Balancing Justice and Social Unity: Political Theory and The Idea of a Truth and Reconciliation Commission" (1999) 49 U. Toronto L.J. 315 at 326-338.
[11] Linda Ross Meyer, "Forgiveness and Public Trust" (1999-2000) 27 Fordham Urb. L.J. 1515 at 1515.

also of the members of the community. Amnesty is thus only a step on the way to unity and concord within the community.

The first chapter studies the Athenian amnesty. It shows how the Athenians believed amnesty to be essential to eradicating *stasis* and restoring *homonoia* within the *polis*. It examines the nature of the amnesty and demonstrates that it was not a law but a political agreement accompanied by a political act, the swearing of oaths. Furthermore, the political nature of this amnesty highlights the important role played by politics within Ancient Athens. The nature and role of amnesty will be viewed through the lenses of history, mythology, and language. The second chapter turns to the amnesty clauses included in Peace Treaties during the era of the *droit public de l'Europe*. As in Athens, amnesty meant the forgetting of all offences committed during the war. The evolution of the concept of war since medieval times until the end of the First World War will be addressed, since it is decisive in the granting of amnesty. Indeed this chapter shows that the doctrine of just war precluded the granting of amnesty, whereas the notion of *justus hostis* (just enemy) that appeared with the emergence of the *droit public de l'Europe* called for it in order to limit war on European soil. The South African amnesty process is the subject of the third chapter. The history of South Africa is dealt with in this chapter as it is helpful to understand the situation faced by the new political leaders after the collapse of the apartheid regime and the political decision to choose amnesty over prosecution. The Truth and Reconciliation Commission was strongly influenced by considerations of *restorative* justice. Within an understanding of justice as restorative, a political act, such as the establishment of the Commission, can take justice into consideration. I will study the work of the Commission through different axes: the victims, the perpetrators, and the

rhetoric employed by the Commissioners. This analysis will show that the emphasis laid on victims eclipsed the fundamental purpose of the Commission, which was to bring harmony within the community as a whole. The fourth chapter examines the legality of granting amnesty under international law and explicates the actual debate over a duty to prosecute, using the South African experience as an example. Moreover, this chapter examines the limits of prosecutions in a society in transition. Finally, the different aspects of the notion of justice are analyzed in order to stress that amnesty can be part of a broader conception of justice, focusing on more than just the punitive aspect. Whether political forgiveness is possible is the main question addressed by the final chapter. First, it establishes that law has limits in the construction or reconstruction process in the context of a political transition. It examines the non legal needs of the community and argues that forgiveness is essential to political transitions, to the construction of "historic bridges" between the past of *stasis* and the future of *homonoia*.

I. Amnesty as oblivion

This first chapter studies amnesty as the sinking of war into oblivion – an absolute forgetting of the conflict – through the amnesty granted in Athens after the civil strife that divided the city in the aftermath of the Peloponnesian war. It examines the reasons that led Athenians to choose amnesty after the civil war that opposed them to one another and the consequences of this amnesty for the life of the city. Why did they decide to forget the past? How did they achieve this common amnesia? This chapter shows that the 403 BC amnesty was not a law or a decree but a political agreement. In this respect, it emphasizes the importance of politics in the life of the Athenian *polis*.

1. Athens in 403 BC: historical context

The defeat of Athens in 405 BC marked the end of the Peloponnesian War. Thirty members of the spartophile oligarchic party seized power. [12] Their bloody and repressive regime earned them the name of the Thirty Tyrants.[13] The Thirty collaborated with Sparta; the Athenians were thus ruled by the enemy. From this constellation of power stemmed a one-year long civil war. The democrats, lead by Thrasyboulos, occupied the Piraeus.[14] The Thirty, no longer feeling safe in Athens, fled to Eleusis.[15] The democrats reconquered Athens in 403 BC. Both political parties had struggled with each other for power since 411 BC and the time was favourable to vengeance. After the victory, an Athenian citizen named Kleokritos stepped before the democrat army and declared to the partisans of the oligarchs:

> Fellow citizens, why do you drive us out? Why do you wish to kill us? We have never done you any harm, but have shared with you the holiest rites and sacrifices and the finest festivals, and we have danced together and been students together and served as soldiers together, and we have often run the risk with you on land and on sea for the sake of the common safety and freedom of us both. In the name of our fathers' and mothers' gods, our common ancestry, marriage connections, and clubs – for many of us have all these in common with one another – and out of respect for both gods and humans, stop doing wrong to the fatherland, and do not obey the most impious Thirty, who for the sake of personal gain killed almost more men in eight months than all the Peloponnesians did in ten years of war. Although we could live together as citizens in peace, they bring us war, the kind of war that is the most shameful, the most grievous, the most impious, and the most hated by both gods and men: war against one another. Yet for all that be assured that we too, and not only you, wept many tears over some of the men killed.[16]

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[12] Xenophon, *Hellenika*, II.3.11 trans. by Peter Krentz (Warminster: Aris & Phillips Ltd., 1995) at 23.
[13] Fifteen hundred Athenians, namely a considerable proportion of the citizens, are killed. Cassin, *supra* note 6 at 19.
[14] Xenophon, II.4.10 *supra* note 12 at 41.
[15] *Ibid.* II.4.24 at 47.
[16] *Ibid.* II.4.20-22 at 45.

This attitude was remarkable at the moment of victory: one could have expect a yearning for vengeance from the democrats, especially after the speech of their army commander which had recalled all the wrongs committed against them in order to exacerbate their desire for fighting.[17]

Thrasyboulos declared an amnesty designed to restore unity and harmony to the Athenian πόλις [*polis*].[18] It was then extended to the Eleusians in 401 BC. Amnesty required sacrifices from both political parties. When the democrats regained power, the laws of Solon and the enactments of Draco (which included the right to kill on sight any refugee who returned illegally to Athens) were still in force. Under these laws, a great number of citizens were subject to prosecution because of their past actions.[19] The democrats realized that erasing the previous evils by granting amnesty was the sole possibility to reunify people alienated by *stasis* – civil strife. They decided to exclude prosecutions and to impede the recollection of the past in order to guarantee peace among citizens. Only the Thirty and their most intimate associates were excluded from the amnesty, and could be prosecuted for past misdoings.[20] Even these, however, could avail themselves of the amnesty, if they were prepared to give a satisfactory account of their actions during the crisis.[21]

After the enactment of the amnesty, Thrasyboulos declared to the devotees of the Thirty:

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[17] Cohen, "Rhetoric of Justice", *supra* note 3 at 346.
[18] Alfred Dorjahn, *Political Forgiveness in Old Athens* (Evanston : Northwestern University, 1946) at 1.
[19] *Ibid.* at 24.
[20] Aristotle, *Constitution of Athens*, XXXIX.6 trans. by Kurt von Fritz & Ernst Kapp (New York: Hafner Publishing Company, 1950) at 111 [Aristotle, *Constitution*].
[21] *Ibid.* See also Elemer Balogh, *Political Refugees in ancient Greece* (Johannesburg: Witwatersrand University Press, 1943) at 61.

> Men from the city, I advise you to 'know yourselves'[22]. You would best know yourselves if you considered why you are so bold as to try to rule us. Are you more just? But the people, although poorer than you, never treated you unjustly for the sake of money; while you, although richer than everyone else, have done many shameful things for the sake of gain. But since you have no share in justice, look to see if your boldness is based on courage. What better test of courage might there be than how we fought against each other? Or might you say that you excel in intelligence, you who, having a wall and arms and money and Peloponnesian allies, have been bested by men who had none of these things? Or do you think, indeed, that you can be bold based on the Lakedaimonians? How, when they – just like men who hand over biting dogs after putting them in collars – handed you over to your victims, this people, and left and went away? Yet it is certainly not the case, men, that I expect you to violate any of the oaths you have sworn. Instead, I expect you to demonstrate this in addition to your other good qualities, that you are respectful of oaths and pious.[23]

He thus emphasized the fact that the democrats, in order to encourage the members of the *polis* to respect their oath not to recall the past, would not avenge past wrongs despite the unjust treatment they had suffered.

Despite it being widely known as *the first amnesty* in history, this was neither the most ancient amnesty in antiquity, nor the first in Athens. The most ancient amnesty clause was included in what is considered to be the first treaty of peace, friendship, and alliance in international law history, the treaty signed by Hattusili, King of the Hittites, and the pharaoh Ramesses II of Egypt after the battle of Kadesh in 1286 BC.[24] This treaty encompassed the following clause granting amnesty to the Egyptians:

> If one man flee from the land of Egypt, or two, or three, and they come to the great chief of Hatti, the great chief of Hatti shall seize them and shall cause them to the brought back to Usima re-setpenre, the great ruler of

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[22] 'Know thyself' [Γνώθι Σεαυτόν] was the admonition inscribed on the oracle-shrine of Apollo at Delphi in ancient Greece. See Wikipedia, on line: Wikipedia <http://en.wikipedia.org/wiki/Delphi>.
[23] Xenophon, II.4.40-42 *supra* note 12 at 53.
[24] Carl Schmitt, *The Nomos of the Earth* (New York: Telos Press, Ltd., 2003) at 52-53 [Schmidt, *Nomos*].

> Egypt. But as for the man who shall be brought to Ramesses-mi-Amun, the great ruler of Egypt, *let not his crime be charged against him,* let not his house, his wives or his children be destroyed, [let him not] be [killed], let no injury be done to his eyes, to his ears, to his mouth or to his legs, *let not any [crime be charged] against him.*[25]

An identical clause amnestying the Hittites followed. Moreover, there is evidence showing that amnesty was actually previously declared on four occasions in Athens (out of a total of six amnesties).[26] Nevertheless, this amnesty in particular was admired in the Greek world,[27] which could explain why it took precedence over the former ones, which were then forgotten by some scholars.

2. The nature of the 403 BC Amnesty or the importance of politics within the *polis*

Aristotle reported thoroughly on the text of the amnesty in his *Constitution of Athens*. The first part of this text dealt with emigration, an essential feature to ensure civil peace between democrats and partisans of the Thirty. The Athenians could, if they wished, move to Eleusis and keep their full civic rights, have an independent administration and enjoy their revenues.[28] The conditions for emigrating were very simple: they had to register within ten days and leave Athens within twenty days.[29] The last part of the text concerned memory: it forbade recalling the past events against anyone.[30] Aristotle, as well as other authors, used the verb *μνησικακεῖν*, a combination of *μνήμη* [memory] and *κάκα* [misfortunes].[31] This linguistic construct is made of the

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[25] (emphasis added) S. Langdon & Alan Gardiner, "The Treaty of Alliance between Hattusili, King of the Hittites, and The Pharaoh Ramesses II of Egypt" (1920) 6 Journal of Egyptian Archaeology 179 at 197.
[26] Dorjahn, *supra* note 18 at 1.
[27] Balogh, *supra* note 21 at 64.
[28] Aristotle, *Constitution*, XXXIX.1 *supra* note 20 at 110.
[29] Aristotle, *Constitution*, XXXIX.4 *supra* note 20 at 111.
[30] *Ibid.* XXXIX.6 at 111.
[31] See also, Xenophon, II.4.43 *supra* note 12 at 53.

genitive case of *thing* and the dative case of *person*: when one recalls the misfortunes of the past, one always reproaches somebody for them (it is always "against" someone).[32] In fact this part of the amnesty involved a solemn promise given by all citizens not to engage in litigation to seek revenge for the wrongs they had suffered.[33] A major concern was to institute a mechanism limiting legitimate desires of vengeance, given that Justice [*δίκη*], in the Greek view, consisted in helping your friends and harming your enemies.[34] Moreover, the term 'misfortunes' [*κάκα*] is a euphemism for the Thirty Tyrants' dictatorship and the hate between aristocrats and democrats.[35] This prohibition is reinforced by an oath, sworn by every citizen:

> *καί ου μνήσικησω τών πολιτών ούδενι*
>
> "And I will not recall the evils against any of the citizens."[36]

This oath was frequently sworn, because each Athenian judge had to take it before standing in court.[37]

Several consequences ensued from the amnesty decree: denouncers and informers under the Thirty were absolved for their past actions and were thus not prosecuted, confiscated property was generally restored to the rightful owners,[38] confiscated

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[32] Cassin, *supra* note 6 at 21.
[33] Cohen, "Rhetoric of Justice", *supra* note 3 at 339.
[34] *Ibid.*
[35] Nicole Loraux, *The Divided City. On Memory and Forgetting in Ancient Athens* (New York: Zone Books, 2002) at 241.
[36] Andocides reports the words of the oath in one of his discourse named *On the Mysteries*: "Well then, your oaths, how do they go? The one which is common to the whole city, which you all swore after the reconciliations: "And I shall not recall grievances against any citizen except the Thirty and the Eleven, and not against any of these who is willing to render account of the office he conducted." [...]" Andocides, "De Mysteries", 90 trans. by Michael Edwards, *Greek Orators IV. Andocides* (Warminster: Aris & Phillips Ltd., 1995) at 65.
[37] Cassin, *supra* note 6 at 22.
[38] Dorjahn, *supra* note 18 at 25.

money could be recovered by taking judicial action,[39] and candidates for a public office had to explain and defend their conduct under the Thirty at their *δομίκασια*, the examination preceding the nomination, in order to demonstrate that they did not support the oligarchy.[40]

What was the Athenian amnesty? A law? A decree? A political agreement? Ancient writers did not agree on its nature. Some spoke of the amnesty as a law, while others consider it as a plebiscite.[41] It is necessary to keep in mind, however, that the parties were bound by an oath, a ritual that would not have been necessary if the amnesty had the status of a decree or a law.[42] Examples of the expression *oath* [*όρκοι*] and *agreements* [*συνθήκαι*] characterizing the amnesty can be found in fragments of Lysias and Isocrates. The former was an orator known for his prose style, "a model of clarity and vividness".[43] In several orations, he refers to amnesty with the words *όρκοι καί συνθήκαι*, which mean "oaths and agreements".[44] Isocrates founded a school dedicated to rhetoric and philosophy, a rival to Plato's Academy.[45] He also employed "oaths and agreements" to describe the amnesty.[46] These sources de-emphasize the legal nature of the amnesty; they regard it as a political agreement ratified by an oath.[47]

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[39] But they were not allowed to sue for damages. See Dorjahn, *supra* note 18 at 27.
[40] *Ibid.* at 31.
[41] *Ibid.* at 20-21.
[42] *Ibid.* at 21.
[43] Michael Gagarin, "Greek Oratory" in *Lysias*, trans. by Stephen C. Todd (Austin: University of Texas Press, 2000) at 17.
[44] *Lysias* VI. Against Andocides, 39 and 45 *ibid.* at 72 and 74, XIII. Against Agoratus, 88-90 *ibid.* at 158-159, XXV. On a Charge of overthrowing the Democracy, 23, 28 and 34 *ibid.* at 267, 268, 269-270.
[45] "Introduction to Isocrates" in *Isocrates I*, trans. by David Mirhady & Yun Lee Too (Austin: University of Texas Press, 2000) at 1.
[46] *Isocrates I*, XVIII. Special Plea against Callimachus, 19-21, 27-29 *ibid.* at 102, 103-104.
[47] Dorjahn, *supra* note 18 at 21.

The nature of the 403 BC amnesty reveals the importance of politics in Ancient Athens. The amnesty was deemed necessary to restore *homonoia* [harmony] within the *polis*, a state that would allow citizens divided by the civil strife to live together again. In the Greek world, the *polis* constituted the centre of its citizens' life. Aristotle described the human being as a *zoon politikon*, a political animal that naturally desires to live with its fellow creatures.[48] The Aristotelian conception meant that besides a private life centred on home (*oikia*), the human being had a second life within the community (*koinon*), a *bios politicos* (a political life).[49] Moreover, belonging to the community was of such importance that exile from the *polis* was regarded as worse than death. The 403 BC civil strife imperilled the political community; its restoration thus became vital for the Athenians citizens. The agreement capable of achieving such a goal was necessarily political – as opposed to legal – because former enemies could not be forced to reintegrate into the same community, they could only agree on doing so. Furthermore, dealing with the hate generated by *stasis* was a matter of politics. In his account of the life of Solon, the illustrious legislator, Plutarch gives such a definition of the political: what "deprives hate from its eternal character".[50] By contrast, law plays a different role; it builds a "wall" between the political and familial lives making the political community possible.[51]

The political agreement had to be accompanied by a political act, necessary to restore the bond of the community. Oath swearing played this role which is emphasized in Greek mythology. *Horkos* (Oath) and *Lethe* (Oblivion) are born out of *Eris* (Discord),

[48] Aristotle, *Politics* I.2.1253a 1-18, trans. by Ernest Barker (New York, London: Oxford University Press, 1958) at 3-8 [Aristotle, *Politics*]
[49] Hannah Arendt, *The Human Condition*, 2nd ed. (Chicago: The University of Chicago Press, 1998) at 24.
[50] Πολιτικόν αφαιρείν τής έχθρας τό αίδιον. Plutarch, *Lives*, trans. by Bernadotte Perin (London: William Heinemann, 1914) at 460. I used the translation of Barbara Cassin. See Cassin, *supra* note 6 at 18.
[51] Arendt, *supra* note 49 at 64.

the most dangerous daughter of *Nux* (Night). All these figures are ambivalent; according to the circumstances, they display a good or a bad side.[52] *Horkos* is considered a weapon against *Eris* given that he descends from her.[53] He is notably conceived to soothe the discord that comes out of political tensions. Moreover, taking oaths prevents civil strife from breaking out again. Cities and political factions thus make frequent use of oaths to ensure peace in the *polis*.[54] Oaths derive their existence and force from a ritual speech, such as in the *Iliad*.[55] Agamemnon invoked the gods to witness and protect the oath through which Helen and all her goods were to be given to the victor of the battle between Paris and Menelaus. Furthermore, he swore to wage war if the Trojan refused to respect this oath.[56] In Ancient Greece most decrees encompass an oath, or at least mention swearing an oath, because the religious constraint is unbreakable – as opposed to the legal one.[57] Yet oath taking is such an essential feature of the legal process in the *polis* that sometimes it becomes difficult to distinguish it from a law.

Were the oaths, and thus the amnesty, respected? There is no clear-cut answer.[58] The democrats' leaders set the example; they showed determination in respecting the amnesty and exhorted their fellow citizens to abide by their oaths several times.[59] However it seems that only the citizens who decided to act for the good of the *polis*, having understood that its well-being was dependent upon the harmony the amnesty

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[52] Loraux, *supra* note 35 at 90.
[53] *Ibid.* at 139.
[54] *Ibid.* at 130.
[55] *Ibid.* at 131.
[56] Homer, *Iliad*, Book III.297-310 trans. by Stanley Lombardo (Indianapolis & Cambridge: Hackett Publishing Company, Inc., 1997) at 59.
[57] Loraux. *supra* note 35 at 138. For instance, all citizens are invited to swear on peace treaties between cities.
[58] Dorjahn, *supra* note 18 at 53.
[59] *Ibid.* at 37.

tried to restore, rendered their oaths effective.[60] The amnesty was a collective agreement of the citizens to live together again and they did so.[61] However, this agreement could not transform the Athenians overnight and erase the hate and tensions that *stasis* initiated. Nevertheless eight years of stability followed the amnesty, to the admiration of the Greeks living in other cities, a reaction that would not have arisen if the amnesty were not successful.[62] A conclusive appreciation of this historical episode is give by Elemer Balogh:

> We are here concerned with the first amnesty in the Greek world that was as perfect in both form and content as could be. It achieved a new harmony amongst the people of Athens, torn by passion and hatred. Wherever it may be necessary to restore civic peace in a state after revolutions and counter-revolutions, this Greek example should be considered and imitated![63]

3. Escaping *stasis*

In order to fully understand the 403 BC amnesty, it is necessary to explore the Greek representation of *στάσις* [civil strife] since the amnesty was designed to end it. Etymologically, *stasis* refers to a physical position. With time, however, the word evolved and became an equivalent for political party. It was known at the time that political parties could bring sedition, and thus generate civil strife.[64] Stasis was a recurring scourge in Athens: "From Solon to Aeschylus, *stasis* is a deep wound in the body of the city."[65]

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[60] *Ibid.* at 35.
[61] Cohen, "Rhetoric of Justice", *supra* note 3 at 341.
[62] Dorjahn, *supra* note 18 at 53.
[63] Balogh, *supra* note 21 at 63.
[64] Loraux, *supra* note 35 at 24.
[65] *Ibid.*

Stasis is a constant theme of classical political philosophy.[66] Aristotle considered that "the cause of sedition [*stasis*] is always to be found in equality [...] It is the passion for equality which is thus the root of sedition."[67] He argues that oligarchies and democracies are generally the theatre of sharp divisions between the numerous poor and the few wealthy, which renders these political communities unstable because the poor always strives for equality.[68] The most striking account of the dramatic events that accompanies *stasis* is indeed provided by Thucydides in his description of the civil war in Corcyra (modern Corfu). This passage of his *History of the Peloponnesian War* recounts some of the atrocities that took place on the island:

> During the seven days that Eurymedon stayed there with his sixty ships the Corcyraeans continued to massacre those of their own citizens whom they considered to be enemies [...] There was death in every shape and form. And, as usually happens in such situations, people went to every extreme and beyond it. There were fathers who killed their sons; men were dragged from the temples or butchered on the very altars; some were actually walled up in the temple of Dionysus and died there. So savage was the progress of this [*stasis*], and it seemed all more so because it was one of the first which had broken out. Later, of course, practically the whole of the Hellenic world was convulsed, with rival parties in every [*stasis*] [...] [69]

Stasis resulted in the disappearance of elementary components of life in community; mediation between opponents and trust, which are essential with this regard, faded away.[70] Indeed trust is a crucial feature in the *polis*; its vanishing destroys the *polis* itself.[71] Thucydides emphasizes how trust had disappeared to a large extent in Corcyra:

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[66] Clifford Orwin, "Stasis and Plague: Thucydides on the Dissolution of Society" (1988) 50 The Journal of Politics 831 at 832.
[67] Aristotle, *Politics*, V.1.1301b.11 *supra* note 48 at 205.
[68] Aristotle *Politics*, V.1.1301b.5-6, *supra* note 48 at 204.
[69] Thucydides, *History of The Peloponnesian War*, Book III.81 trans. by Rex Warner (London: Penguin, 1954) at 208. I modified the translation with regard to the word *stasis*; I left the Greek term.
[70] David Cohen, *Law, Violence, and Community in Classical Athens* (Cambridge: Cambridge University Press, 1995) at 26 [Cohen, *Law*].
[71] Orwin, *supra* note 66 at 837.

> [Forming up into two hostile camps became widespread], and each side viewed the other with suspicion. As for ending this state of affairs, no guarantee could be given that would be trusted, no oath sworn that people would fear to break; everyone had come to the conclusion that it was hopeless to expect a permanent settlement and so, instead of being able to feel confident in others, they devoted their energies to providing against being injured themselves.[72]

This description of *stasis* shows that a generalized conflict among different groups within a *polis* leads to the disintegration of the social order, to chaos.[73] According to David Cohen, Thucydides considers the origins of *stasis* to be in the subversion of legal institutions and of the rule of law, which lead to an explosion of violence.[74] He uses the example of Corcyra to illustrate the similar patterns of different civil strives within the Greek world. However, Thucydides does not suggest that identifying the patterns of *stasis* will help to avoid it. As Clifford Orwin writes, Thucydides "does not doubt that *stasis* is a permanent blot in human life, to which men are subject by their very nature and so until such time as nature relents."[75] The question then is how does the *polis* attempt to eradicate *stasis*? According to Nicole Loraux, the *polis* erases *stasis* with a gesture and a speech.[76] The gesture lies in the amnesty agreement deciding that acts committed during *stasis* (usually called the misfortunes of the past) will be forgotten. The speech, which constitutes a means of building the *polis*' history, tries to bury the past outbreak of *stasis* as much as possible.[77] For instance the anniversary day of the conflict is subtracted from the calendar.[78]

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[72] Thucydides, Book III.83 *supra* note 69 at 210. I modified the translation of the first sentence.
[73] Cohen, *Law, supra* note 70 at 28.
[74] Cohen, "Rhetoric of Justice", *supra* note 3 at 343.
[75] Orwin, *supra* note 66 at 833.
[76] Loraux, *supra* note 35 at 64.
[77] *Ibid.*
[78] *Ibid.* at 153.

4. Falling into amnesia

By swearing not to recall the evils of the past, Athens based its political existence on a loss of memory.[79] The whole city sank into amnesia. Amnesty was tightly linked to amnesia in Ancient Greece; etymologically, both terms are rooted in the Greek term ἄμνηστος, which means forgetting. Oblivion of the civil strife was the condition *sine qua non* of a return to peace and, thereby, of life in community. The Greek vision of memory sheds light on the reason why oblivion was such an essential feature of peace. Homer's famous epic poem, *Iliad,* recounts the wrath of Achilles, the greatest of the Greek heroes fighting in the war against the Trojans.[80] Homer begins the narrative in the following way:

> Sing, Goddess, Achille's wrath
> Black and murderous, that cost the Greeks
> Incalculable pain, pitched countless souls
> Of heroes into Hades' dark,
> And left their bodies to rot as feasts
> For dogs and birds, as Zeus' will was done.[81]

Achilles' wrath has its origin in the tensions within the Greek camp that were due to his intense rivalry with his commander Agamemnon.[82] At the beginning of the poem, Agamemnon decides to take Achilles' war prize, a woman called Briseis, causing him public humiliation and insulting his status as the best Greek warrior. Achilles cannot stand this affront and explodes with rage. The rest of the poem tells the story of

[79] *Ibid.* at 44.
[80] Contemporary readers do no consider this theme as the main one; they regard the Iliad as a tragedy of nature versus culture or a confrontation with the aporias of life and death. Gregory D. Alles, "Wrath and Persuasion: The "Iliad" and Its Contexts" (1990) 70 The Journal of Religion 167 at 170. I will leave this debate aside.
[81] Homer, *Iliad*, Book I.1-6 *supra* note 56 at 1. I translated the word *menis* by wrath and not rage.
[82] Sheila Murnaghan, "Introduction", in Homer, *Iliad*, trans. by Stanley Lombardo (Indianapolis & Cambridge : Hackett Publishing Company, Inc., 1997) at xvii.

Achilles' wrath that intensifies, change direction and eventually disappears.[83] After his dearest friend Patroklos' death, Achilles regains composure and addresses Agamemnon and the Greeks:

> [...] The Greeks, I think, will long
> Remember our contention. Let us have
> These things among the things that were, and,
> though,
> They make us grieve, let us subdue our minds
> To what the time requires. Here then my wrath
> Shall end; it is not meant that it should burn
> Forever. [...][84]

His denial of the past was imperative to reintegrate the Greek army. Achilles is an "ambiguous" hero, as his wrath represents "the internal forces of social disintegration raised to their higher power" that threaten harmony among the Greeks.[85] According to Loraux, this story was present in every Greek memory, where Achilles' heroic wrath symbolised collective resentments.[86] Furthermore, μήνις [wrath] was one name for civil war in ancient Greek.[87] Thus in Athens, this epic wrath was regarded as an image of *stasis*; both of them endangered the community and, therefore, had to be erased from memory by an act of forgetting. The unity of the city, as the unity of the Greek army against Troy, was assured only by the passage of past evils from memory to oblivion.

Thanks to the amnesty, *stasis* entered the limbo of oblivion. Yet its threat still hovered over Athens. The irreversibility of time actually implies that past misdoings "both

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[83] *Ibid*, at xvii-xix.
[84] Homer, *Iliad,* Book XIX.75-81 trans. by William C. Bryant (Boston: Houghton, Mifflin & Co., 1898) at 193. I chose a more literal translation than in the previous passage to render exactly Achilles' words.
[85] Alles, *supra* note 80 at 179.
[86] Loraux, *supra* note 35 at 66.
[87] *Ibid.* at 41.

cannot be directly undone and cannot be made to disappear entirely."[88] The threat of *stasis* was symbolised by the establishment, at the foot of the Areopagus, of the Erinyes (Furies), the deities that "remember evil" [μνήμονες κάκων] as Aeschylus tells us.[89] The Erinyes represent the divine figure of wrath and vengeance; they attack murderers, their families and even their city by setting free a triple "plague", the sterility of the earth, of flocks and of women.[90] As mythological figures, these deities display a good or a bad side depending on the circumstances. When opting for their benevolent side, the Erinyes can take the plague away, transform themselves into Eumenides (literally Benevolents), and become protectors of the *polis*. The presence of the Erinyes in Athens prevented the citizens from recalling the misfortunes of the past because the deities took charge of memory, and at the same time, reminded them that *stasis* was never far from the city.[91] Additionally, Athenians erected in the Erechteion, the most sacred sanctuary of the Acropolis, an altar to *Lethe* (Oblivion). This demonstrates the clout Oblivion enjoyed in the city and the veneration that surrounded him.[92]

Nicole Loraux suggests that through these practices and symbols, what must actually be denied and forgotten is that "*stasis* is congenital to Greek political experience"[93], an idea that was already defended by Thucydides. Every amnesty process served to reinforce the forgetting of a very ancient time when conflict was ruling life in community.[94]

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[88] James Booth, "The Unforgotten: Memories of Justice" (2001) 95 The American Political Science Review 777 at 785.
[89] Aeschylus, *Eumenides*, trans. by Anthony J. Podlecki (Warminster: Aris & Phillips Ltd, 1989) at 87.
[90] Loraux, *supra* note 35 at 38.
[91] *Ibid.* at 39.
[92] *Ibid.* at 153
[93] *Ibid.* at 66.
[94] *Ibid.*

5. Transforming *stasis* into *homonoia*

The amnesty aimed to bring *homonoia* – unity, consensus, concord, civic harmony – back to the city. Literally, *homonoia* means the sameness (*homo-*) of minds and thoughts (*-noia*).[95] This idea is developed in Aristotle's *Constitution of Athens* recounting the consequences of the amnesty on Athenians:

> In fact, it appears that their attitude both in private and in public [*kai idiai kai koinei*] in regard of the past disturbances was the most admirable and the most statesmanlike [*politikotata*] that any people have ever shown in such circumstances. For, apart from having wiped out all considerations of guilt in regard to the past events, they even refunded at common expenses the money the Thirty had borrowed from the Laecedaemonians for the war, though the agreement said that the two parties, namely, that of the city and that of the Piraeus, should pay their own debts separately. For they thought that it was the way to start the restoration of harmony [*homonoia*]. [96]

Two factors helped on the way to reconciliation and harmony; first the Athenians redefined the conflict in order to portray the Thirty as the common enemy of the reunified Athenian citizen body.[97] For instance the former collaborators were no longer considered enemies, but victims.[98] Second, Athenians could refer to their common education, institutions, religious rites, precious freedoms, and common need of an external security to reconstruct a sense of community.[99] As political animals, citizens felt the need to live in the same community again; a common enemy and shared references facilitated the break with the past. Moreover, the Greek language expressed reconciliation (*dialusis*) as a ruptured bond. The verb *dialuo* means literally

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[95] See Anatole Bailly, *Abrégé du Dictionnaire Grec-Français* online: Abrégé du Dictionnaire Grec-Français <http://home.tiscali.be/tabularium/bailly/index.html>.
[96] Aristotle, *Constitution* XL.2-3 *supra* note 20 at 112-113.
[97] Cohen, "Rhetoric of Justice", *supra* note 3 at 352.
[98] *Ibid.*
[99] *Ibid.* at 346.

"to separate" and in this context to "unbind the citizens from the anger that made them rise against each other".[100] In other words, amnesty consisted in a clear break with the past, which was necessary to leave hate and division behind and to attain *homonoia* within the *polis*.

In Athens, the issue at stake was the passage from the old state of *stasis* to the new state of *homonoia*. This transition necessitated a political act at the moment of *krisis*, the critical instant where the outcome of a situation is either fatal or triumphant.[101] In this particular case, the Athenians democrats responded to *krisis* by declaring a general amnesty.[102] Every citizen swore an oath, a process that recreated a common language among the population and permitted the passage from the "I" to the "we". According to Barbara Cassin, the transition from the singular to the plural, from the individual to the community, was indispensable to attain *homonoia*.[103] Athens succeeded in escaping *stasis*, but the price to pay was to forget the past and forgo criminal proceedings against collaborators and their accomplices, as it constituted the unique solution to reconstruct the community. Like the phoenix, the city rose from its ashes and was therefore widely admired in the ancient world.

II. Amnesty as the core of European Peace Treaties

The idea of amnesty as oblivion again became prevalent in Europe at the time of the discovery of the New World and thereafter. Indeed numerous peace treaties contained amnesty clauses indicating the willingness of the parties to apply the principle of *tabula rasa* to past offences – generally to political offences such as treason, sedition

[100] Loraux, *supra* note 35 at 95-96.
[101] Cassin, *supra* note 6 at 23.
[102] *Ibid.*
[103] *Ibid.* at 24.

and rebellion, but also to war crimes.[104] The evolution of the concept of war was decisive in the rebirth of the practice of granting amnesty. Indeed, the medieval doctrine of just war excluded such a process. By contrast, the notion of *justus hostis* that appeared with the emergence of the *droit public de l'Europe* called for amnesties in order to limit war within the community of European States.

1. The Peace of Westphalia as a watershed

In 1648 the Peace of Westphalia marked the end of the Thirty Years War, one of the most devastating and large-scale wars between Catholics and Protestants. The estimates vary, but about a third of Europe's population died as a result of this extremely brutal conflict.[105] The peace settlement was composed of two treaties, one signed at Münster between the Roman-Germanic Empire and France and another signed at Osnabrück between the Empire and Sweden.[106] According to Randall Lesaffer, these treaties entailed a triple significance. First, they introduced the idea of sovereign equality among European States, although this principle was not expressly stated in the texts.[107] Second, they recognized the equality of religions, which led to the secularization of European politics.[108] Finally, these peace treaties were the first serious attempt to establish a structured and enduring legal order among European States.[109] These three essential features of the Peace of Westphalia played a fundamental role in the historical development of the modern law of nations and are thus considered by numerous authors as "the very birth" of the *droit public de*

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[104] Rudolf Bernhardt, *Encyclopedia of Public International Law*, vol. 1 (Amsterdam, New York: North-Holland, 1992-2003) at 148.
[105] Charles W. Kegley & Gregory A. Raymond, *From War to Peace, Fateful Decisions in International Politics* (Boston, New York: Bedford/St. Martin's, 2002) at 66.
[106] Randall Lesaffer, "The Westphalia Peace Treaties and the Development of the Tradition of Great European Peace Settlements prior to 1648" (1997) 18 Grotiana 71 at 71[Lesaffer, "Westphalia"].
[107] Lesaffer , "Westphalia", *supra* note 106 at 72.
[108] *Ibid.*
[109] *Ibid.* at 73.

l'Europe[110] (*Jus Publicum Europaeum*).[111] However, Randall Lesaffer challenges this assertion, which he calls the "Westphalian myth".[112] According to him, the sole author so far who has tried to determine the real influence of the Westphalia treaties on the development of peace treaties as legal instruments is Jörg Fisch, who argued that the two Westphalia Peace Treaties were actually curiosities[113] whose influence arose more from their political importance than from their legal innovation.[114] However, Fisch expressed this idea briefly, without any explanation or corroboration.[115] In Lesaffer's conception of modern international legal history, "the Westphalia Peace Treaties did not lay down the basic principles of the modern law of nations; they did, however, lay down the political and religious conditions for allowing the European powers to start building a new international legal order."[116]

A crucial element of the Peace of Westphalia was its amnesty clause. The Article 2 common to the Treaty of Osnabrück and to the Treaty of Münster declared:

> "[...] there shall be on the one side and the other a perpetual Oblivion, Amnesty or Pardon of all that has been committed since the beginning of these Troubles, in what place, or what manner soever the Hostilitys have

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[110] The French expression is used in the literature, since modern international law emerged during what Steiger considers to be the French period of public international law, namely the period between 1648 and 1815. The modern law of Nations can be divided as follows: the Spanish period 1494-1648; the French period until 1815; the English period until 1919; the English-American period until 1945. Heinhard Steiger, "From the International Law of Christianity to the International Law of the World Citizen – Reflections on the Formation and the Epochs of the History of International Law" (2001) 3 Journal of the History of International Law 180 at 182 [Steiger, "International Law"].

[111] Heinhard Steiger, "Peace Treaties from Paris to Versailles" in Randall Lesaffer, ed., *Peace Treaties and International Law in European History, From the Middle Ages to World War One* (Cambridge: Cambridge University Press, 2004) at 72 [Steiger, "Paris"].

[112] Randall Lesaffer, "Peace Treaties from Lodi to Westphalia", in Randall Lesaffer, ed., *Peace Treaties and International Law in European History, From the Middle Ages to World War One* (Cambridge: Cambridge University Press, 2004) at 9 [Lesaffer, "Peace Treaties"].

[113] Jörg Fisch, *Krieg und Frieden im Friedensvertrag, Eine universalgeschichtliche Studie über Grundlagen une Formelemente des Friedensschlusses* (Stuttgart: Klett-Cotta, 1979) at 537. Fisch uses the German words *Kuriosum* and *Monstrum*.

[114] Lesaffer, "Westphalia", *supra* note 104 at 76.

[115] Fisch, *supra* note 113 at 536-537. „Dem entspricht nicht dieselbe Bedeutung in der Geschichte der Vertragsformen. Gerade wegen seiner politischen Sonderstellungen bietet der Vertrag darin mehr das Bild eines Kuriosums und eines Monstrums als der Grundlage der Tradition."

[116] Lesaffer, "Peace Treaties", *supra* note 112 at 10.

> been practis'd, in such a manner, that no body, under any pretext whatsoever, shall practice any Acts of Hostility, entertain any Enmity, or cause any Trouble to each other; neither as to Persons, Effects, and Securitys, neither of themselves or by others, neither privately nor openly, neither directly nor indirectly, neither under the colour of Right, nor by the way of Deed, either within or without the extent of the Empire, notwithstanding all Covenants made before to the contrary: That they shall not act, or permit to be acted, any wrong or injury to any whatsoever; but that all that has pass'd on the one side, and the other, as well before as during the War, in Words, Writings, and Outrageous Actions, in Violences, Hostilitys, Damages and Expences, without any respect to Persons or Things, shall be entirely abolish'd in such a manner that might be demanded of, or pretended to, by each other on that behalf, shall be bury'd in eternal Oblivion."[117]

This clause implied that the parties to the treaty would not be allowed to seek revenge or to take sanctions, not even through a judicial process, for all damages suffered during the war.[118] At first sight, the words "oblivion" and "amnesty" seem synonyms as both mean forgetting, the first coming from a Latin root and the latter from a Greek one. Nonetheless they assume different functions in the peace process. "Oblivion" expresses the position taken towards the past, namely that everything has to be forgotten.[119] "Amnesty" defines the legal consequences of the peace treaty; the crimes would remain unpunished and the damages would not be compensated.[120] The Peace of Westphalia amnesty clauses are of a fundamental importance because of their great influence on subsequent peace settlements. Before examining the consequences of common Article 2, a picture of amnesty in Medieval European law is necessary.

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[117] Fred L. Israel, *Major Peace Treaties of Modern History 1648-1967*, vol. 1 (New York: Chelsea House Publishers, 1967) at 9-10.
[118] Lesaffer, "Westphalia", *supra* note 104 at 87.
[119] Fisch, *supra* note 113 at 95.
[120] *Ibid.*

2. International Law in Medieval Europe

During the Medieval and Renaissance epochs, Europe formed a religious and, in some measure, political and juridical unity founded in Christianity, and was therefore named *the Respublica Christiana.*[121] The different political units such as monarchies, cities, and fiefs were all part of this larger entity and were subject to the supreme *auctoritas* of the Pope and *potestas* of the Emperor of the Holy Roman Empire.[122] Moreover, the different elements of this entity shared *Jus Commune* – a melange of Roman and canon law that shows the importance of religion during this period.[123] The relations between these elements were ruled by the law of nations, a common and mutual law between sovereign states of equal importance, which was also rooted in divine law and administered by the church.[124]

According to Carl Schmidt, the religious component of the Medieval Europe also affected the spatial order. The soil of non-Christian populations became Christian missionary territory that could be attributed by papal order to a Christian prince for occupation and conversion to the Catholic faith.[125] Moreover, the soil of Islamic empires was regarded as enemy territory susceptible to conquest during crusades.[126] A papal approbation would transform the crusades into holy wars.[127] Thus a clear distinction was made between wars among Christian princes and wars against non-Christians. Indeed Christian princes were not allowed to wage war against each other

[121] Steiger, "International Law", *supra* note 110 at 184.
[122] Lesaffer, "Peace Treaties", *supra* note 112 at 11. Schmidt, *Nomos*, *supra* note 22 at 66.
[123] Lesaffer, *ibid.*
[124] Steiger, "International Law", *supra* note 110 at 183-184.
[125] Schmitt, *Nomos*, *supra* note 24 at 58.
[126] *Ibid.*
[127] *Ibid.*

without a *justa causa,* a moral-theological and juridical evaluation.[128] Accordingly war was bracketed (*einklammern*) – limited – on European soil.[129]

In the *Respublica Christiana*, war was considered a means of punishment inflicted by God upon sinful human beings.[130] Wars ordained by God were permissible and had to be waged, whereas campaigns lacking a divine attribute had to be avoided. To correspond to God's orders a war had to be just, which meant that the war had to be waged under the authority of a prince as the authority of a nation and not by private individuals; it had to be based on a just cause (war had to be waged *ex justa causa*, from just cause); and the belligerents had to be motivated by the right intention, the victory of good over evil.[131] Just cause were principally defense, recovery of property, and punishment, while unjust causes were the desire for richer land, the desire for freedom from a politically subjected state, or the wish to impose rules upon others against their will by way of asserting that it is for their own good.[132]

A notion of just peace accompanied the concept of just war; the victor's power to punish and destroy the vanquished was limited. The victor could not impose war indemnities, tributes, or the cessation of territories in such a considerable proportion that it would jeopardize the establishment of lasting peace.[133] This idea was elaborated by Francisco de Vitoria, a Spanish theologist and jurist, in *De Indis et de ivre Belli*

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[128] *Ibid.* at 59.
[129] *Ibid.* at 58.
[130] Joachim von Elbe, "The Evolution of the Concept of Just War in International Law" (1939) 33 AJIL 665 at 668.
[131] *Ibid.* at 669.
[132] *Ibid.* at 679.
[133] *Ibid.* at 677.

Relectiones written in 1557, in which he applied the just war doctrine to the Spanish *conquista* of the New World.[134]

> If after the Spaniards have used all diligence, both in deed and in word, to show that nothing will come from them to interfere with the peace and well-being of the aborigines, the latter nevertheless persist in their hostility and do their best to destroy the Spaniards, they can make war on the Indians, no longer as on innocent folk, but as against forsworn enemies and may enforce against them all the rights of war, despoiling them of their goods, reducing them to captivity, deposing their former lords and setting up new ones, yet withal with observance of proportion as regards the nature and the circumstances and of the wrongs done to them.[135]

The logic of just war did not permit the emergence of amnesty clauses as key components of a peace process during the *Respublica Christiana*. On the contrary, the party which was waging war according to a just cause did not need to forget anything since it was conducting a just war and wanted to enjoy the benefits of the victory. Nevertheless, amnesty clauses appeared in peace treaties from the fifteenth century, in clear contradiction with the medieval doctrine of just war.[136] The *Respublica Christiana* was actually in crisis due to two major events; the Reformation, which put an end to the spiritual leadership of the Pope within the Christian world, and the apparition of a new spatial order after the discovery of the New World.[137] By 1550, the old European system had collapsed and rendered a new conception of war and

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[134] See Anthony Anghie, "Francisco de Vitoria and the Colonial Origins of International Law" (1996) 5 Social & Legal Studies 321 at 327. Vitoria argued that Indian resistance to conversion was a cause of just war because it constituted a violation of the law of nations administered by the sovereign. The concept of just war no more ensued from divine law, but from a secular *jus gentium* (law of the people and by extension international law). Nevertheless this new conception did not modify the view that only Christian countries were sovereign and were thus allowed to wage a just war as an attribute of sovereignty.

[135] Cited by Anghie, *supra* note 134, at 328.

[136] Treaty of Conflans of 1465, Arts. 4 and 6; Treaty of Arras of 1482, Art. 42; Treaty of Madrid of 1526, Art. 30; Treaty of Asti of 21 June 1615, Art. 8. Lesaffer, "Peace Treaties", *supra* note 112 at 39.

[137] Lesaffer, *ibid.* at 13.

peace possible.[138] A new European legal order emerged, based on the modern sovereign state.

3. The emergence of the *droit public de l'Europe*

In *The Nomos of the Earth* Carl Schmitt argues that the fundamental event that gave birth to modern international law in Europe was the land-taking (*Landnahme*) of the New World.[139] The European states discovered practically unlimited free space available for appropriation and thus faced two new legal questions: how to define the relationships between European states and the non-European areas and how to determine the order between the European states with regards to accessing to the new areas.[140] The collapse of the *Respublica Christiana* signified that European states were no longer subject to the superior authority of the Emperor and the Pope; they thus enjoyed sovereignty.[141]

The influence of divine law faded away and was replaced by rational natural law (and then positive law). In the 16th century *ius gentium*, which originally meant the law of people, began to be translated as "law of nations" and began to form a special area of law, which later became an independent area of law known as *droit public de l'Europe*.[142] During the nineteenth century, European States – those States which had European civilization in common – expanded into the non-European world and developed increasingly frequent relations with non-European countries. The European community of States which previously identified itself with Christianity and then

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[138] *Ibid.*
[139] Schmitt, *Nomos*, *supra* note 24 at 80-81. Schmitt thus shares the point of view of Lesaffer, both do not consider the Peace of Westphalia to be the founding event of the *Jus Publicum Europaeum*.
[140] Steiger, "International Law", *supra* note 110 at 186.
[141] Schmitt, *Nomos*, *supra* note 24 at 66.
[142] Steiger, "International Law", *supra* note 110 at 186-187.

Europe began to characterize itself as "civilized".[143] By the end of the nineteenth century the circle of civilized States incorporated European states, the USA, and Japan.[144] Only civilized states were members of the international legal system and bound by the *droit public de l'Europe*, which afforded them the right to wage war, whereas "uncivilized" parts of the world were ruled by "Colonial law".[145] As a result of this legal division of the world in two European states were allowed to rule several parts of the world according to rules that did not have to comply with the *droit public de l'Europe*.

As European sovereign states emerged and religion lost some of its importance, the theory of just war became obsolete and was replaced by the notion of *guerre en forme* ("war in form"). Emer de Vattel, an advocate of the positivist doctrine, explained: "la guerre en forme, quant à ses effets, doit être regardée comme juste de part et d'autre."[146] How to end or limit war among states that were no longer subject to a higher authority became the central challenge facing the new corpus of law.[147] To take it up, the *droit public de l'Europe* abandoned the notion of *justa causa* for the notion of *justus hostis* (just enemy), which became the core concept of modern European international law.[148] The sovereignty of States determined the legality of war; if the war opposed equal sovereigns it was legal whatever the cause. Moreover, European states were regarded as *personae publicae* since they were living on common

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[143] Gerrit W. Gong, *The Standard of "Civilization" in International Society* (Oxford: Clarendon Press, 1984) at 4.
[144] *Ibid.* at 4-5.
[145] Steiger, "International Law", *supra* note 110 at 188-189.
[146] War in form, with regards to its effects, must be regarded as just on both sides. [translated by author]. Emer de Vattel, *Le Droit des Gens*, Vol. II, Livre III, Chapitre 12, § 190, (Paris: Janet et Cotelle, 1820) at 647.
[147] Alfred Vagts & Detlev Vagts, "The Balance of Power in International Law: A History of an Idea" (1979) 73 A.J.I.L. 555 at 578.
[148] Schmitt, *Nomos*, *supra* note 24 at 121.

European soil and belonged to the same European "family."[149] Because states were equal and belonged to the same family, they could consider the other party as *justus hostis* during a war.[150] In such a case both parties had the same political character and the same rights. Schmitt shows that the notion of *guerre en forme* constituted a progress vis-à-vis war based on a just cause:

> Compared to the brutality of religious and factional wars, which by nature are wars of annihilation wherein the enemy is treated as a criminal and a pirate, and compared to colonial wars, which are pursued against "wild" peoples, European "war in form" signified the strongest possible rationalization and humanization of war.[151]

As the belligerents were equal sovereigns and enjoyed the same rights, they did not search to annihilate their adversary anymore. A peace treaty between the victor and the vanquished became conceivable.[152]

The Peace Treaties

During the era of the *droit public de l'Europe,* war was still threatening European States and broke out on numerous occasions; peace settlements were thus a fundamental element of this new body of law. The structure of peace treaties was roughly the following: *invocatio trinitatis or dei* (invocation of the Trinity or God); preamble; clauses of peace and friendship; amnesty clause; operational provisions for the settlement of conflicts and problems that had led to the war and whose solution was a precondition for the restoration of peace; concluding clauses with various contents such as the settlement of consequences of war; guarantee clause; ratification

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[149] *Ibid.* at 141.
[150] *Ibid.*
[151] *Ibid.* at 142.
[152] *Ibid.*

of the text with confirmation on oath by the partners to the treaty if required.[153] This construction reflects the philosophy of the peace treaties after the Peace of Westphalia: no party tried to humiliate the other side and thus treaties did not accord reparations or declare a party guilty.[154] The parties preferred to fall back upon the amnesty clause, which imprisoned war and its consequences within oblivion.

Since the Middle Ages, the swearing of an oath comprised the main constitutive act in the process of treaty ratification.[155] The oath was sworn during a religious ceremony in church, wherein oath takers carried out symbolic acts, such as the touching of the Gospels or the Holy Cross.[156] The approval of the treaty text was also confirmed by signed documents, however the oath swearing remained the most important part of the ratification process.[157] Surprisingly the Reformation did not terminate this practice which continued after the emergence of the *droit public de l'Europe*.[158] Most of the important peace treaties were confirmed by an oath until well into the seventeenth century.[159] At this time written documents completely replaced this practice, exemplifying the novel primacy of law over religion.[160]

The medieval and early modern practice of oath swearing resembles the oaths sworn by the Athenians in order to make the amnesty effective. In both cases the parties made an agreement – political in Athens and juridical in the *droit public de l'Europe* –

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[153] Steiger, "Paris", *supra* note 111 at 70.
[154] Heinz Duchhardt, Peace Treaties from Westphalia to the Revolutionary Era, Randall Lesaffer, ed., *Peace Treaties and International Law in European History, From the Middle Ages to World War One* (Cambridge: Cambridge University Press, 2004) at 49.
[154] Steiger, "Paris", *supra* note 111 at 70.
[155] Lesaffer, "Peace Treaties", *supra* note 112 at 22.
[156] *Ibid.* at 23.
[157] *Ibid.* at 23.
[158] *Ibid.* at 24.
[159] See Treaty of Madrid of 15 November 1630, Art. 35; Treaty of the Pyrenees of 7 November 1659, Art. 124. Lesaffer, "Peace Treaties", *supra* note 112 at 27; Steiger, "Paris", *supra* note 111 at 96.
[160] Steiger, "International Law", *supra* note 110 at 184.

come to life through the swearing of oaths. The giving of one's word gave more weight to these various agreements than a signed document, showing the profound moral impact of the oath.

Granting Amnesty

Four important kinds of clauses can be distinguished regarding the ending of war and the restoration of peace and friendship between the parties in early modern peace treaties: the resolution of the conflict that led to the war or was caused by hostilities; the normalization of the situation and the attempt to extinguish the consequences of the war; the prevention of a new armed conflict; and the safeguarding of peace and security through some military measures.[161] The yearning for extinguishing the consequences of the war and for preventing a new conflict required a general amnesty of all the misdeeds that occurred during the war. Following the acceptance of the amnesty clause, everything that occurred during the war sank into oblivion and neither actions nor sanctions were allowed to respond to past misdeeds.[162] The amnesty not only included the states themselves, but also their soldiers and subjects.

In the *droit public de l'Europe* the rationale underlying amnesty consisted of limiting enmity. According to Carl Schmitt, "the concept of the state presupposes the concept of the political."[163] Moreover, he affirms that political actions and motives can be reduced to the categories of "friend" and "enemy".[164] Limiting the qualification of other states as enemies was of major concern among European states since never-ending wars and absolute enmity were their primary fears. By amnestying their

[161] Lesaffer, "Westphalia", *supra* note 106 at 84.
[162] *Ibid.* at 87.
[163] Carl Schmitt, *The Concept of the Political* (Chicago & London : The University of Chicago Press, 1996) at 19 [Schmidt, *Political*].
[164] *Ibid.* at 26.

enemy, the parties to a peace treaty forgot this qualification and thus could become friends again. The bracketing of war on European soil was the principal *raison d'être* of the just war doctrine and continued to be an important objective after the emergence of the *droit public de l'Europe*, which tried to achieve it by granting amnesties.

The amnesty clause encompassed in the Westphalia Peace Treaties was much more detailed than analogous clauses in previous peace treaties. Furthermore, these treaties influenced subsequent peace settlements; amnesty clauses were agreed upon in most important treaties.[165] This impact on following peace processes is probably the most important legacy of the Peace of Westphalia because it consecrated the "apotheosis of the non-discriminatory concept of war".[166] Thereafter, such clauses became usual in European peace treaties until the end of the eighteenth century.[167] Louis XIV was a fervent proponent of amnesty, he agreed on such clauses in three major peace treaties with other European powers.[168] For instance, after his failure to triumph over the Northern Netherlands, a peace agreement was concluded at Nimeguen on the 17th of September, 1678. Article 3 of the Treaty provided that: "all that has been done during this war shall be buried in perpetual oblivion."[169] The most successful peace treaty of the eighteenth century, which inaugurated a period of stability in Europe for almost thirty years, was the Treaty of Utrecht of 1713 that declared in its Article 3: "All Offences, Injurys, Harms, and Damages, which the aforesaid Queen of Great Britain, and her Subjects, and the aforesaid most Christian King, and his Subjects, have

[165] Lesaffer, "Westphalia", *supra* note 106 at 88.
[166] *Ibid.* at 95.
[167] This subchapter will not refer to all peace treaties signed in Europe during this period; rather it will highlight some interesting developments concerning amnesty.
[168] O'Shea, *supra* note 4 at 9.
[169] Israel, *supra* note 117 at 135.

suffered from the one from the other, during this War. Shall be buried in Oblivion [...]"[170] The Treaty of Hubertsburg of 1763 concluding the Seven Years' War in 1763 encompassed one of the most elaborated amnesty clauses since the Peace of Westphalia:

> Both side shall grant a general amnesty and totally wipe from their memory all hostilities, losses, damages and injuries whatever their nature, committed or sustained on either side during the recent disturbances. Hostilities shall nevermore be alluded to nor shall any compensation be claimed under any pretext or in any name. No subject on either side shall ever be troubled but shall enjoy this amnesty and all its effects to the full, despite the decrees sent out and published; all orders for confiscation shall be withdrawn and goods confiscated or sequestrated shall be returned to their owners, from whom they were taken during the recent disturbances.[171]

In the nineteenth century, amnesty clauses lost some of their importance; they were less frequently expressly stipulated in peace agreements. However, some important treaties still contained such a clause. Napoleon intended to establish a new international order and triggered wars that ravaged Europe from 1803 to 1815. The Napoleonic wars ended with the signature of the First Peace of Paris signed in 1814.[172] This treaty provides at Article 16:

> The High Contracting Parties, desirous to bury into entire oblivion the dissensions which have agitated Europe, declare and promise that no Individual, of whatever rank or condition he may be, in the countries restored and ceded by the present Treaty, shall be prosecuted, disturbed, or molested, in his person or property, under any pretext whatsoever, either on account of his conduct or political to opinions, his attachment either to any of the Contracting Parties, or to any government which has ceased to exist, of for any other reason, except for debts contracted towards Individuals, or acts posterior to the date of the present treaty.[173]

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[170] *Ibid.* at 179.
[171] Article 2 of the Treaty of Hubertsburg. Israel, *ibid.* at 330.
[172] Kegley & Raymond, *supra* note 105 at 88.
[173] Treaty signed between France and the Quadruple Alliance (Great Britain, Austria, Russia, and Sweden). Israel, *supra* note 117 at 509.

Amnesty was regarded as inherent to peace since the emergence of the *droit public de l'Europe*. According to early modern legal scholarship, the silence of a peace settlement on the matter did not obviate the fact that an amnesty clause was implied in it. As Emer de Vattel express it:

> L'amnistie est un oubli parfait du passé ; et comme la paix est destinée à mettre à néant tous les sujets de discorde, ce doit être là le premier article du traité. C'est aussi à quoi on ne manque pas aujourd'hui. Mais quand le traité n'en dit pas un mot, l'amnistie y est nécessairement comprise par la nature même de la paix.[174]

Amnesty was considered a fundamental feature of the *droit public de l'Europe*. Yet the European examples of the seventeenth to nineteenth centuries tend to demonstrate that amnesty was most likely to be granted when there was no clear victor, and where the negotiating parties were firmly resolved to establish an enduring peace.[175] By sinking the past into oblivion thanks to the signing of a peace treaty, the parties tried to avoid vengeance and humiliation, and thus to create a stable situation that would impede the reoccurrence of war. Europe formed a community of equal states whose major concern was limiting the consequences of the numerous wars they waged against each other. The fear of a never ending war forced the parties to compromise and to put an end to past offences according to logic similar to that which prevailed in Athens. The threat of *stasis* was replaced by the threat of interstate wars; the spectre of both never disappeared from memory. The only conceivable solution to achieve concord was to forget the offences committed during the conflict. Thanks to amnesty, Europe enjoyed some periods of stability amid troubled times like the Athenians two thousands years before.

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[174] Emer de Vattel, Livre IV, Chapitre II, § 20 *supra* note 146 at 735. See also Hugo Grotius, *Le Droit de la Guerre et de la Paix*, Livre III, Chapitre 15, t. 2, trans. by Jean Barbeyrac (Caen: Publications de l'Université de Caen, 1984) at 950.
[175] O'Shea, *supra* note 4 at 15.

4. Abandoning the *droit public de l'Europe*

After the end of the First World War, American, Asian, and African powers directly influenced the political and legal order by participating in the peace conferences and by signing the Versailles Peace Treaty.[176] As a result, Europe lost its power of self-regulation and never regained it fully.[177] The peace process and the Versailles Treaty clearly mark the death of the *droit public de l'Europe* and the birth of a universal international law.[178]

Furthermore, the First World War led to a fundamental transformation of the concept of war. Yet this war had started as an old style European war, as the belligerents considered themselves and the other parties as *justi hostes* applying the *droit public de l'Europe*.[179] The beginning of the change appeared when Belgium, whishing to deny Germany's position as an occupying power under international law, made a distinction between just and unjust war with regards to the violation of its neutrality.[180] The watershed came with the signature of the Versailles Treaty, marking the closure of the war in 1919. The parties did not include an amnesty clause: on the contrary they demanded the punishment of the former Kaiser, Wilhelm II (Art. 227) and they affirmed the guilt of Germany (Art. 231). This abandonment of amnesty in favour of prosecution signified a fundamental change in modern international law. At the criminal level, it opened the way to international tribunals, such as the Nuremberg and Tokyo Tribunals established after the Second World War. However, amnesty was

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[176] USA, Bolivia, Brazil, Cuba, Ecuador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru, China, Japan, Siam, Liberia. See Preambule to the Versailles Peace Treaty of 1919. Israel, *supra* note 117 at 1265.
[177] Steiger, "Paris", *supra* note 111 at 77.
[178] *Ibid.*
[179] Schmitt, *Nomos*, *supra* note 24 at 259.
[180] *Ibid.*

replaced by "discrimination against the vanquished".[181] The Versailles treaty thus abandoned the principle of the equality of states, which escaped from moral appreciation and formed the basis of the *droit public de l'Europe*. Moreover, the Versailles Treaty did not put an end to war in Europe. The Victors of the First World War imposed such conditions on Germany that its dignity as a state was undermined. The German resentment, associated with other causes, contributed to the outbreak of the Second World War.[182] This result vindicated those former peace-makers who had granted amnesties to avoid humiliation and desires of vengeance that follow it.

III. Amnesty as a step to reconciliation

The Truth and Reconciliation Commission established in South Africa after the fall of the apartheid regime received the power of granting individual amnesties. At that time, the country could not avoid facing its violent past and the former and newly elected political leaders decided to grant amnesty to perpetrators of "gross violations of human rights"[183] during the apartheid era provided that they made full disclosure of their past crimes. In this case amnesty was not granted to forget the past; on the contrary it was granted to know the truth about the atrocities committed under the previous regime and thereby acknowledge them. This process was supposed to bring reconciliation among the different components of the population, including victims of the apartheid regime and the perpetrators. The history of South Africa will help to understand the situation encountered by post-apartheid political leaders and the decision of granting individual amnesties. The conception of *restorative* justice

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[181] *Ibid.* at 262.
[182] O'Shea, *supra* note 4 at 25.
[183] *Promotion of National Unity and Reconciliation Act, 1995,* No. 34 of 1995, Preamble. [*National Unity Act*].

adopted by the Commission shows that a political act such as its establishment can take justice into consideration. It should finally be noted that although the approach taken in South Africa constitutes a valuable model in paving the way towards *homonoia*, its practical application was plagued by certain weaknesses. The examination of the work of the Commission with regard to victims and perpetrators and of its rhetoric indicate that the fundamental objective of the truth and reconciliation process, the unifying of the whole community, was eclipsed by the primary role given to victims.

1. The violent history of South Africa

The Report of the Truth and Reconciliation Commission emphasizes that violence is a recurring theme in the South African history:

> Violence has been the single most determining factor in South Africa political history: The reference, however, is not simply to physical or overt violence – the violence of the gun – but also to the violence of the law or what is often referred to as institutional or structural violence.[184]

A long history of systematic internal conflicts characterizes South Africa.[185] Dutch colonists – the Boers – began settling in the region and exploiting farms in the mid-seventeenth century.[186] Colonization was accompanied by violence towards indigenous people as a result of the settlers' craving for land. During the "era of slavery", from 1652 until 1834, colonists fought the local tribes and systematically

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[184] *Report of the Truth and Reconciliation Commission of South Africa*, vol. 2 (Cape Town: Truth and Reconciliation Commission, 1998), at 40 [*Report*].
[185] Marianne Geula, "South Africa's Truth and Reconciliation Commission as an Alternate Means of Addressing Transitional Government Conflicts in a Divided Society" (2000) 18 B.U. Int'l L. J. 57 at 58.
[186] Paul Lansing & Julie C. King, "South Africa's Truth and Reconciliation Commission: The Conflict between Individual Justice and National Healing in the Post-Apartheid Age" (1998) 15 Ariz. J. Int'l & Comp. L. 753 at 754.

hunted and killed their members.[187] Moreover, this conflict divided indigenous black Africans who started to fight each other, causing the death and the displacement of tens of thousand of people.[188] British colonists, fleeing Europe devastated by the Napoleonic Wars, arrived in South Africa in the early nineteenth century. The discovery of diamonds and gold on the Boers' territory increased the tensions with the British. War broke out and lasted from 1899 to 1902, which marked the victory of the British.[189]

In 1909, the British Parliament passed the *South African Act* which united the four British colonies into one state and granted them independence.[190] The British transferred internal political control in perpetuity to the Boers, who became known as Afrikaners. The Afrikaners demonstrated strong racist beliefs which affected their policies towards the native population.[191] The Afrikaner National Party (NP) created the apartheid state in 1948, establishing legal requirements of racial separation, and later racial classification, which reinforced previous policies of social division and inequity based on race.[192] The Universal Declaration of Human Rights was adopted the same year. South Africa was one of eight states that abstained from signing it, since apartheid violated almost every right proclaimed in the Declaration.[193] The apartheid system did not consider blacks South African citizens, but citizens of ethnic tribes, to which they were assigned.[194] Without government permission, blacks were not allowed to live in white urban areas. Everyone had to carry an identification pass,

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[187] Geula, *supra* note 185 at 58.
[188] *Ibid.*
[189] Lansing & King, *supra* note 186 at 755.
[190] Geula, *supra* note 185 at 58.
[191] Lansing & King, *supra* note 186 at 755.
[192] *Ibid.*
[193] John Dugard, "Reconciliation and Justice: The South African Experience" (1998) 8 Transnat'l L. & Contemp. Probs. 277 at 278.
[194] Lansing & King, *supra* note 186 at 756.

which permitted the police to verify if one's presence was legal, and this was enforced – not surprisingly – mostly against blacks.[195]

In March 1960 blacks marched against the pass system, which locked them up in rural areas where no employment prospect existed.[196] Some of them were shot in Sharpeville, which ignited protests among the country. The government outlawed the African National Party (ANC) and the Pan-Africanist Congress (PAC), both black political parties that had been legal until then.[197] These events marked the beginning of a turbulent era symbolised by civil unrest and political violence. In 1973, the International Covenant on the Suppression and Punishment of the Crime of Apartheid was adopted showing international disapproval towards South Africa. The international pressure intensified throughout the next decades; it eventually incited newly elected President Frederik de Klerk to begin dismantling the apartheid system in 1990.[198] He granted amnesty to Nelson Mandela, who had been imprisoned for twenty years, and to other jailed ANC leaders.[199]After his release, Mandela initiated a dialogue with de Klerk, which opened up the way to political change in South Africa.

2. Establishing the Truth and Reconciliation Commission

From the spring of 1990 until mid 1993, in an atmosphere of violence and political assassinations, representatives of de Klerk's government and principal political parties negotiated, both in secret and in the open, a transition from the apartheid regime to a

[195] *Ibid.*
[196] *Ibid.*
[197] *Ibid.*
[198] *Ibid.* at 757.
[199] *Ibid.* at 756.

democratic state.[200] The former political elites would never have sat at the negotiation table, if they had believed that by making an agreement, they would risk criminal prosecution.[201] Thus the fear of civil strife which, as the modern history of this country demonstrates, is very present in the South African context, clearly influenced the ANC when it decided not to prosecute the representatives of the former regime. The NP tried to take advantage of the fear and pushed for a blanket amnesty, but did not succeed in reaching an agreement granting it.[202] In 1993, the government and the ANC agreed upon an interim constitution. Its epilogue committed post-Apartheid South Africa to a policy of national reconciliation, including a provision for granting individual amnesty under certain conditions. Thus, the epilogue of the interim Constitution states:

> The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society.
>
> The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge.
>
> These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimization.
>
> In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 Oct 1990 and before 6 Dec 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.[203]

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[200] Geula, *supra* note 185 at 60.
[201] Lorna McGregor, "Individual Accountability in South Africa: Cultural Optimum or Political Facade?" (2001) 95 A.J.I.L. 32 at 35.
[202] Naomi Roht-Arriaza & Lauren Gibson, "The Developing Jurisprudence on Amnesty" (1998) 20 Hum. Rts. Q. 843 at 856.
[203] *Constitution of the Republic of South Africa 1993*, No. 200 of 1993, Epilogue.

The *Promotion of National Unity and Reconciliation Act* adopted by the Parliament in 1995 created the Truth and Reconciliation Commission.[204] Twelve countries had established truth commissions[205] before South Africa, which invited representatives of these countries to two preparatory conferences in order to benefit from their experiences.[206] The post-apartheid state benefited from their knowledge. The establishment of the Commission was inspired by the concept of restorative justice, which involves the "restoration of the social equilibrium".[207] The need for restoration requires determining the conditions which allow the victim and the perpetrator to live within the same community.[208] South Africa attempted to restore the social equilibrium ruined during apartheid by uncovering the truth about this dramatic era. This process necessitated hearing the victims and granting amnesty to the perpetrators in order to know the truth and learn the lessons from the past, which would help in building a new community. On its face, the link made between amnesty and justice may seem somewhat unconvincing. Yet the *Report of the Truth and Reconciliation Commission* brings to the forefront the idea that amnesty can be regarded as justice if one adopts the concept of *restorative* justice:

> Certainly, amnesty cannot be viewed as justice if we think of justice only as retributive and punitive in nature. We believe, however, that there is another kind of justice – a restorative justice which is concerned not so much with punishment as with correcting imbalances, restoring broken relationships – with healing, harmony and reconciliation. Such justice focuses on the experience of victims; hence the importance of reparations.[209]

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[204] See *National Unity Act*, *supra* note 183.
[205] See Priscilla Hayner, "Fifteen Truth Commissions – 1974 to 1994: A Comparative Study" (1999) 16 Hum. Rts. Q. 597.
[206] Teresa Godwin Phelps, *Shattered Voices, Language, Violence, and the Work of Truth Commissions* (Philadelphia: University of Pennsylvania Press, 2004) at 107.
[207] Jennifer J. Llewellyn & Robert Howse, "Institutions for Restorative Justice: The South African Truth and Reconciliation Commission" (1999) 49 U. Toronto L. J. 355 at 374.
[208] *Ibid.*
[209] *Report*, vol. 1, *supra* note 184 at 9.

The participation of South African people in the truth and reconciliation process was deemed necessary under this notion of justice. After his election as President in 1994, Nelson Mandela and his cabinet decided that the selection of the Truth and Reconciliation Commission members should involve the public.[210] Nominations for the Commission were therefore submitted by the public to a selection panel, which narrowed the list of nominees after questioning them. President Mandela chose the commissioners from this list.[211] He nominated Archbishop Desmond Tutu to be Chairman of the Commission. The seventeen commissioners participated in one of three committees established by the Act. The Human Rights Violations Committee received the mandate to establish and make known the fate of the victims of "gross human rights violations" and to "restore their human dignity" by granting them the opportunity to tell their stories.[212] The Amnesty Committee, on the other hand, had the power to grant amnesty "to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective."[213] Finally, the Reparations and Rehabilitation Committee had the mission to determine and administer reparations to "victims of gross human rights violations".[214]

3. Hearing the victims

> Commissioner Bongani Finca starts with the well-known Xhosa hymn: "*Lizalise idinga lakho*" (The forgiveness of sins makes a person whole). As the song carries, the victims file into the hall and take their seats at the front. Archbishop Tutu prays. But untypically he sounds as he is praying from a piece of paper: "We long to put behind us the pain and division of apartheid, together with all the violence which ravaged our communities in its name. And so we ask you to bless this Truth and Reconciliation

[210] Geula, *supra* note 185 at 65.
[211] *Ibid.*
[212] *National Unity Act*, *supra* note 183 ch. 2 s. 3 c).
[213] *Ibid.* ch. 2 s. 3 b).
[214] *Ibid.* ch. 2 § 3 c).

> Commission with your wisdom and guidance as a body which seeks to redress the wounds in the minds and the bodies of those who suffered." Everyone stands with heads bowed while the names of the deceased and disappeared who will come under the spotlight today are read out. A big white candle emblazoned with a red cross is lit. Then all the commissioners go over to the victims to greet and welcome them, while the audience stays standing.[215]

This passage describes the beginning of the first hearing by the Human Rights Violations Committee and shows the atmosphere of the "quasi-Christian" ritual that surrounded every hearing.[216] The mission assigned to this Committee consisted in hearing the victims' stories to establish whether "gross violations of human rights" had occurred. The definition of such acts was the following: the "violation of human rights through the killing, abduction, torture, or severe ill treatment of any person [...], which emanated from conflicts of the past, [...] and the commission of which was advised, planned, directed, commanded, or ordered by any person acting with a political motive:"[217]

While the three committees were supposed to hold hearings around the country at the same time, the Human Rights Violations Committee played a prominent role from the beginning. Thousands of victims came out to tell their horrific stories of apartheid-era crimes; the Committee received approximately twenty-one thousands statements.[218] As they appeared in front of the Committee, the victims were not submitted to cross-examination and the commissioners demonstrated that they sympathized with them.[219] The hearings were held in town halls, hospitals, and churches all around the country to

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[215] Antje Krog, *Country of My Skull. Guilt, Sorrow, and the Limits of Forgiveness in the New South Africa*, 2nd ed. (New York: Three Rivers Press, 2000) at 37-38.
[216] Phelps, *supra* note 206 at 109.
[217] *National Unity Act*, *supra* note 183 ch. 0 s. 1 (ix) (a) and (b).
[218] Phelps, *supra* note 206 at 108.
[219] Martha Minow, *Between Vengeance and Forgiveness. Facing History after Genocide and Mass Violence* (Boston: Beacon Press, 1998), at 72-73.

get closer to the population.[220] Moreover, the hearings were both televised and broadcast over the radio; the South Africans were thus exposed almost daily to testimonies and discussions about the country's brutal past.[221]

The hearings had various effects on the victims and their relatives. Many individuals experienced a feeling of "catharsis" by telling their stories or a sense of closure by learning the truth about the fate of their friends and relatives.[222] After being asked how he felt about testifying, a man blinded by a police officer during the apartheid regime responded: "I feel what – what has brought my sight back, my eyesight back is to come back here and tell the story. But I feel what has been making me sick all this time is the fact that I couldn't tell my story. But now I – it feels like I got my sight back by coming here and telling my story."[223] Nevertheless, some others were more traumatized than relieved after listening to testimonies relating torture and murders concerning themselves or their relatives.[224] For those who were hoping for widespread forgiveness and reconciliation, the hearings were a disappointment since only isolated, though inspiring, sessions fulfilled their expectations.[225] According to Teresa Godwin Phelps, a legal scholar who studied the work of various truth commissions, the global results were still positive:

> Despite their imperfections, though, the hearings were a public enactment of a radical kind of justice, justice that returns dignity to those who have been victimized; justice that gives back the power to speak in one's own words and to shape the experience of violence into a coherent story of one's own, thereby allowing for a renewed (or new) sense of autonomy and sense of control; justice that allows the victims, in hearing stories

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[220] Lyn S. Graybill, *Truth and Reconciliation in South Africa. Miracle or Model?* (Boulder & London: Lynne Rienner Publishers, 2002), at 6.
[221] Phelps, *supra* note 206 at 108.
[222] Lansing & King, *supra* note 186 at 769.
[223] Krog, *supra* note 215 at 43.
[224] Lansing & King, *supra* note 186 at 770.
[225] Phelps, *supra* note 206 at 111.

> from other victims, to locate their personal stories in a larger cultural story [...].[226]

The emphasis laid on the victims, which meets the requirements of the moralized discourse of human rights that emerged since the end of the Second World War, overshadowed the main goal of the Truth and Reconciliation Commission. Indeed, the primary place given to victims, demonstrated by the importance accorded to victims' stories, shows that the Commission did not respond to the whole community's needs. The predominant role of the victims in the process was not consistent with the stated purpose of the Commission, which was to build a new South African community that included the victims and the accomplices of the apartheid regime, as well as the perpetrators themselves.

4. Applying for amnesty

The Amnesty Committee was mandated to fulfil the imperative contained in the interim Constitution: "amnesty shall be granted in respects of acts, omissions, and offences associated with political objectives and committed in the course of the conflicts of the past."[227] This Committee resembled a quasi judicial body, as it was composed of judges, lawyers and laypersons, and it encompassed a highly structured petition and review process.[228] The *Promotion of National Unity and Reconciliation Act* did not allow the granting of blanket amnesties; on the contrary it made provision for a mechanism that can be called "particularized amnesty".[229] Amnesty could be granted to individuals who applied for it with regard to specific acts committed in

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[226] *Ibid.*
[227] *Constitution of the Republic of South Africa, 1993*, No. 200 of 1993, Epilogue.
[228] Geula, *supra* note 185 at 75.
[229] This expression is introduced by Dan Markel. See Dan Markel, "The Justice of Amnesty? Towards a Theory of Retributivism in Recovering States" (1999) 49 Univ. Toronto L. J. 389 at 390.

pursuit of a political objective, if they fully disclosed the truth about those acts. Furthermore, the amnesty was not automatic, but conditional. The Amnesty Committee had to consider six criteria in deciding whether or not to grant amnesty to a perpetrator of a gross violation of human rights: the motive of the offender; the context and circumstances of the act, including whether it was political; the legal and factual nature of the offence; the objective of the act, in particular whether it was politically motivated and whether directed against the state or an individual; whether the offence was committed on behalf of a political organization; and the proportionality of the act to the political objective pursued.[230] These criteria are founded on the "principles for defining the concept of a political offence" set forth by Carl Aage Norgaard, a former Danish President of the European Commission of Human Rights, in the 1989 settlement in Namibia.[231]

The Amnesty Committee, like the Human Rights Violations Committee, conducted its hearing in public. The apartheid security police officers, contrary to members of the military, considered that amnesty offered them the best option; they thus generally applied for amnesty.[232] Their confessions about the assassination and torture of anti-apartheid activists moved the public, particularly the white South Africans. As the South African writer and journalist Antje Krog tells it:

> For more than a month, the five security cops have been sitting opposite their victims and talking about their deeds. And unlike Dick Coetzee, who was always only watching, these men did it. Every single gruesome detail, their hands did, their eyes saw, their brains sucked. Their testimony has changed the debate among white South Africans. Whereas before, people denied that atrocities happened, now they deny that they knew they were happening.[233]

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[230] Lansing & King, *supra* note 186 at 764-765.
[231] *Ibid.* at 765.
[232] Dugard, *supra* note 193 at 299.
[233] Krog, *supra* note 215 at 115.

However the applications of the police officers constituted only a small part of the total number of applications. Of more than seven thousands applications received by the Amnesty Committee, amnesty was granted, fully or partially, in only about six hundred cases.[234] The Truth and Reconciliation Commission amnesty decisions were binding on the traditional criminal system. Once the Commission had granted amnesty to an individual, he could no longer be prosecuted by a criminal court for the same violations.[235] Moreover, the Commission overturned some convictions and sentences administered by the tribunals.[236] The ultimate purpose of the truth and reconciliation process was to reconcile the different elements of the South African nation. However, the Commission clearly distinguished between granting amnesty and forgiveness. Indeed, amnesty is essentially a political act, whereas forgiveness is mainly a personal act.[237] Only the victims can decide to forgive their perpetrators; no one can force them to do so. Therefore, granting amnesty was only a step on the way to reconciliation.

Since its inception, the Truth and Reconciliation Commission was a controversial institution. Several families of victims of the apartheid regime protested against the amnesty process and asked for trials and punishment. The most famous case brought before the tribunals was *Azanian Peoples Organization (AZAPO) v. President of the Republic of South Africa,* in which AZAPO and the relatives of some leading anti-apartheid activists that were killed by the regime – Steve Biko, Griffith and Victoria Mxenge, and Florence and Fabian Ribeiro – claimed that granting amnesty was

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[234] See The Truth and Reconciliation Commission online: The Truth and Reconciliation Commission <http://www.doj.gov.za/trc/amntrans/index.htm>.
[235] Lansing & King, *supra* note 186 at 767.
[236] *Ibid.*
[237] Markel, *supra* note 229 at 403.

unconstitutional.[238] The applicants attacked the constitutionality of Section 20(7) of the *Promotion of National Unity and Reconciliation Act* on the grounds that its consequences were not authorised by the interim Constitution of South Africa. They claimed that the agents of the Apartheid regime responsible for their relatives' killings should be properly prosecuted and punished instead of being amnestied.[239] Section 20(7) of the Act provides as follows:

> "(7) (a) No person who has been granted amnesty in respect of an act, omission or offence shall be criminally or civilly liable in respect of such act, omission or offence and no body or organisation or the State shall be liable, and no person shall be vicariously liable, for any such act, omission or offence." [...][240]

The applicants asserted that this provision contradicted Section 22 of the Interim Constitution that provides as follows:

> "[e]very person shall have the right to have justiciable disputes settled by a court of law or, where appropriate another independent or impartial forum."[241]

They claimed that the Amnesty Committee was neither "a court of law" nor "an independent or impartial forum" and therefore was not authorized to settle "justiciable disputes".[242]

The judgment written by Chief Justice Ismail Mahomed held that Section 20(7) did not violate the Constitution because the epilogue enjoys the same constitutional status

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[238] Dugard, *supra* note 193 at 302.
[239] *Azanian Peoples Organization (AZAPO) v. President of the Republic of South Africa*, [1996] 4 S. Afr.L.R. 671 (S, Afr. Const. Ct) at para. 8. [*AZAPO* cited to S. Afr. L.R.].
[240] *National Unity Act*, *supra* note 183 ch. 4 s. 20 (7).
[241] *Constitution of the Republic of South Africa, 1993*, No. 200 of 1993, s. 22.
[242] *AZAPO*, *supra* note 239 at para. 8.

as the other provisions of the Constitution.[243]. In a critical passage of the judgment, Chief Justice Mahomed acknowledged the difficulties experienced by the victims while knowing their perpetrators go freely. He then insisted on the problems encountered in gathering evidence and proving guilt about crimes committed during the apartheid regime, a period characterized by secrecy. He thus wrote:

> Every decent human being must feel grave discomfort in living with a consequence which might allow the perpetrators of evil acts to walk the streets of this land with impunity, protected in their freedom by an amnesty immune from constitutional attack, but the circumstances in support of this course require carefully to be appreciated. [...] Secrecy and authoritarianism have concealed the truth in little crevices of obscurity in our history. Records are not easily accessible, witnesses are often unknown, dead, unavailable or unwilling. All that effectively remains is the truth of wounded memories of loved ones sharing instinctive suspicions, deep and traumatising to the survivors but otherwise incapable of translating themselves into objective and corroborative evidence which could survive the rigours of the law.[244]

Chief Justice Mohamed therefore emphasized the obstacles that criminal trials would encounter when judging crimes committed during the apartheid era. He affirmed that above all victims and survivors needed to know the truth about the past evils. In the post-Apartheid South Africa, truth would more likely be discovered if perpetrators were encouraged to disclose it by being assured that they would not be punished. The *Promotion of National Unity and Reconciliation Act* pursued these objectives in the following way:

> The Act seeks to address this massive problem by encouraging these survivors and the dependants of the tortured and the wounded, the maimed and the dead to unburden their grief publicly, to receive the collective recognition of a new nation that they were wronged, and crucially, to help them to discover what did in truth happen to their loved ones, where and under what circumstances it did happen, and who was responsible. That truth, which the victims of repression seek so desperately to know is, in the circumstances, much more likely to be forthcoming if those

[243] *Ibid.* at para. 14.
[244] *Ibid.* at para. 18.

> responsible for such monstrous misdeeds are encouraged to disclose the whole truth with the incentive that they will not receive punishment which they undoubtedly deserve if they do.[245]

Amnesty thus constituted the only way of discovering the truth. Moreover, the judgment referred to the political situation after the apartheid regime in which the ANC was forced to negotiate a peaceful transition with the NP, which had required hard choices and significant compromises from the victims and from the former political elite as well. Chief Justice Mohamed thus wrote:

> For a successfully negotiated transition, the terms of the transition required not only the agreement of those victimized by abuse but also those threatened by the transition to a "democratic society based on freedom and equality". If the Constitution kept alive the prospect of continuous retaliation and revenge, the agreement of those threatened by its implementation might never have been forthcoming [...][246]

These political constraints were not peculiar to South Africa. Thereafter, the judgment appealed to Chile, Argentina and El Salvador where amnesties had been granted and Truth Commissions established.[247] According to the Court, these examples demonstrated that amnesty should be granted to violators of human rights in appropriate circumstances to facilitate the consolidation of a new democracy.[248] However, the judgment did not note the very distinctive contexts under which amnesties were granted in these countries, namely the strong military pressure that led to the adoption of these laws.[249] Furthermore, in the Latin American countries amnesty was not granted after a full disclosure of past crimes. On the contrary the laws granted blanket amnesty. Nevertheless, the judgment recognized that the

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[245] *Ibid.*
[246] *Ibid.* at para. 19.
[247] *Ibid.* at para. 22.
[248] *Ibid.*
[249] Roht-Arriaza & Gibson, *supra* note 202 at 874.

experiences of these countries showed that there was no uniform practice in relation to amnesty.[250]

The case tackled the question of South Africa's alleged obligation to prosecute "gross violations of human rights" under international law. Indeed the applicants argued that the Geneva Conventions of 1949 required effective penal sanctions for persons committing graves breaches of these conventions. According to them the South African amnesty process constituted a breach of international law because it impeded prosecutions.[251] John Dugard, an international law scholar, found it very disappointing that the Court did not address this argument; on the contrary it declared that international law was "irrelevant".[252] In the Court's view only the interpretation of the Constitution itself was relevant. Chief Justice Mahomed explained that international conventions and treaties would not become part of South Africa domestic law until the Parliament had enacted implementing legislation.[253]

International law scholars may regard this part of the judgment as being deeply unsatisfactory, because the question of whether a successor regime is obliged by conventional or customary law to prosecute the perpetrators of gross violations of international law committed during the previous regime is not properly addressed. Numerous legal scholars and non governmental organizations devoted to upholding human rights strongly support the view that international law obliges states to do so. However specialists of international law could also find this case instructive because it demonstrates that the different organs of the South African State such as the

[250] *AZAPO, supra* note 239 at para. 24.
[251] *Ibid.* at para. 25.
[252] *Ibid.* at para. 26.
[253] *Ibid.*

executive, the legislative as well as the judiciary, were heavily influenced by policy considerations, in particular by the necessity of discovering the truth about past atrocities and of achieving a democratic transition. Moreover, this judgment showed that the Constitutional Court of South Africa would not declare an act adopted by the Parliament as being unconstitutional only because it breached international law. Indeed the Court considered the legislation adopted by the Parliament to be a sovereign act, which had to comply with the Constitution, not with international law. The establishment of the Truth and Reconciliation Commission constituted a political decision taken by political elites, which then became law after a parliamentary enactment. Nevertheless, this political decision took international law into consideration to some extent in that it was influenced by the moralized discourse of human rights, which emphasizes the rights of the victims.

5. The Rhetoric of the TRC

Language is an essential aspect of life within a community. According to Teresa Godwin Phelps, during the rule of an authoritarian regime, the language of the community is affected in two ways; the regime officials silence the people who thus become alien to each other and they create a "new national narrative".[254] In South Africa, the apartheid regime elaborated a narrative about the necessary separation of the races.[255] Indeed the *Report of the Truth and Reconciliation Commission* acknowledges that language shapes reality: "language, discourse and rhetoric *does* things: it constructs social categories, it gives orders, it persuades us, it justifies, explains, gives reasons, excuses... It moves certain people against other people."[256]

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[254] Phelps, *supra* note 206 at 49.
[255] *Ibid.*
[256] *Report*, vol.1, *supra* note 184 at 294.

The Truth and Reconciliation Commission was not only intended to reinforce the new constitutional and political order, it was also dedicated to constructing a new South African identity.[257] As Richard Wilson shows, this purpose is reflected in the discursive associations made between truth, reconciliation, and nation-building.[258] The Commission created a new vocabulary, which was adopted by the judiciary,[259] the political elites, and other countries in transition and is now part of political glossary.[260] This vocabulary associates the following terms: healing, truth, and reconciliation.

Healing

Archbishop Desmond Tutu declared in his opening address to the first meeting of the Truth and Reconciliation Commission: "We are meant to be part of the process of healing of our nation, of our people, all of us, since every South African has to some extent or other been traumatized. We are a wounded people [...]. We all stand in need of healing."[261] South Africa is represented by a physical body composed of all its citizens. The national body is sick; it needs a healing treatment through truth-telling that will facilitate forgiveness and reconciliation. The treatment requires reopening the wounds, cleansing them and thus stopping them from festering. This representation of the nation has been challenged; some regard this process as breathing psyche into an "abstract entity which exists primarily in the minds of nation-building politicians".[262]

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[257] Richard A. Wilson, *The Politics of Truth and Reconciliation in South Africa. Legitimizing the Post-Apartheid State* (Cambridge: Cambridge University Press, 2001) at 13.
[258] *Ibid.*
[259] See, *AZAPO v. President of the Republic of South Africa*, which is revealing with this respect.
[260] Salazar, *supra* note 6 at 82.
[261] Cited, by Wilson, *supra* note 257 at 14.
[262] *Ibid.* at 15.

Truth

The first step to achieving national healing was to discover and acknowledge the truth. The ancient Greek word for truth was *aletheia*, which literally means the "unforgotten" (from the root *lethe*, oblivion as seen in Chapter I).[263] This vision of truth facilitates to understand the importance of truth in the South African reconciliation process. Sometimes the truth uncovered by the TRC was difficult to accept. The final Report portrayed a complex picture of individuals who were often victims and perpetrators as well.[264] As Antje Krog emphasizes:

> The human rights of black people were violated by whites, but also by blacks at the instigation of whites. So the Truth Commission was forced to say: South Africa's shameful apartheid past has made *people* lose their humanity. It dehumanized people to such extent that they treated fellow human beings worse than animals. And this must change forever.[265]

Victims were deeply traumatized by their dehumanized perpetrators. According to psychological studies, the victims of violence are assisted in overcoming their trauma by telling their stories, which generates a transformation from the status of 'victim' to the status of 'survivor'.[266] This transformation concerns personal healing; in the case of widespread atrocities, a national healing is needed. Victims' stories have to be heard by official representatives and publicly acknowledged. Thus the nation recognizes the truth about its past and creates the conditions what makes possible the construction of a new community.[267] The *Report of the Truth and Reconciliation Commission* reveals the constructive role played by the victims' stories:

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[263] Booth, *supra* note 88 at 781.
[264] The case of Winnie Madikizela-Mandela was perhaps the most famous one. See Graybill, *supra* note 220 at 61.
[265] Krog, *supra* note 215 at 77.
[266] Phelps, *supra* note 206 at 56.
[267] *Ibid.* at 59.

> By providing the environment in which victims could tell their own stories in their own languages, the Commission not only helped to uncover existing facts about past abuses, but also assisted in the creation of a 'narrative truth'. In so doing, it also sought to contribute to the process of reconciliation by ensuring that the truth about the past included the validation of the individual subjective experiences of people who had previously been silenced or voiceless.[268]

The association between truth, healing, and reconciliation constituted the basis of the establishment of the Truth and Reconciliation Commission, it was also recalled in the judgment of the Constitutional Court: by discovering the truth, "the country begins the long and necessary process of healing the wounds of the past, transforming anger and grief into a mature understanding and creating the emotional and structural climate essential for the "reconciliation and reconstruction".[269]

Reconciliation

In the next step of the healing process, a victim envisages forgiving his perpetrator. Once the truth about past misdeeds is acknowledged, the victim can leave the past behind and move forward.[270] This process, when it is generalized, might lead to the reconciliation of the nation. After the establishment of the TRC, the language of reconciliation became synonymous with *ubuntu*,[271] a term that does not enjoy a precise definition, but connotes humaneness, caring, and community.[272] *Ubuntu* originates from the Xhosa expression "*Umuntu ngumuntu ngabanye bantu*" – people are people through people. This expression also describes a vision of individual identity, which considers an individual to be a person in that he has relationships with

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[268] *Report*, vol. 1, *supra* note 184 at 112.
[269] *AZAPO*, *supra* note 239 at para. 17.
[270] McGregor, *supra* note 198 at 37.
[271] Wilson, *supra* note 257 at 9.
[272] Graybill, *supra* note 220 at 32.

other people.[273] The commitment to *ubuntu* was already expressed in the interim Constitution: "[...] there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimisation." The Chairman of the Truth and Reconciliation Commission, Archbishop Desmond Tutu, relied heavily on this notion which he defines in the following way:

> God has given us a great gift, *ubuntu*... *Ubuntu* says I am human only because you are human. If I undermine your humanity, I dehumanize myself. You must do what you can to maintain this great harmony, which is perpetually undermined by resentment, anger, desire for vengeance. That's why African jurisprudence is restorative rather than retributive.[274]

The importance of *ubuntu* in the African culture is controversial. According to Wilson, this notion represents "a romanticized vision of the 'rural African community' based upon reciprocity, respect for human dignity, community cohesion and solidarity."[275] However some other authors argue that *ubuntu* does actually exist in African culture, even though politicians and intellectuals exploit this concept to promote political compromise as an African virtue.[276]

Reconciliation is expressed by two different rhetorical images. The first one is that reconciliation permits one to "close the book on the past".[277] The idea does not consist in forgetting the past, but rather in uncovering it in order to move forward on the way to democracy. The construction of a bridge is the second image employed; a bridge between the past and the future as well as between white and black South African. This metaphor was first used in the interim Constitution, which was intended to provide:

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[273] Geula, *supra* note 185 footnote 105 at 72.
[274] Cited by Wilson, *supra* note 257 at 9.
[275] *Ibid.*
[276] Graybill, *supra* note 220 at 35.
[277] See *AZAPO*, *supra* note 239 at para. 2.

> [...] 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 African, irrespective of colour, race, class, belief or sex.[278]

The images of building a bridge and closing a book show that the Commission's rhetoric resorted to everyday words as an integral part of the reconciliation process in order to create a shared language among the South African population.[279] Indeed shared language is the minimum requirement to make a feeling of belonging to a community – by transforming the singular "I" into the plural "We" – which is the goal of an amnesty process.[280] The South African people, unlike the Athenians, had never been unified before. The rationale of the Truth and Reconciliation Commission was therefore to create a community founded on a common past and on a shared language. *Homonoia* draws from *homologia*[281]. However, the term "reconciliation" does not seem appropriate given that the different ethnic entities composing South Africa had never been unified before. Indeed the purpose of the Truth and Reconciliation Commission was to go beyond violence and "unify" South Africans rather than "reconcile" them.

Barbara Cassin affirms that at first sight, the South African amnesty seems to be in stark contrast with the Athenian one, as they adopted "two opposite politics of deliberative memory" to face the past. [282] Athens decided to completely forget the civil strife by granting amnesty, whereas South Africa attempted to make a full disclosure of the atrocities committed during apartheid. Yet they pursued an identical

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[278] *Constitution of the Republic of South Africa, 1993*, No. 200 of 1993, Epilogue.
[279] Cassin, *supra* note 6 at 20.
[280] *Ibid.* at 34.
[281] Salazar, *supra* note 6 at 82.
[282] Cassin, *supra* note 6 at 26.

goal: bringing *homonoia* – harmony – into the community.[283] Only the means to attain it differed; Athens chose oblivion, while South Africa truth. The Truth and Reconciliation Commission and the Athenian amnesty were political acts that facilitated the passage of an old state of civil strife to a new state of *homonoia*. However, in South Africa, as opposed to in Athens, considerations of justice influenced the political decision of granting amnesty.

IV. Amnesty as a violation of the duty to prosecute?

Carl Schmitt appealed to the ancient measure of amnesty for the criminals of the Second World War, such as murderers, saboteurs, and gangsters.[284] He argued that a war of everyone against everyone was a civil war and that in world history all civil wars which had not ended because of the total annihilation of the enemy had terminated in an amnesty.[285] However, as the establishment of the Nuremberg and Tokyo Tribunals showed, his proposition was not retained. Criminal prosecutions became from then on a crucial means to deal with war crimes. Not only were war criminals no longer exempt from prosecutions, but neither were former leaders of political regimes responsible for "grave violations of human rights".[286] Indeed prosecutions have been initiated after a political transition in countries such as Greece after the fall of the colonels' regime, Germany after the reunification, and Ethiopia, among others.[287] However in the last decades, members of a prior regime that controlled death squads which tortured and killed thousands of civilians have been

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[283] *Ibid.* at 27.
[284] Carl Schmitt, *Staat, Grossraum, Nomos*, (Berlin: Duncker & Humblot, 1995) at 218-219 [Schmidt, *Staat*].
[285] „Alle Bürgerkriege der Weltgeschichte, die nicht in der totalen Vernichtung der Gegenseite endeten, haben mit einer Amnestie geendet." Schmitt, *Ibid.* at 218.
[286] I use the term "grave violations of human rights" as encompassing forced "disappearances", political killings and torture.
[287] Dugard, *supra* note 193 at 279-280.

amnestied in Argentina, Cambodia, Chile, El Salvador, Guatemala, Haiti, Uruguay, and South Africa.[288] Several legal scholars and human rights non governmental organizations (NGOs) like Human Rights Watch and Amnesty International condemned these amnesties and argued for prosecutions.[289] This chapter will study the legality of granting amnesty in positive international law and will explicate the actual debate over a duty to prosecute past atrocities. Moreover, it will examine the limits of prosecutions in a society in transition. At the end of the chapter, the different aspects of justice will be addressed in order to show that a broader conception of justice than merely the punitive one can encompass individual amnesties.

1. The debate on the duty to prosecute

Diane Orentlicher, a leading representative of the legal scholars calling for prosecutions, claims that states have the duty to prosecute grave human rights violations of a prior regime.[290] She argues that the fundamental importance of the rule of law in civilized societies requires prosecution of "especially egregious violations of human rights".[291] She invokes different reasons: prosecutions will deter such horrific crimes within the society, they will demonstrate that impunity is no longer an option

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[288] Michael Scharf, "The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes" (1996) 59 Law & Contemp. Probs. 41 at 41.
[289] See Reed Brody, "Justice: First Casualty of Truth?" (30 April 2001), online: Human Rights Watch <http://www.hrw.org/editorials/2001/justice0430.htm>.; Human Rights Watch, "Justice Denied for East Timor," online: Human Rights Watch <http://www.hrw.org/backgrounder/asia/timor/etimor1202bg.htm>.; Amnesty International, "Crime without Punishment: Impunity in Latin America," online: Amnesty International <http://web.amnesty.org/library/index/ENGAMR010081996 >.; Amnesty International, "Algeria: Truth and Justice obscured by the shadow of impunity," online: Amnesty International <http://web.amnesty.org/library/index/ENGMDE280112000>.; Amnesty International, "El Salvador; Peace can only be achieved with Justice", online: Amnesty International <http://web.amnesty.org/library/index/ENGAMR290012001>.; Amnesty International, "Chile: The Inescapable Obligation to bring to Justice those responsible for Crimes Against Humanity Committed during the Military Government in Chile" online: Amnesty International <http://web.amnesty.org/library/index/ENGAMR220161998>.
[290] See generally, Orentlicher, *supra* note 8.
[291] *Ibid.* at 2540.

and thus will reinforce the legitimacy of the new regime, and they will eventually strengthen the rule of law.[292] Furthermore, she considers that there is no exception for societies in transition:

> [...] a state cannot evade its duty to punish atrocious crimes merely to appease disaffected military forces or to promote national reconciliation. However desirable the objectives, the government must find other means to achieve them. Ratification of an amnesty law through some form of democratic procedure would not alter this conclusion; nations cannot extinguish their international obligations by enacting inconsistent domestic law.[293]

Moreover, a state's duties under international law bind the new government.[294] Accordingly, if the previous government failed to fulfil its duty to punish grave violations of human rights, its successor is still obliged to prosecute.[295] Furthermore, she argues that recently developed norms of international law, both customary and conventional, impose significant duties in this regard.[296] She adds that limited prosecutions respecting a state's international obligations are not satisfactory as a policy, because this solution would endanger common standards of justice and weaken deference to the law.[297]

In responding to Diane Orentlicher, Carlos Nino, an Argentinean scholar who advised Argentinean President Raul Alfonsin on questions relating to potential trials and amnesties concerning the former military regime, argues that she leaves aside significant factual circumstances that successor governments may encounter and that

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[292] *Ibid.* at 2542-2543.
[293] *Ibid.* at 2595-2596.
[294] *Ibid.* at 2595.
[295] *Ibid.*
[296] *Ibid.* at 2551-2592.
[297] *Ibid.* at 2601.

are critical in deciding whether to prosecute "grave human rights violations".[298] The prosecutions encounter limits and must be "counterbalanced with the aim of preserving the democratic system".[299] He affirms that the inclusion in international law of the duty to prosecute past grave human rights violations could jeopardize the new democratic equilibrium, an important aspect that one must take into consideration when assessing the whole situation according to a moral discourse.[300] Indeed prosecuting individuals responsible for human rights violations may generate violence and precipitate a step back to non-democratic rule.[301]

2. Sources of a duty to prosecute

In order to assess if granting amnesty constitutes a violation of the duty to prosecute grave human rights violations, it is necessary to examine the extent to which positive international law obliges states to prosecute past human rights violations. Article 27 of the Vienna Convention on the Law of Treaties provides: "[a] party may not invoke the provisions of its internal law as a justification for failure to perform the treaty."[302] Indeed international conventions to which a state is party can circumscribe the prerogative of this state to grant amnesty.[303]

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[298] Carlos S. Niño, "The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina" (1990-1991) 100 Yale L. J. 2619 at 2619.
[299] *Ibid.* at 2620.
[300] *Ibid* .at 2622.
[301] *Ibid.* at 2639.
[302] *Vienna Convention on the Law of Treaties*, 23 May, 1969, U.N. Doc. A/CONF.39/27.
[303] Scharf, *supra* note 288 at 43.

Some international conventions include the principle *aut dedere aut judicare* – extradite or prosecute – which dates back to Grotius.[304] The four 1949 Geneva Conventions encompass international rules with regard to the treatment of prisoners of war and civilians in occupied territory.[305] The four Conventions, which are among the most widely ratified treaties in the world, provide that the High Contracting Parties "[...] shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches [grave war crimes], and shall bring such persons, regardless of their nationality, before its own courts [...] [or] hand such persons over for trial to another High Contracting Party [...]."[306] However, the obligation to prosecute is limited to the context of international armed conflict.[307] In 1977 Protocol II was added to codify the obligations of parties to non international armed conflicts.[308] Article 6(5) of Protocol II states:

> At the end of the 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 relating to the armed conflict, whether they are interned or detained.

The Salvadoran Supreme Court, the Chilean Supreme Court and the South African Constitutional Court relied on this disposition to affirm that amnesties are valid under

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[304] Naomi Roht-Arriaza, "State Responsability to Investigate and Prosecute Grave Human Rights Violations in International Law" (1990) 78 Cal. L. Rev. 451 at 463.
[305] Scharf, *supra* note 288 at 43.
[306] *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31, 62, s. 49; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick, Shipwrecked Members of Armed Forces at Sea*, 12 August 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85, 116, s. 50; *Geneva Convention Relative to the Treatment of Prisoners of War*, 12 August 1949, 6 U.S.T. 3316, 3418, 75 U.N.T.S 135, 236, s. 129; *Geneva Convention Relative to the Protection of Civilians Persons in Time of War*, 12 August 1949, 6 U.S.T. 3516, 3616, 75 U.N.T.S. 287, 386, s. 146.
[307] Scharf, *supra* note 288 at 44.
[308] Roht-Arriaza & Gibson, *supra* note 202 at 864.

international law.[309] They supported this conclusion by putting emphasis on the importance of reconstructing the society after a violent civil strife, which is the rationale behind Article 6(5) according to their interpretation.[310] Yet according to Naomi Roht-Arriaza and Lauren Gibson, the International Committee of the Red Cross interprets this article narrowly and concludes that Article 6(5) is inapplicable to amnesties which extinguish the penal responsibility of persons who have violated international law.[311] Thus the difference made by international humanitarian law between international and civil conflicts is significant with regard to amnesty. Do these two types of wars have common features? The examples provided by the general amnesties encompassed in European Peace treaties during the *droit public de l'Europe* era and the individual amnesties granted by the South African Truth and Reconciliation Commission show that they pursue the same purposes, harmony and (re)conciliation – impeding the re-emergence of either civil or international war – within the community of citizens or within the community of states. Is therefore the distinction made by the Geneva Conventions and their Additional Protocols between international and civil conflicts justified? Steven Ratner, an American legal scholar, claims that the distinction among wartime atrocities between the criminality of those committed in interstate conflicts and the criminality of those in civil wars is an "arbitrary schism" demonstrating one of the "schizophrenias" of international criminal law.[312]

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[309] *Ibid.*
[310] *Ibid.*
[311] *Ibid.* at 865. Actually the Commentary on the Additional Protocols of the International Committee of the Red Cross is not so restrictive; "Amnesty is a matter within the competence of the authorities.[...] The object of this sub-paragraph is to encourage gestures of reconciliation which can contribute to reestablishing normal relations in the life of a nation that has been divided." Claude Pilloud *et al., Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: Martin Nijhoff Publishers, 1987) at 1402.
[312] See Steven R. Ratner, "The Schizophrenias of International Criminal Law" (1998) 33 Tex. Int'l L.J. 237 at 240.

The Genocide Convention provides an absolute obligation to prosecute persons responsible for genocide as defined in Article II of the Convention.[313] However the Genocide Convention concerns only very few political transitions; acts directed against "political groups" were not included in the Convention's definition of Genocide.[314] The Torture Convention that entered into force on June 26, 1987 defines "torture" as

> Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on a discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[315]

This definition includes many atrocities committed in countries under an authoritarian regime such as disappearances or death squad killing.[316] States Parties are required to "ensure that all acts of torture are offences under [their] criminal law"[317] and to either extradite an alleged torturer or to "submit the case to [their] competent authorities for the purpose of prosecution".[318] According to Naomi Roht-Arriaza, these Conventions,

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[313] *Convention on the Crime of Genocide*, 9 December 1948, 78 U.N.T.S. 277 [*Genocide Convention*]. Article 2 defines genocide as "any of the following act when committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such:

a) Killing members of the group;
b) Causing serious bodily or mental harm to members of the group;
c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
d) Imposing measures intended to prevent births within the group;
e) Forcibly transferring children of the group to another group.

[314] Orentlicher, *supra* note 8 at 2565.

[315] *Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, 4 February 1985, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), *reprinted* in 23 I.L.M. 1027 (1984), *as modified*, 24 I.L.M. 535 (1984) (entered into force June 26, 1987) [*Torture Convention*].

[316] Roht-Arriaza, *supra* note 304 at 466.

[317] *Torture Convention*, *supra* note 315 Art. 4.

[318] *Ibid.* Art. 7.

whether applying to international or national crimes, demonstrate an "increasing tendency in international law to require states to investigate and prosecute serious offences."[319]

International Human Rights Conventions

It is a matter of controversy whether the International Covenant on Civil and Political Rights[320] imposes on states a duty to punish violations of the rights contained in the treaty.[321] The Covenant does not address the question expressly, but the Human Rights Committee considers that amnesties covering acts of torture "are generally incompatible with the duty of States to investigate such acts."[322] The word "generally" suggests that some amnesties, such as those that accompany a truth and reconciliation process, are acceptable.[323]

In the *Velasquez Rodriguez Case* the Inter-American Court of Human Rights found that an obligation on governments to investigate and prosecute those accused of disappearances must be read into the obligation to ensure rights recognized in the American Convention on Human Rights (Art.1.1)[324] The case concerned the arrest, torture, and execution of a student activist by the Honduran military. The Court declared that the failure to guarantee the rights affirmed by the Convention constitutes a violation of the state's obligation under Article 1 of the Convention. The judgment states:

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[319] Roht-Arriaza, *supra* note 304 at 466.
[320] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, 6 I.L.M. 368.
[321] Dugard, *supra* note 193 at 282.
[322] General Comment No. 20 (44) (art. 7), U.N. Doc. CCPR/C21/REV.I/Add.3, at para. 15 (Apr. 1992).
[323] Dugard, *supra* note 193 at 282.
[324] *Velasquez Rodriguez Case* (Honduras) (1988), Inter-Am. Ct. H.R. (Ser. C) No. 4, *Annual Report of the Inter-American Court of Human Rights*: OAS/ser. L/V/III. 19, doc.13, app. IV (1988). [*Velasquez*]. See Roht-Arriaza, *supra* note 304 at 469.

> This obligation implies the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.[325]

The Court found that the obligations to prevent, investigate and punish had been violated by the Honduran government and ordered the payment of compensation to the victim's relatives.[326] However, Michael Scharf cautions against reading too much in this case with regard to the duty to prosecute, as the Court, in ordering remedies, did not direct the Honduran government to institute criminal proceedings against those responsible for Manfredo Velasquez's disappearance and did not expressly refer to criminal prosecution in order to redress the situation.[327]

Customary Law

Does a customary duty to prosecute grave violations of human rights exist? In the context of an alleged customary duty to prosecute, one should take into account the two elements that give birth to a customary norm: State practice and the corresponding view of States that the norms are binding upon them (*opinio juris*).[328] State practice may be reflected by international instruments if they allow any state to adhere and they are widely accepted.[329] In the *North Sea Continental Shelf Cases*, the International Court of Justice considered the number of parties to a treaty, the structure of the treaty as a whole, and the subsequent state practice under the treaty to

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[325] *Velasquez*, *ibid.* at para. 166.
[326] *Ibid.* at para. 195.
[327] Scharf, *supra* note 288 at 50-51.
[328] Antonio Cassese, *International Law*, 2nd ed. (Oxford: Oxford University Press, 2005) at 157.
[329] Roht-Arriaza, *supra* note 304 at 490.

establish whether a treaty provision was of a "norm-creating character" and therefore constituted a norm of customary law.[330] Public measures and governmental acts, diplomatic instructions and acts, and official statements of policy are indicators revealing state practice.[331] As seen in the beginning of this sub-chapter, a duty to prosecute grave human rights violations is included in almost every important human rights protection instrument. State practice must however be uniform and consistent to fulfil the *opinio juris* requirement to render a norm customary.[332] The amnesties granted by numerous states after their transitions pose problems because they can be interpreted as examples of contrary state practice.[333] In the *Nicaragua Case*, the International Court of Justice tried to solve the problem of inconsistency between actual practice and *opinio juris* as follows:

> In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, [...] the significance of that attitude is to confirm rather than to weaken the rule.[334]

According to Michael Scharf, in the context of a duty to prosecute crimes against humanity, there are numerous problems with the argument of the International Court of Justice. He argues that even though a few states which have granted amnesty to representatives of the prior regime have declared that their action constituted an

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[330] *North Sea Continental Shelf Cases (West Germany v. Denmark; West Germany v. Netherlands)* (1969) I.C.J. Rep. 3 at 41-43.
[331] Roht-Arriaza, *supra* note 304 at 492.
[332] O'Shea, *supra* note 4 at 260.
[333] Roht-Arriaza, *supra* note 304 at 495; Steven R. Ratner, "Judging the Past: State Practice and the Law of Accountability", Book Review of *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* by Neil Kritz (1998) 9 E.J.I.L. 412 at 417-418.
[334] *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)* (1986) I.C.J. Rep. 14, at 186.

exception to the rule, most of them did not refer to the existence of such a rule at all.[335] Moreover, the reasoning of the International Court of Justice is valid only with regard to a situation "where customary law has gradually been built up through State practice, and where instances of inconsistent conduct subsequently occur."[336] Accordingly, this reasoning is applicable to the duty to prosecute grave human rights violations committed during a prior regime; a customary duty to prosecute might be emerging because several human rights treaties encompass it and a few states have respected it and proceeded to prosecutions.[337] However such a customary norm has not crystallized yet.[338]

3. Did South Africa violate its duty to prosecute?

It is widely accepted that practices of apartheid such as systematic murder, torture, disappearances and racial persecution constitute crimes against humanity.[339] Did South Africa have the duty to prosecute the perpetrators of such egregious crimes? The Genocide Convention and the Convention against Torture obligate a successor regime to prosecute representatives of the prior regime for acts which constitute grave violations of human rights. However, these treaties were not applicable because South Africa was not party to them at the time the grave human rights violations were committed.[340] Moreover, South Africa was not party to the Convention on the Suppression and the Punishment of the Crime of Apartheid that obligates parties to

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[335] Scharf, *supra* note 288 at 58.
[336] *Ibid.* at 59.
[337] Roht-Arriaza, *supra* note 304 at 489.
[338] Dugard, *supra* note 193 at 306; Douglas Cassel, "Lessons From the Americas: Guidelines for International Responses to Amnesties for Atrocities" (1996) 59 Law & Contemp. Probs. 197 at 205. *Contra* Orentlicher, *supra* note 8.
[339] Dugard, *supra* note 193 at 304.
[340] *Ibid.* at 303.

either prosecute or extradite suspects. [341] The only applicable conventions were the 1949 Geneva Conventions on the Laws of War and their 1977 Protocols, which were invoked by the Constitutional Court. Even if the International Committee of the Red Cross' narrow interpretation of article 6(5) of Protocol II had been retained, prosecutions for violations of international law were not mandatory since neither international conventional law nor international customary law obligated South Africa to prosecute. Indeed a duty to prosecute crimes against humanity has not yet crystallised. That being said, the South African example was perhaps a unique one given that the Apartheid regime did not sign the most important human rights treaties. However, even if a state is party to international conventions requiring prosecutions, political constraints may impede it from carrying out this duty.

4. The limits of prosecutions

José Zalaquett, a former member of the Chilean Truth and Reconciliation Commission, despite supporting the validity of Diane Orentlicher's arguments in theory, emphasizes that prosecutions of human rights violations are often not feasible in practice.[342] He examines the different political constraints that can impede prosecutions: the military regime which ruled the country may have lost the governing power but retained control of armed power; the military regime may allow a transition to democracy following a negotiation or under its own terms and thus keep playing a prominent role; the new government may conclude an alliance with the military after gaining power and there may be no clear break with the past; political struggles may

[341] *International Convention on the Suppression and Punishment of the Crime of Apartheid*, 30 November 1973, G.A. Res. 3068, U.N. GAOR, 28th Sess., Supp. No. 30, at 75, U.N. Doc. A/9030 (1974), reprinted in 13 I.L.M 50. Art. 4-5.
[342] José Zalaquett, "Confronting Human Rights Violations Committed by Former Governments: Applicable Principles and Political Constraints" (1990) 13 Hamline L. Rev. 623 at 642.

be rooted in internal frictions caused by ethnic or religious divisions and prosecutions might exacerbate the still existing tensions; the atrocities may be so widespread that they render investigations difficult or finally, there may be no competent or independent judiciary to carry out proper prosecutions.[343] These are political constraints that are recurrent in political transitions. Moreover, practical constraints may impede prosecutions. For example, the outcome of prosecutions may lack legitimacy if the courts participated in the former regime's authoritative rule by confirming its decisions and by ignoring the regime's abuses. Furthermore, prosecuting all the people who have collaborated with the former regime may be impossible because it would paralyze the justice system. As Richard Goldstone, a former judge at the South African Constitutional Court, said: "if one had to bring to court all the perpetrators of human rights abuses during the last forty years, there just would be not enough courts to deal with it."[344]

Numerous legal scholars nevertheless support the option of prosecuting, however their arguments are lacking in that they only recognize the punitive role of justice. Every political transition following a civil strife or an international conflict gives rise to the fear that war may break out again at any occasion. The fear of *stasis* was an element that induced Athenians to swear the oath not to recall the past, and persuaded the new South African political elites to agree on the truth and reconciliation process. However, since the end of the Second World War, law, as opposed to political acts such as granting amnesty, has played an increasing role as a "tool" responding to this fear and facilitating the transition of a society.[345] The increasing importance attached

[343] *Ibid.* at 644-645.
[344] Graybill, *supra* note 220 at 68.
[345] Jennifer L. Balint, "The Place of Law in Addressing Internal Regime Conflicts" (1996) 59 Law & Contemp. Probs. 103 at 104.

to law reflects the emergence of a moralized discourse of human rights, which attempts to clearly separate law from politics. Indeed proponents of this discourse view politics as a dirty or immoral business from which nothing good can be expected,[346] and consequently, in the case of a political transition, this discourse puts an emphasis on justice while leaving politics aside. The discourse therefore entails that amnesty, a political rather than a legal act, cannot play a role in a political transition. However, the proponents of this discourse who are calling for prosecutions only see justice in a restricted way, through its punitive function.

Other scholars consider that justice can be viewed in a broader way and that it reaches beyond a merely punitive function. Jonathan Allen identifies four different aspects of justice: punitive justice, justice as recognition, compensatory justice, and justice as ethos.[347] These aspects encompass some of the different roles that law can play.

Punitive justice is based on the idea of retribution, the rationale for which is that fairness requires the offender to "pay his or her due."[348] In other words, someone found guilty of transgressing the law has to be punished in proportion to his or her offence. Punishment may comprise an educative function by highlighting the evil aspect of the act committed and the need to avoid and prevent it.[349] Punishment may also have a deterrent effect – the message sent to the perpetrator and to the society as a whole is that such conduct will not be tolerated. Diane Orentlicher argues that deterrence constitutes the best insurance against future crimes.[350] Responding to this

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[346] This view of politics is Protestant in origin, but can by no means be restricted to Protestantism. See Allen, *supra* note 10 at 337.
[347] Allen, *supra* note 10 at 326-338.
[348] *Ibid.* at 327.
[349] *Ibid.*
[350] Orentlicher, *supra* note 8 at 2542.

argument, Jennifer Balint stresses that the perpetrators of grave violations of human rights often do not think about potential redress because they are neutralized by an irresistible belief in the "rightness" of their actions.[351] She considers that neither criminal prosecution nor truth commissions can fully deter such horrific actions.[352] Jennifer Llewelyn and Robert Howse add that it is not surprising that the idea of resorting to individual responsibility to surmount the problem of collective culpability is appealing in the West. They write:

> Having seen the images of concentration camps and torture on their televisions screens, people too weary to engage in some complex exercise of political and historical judgment seek a solution that reflects life on television: the bad guys – the monsters – get caught, the moral order is restored, and peace and security prevail.[353]

Some aspects of justice go beyond this punitive purpose and better address the necessity of avoiding future crimes being committed, attaining this goal through uncovering the truth about past atrocities.

Justice may encompass a form of recognition; the recognition of the equal dignity of individuals.[354] This feature is achieved by an official acknowledgment of the truth about past atrocities that is essential to move forward during a political transition. As Justice Richard Goldstone emphasizes: "If it were not for the Truth and Reconciliation Commission people who today are saying that they did not know about apartheid would be saying that it did not happen. This is a fact, and it cannot be

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[351] Jennifer Balint gives the example of a speech of Himmler addressed to senior SS officers in 1943: "This is an unwritten and never-to-be written page of glory in our history [...] We had the moral right, we had the duty towards our people, to destroy this people that wanted to destroy us [...] All in all, however, we can say that we have carried out this most difficult of tasks in a spirit of love for our people. And we suffered no harm to our inner being, our soul, our character." Balint, *supra* note 345 footnote 83 at 124.
[352] *Ibid.* at 124.
[353] Llewelyn & Howse, *supra* note 207 at 361.
[354] Allen, *supra* note 10 at 329.

underestimated."[355] Indeed the absence of official acknowledgment can be "devastating" to individuals who suffered from past atrocities, as Turkey's denial of the Armenian community shows.[356] Michael Ignatieff claims that truth-telling is the principal and the sole goal that a truth commission ought to achieve:

> All that a truth commission can achieve is to reduce the number of lies that can be circulated unchallenged in the public discourse. In Argentina, its work has made it impossible to claim, for example, that the military did not throw half-dead victims into the sea from helicopters. In Chile, it is no longer permissible to assert in public that the Pinochet regime did not dispatch thousands of entirely innocent people. Truth commissions can and do change the frame of public discourse and public memory.[357]

In addition to uncovering the truth, this aspect of justice restores the victims' dignity by providing them with the chance to tell their stories, a process that may have a therapeutic effect.[358]

Compensatory justice is based on the assumption that awarding reparations is an essential feature of justice in case of grave injury or disability.[359] The last aspect of justice distinguished by Jonathan Allen is called justice as ethos and arises when someone's sense of injustice has been outraged in some way.[360] A regime guilty of grave human rights violations very likely corrupts the sense of injustice among the population and subordinates it to ideology.[361] During a political transition it is thus necessary to restore sensitivity to injustice in order to re-establish justice. This aspect

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[355] Cited by Balint, *supra* note 345 at 117.
[356] *Ibid.* at 118.
[357] Michael Ignatieff, "Articles of faith" (1996) 5 Index on Censorship 110 at 113.
[358] Minow, *supra* note 219 at 70.
[359] Allen, *supra* note 10 at 335.
[360] *Ibid.*
[361] *Ibid.* at 336.

of justice is achieved by educating the population on the moral evils of the former regime and the breakdown of the sense of injustice.[362]

These four aspects of justice are better addressed by a truth and reconciliation commission based on the South African model than by a criminal trial. Indeed the Truth and Reconciliation Commission allowed the victims to tell their stories and acknowledged the past atrocities, it made recommendations to award reparations to victims, and it restored sensitivity to injustice by confronting the specific circumstances of injustice, which was the core of the apartheid system. Jonathan Allen argues that no one has convincingly demonstrated that truth commissions assure healing, catharsis, disclosure of the truth and reconciliation since the evidence is nuanced, fluctuating from country to country and from individual to individual.[363] However a truth and reconciliation commission does not sacrifice justice to truth or reconciliation, as some NGOs and legal scholars claim. On the contrary, the South African Truth and Reconciliation Commission recognized the value of justice and tried to encompass the diverse elements of justice, although some of those are represented at a lower level.[364] For example, the punitive role of justice is addressed to a certain extent by the shame cast on perpetrators as a result of the process of uncovering their crimes. Thus the establishment of a truth and reconciliation commission does not only respond to political and practical constraints, it also secures justice.

Furthermore, granting individual amnesties can appeal to the broader multi-faceted conception of justice because this process helps to disclose the truth about the abuses

[362] *Ibid.*
[363] *Ibid.* at 316.
[364] *Ibid.* at 338.

committed by the former regime, an essential measure in leaving the past behind. Otherwise, as Michael Ignatieff writes, the spectre of the past does not cease to haunt the community:

> For what seems apparent in the former Yugoslavia, in Rwanda and in South Africa [before the establishment of the TRC] is that the past continues to torment because it is *not* past. These places are not living in a serial order of time, but in a simultaneous one, in which the past and present are a continuous, agglutinated mass of fantasies, distortions, myths and lies. Reporters in the Balkan wars often reported that they were told atrocity stories they were occasionally uncertain whether these stories had occurred yesterday or in 1941 or 1841 or 1441.[365]

The only means to avoid distortions, myths, and lies about the past is to uncover the truth about it. Trials cannot portray the past in as complete a way as Truth Commissions can.

This vision of justice based on recognition, truth-telling, compensation and redressing the sense of injustice is not sufficiently taken into consideration by the proponents of a duty to prosecute. Influenced by the moralized discourse of human rights, they emphasize the individual's rights and not the community's needs. By contrast, the historical examples employed show that building and unifying the community is the major concern during political transitions. Moreover, the South African example demonstrates that a political act such as the decision to establish a Truth and Reconciliation Commission can be influenced by considerations of justice.

[365] Ignatieff, *supra* note 357 at 119-121.

V. Is political forgiveness possible?

Law plays an increasing role as a "tool" in responding to the fear surrounding a situation of post-conflict and in facilitating the transition of a society. However, Jennifer Balint highlights that law cannot do everything; its functions and scope are necessarily limited.[366] Both law's capacities and limits should be recognized.[367] As Julius Cohen writes:

> There are limits also to what law can possibly control. Its power can readily extend to property, to things, and, to a limited extent, to persons. It can [...] implement their acquisitions, but it cannot secure their affection. It cannot erase hurt feelings, restore lost limbs, or bring back to a family a life that has been inhumanly snuffed out. For such pains and deprivations, compensatory palliatives are, at best, woefully inadequate.[368]

Thus, law has limits: in the case of a political transition, law cannot lead to reconciliation in and of itself. Politics plays an important role, as the Athenian and South African examples show. Law associated with politics can facilitate reconciliation, but cannot make people forgive. For instance, in South Africa, the Truth and Reconciliation Commission created conditions that paved the way to reconciliation, but it could not ensure that people would forgive. Indeed forgiveness is a private act, and law cannot play a role in such an act.[369]

Generally forgiveness means re-establishing a relationship after the occurrence of a wrong. The victim acknowledges the harm he or she suffered and, thanks to this

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[366] Balint, *supra* note 345 at 107.
[367] *Ibid.*
[368] Julius Cohen, "Perspectives of the Limits of Law", in J. Roland Pennock & John W. Chapman, eds., *The Limits of Law* (New York: Lieber-Atherton, 1974) at 43.
[369] Balint, *supra* note 345 at 122.

acknowledgment, releases the offender from the moral debt generated by his action.[370] Roger Smith explains that "forgiveness asks us to reject the crime and accept the man. Acceptance through forgiveness, thus, does not mean that one's transgressions are denied or excused. On the contrary forgiveness confirms guilt, but nevertheless allows reconciliation and a new beginning."[371] However forgiveness is difficult since resentment is such a fierce emotion.[372] According to Friedrich Nietzsche forgiveness is the distinguishing feature of the weak who transforms a necessity into a virtue. His portrait of the weak is revealing with this respect:

> The inoffensiveness of the weak, his cowardice, his ineluctable standing and waiting at doors, are being given honorific titles such as patience; to be *unable* to avenge oneself is being called is called to be *unwilling* to avenge oneself – even forgiveness ("for they know not what *they* do – we alone know what they do.") Also there's some talk of loving one's enemy – accompanied by much sweat.[373]

Forgiving or even more loving one's enemy is not needed by people with a strong temperament since these persons have a "power of oblivion".[374] Nietzsche supports this idea by the example of Mirabeau "who lacked all memory for insults and meanness done him, and who was unable to forgive because he had forgotten."[375] According to the Nietzschean critique this argument is flawed to the extent that it conceives forgiveness as intrinsically linked with resentment.[376] In contrast to Nietzsche who regards forgiveness as the prerogative of the weak, Hannah Arendt

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[370] Peter Digeser, "Forgiveness and Politics. Dirty Hands and Imperfect Procedures" (1998) 26 Political Theory 700 at 701.
[371] Roger W. Smith, "Redemption and Politics" (1971) 86 Political Science Quarterly 205 at 218.
[372] Digeser, *supra* note 370 at 702.
[373] Friedrich Nietzsche, *The Birth of the Tragedy and The Genealogy of Morals* (New York: Doubleday & Company, Inc. 1956) at 181 [Nietzsche, "*Genealogy of Morals*"].
[374] *Ibid.* at 173.
[375] *Ibid.*
[376] Peter Digeser, *Political Forgiveness* (Ithaca & London: Cornell University Press, 2001) at 15.

believes that forgiveness derives from the capacity of human beings to love one another.[377]

Is forgiveness then possible in a political context such as a political transition? Hannah Arendt affirms that certain offences are so horrific that they are neither punishable nor forgivable; she gives them the name of "radical evil".[378] Moreover, she argues that despite the necessity of forgiving for human action, forgiveness "perhaps because of its religious context, perhaps because of the connection with love attending its discovery – has always been deemed unrealistic and inadmissible in the public realm [...]."[379] On the other hand, Linda Ross Meyer argues that forgiveness is not only private, but initiates the fundamental trust that renders community possible.[380] Not only should the victims forgive, but also the other members of the community. How may someone who is not a direct victim of a wrong forgive it? It is only possible if we consider that people are bound through their community and that the wrong is not wrong to the victim as an individual, but to the victim as a community member. Thus the wrongdoer breaches the trust not only with the individual, but also with the whole community.[381] Some societies are accustomed to this notion of community which binds people together; in ancient Athens the bond of political community, which connected each citizen to all the others through a tight web, gave the *polis* its unity.[382] Moreover, the concept of *ubuntu* achieves a comparable bond in South Africa since it conceives a person to be a person through

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[377] *Ibid.*
[378] Arendt, *supra* note 49 at 241.
[379] *Ibid.* at 243.
[380] Meyer, *supra* note 11 at 1515.
[381] *Ibid.* at 1517.
[382] Loraux, *supra* note 35 at 94.

other persons.[383] Nietzsche saw the criminal as an entity separated from the community, someone no longer standing inside the law founding the community, an "outlaw".[384] Forgiveness is thus a means to bring the "outlaw" back into the community; this return is feasible providing that the community attempts to empathize with him and regards him not only as a criminal.[385] This process permits the community to commit itself to coping with the criminal, which is an important path on the way to a possible reconciliation.[386]

Linda Ross Mayer argues that despite the fact that many scholars identify retributive justice as the only morally satisfactory theory of punishment, retribution is not adequate because it "falsely ties the victim's value to the offender's punishment."[387] We should instead recognize that the victim's true worth is never attained by criminal actions, as it is not the victim that is touched but the community.[388] Ultimately the basic point is the return to community, not a punishment equivalent to the crime.[389] According to this conception, punishment resembles more a form of forgiveness – a return of the wrongdoer to the community.

Hannah Arendt said that the human condition needs forgiveness as its very basis "in order to make it possible for life to go on by constantly releasing men from what they have done unknowingly".[390] She writes:

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[383] See Chapter III.
[384] Friedrich Nietzsche, *The Twilight of the Idols* (Edinburgh & London: T.N. Foulis, 1915) at 103-104. See Meyer, *supra* note 11 at 1518.
[385] Meyer, *ibid.* at 1522.
[386] *Ibid.* at 1523.
[387] *Ibid.* at 1525-1526.
[388] *Ibid.* at 1527.
[389] *Ibid.* at 1530.
[390] Arendt, *supra* note 49 at 240.

> Without being forgiven, released from the consequences of what we have done, our capacity to act would, as it were, be confined to one single deed from which we could never recover; we would remain the victims of its consequences forever, not unlike the sorcerer's apprentice who lacked the magic formula to break the spell.[391]

Without forgiveness, we cannot act. Yet one cannot forgive oneself, someone else – a member of the community – has to forgive.[392] Thus the community is fundamental for human action.[393] The concept of *ubuntu* illustrates this idea: a person is a person through other persons. In fact, forgiveness is "more central to the creation of the community than is justice."[394]

Constructing or reunifying the community is of central concern during political transitions. To achieve such an ambitious goal, political elites have to deal with the past misdeeds that likely still divide the community. The Athenian and European elites opted for oblivion, whereas the South African ones preferred truth. Yet these antagonistic ways of facing the past had an identical purpose; bringing *homonoia* into the *polis*, the community of states or the community of people. Moreover these "opposed" purposes were pursued by the same mechanism, amnesty. However, even if amnesty can bring oblivion or truth, it cannot achieve *homonoia*. Amnesty as a legal or a political act, shows that law and politics have limits in (re)unifying the community. Such a goal can be attained only if forgiveness accompanies law and politics. Individual amnesty can facilitate forgiveness by fostering the disclosure of the truth of past atrocities. Forgiveness is deemed necessary to render the construction

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[391] *Ibid.* at 237.
[392] Meyer, *supra* note 11 at 1533.
[393] *Ibid.*
[394] *Ibid.* at 1536.

of a community possible. Indeed "to live is to forgive and to risk and to be uncertain and to outstrip language and reason itself."[395]

Conclusion

Amnesty has been a constant theme in the history of international law from Ancient Egypt to Post-Apartheid South Africa. Depending on the era, amnesty was employed to forget past atrocities that divided communities – of people or states – or, on the contrary, to uncover the truth about such atrocities. Even though these examples may seem opposed at first sight, they pursue the same ultimate goal: bringing *homonoia* into the community. The Athenian amnesty and the establishment of the South African Truth and Reconciliation Commission were political acts aimed at facilitating the passage from civil strife to *homonoia*, to reunify or create a community of people. The amnesty clauses comprised in the peace treaties signed during the era of the *droit public de l'Europe* attempted to attain the same goal: achieving harmony within the community of states. Language was used during these different historical periods to achieve the passage, from the "I" to the "We", that unifies the community through the swearing of oaths or the creation of a new vocabulary.

This study shows that granting individual amnesties to those responsible for past atrocities, as opposed to their prosecution, is a critical element in paving the way towards *homonoia* in a community that has been affected by civil strife, even though it cannot single-handedly achieve such a goal. Ancient Athens and Post-Apartheid South Africa, faced with similar constraints, both opted for amnesty instead of prosecutions. In both contexts, the former political leaders had abandoned power but had retained

[395] *Ibid.*at 1539.

some influence within the community. The sheer number of perpetrators and their accomplices and the involvement of the population in general rendered prosecutions hardly feasible. Furthermore, the entrenched division of the community as a result of the civil strife called for amnesty, the only effective way of working towards *homonoia* in the circumstances. During the era of the *droit public de l'Europe*, amnesty was regarded as the unique way to extinguish the consequences of war and re-establish friendly relations within the community of States in order to limit war on European soil. Similar fears induced the Athenian, European and South African political leaders to agree to amnesty: they were all afraid of the reoccurrence of wars that would break out at any occasion. Despite these historical examples that show the central role played by amnesty, numerous legal scholars and human rights activists have called for prosecutions of past atrocities committed by a former regime, and positive international law codifies a duty to prosecute in various international conventions. The proponents of prosecutions argue that criminal trials constitute the only mechanism which can ensure the deterrence of horrific crimes, demonstrating the end of a culture of impunity, and strengthening the rule of law by showing that the new regime is dedicated to respect it. However, by advocating the systematic prosecution of perpetrators, these proponents jeopardize the precarious process of unifying the community which is critical in attaining *homonoia*. Only individual amnesty can reinforce this process by uncovering, through full disclosure on the part of the perpetrators, the truth about the atrocities which divide the community.

International law affirms a duty to prosecute grave human rights violations in various international conventions. However such a duty has not yet reached the status of customary norm, as state practice still involves the granting of amnesties, as was the

case in South Africa. The discrepancy between state practice and international law is due to the emergence of a moralized discourse of human rights that seeks to guarantee victims' rights against the State. In the case of a political transition, this discourse calls for prosecutions but does not address the needs of the community as a whole and this is arguably the reason why it has not become state practice.

The contrast between amnesty processes and the prosecutions advocated for by the proponents of such a discourse is reinforced by their different views of politics. The Truth and Reconciliation Commission, like the Athenian amnesty, was a political act opted for by political leaders in order to facilitate the transition towards a democratic state. The problem is that scholars and activists influenced by the moralized discourse of human rights consider politics not to be a satisfactory means of dealing with past atrocities, a view which led Diane Orentlicher to suggest that a process chosen because of political constraints and decided on by politicians are not acceptable in facilitating a democratic transition. However, the Truth and Reconciliation Commission shows that a political act can be reconciled with juridical concerns and, even more importantly, can promote a different vision of justice. This hybrid institution demonstrates that a political act can address considerations of justice provided that justice is considered not only in its retributive sense but in a broader one, encompassing recognition, compensation and the restoration of the community's sensitivity to injustice. Furthermore, the increasing role played by law in political transitions should not overshadow the fact that law has limits which should be recognized. Indeed, law cannot achieve *homonoia* within a community by itself; the Athenian and South African examples show that politics plays an important role as well. However, law and politics are not enough. Forgiveness, on the part of victims as

well as other members of the community, is also a necessary component of *homonoia*. As Linda Ross Meyer emphasizes, forgiveness creates the basic trust that renders community possible.[396] Forgiveness confirms guilt but nonetheless allows *homonoia* and thus a new beginning of the community. It must be stressed that forgiveness is very difficult to achieve since resentment is such a fierce emotion to overcome, however it is nevertheless essential.

Amnesty can facilitate the uncovering and acknowledgment of the truth, which is necessary to allow people to forgive and to ensure that the spectre of the past ceases to disturb the community. The South African Truth and Reconciliation Commission succeeded in discovering the truth about numerous atrocities committed during the apartheid era because of the amnesty granted to the perpetrators of such atrocities. The prosecution of the perpetrators would not have allowed for such a complete disclosure of the truth.

The call for prosecutions influenced by the moralized discourse of human rights that appeared recently loses sight of historical perspective, which shows that similar issues to those we know today were already present in Antiquity and during the emergence of modern Europe. From time immemorial human beings have waged war against each other, have attempted to conclude an acceptable peace and started all over again. Amnesty is a recurring mechanism adopted during peace processes and political transitions, therefore the modern discourse of human rights should not dismiss it as a viable mechanism. Moreover, very intricate political transitions, such as the ones taking place in Iraq and Afghanistan, face political and practical constraints analogous

[396] Meyer, *supra* note 11 at 1515.

to those encountered by post-apartheid South Africa and even Ancient Athens. Therefore, individual amnesties should be envisaged as a mechanism to reconstruct and unify these communities.

The construction of a historic bridge between a brutal past and a peaceful future necessitates facing past atrocities and transforming the suffering they created into something good, allowing the building or the reunifying of a community. Law cannot achieve such a bridge by itself: political acts and forgiveness have a role to play. However, granting individual amnesties to perpetrators of past atrocities in exchange of their testimonies facilitates its construction.

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