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**Amnesty and Accountability:
A Study of the South African Amnesty in the Light
of the Nuremberg Tribunal**

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Declaration:

This work has not been previously submitted in whole, or in part, for the award of any degree. It is my own work. Each significant contribution to, and quotation in, this dissertation from the work, or works, of other people has been attributed, and has been cited and referenced.

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Abstract

The topic of this Masters mini-dissertation is amnesty and the principle of individual accountability for gross human rights violations. The field in which this topic is located is that of transitional justice. The issue with which this mini-dissertation is concerned is the practical, political and moral problems which states in transition from authoritarian regimes to newly established democratic government based on human rights have experienced in the last three decades when seeking accountability for the past atrocities. These state transitions have significantly employed amnesty as a means to address the need for peace and stability at the end of conflict, but this has tended to foreclose the possibility of holding the previous regime accountable for its legacy of human rights abuse. The historical context of this enquiry is the the International Military Tribunal at Nuremberg (IMT) in Germany 1945 – 1946, which established a precedent for individual criminal accountability for crimes against humanity. The Nuremberg precedent fundamentally assumed that individuals at every level of the authorisation of crime are accountable for their own actions. Since the Milgram experiment on obedience to orders in the 1960s, social science experiments have shown, however, that individuals acting under orders do not perceive of their moral autonomy as clearly as previously assumed. In the light of the historical transitions since Nuremberg, the recent innovation in the South African Constitution in 1995, which introduces the notion of conditional amnesty, represents a novel attempt to hold individuals accountable. It required individual acknowledgement and full disclosure in public of the responsibility for heinous deeds. This framework also grants amnesty for gross human rights violations committed in the execution of an order of, on behalf of or with the approval of a political organisation. Few commentators have addressed the question of whether such conditional amnesty may be compatible with the Nuremberg model of accountability. The specific task which this mini-dissertation sets out is, therefore, to 1) clarify the concept of accountability, 2) determine in which senses one may hold individuals accountable for their actions, and 3) assess whether, to what extent and how the South African amnesty may achieve the accountability required by a liberal-democratic framework which upholds the moral principle that individuals are responsible for their actions.

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Table of Contents

Introduction	1
1 The Concept of Individual Accountability	5
1.1 The Quest for Accountability after Gross Human Rights Violations	
1.2 The Religious and Philosophical Origins of the Notion of Accountability	
1.3 Accountability in relation to Responsibility	
1.3.1 Responsible Agency and Holding an Agent Responsible	
1.3.1.1 Causal Responsibility	
1.3.1.2 Moral Responsibility	
1.3.1.3 Membership and Subject Responsibility	
1.3.1.4 Role Responsibility and Accountability in Hierarchical Structures	
1.3.1.5 Political Accountability and the Dual Notion of Political Representation	
1.4 Guilt as Charged from Without and Guilt Charged from Within: The Four Notions of Guilt	
1.4.1 Criminal Guilt	
1.4.2 Political Guilt	
1.4.3 Moral Guilt	
1.4.4 Metaphysical Guilt	
2 The Nuremberg Precedent – Accountability in Transitional Contexts	32
2.1 A Brief History of Individual Accountability for Gross Human Rights Violations	
2.2 The Creation of the International Military Tribunal at Nuremberg	
2.3 The Charges and their Implications	
2.3.1 Legal Accountability	
2.3.2 Individual Accountability	
2.4 The Legacy of the Nuremberg Precedent	
3 Crimes of Obedience – Individual Moral Autonomy under Authority Structures	45
3.1 The Nuremberg Precedent and Social Science Research: Conflicting Frameworks for Due Obedience	
3.2 Crimes of Obedience: Implications of the Nuremberg Precedent	
3.3 The Construction of Moral Autonomy in Authority Structures	
3.4 The Milgram Experiments and “the Agentic State”	
3.4 Implications of Milgram’s Theory: Obedience as a Learned Moral Norm	

3.5	The Argentine Due Obedience Law: A Legal Framework of Accountability for Moral Obedience under Authority	
4	Transitional Justice and Conditional Amnesty as Non-retributive Means to Justice	62
4.1	Amnesty and Transitional Justice	
4.2	Amnesty and the Obstacles to Prosecution and Punishment	
4.2.1	Political Constraints	
4.2.2	Practical Constraints	
4.2.3	Moral Choices	
4.3	Three Types of Amnesty	
4.3.1	General Amnesty and Blanket Amnesty	
4.3.2	Conditional Amnesty and Partial Amnesty	
4.3.3	Accountable Amnesty	
4.4	The Transitional Justice Literature: A Normative Framework for Justice in Transitional States	
4.4.1	The Prosecution and Punishment Position	
4.4.1.1	The Nuremberg Precedent	
4.4.1.2	Lustration / Purges	
4.4.2	The General Amnesty Position	
4.4.2.1	A Political Compromise	
4.4.2.2	A Practical Compromise	
4.4.3	The Truth Process Accompanied with an Amnesty Approach	
4.4.3.1	A Truth Process Accompanied by General Amnesty	
4.4.3.2	A Truth Process Accompanied by Conditional Amnesty	
5	Conditional Amnesty and Accountability: The South African Case	77
5.1	The Significance of the South African Amnesty	
5.2	The Transitional Context: A Political Settlement	
5.3	The Goals, Objectives and Functions of the South African Conditional Amnesty: Reconciliation, Truth and Accountability	
5.3.1	The Task of Defining, Identifying and Adjudicating Political Objective	
5.4	The Implications of Favouring Politically Motivated Crime	
	Conclusion	95
	Bibliography	98

Introduction

This mini-dissertation poses the question of how, and to what extent, the recent South African conditional amnesty makes possible the accountability for gross human rights violations required by transitional justice. Such accountability has traditionally been sought, following the precedent set by the Nuremberg model, through prosecution and punishment, which precludes any notion of amnesty.

The context of this study is that of post-conflict societies that are in transition from authoritarian or totalitarian regimes to the establishment of a new moral social order based on human rights and the rule of law. To the extent that their needs are associated with transitional justice, three distinct but related areas will be clarified: the moral, legal and political. These respectively concern three core aspects of accountability: 1) the establishment of a human rights culture, 2) the establishment of rule of law and 3) the consolidation of a peaceful transition to a new (democratic) regime and social order.

These three aspects of accountability need to be seen in the context of a further consideration: accountability needs to be both retributive and preventative, to reconcile “the backward-looking need” of holding perpetrators accountable for past atrocities with “the forward-looking need” for a peaceful transition to a new regime and the establishment of the rule of law.

The establishment of the International Military Tribunal (IMT) at Nuremberg in 1945 for prosecuting the major German war criminals after World War Two created a watershed in international law in so far as it established the precedent that individuals are criminally accountable for “crimes against humanity.” This significantly ruled out the previously sovereign immunity enjoyed by state agents for human rights crimes committed under the state (Teitel, 1999:48; Ratner and Abrams, 2001:6 – 7).

Nevertheless, in the context of this historical framework, the last three decades have witnessed a series of transitions from repressive regimes to democracy in which states have experienced grave practical and political obstacles to the prosecution and punishment of state agents for gross human rights violations committed during the previous regime as required by

the principles established at Nuremberg. Due to the balance of power and/or the necessity of a political compromise, state agents connected with the prior regime have to a large extent retained political and/or military power, making it difficult for the new civilian governments to deal with the legacy of human rights violations. The general practice of the new regimes has been to respond to the past violations by passing general amnesty laws to the previous government agents. This violated the precedent that individuals responsible for gross human rights violations should be held criminally accountable.

However, it is not clear whether prosecution and punishment is the only means of achieving the accountability (or justice) required in transitional states. In this regard, the South African amnesty process presents a significant innovation. It has introduced *conditional amnesty*, which is limited in scope and requires a public process in which individual perpetrators of politically motivated crimes stand to account by being required to fully disclose the nature of the gross human rights violations they were party to. This individualised public amnesty process challenges the notion that prosecution and punishment is the only way of achieving individual accountability for gross human rights violations.

This mini-dissertation thus looks at the possibility of conditional amnesty as another, non-punitive means of accountability. The question posed here is, therefore, whether, and to what extent, the accountability for gross human rights violations achieved by such conditional amnesty serves the purpose of the accountability traditionally sought, since Nuremberg, through prosecution and punishment.

In order to set the framework for answering this question, the dissertation will provide a conceptual analysis of what is actually meant by accountability. This will enable one to distinguish 1) between levels and degrees by which individuals may be held responsible for the commissioning of human rights crimes and 2) how to separate who and in which relevant senses those responsible are accountable.

A fundamental implication of the Nuremberg's precedent of holding individuals accountable for gross human rights violations is the assumption that individuals under authority structures are capable of refusing orders to commit such crimes of obedience (Kelman and Hamilton, 1989:46).

Social science investigations into obedience to authority since the 1960s have conducted experiments that contradict this assumption. In one of the famous cases, Professor Stanley Milgram of Yale University published a series of experiments on obedience in 1965 that found that, when instructed to act under a presumed legitimate authority, the average person will obey orders that contradict his/her own moral choice (Miller, 1986:9). Evidence such as this has led the social sciences to question whether individuals under authority structures actually perceive themselves as having a moral choice when prompted to act on command.

The findings of relevant social science research into crimes of obedience require a reconsideration of the Nuremberg principles as model for transitional justice. Against this background, when the South African Truth and Reconciliation Commission (TRC) was mandated to grant amnesty to perpetrators responsible for politically motivated gross human rights violations, it accepted as one of its central requirements for amnesty that it was only granted to people who acted under authority structures. It therefore applied only to perpetrators who had acted on behalf of, with the support of, or on the order of a political organisation (Republic of South Africa Act No. 34, 20 (2) (3) (e)). This requirement contradicts the Nuremberg precedent that superior orders should be no exception to the rule of holding individuals criminally accountable for gross human rights violations. The South African TRC has nevertheless been acclaimed as a model of amnesty that results in some kind of accountability that responds to the core notions of transitional justice.

In explaining the problem of amnesty and accountability, this dissertation will evaluate a growing scholarly debate in the field of international law and transitional justice which addresses the political and practical obstacles posed by the need to accommodate peace and stability to the international obligation to hold perpetrators accountable for gross human rights violations. These studies take into account the special needs of social stability and reconciliation in post-conflict societies where a victim group or population had been systematically deprived of fundamental human rights, and/or where a violent conflict had resulted in large-scale violations of human rights and social instability. Importantly, they do not consider prosecution and punishment to be the only necessary means to accountability for mass gross human rights violations (Van Zyl, 2000:43; Zalaquett, 1995:6; Slye, 2002:245 – 246; Du Toit, 2000:123).

Finally, this dissertation will analyse and investigate the aims and objectives of the TRC according to the 6-volume TRC report published in 1998 and 2003. It will also consider the actual amnesty criteria stipulated by the TRC Act passed by the South African Parliament in 1995.

The chapter structure will be as follows:

- **Chapter One:** A conceptual analysis of accountability and the basic criteria for holding individuals accountable.
- **Chapter Two:** A historical investigation of the Nuremberg precedent and the post-Nuremberg political context.
- **Chapter Three:** The implications of socio-psychological research into crimes of obedience for holding accountable individuals who act under authority structures.
- **Chapter Four:** A discussion and analysis of the main positions adopted in the transitional justice literature regarding accountability objectives for transitional states.
- **Chapter Five:** An investigation and analysis of the aims and objectives of the South African conditional amnesty and the kind of accountability it sought to achieve.
- **Conclusion**

Chapter One

The Concept of Individual Accountability

1.1 The Quest for Accountability after Gross Human Rights Violations

Responsibility and accountability are key aspects of moral and political life and of the legal order. With respect to morality, the fundamental axiom holds that moral agents are responsible for their own actions. With regard to politics, the appropriate structures of accountability are crucial to holding representatives and agents of government liable for their duties and responsibilities in democratic governments, modern organisations, and bureaucracies. Legally, the procedures for determining and adjudicating criminal responsibility and accountability for crimes or violations of rights are central to the criminal justice system.

Transitional justice extends these three concerns to the context of transitions from authoritarian regimes to democratic government. This involves both crimes under a prior regime and the founding of a new liberal and democratic rights culture. It also involves both the perpetrators and victims of human rights atrocities. Political atrocities and grave violations of human rights typically occur during civil wars or under authoritarian rule.

Societies that manage to bring such violent conflicts to an end, or that achieve transitions from authoritarian rule to some form of democracy, do not thereby simply escape the legacies of such past atrocities and human rights violations. The classic way in which a society may commit itself to the creation of a moral, legal and political environment where violations of human rights are no longer accepted is through the introduction of a Constitution and Bill of Rights. Some, e.g. the liberal philosopher Bruce Ackerman in *The Future of the Liberal Revolution* (1992:46), argue that such *forward-looking measures* are more important than any *backward-looking measures* that seek to deal with the past. This thesis will argue, however, that for societies emerging from a legacy of large-scale, heinous human rights violations, forward-looking measures are insufficient. They do not deal with the need to not only hold the responsible perpetrators accountable but to also restore moral dignity to victims. The needs of post-conflict societies in transformation are, furthermore, intrinsically connected with both backward-looking measures that address the legacies of past violations of human rights and

forward-looking measures that address the need for future deterrence (Zalaquett, 1995:5; Zalaquett quoted in interview by Roht-Arriaza, 1999:197; Nino, 1996:142; Orentlicher, 1995:408).

Holding individuals accountable, both for their own actions and also for what others have done under their authority, is fundamentally associated with the notion of moral agency. According to this, each individual would be accountable to the community in which he or she resides. By adopting this notion of moral agency, a community would be taking seriously the idea that individuals are independent, conscious beings capable of judging their own behaviour and therefore responsible for it. Accountability is a way in which a moral community regulates human conduct and asserts its norms on its members (Nino, 1996:143 – 144).

The question this dissertation asks is whether prosecution and punishment is the only meaningful way in which perpetrators of past gross human rights violations may be held accountable. To answer to this question it is necessary to have a basic understanding of what it means to be accountable and what is involved in holding individuals accountable. That will be the specific topic of this chapter.

Following the calamity of gross human rights violations, uncovering those responsible and guilty is a murky business. It involves distinguishing the moral, political and legal issues and eventually deciding who are to be held to account, to whom and for what. Political atrocities involve not only the primary perpetrators and political decision-makers but also a range of political and non-political actors who are in varying degrees involved in the commission of human rights violations. Apart from the direct perpetrators there are also the instigators, bystanders, collaborators, beneficiaries, subordinates etc. Bureaucratic atrocities such as the Holocaust are impossible without the silent consent of bystanders and the indirect assistance of civil servants in such mundane tasks as the performance of bureaucratic routines, transport and filing of documents. These tasks serve an indispensable function in the day-by-day running of any large-scale organisation (Thompson, 1987:44; Fletcher and Weinstein, 2002:605).

This scenario works differently in different types of regime. According to Tina Rosenberg (1999:339), a rough distinction can be made between “regimes of criminals” and “criminal

regimes.” She also distinguishes “ethnic conflict” as a third regime type. In “regimes of criminals,” a small powerful elite is responsible for the repression of the population. Typically they would rely on the ignorance and absence of participation in politics of the general population (Rosenberg, 1999:336). In such regimes the atrocities would be illegal and often concentrated as intense repression on a particular group of the population, as in the Latin American military dictatorships’ “disappearances” of political dissidents in the early 1980s (Rosenberg, 1999:332).

It is, therefore, in principle if not necessarily in practice, easier to identify the perpetrators in the aftermath of these regimes than in the case of “criminal regimes” where the regime itself is structurally and ideologically embedded and the leadership relies on indoctrination inherent in nearly all aspects of life. The commission of human rights violations in criminal regimes is therefore widespread, legal (at the time of commission) and relies on the tolerance and acceptance of most of the population (Rosenberg, 1999:336). In the communist dictatorships of Eastern Europe (the most common example of criminal regimes) the state relied on control through rewarding collaboration of citizens with state benefits (Rosenberg, 1999:337). In such cases the distinctions between victims and perpetrators of human rights violations are much more unclear and it is difficult to determine who, if anyone, should or could be held accountable.

Much the same applies to ethnic war as a third type of repressive regime where religion, race, or tribal or ethnic identity causes divisions and violent hostility between groups of people (Rosenberg, 1999:251). A society immersed in conflict based on identity makes everyone see him/herself as a victim and no one sees him/herself as a perpetrator, since all members of the society get (willingly or unwillingly) immersed into the conflict and forced to fight for their physical and/or cultural survival (Rosenberg, 1999:249). The most recent and prominent examples of such conflict are the Rwandan and Bosnian civil wars. In these cases, too, the quest for accountability is immensely complicated.

The situation in apartheid South Africa, which is the case study for this mini-dissertation, represents features of all three regime types. As in the case of “regimes of criminals,” illegal acts of repression were committed. Like communism and other “criminal regimes,” the bureaucratic system of apartheid depended on widespread societal complicity (Rosenberg, 1999:352 – 353). As in the third regime type, apartheid divided South Africa’s population

along several “racial divisions,” between whites and blacks on one level and between different ethnic groups of blacks on another. Race was politicised by the white apartheid government and some of the liberation movements; ethnicity was politicised by the conflict between movements such as the African National Congress and the Zulu Inkatha Freedom Party.

The nexus of accountability and responsibility poses two important problems when it comes to holding perpetrators of gross human rights violations accountable. An agent in a position of higher authority may be involved, especially in complex bureaucratic or political contexts, in initiating a project or setting a policy objective but not necessarily in its actual implementation or execution. In such a case, the problem is to what extent should the superior be held accountable in terms of command/political responsibility if this results in gross human rights violations. The same problem arises when a subordinate who executes the project or policy in practice may not actually be responsible for having made the decision to initiate this course of action or for setting its policy objectives but is only acting as a functionary or following instructions. As a moral agent he or she would still be responsible for his or her own acts, including any political atrocities and not merely be accountable to the superior under whose auspices these were undertaken.

This scenario poses the need to understand accountability and its relation to responsibility in social structures. The subsequent introductory analysis will therefore focus on the following central issue:

What is the relationship between *accountability* and *responsibility*, and under what circumstances will holding someone *accountable* be compatible with holding him or her *responsible*?

First, a brief look at the origin of the concept of individual accountability will give the historical context in which it developed into being considered a fundamental condition of moral agency.

1.2 The Religious and Philosophical Origins of the Notion of Accountability

The modern concept of accountability has religious and philosophical roots in the ancient Judaic and Greek traditions. According to the Judaic biblical tradition a group of tribes, later known as the Israelites, escaped from bondage in Egypt and made their way into Canaan around 1200 B.C. Along the way, they made a pledge to their special God through the prophet Moses. This founding covenant binding Israel as a people made them accountable to God in return for God's protection (*The Holy Scriptures*, Genesis 31.43 and Exodus 20.2 – 7). The Old Testament idea that the Chosen People was subject to divine judgement was later popularised through the more inclusive Christian notion of the Last Judgement and extended to the whole of humanity (Clarke, 1996:309). This notion of some basic moral and religious accountability to God prevailed for many centuries and profoundly informed subsequent secular conceptions of individual accountability under the rule of law. The rise of absolutist monarchy and of the modern sovereign state positioned “the earthly ruler,” who was responsible for “natural law,” closer to God and above the common people. This in turn gave way to legal positivism and the sovereign state as the sole source of legitimate law (Douzinas, 2000:63). The secular notion of accountability thereby developed into a series of functional requirements for rulers in asserting authority, such as delegating tasks with defined mandates and policy objectives, verifying the performance of those tasks, maintaining the responsiveness of accountable agents, assessing blame for accountable actions and sorting out responsibility among many agents (Romzek and Dubnick, 1998:6).

The second main source of modern notions of accountability can be found in classical Greece. In a general sense, the Greek notion of accountability is concerned with questions of order or rules (law), of morals (ethics), and of social order (politics) (Clarke, 1996:309). Systematic and self-reflective thinking as a form of reason in the Western tradition can be traced back to Greek philosophy of around 450 B.C.¹, which was concerned with questions of the scope and justification of “right action” and the nature of justice (Clarke, 1996:307). This reflective spirit in ethical philosophy marked a break with uncritical adherence to tradition and custom and proposed a search for the best way to conduct one's life based on “virtue” (excellence) and “right action”² (Clarke, 1996:308). However, ancient Greek philosophy did not yet have

¹ Socrates (469 – 399 B.C.) is regarded as the first philosopher in ethics (Clarke, 1996:308).

² Plato (429 – 347 B.C.) was the first thinker to criticise blind and uncritical acceptance of the authority of the gods, which raised the issue of moral and civic obligation. Aristotle (384 – 322 B.C.) later represented a

a developed sense of the “individual” or “the self” as a “responsible being.”³ This notion came about with Christianity’s shift from an “outward compliance” with God’s rule to an “inward compliance” through reason and consciousness (Clarke, 1996:310).

Both the philosophical and religious origin of the notion of accountability assume a certain level of human capacity for individual self-reflection as a basis upon which individuals are expected to be responsible for their actions and capable of distinguishing ethically “right” from “wrong” actions. The German philosopher Immanuel Kant (1724 – 1804) furthered the idea of a God-given natural law by arguing that the individual capacity for rational thinking enabled individuals to autonomously, without the help of societal rules or laws, distinguish an ethically right act from an ethically wrong act. According to Kant any moral act could be distinguished according to rational criteria (Kant, 1956:21).

Whereas Kant’s ethical approach to the individual is more that of seeing him or her as an autonomous agent than as a product of society, modern ethical philosophy recognises the social community as a moral entity in its own right. This means that it plays a role in the way the individual makes moral judgements since it is capable of shaping perceptions of the self and others (Clarke, 1996:311). Thus, individuals are assumed to be acting not only with free will but also with moral responsibility within the established norms of moral communities. These social structures influence how and when individuals are held to answer for their actions to other people.

This brings us back to the question raised above about the relationship between accountability and responsibility. When looking at this relationship, one needs to bear in mind both the role of moral responsibility in terms of the codes of the community and the individual’s free will as a moral agent in Kant’s sense. When, for instance, individuals commit gross atrocities in authoritarian contexts that elicit or condone such actions, transitional justice needs to not only address moral responsibility but also to assert individual accountability for the consequences.

departure from ancient Greek thinking by conceiving ethical reflection as a practical shaping of one’s character and one’s intellect in conventional societies, as opposed to the ideal forms in Plato’s Republic. This linked questions of ethics with questions of practical reasoning (Clarke, 1996:309).

³ The individual mind or soul was referred to by different terms. *Phrenes* was used to refer to the mind outside of the individual and *Pneuma* in relation to the world spirit. None of these terms invoked individual responsibility of conscious agents (Clarke, 1996:310).

However, unravelling the spectrum of human action, it becomes evident that the notions of responsibility and accountability, which are interlinked but distinct, should not be confused when attempting to hold individuals accountable for their actions. Thus, we need to establish what is involved in holding individuals *responsible* for their actions and how and in which senses this notion is similar to but distinct from the notion of holding individuals to *accountable*.

1.3 Accountability in relation to Responsibility

In the light of the above, the following observations can be made about the modern concept of accountability. First, it is a relational concept. Accountability implies or requires 1) a relation between an agent and an authority to whom the agent is accountable for his or her performance of a task or the disposal of some delegated authority and/or 2) a relation between an agent and some legal order to which the agent is bound subject to sanctions for transgressions. E.g. a lecturer is accountable to the school board who sets out the curriculum and also has to act in accordance with the rules of the school where he is teaching. Hence, accountability implies a duty or an obligation on the part of an agent who is answerable either 1) in the context of a delegation of authority or 2) in the context of law. So, following from the previous example the lecturer would be answerable to the school board for teaching according to the rules of the school.

Accountability presupposes individual moral agency. Holding individuals accountable assumes that they are capable of self-reflective reasoning and have control over their own desires, intentions, actions and behaviour. E.g. an adult as opposed to a toddler is regarded as an individual with fully developed mental and physical abilities who is in control of his or her own actions. It is important to distinguish here between the notion of accountability and the related notion of responsibility: although accountability presupposes individual responsibility, individual responsibility does not necessarily imply individual accountability. For instance, hiring a moving company to transport one's personal items presupposes that, when something is broken, the moving company or person who caused it will be accountable. This does not mean that an employer who was *responsible* for breaking a lamp while moving it is held *accountable*. The company as a whole (which the employer is acting for) is held *accountable*. The owner of the lamp would thus seek reimbursement from the company and not the

employer. Similarly it is possible that those who have to be held accountable may not necessarily be those directly responsible. In the previous example it is the moving company or their insurance company who stand in a contractual and thus accountable relationship to the owner of the broken lamp although neither the owners of the company or the insurance company “personally” broke the lamp. This raises the need to distinguish “responsible agency” from that of “holding an agent responsible.” These issues will be dealt with in what follows from which separate and important criteria for holding individuals accountable will be analysed further in Chapter Four.

1.3.1 Responsible Agency and Holding an Agent Responsible

The notion of “responsibility” has a wide application. Generally speaking, *responsibility* is used in two distinct, but connected, senses: “X is responsible (for something)” and “X is held responsible by someone (for something)”. “*Being a responsible agent*” refers to the ability of acting deliberately and with intention to achieve the desired outcome of one’s actions – though not all outcomes are intended (Mulgan, 1993:535). A responsible individual is a person or agent who is assumed to be in charge or in control of his or her own actions and therefore able to freely choose how to conduct him or herself (Oshana, 2001:13280 – 13281). For instance, a responsible individual is a person who is free to choose his or her own course of action as opposed to an individual who is being forced or for whom decisions are being made by others. Responsibility is also used to describe the act of “holding someone responsible.” Whereas all individuals with sound mental faculties (excluding children under a legal age, mentally disabled or individuals declared insane etc.) are regarded as capable agents and therefore *ipso facto* responsible for their actions, holding a person *liable to answer* for certain actions implies more than this: it suggests that that person is not only responsible *for* his or her own actions but also answerable for them *to* some authority and so subject to possible sanction. In relation to the previous example of the lecturer, we may regard him as responsible to the school board for teaching the curriculum to his students, and in so far as he fulfils his job satisfactorily or not according to the school board’s rules, he may be fired or nominated to a higher position. From this it will be clear that *holding someone responsible* for something is closely related to holding him/her *accountable* in the sense of being answerable *to* others for it. Indeed, this notion provides the link between the concepts of responsibility and accountability.

We may thus distinguish between the concept of autonomously “being a responsible agent,” with responsibility as a quality of the individual, on the one hand, and, on the other, the relational notion of “holding someone responsible” or “holding someone accountable.” Hence, we can distinguish between being held responsible, which expresses a moral condemnation or moral judgements only, and being held accountable, which also implies a possible sanction. The subtle distinction between these two concepts is that holding someone accountable implies holding a person liable for the consequences of his or her actions. For instance, a soldier can be given responsibility for the security of a certain terrain: it is up to him to take whatever measures are necessary to ensure that there are no intruders. This does not mean that he is answerable to anyone for these measures, but that he will be blamed for their failure and credited for their success, i.e. “the buck stops with him.” *Holding someone responsible* accordingly amounts to an assertion or requirement that he/she accept the responsibility which has been vested in them. This is consistent with a measure of autonomy or discretionary authority. As against this, holding someone *accountable* refers them to their answerability in terms of delegated authority or a given mandate which *limits* autonomous action or discretionary authority. “Holding someone responsible” is compatible with *the rule of men*, “holding someone accountable” is part of the logic of *the rule of law* (Mulgan, 1993:535 – 536).

There are consequently four different ways and two different senses in which we may regard individuals as responsible agents and in which we may hold them responsible and/or accountable. Within the notion of “responsible agency” we can distinguish between 1) *causal responsibility* and 2) *moral responsibility*. Within the notion of “holding someone responsible” we can distinguish between 3) the more general sense of *membership and subject responsibility* in moral communities and 4) the narrower sense of *role responsibility and accountability in hierarchical structures*.

1.3.1.1 Causal Responsibility

The most general sense in which an individual is causally responsible for an action is that of having caused an event or a state of affairs. Assigning causal responsibility is to identify the relevant factors that cause an event to transpire (Bessette, 2001:38). We may, for instance,

think of the incident of the broken lamp and the moving company in the previous example. Although the employer who conducted the move may be held responsible for breaking the lamp, it may have fallen over and broken inside the truck during transport and thus the employer may not be directly or physically responsible for causing it to break. Assigning causal responsibility is, therefore, not only concerned with human beings or moral human beings as such. It is possible, for instance, for a thing or an animal to cause an event or a state of affairs.

Causal responsibility is, however, not sufficient for holding individuals responsible and accountable. In addition to causal responsibility the latter will also require motive and intention. For instance, in order to say that a person is responsible for the acts that he or she commits, the person must not only be the decisive causal factor but also act with intention and a clear motive. Adriana spills the tea in her cup as she reaches for the book. Although her act of reaching for the book did cause the tea to spill and she therefore is the cause of the tea spilling, she did not intend this, so we would not hold her responsible for it. In so far as accountability presupposes responsibility, it would therefore not make sense to hold individuals accountable for everything which they physically cause.

1.3.1.2 Moral Responsibility

Moral agency is judged according to each moral community's norms and rules. At a general level the main conditions for moral agency are that individuals satisfy certain epistemic and control conditions such as being self-aware, rational, and not ignorant of the circumstances in which they act. These are also conditions that enable individuals to act within a society's established moral guidelines (Oshana, 2001:13280). Allocations of moral responsibility thus, firstly, assume a basic level of voluntary intention or free will⁴.

The second assumption which moral communities make when holding individuals responsible is the existence of a set of shared beliefs, a common system of norms against which individual

⁴ There are many important philosophical and psychological debates about free will. However this issue is beyond the scope of this mini-dissertation. The issue will be returned to in Chapter Four on socio-psychological research on human behaviour. For this discussion on moral responsibility, a certain level of human free will is a prerequisite.

actions can be judged (Oshana, 2001:13281). Moral agents are held responsible on the basic assumption of free will, which in turn allows moral communities to evaluate and separate “good” from “bad” conduct as well as “right” from “wrong” action and subsequently either morally blame or praise individuals’ conduct (Oshana, 2001:13282).

Moral communities, therefore, expect individuals to know their social norms and to follow them. As interacting members of a community, individuals implicitly consent to being held responsible to the moral community of which they are regarded as members and thus to being subjected to moral blame or praise for their conduct. In a similar way, citizens implicitly consent to being held accountable to the sovereign state of which they are citizens and are subject to legal liability according to that state’s sovereign law.

Unlike causal responsibility, however, moral responsibility is not only judged by identifying the physical causal factors bearing on an event or state of affairs but also through the moral quality of the event, i.e. including relevant intentions and motives associated with the actor (Oshana, 2001:13280). Significantly, relevant aims and intentions may relate to complex sequences of actions or policies, including the participation of others as subordinates, functionaries or agents. A person can, therefore, be morally responsible for something without being the direct causal (physical) factor in bringing about an event. In other words, causal responsibility does not necessarily imply moral responsibility, while moral responsibility may also, but not necessarily, include a measure of causal responsibility. Hence, we may claim a commander *morally responsible* for the acts he orders his subordinates to execute even though he may not be *causally responsible* for executing the actions himself. Conversely, the subordinates have causal responsibility for the acts which they execute in compliance with the instructions of their superior and may even be morally responsible if they are to be regarded as independent, moral agents.

From this it follows that there may be a trade-off between *being held responsible* and *being held accountable*. To the extent that a subordinate agent is *accountable* to superiors for his or her actions, this diminishes the extent to which he or she can be *held morally responsible*, in the sense of being regarded as an autonomous agent or having discretionary authority. In such cases the subordinate or functionary will still *be* morally responsible for his/her own actions, but the nature and extent of this moral responsibility is problematic. Conversely, in cases where subordinates are not specifically accountable to superiors but are *held* responsible for

their domain, the problem of their *being* responsible does not arise. E.g. in a military context, where a soldier is prosecuted for unjustly killing civilians under the orders of a commander, he or she is not being held morally responsible for the will or intention to kill. Conversely, when the soldier is not accountable to the commander, the soldier is held responsible for acting with intention and will to kill targets set by the commander although he or she is not being held morally responsible for actions that he or she chooses to take in order to comply with the military target goal decided by his or her superiors. We may also apply the same consequences to a non-military context: in relation to the previous examples regarding the lecturer, we may conceive of him being accountable to the school board for teaching his students the curriculum, and thus he himself is not regarded as morally responsible for what he is teaching (the curriculum). However, in the case that he is only held responsible for enabling his students to pass the exam, he is held responsible for whether or not his students pass the exam. The lecturer is, therefore, held responsible according to the success rate of the end product, which is not the same as holding him morally responsible for the way in which or what he teaches.

The legal doctrine of command responsibility, *respondeat superior*, attributes guilt to those responsible who did not directly commit a crime based on their hierarchical relationship as superiors to subordinates (Ratner and Abrams, 2001:132). Ratner and Abrams argue that, under current legal trends, a superior is regarded as responsible due to the level and extent of his or her 1) accomplice liability in the crime (situations where he or she orders or assists in the commission of the act) and 2) omission (failing to prevent certain actions of subordinates). In general, the doctrine holds that a commander is accountable for the acts of subordinates if 1) he or she knew or should have known that the subordinate had committed, or was about to commit the acts, and if 2) he or she did not take necessary and reasonable measures to prevent the acts or punish the subordinate (Ratner and Abrams, 2001:133).

However, the general basis of this doctrine 1) obscures the precise scope of the superior's liability, first of all in terms of his or her definition as a superior and, secondly, in terms of the scope of the duty as a superior (Ratner and Abrams, 2001:133 – 134). For instance, in cases where subordinates lie to their superior or disguise or cover-up crimes committed under duty, it is unclear to what extent the superior should be held liable and to what extent it is the duty of the superior to employ extraordinary check-ups on his or her subordinates. The variety of judicial interpretations and standards suggests that there is an international lack of clarity

regarding the outer limits of a superior's responsibility. This, furthermore, places a low burden on subordinates, allowing them to assert the defence that they were merely acting under orders. Since the precedent set by the Nuremberg trial after World War Two, the mere fact that a subordinate followed orders has not been a defence for a crime against humanity. It has generally been accepted that the complexity of certain laws and the inability of some (primary, low-rank) defendants to understand them may render it unjust to hold subordinates accountable for their actions according to the principle of *nullum crimen sine lege* (an act is not a crime unless the person who committed it had prior knowledge of its illegal nature) (Ratner and Abrams, 2001:135 - 136).

Moreover, due to the social structure of authority, subordinates are, in a sense, disempowered as self-reflecting individuals with independent moral agency to the extent that they are accountable through the submission to orders. Social science research has, since the Milgram experiments in the early 1960s, been aware of the psychological effect authority structures have on individuals' sense of autonomous moral agency when acting under orders (Mixon, 1989:9). This problem will be dealt with in more detail in Chapter Three.

A basic assumption of the criminal justice system and of the rule of law, also recognised by the Nuremberg trial and in the Statute of the recent International Criminal Court, is that a person is morally responsible and thus accountable for committing a crime unless he or she was acting under duress and can prove that he or she lacked moral choice of action.

Generally, lack of moral choice is accepted if the defendant can prove that 1) there was an immediate threat to his or her life or physical well-being; 2) that there was no adequate way to avert the threat; 3) that the crime committed was not disproportionate to the threat and 4) that the defendant did not voluntarily bring about the situation (Ratner and Abrams, 2001:138).

Hence, fundamentally subordinates remain personally (thus morally) responsible and accountable for their own actions as moral agents except when they are acting under severe duress (Thompson, 1987:64). The same basic assumption of moral agency relates to holding individuals responsible in relation to their implied moral membership in the social community in which they reside.

1.3.1.3 Membership and Subject Responsibility

Moral judgements of responsibility are necessarily structured through the established conventions, institutions and procedures of the moral community concerned. What kind of moral judgements are made and how they are structured depends on the moral community. Some moral communities, such as communist, totalitarian and fundamentalist Muslim communities, do not make a clear distinction between private and public morality. The kind of moral community with which this dissertation is concerned is, however, a liberal moral community which makes the distinction between a private sphere subject to moral condemnation only, and a public sphere where sanctions and the law intervene.

The classic liberal distinction between self-regarding personal acts and acts which concern the well-being of others was provided by the British philosopher J.S. Mill's harm principle in *On Liberty* (1859 in Rhees, 1991:90). Mill argued that state or public intervention and sanction is only justified when individual actions cause harm to others (Rhees, 1991:90). Mill's harm principle is closely related to accountability in two ways: firstly, for responsible moral agents all actions are subject to moral condemnation in terms of the applicable norms and conventions of the community, but individuals are not accountable to anyone else insofar as their actions concern the interests of no other person than themselves. Secondly, individuals are accountable for actions that are prejudicial to the interests of others and, in terms of the harm principle, they may be subjected to either moral censure or legal punishment for such actions (Rhees, 1991:171).

Mill concedes that almost all individual actions produce effects on other individuals in one way or another (Rhees, 1991:91). Mill therefore makes two clear distinctions. The first distinction is between consensual acts between adults which are regarded as private in so far as they are granted acceptance by the other parties and do not affect any other (non-consenting) individuals as distinct from acts that have not been agreed to or accepted by the affected parties. The second distinction is that between holding individuals accountable for their interference on other people's *rights* and on other people's *interests* (Rhees, 1991:179).

Joel Feinberg (1997:138) attempts to make the distinction between public and private morality in the liberal state by distinguishing between "offensive nuisances merely" and "profound offences." The experience of "offensive nuisances merely" is often wholly or

partly *personal*, relatively trivial and offends because of the unpleasant state they produce in the person who feels offended. “Profound offences,” on the other hand, are wholly or partly *impersonal*, grave or serious (thus more than a “nuisance”) and offend because they are seen (as well as socially agreed and accepted) as “wrong” (Feinberg, 1997:147 – 148). It would make sense to hold individuals *accountable* only for those offences that bear the characteristics of profound offences, in other words offences which violate *fundamental individual rights*, or in Mill’s sense, legitimate individual interests, while merely offensive nuisances are subject to moral condemnation but not criminal sanction (Feinberg, 1997:160).

This brings the discussion closer to the core of the distinction between *moral responsibility* and *accountability*. Mill differentiates between two ways in which individuals may be held responsible and/or accountable for actions affecting the rights or interests of others. Firstly, such individuals may be *morally judged* (i.e. “being held responsible”) as *social members* of a moral community (moral condemnation). Secondly, such individuals may be *held accountable* as *subjects* of the law (legal prosecution). The following two sections will distinguish between two ways of holding individuals accountable. The first is in terms of the classical notion of *hierarchical accountability* and the second is the classical political notion of *democratic accountability*.

1.3.1.4 Role Responsibility and Accountability in Hierarchical Structures

Role responsibilities invoke special duties which are specific to the task, position or roles of individuals in traditional communities, for instance as parents, children, servants etc. (Romzek and Dubnick, 1998:10). For instance, parenthood invokes special duties as guardians for children under a legal age to teach the child social norms and make sure the child does not violate the legal rules of the state.

These familiar and traditional/informal social roles with their associated responsibilities differ, however, from responsibilities formally conferred on individuals who serve in positions in complex social hierarchical organisations such as bureaucracies. Office-holders and functionaries take on particular role responsibilities as agents in a social structure and become accountable accordingly. We may, for instance, conceive of low-ranking public

servants as being accountable to the Head of the Department for carrying out certain tasks assigned to them.

The Weberian model of rational bureaucracy depicts the accountability of the classical hierarchical organisation as that of each agent's duties being structured in a vertical chain whereby each is answerable to a superior for the performance of his or her own duties. These duties may involve the supervision of agents lower down in the chain for which a superior may be responsible in addition to his or her own duties. Hierarchical accountability is organised inter-dependently in which each agent acts under close control of another. This allows for little discretion at the lowest levels. Thus accountability in hierarchical structures is monitored through close supervision by the next authority in command (Mulgan, 1993:356).

The hierarchical chain of accountability diverts the moral responsibility for the outcome from the person who performs the act to the person in charge, which is supported by the doctrine of *respondeat superior* (the superior answers for the act). The underlying principle of the doctrine is that the superior should be held liable for the mistakes or crimes of his subordinates as a failure of exercising his or her duties as commander. Since the subordinate is commanded to execute an order, he or she does not have a choice to decide for him or herself the action with a conscious intention of the consequences, which is a basic assumption in holding someone responsible (Thompson, 1987:75; Ratner and Abrams, 2001:133). In other words, if in accordance with the principle of *respondeat superior*, accountability is vested in the superior then this must affect the moral responsibility of subordinate agents. This problem applies more generally to the standard of moral self-control we expect of human behaviour under duress. It is therefore commonly regarded as neither the duty nor the expectation of a soldier to morally evaluate and criticise or develop his own response in military situations where he or she is under a chain of command (Thompson, 1987:47). On the face of it, this comes close to absolving subordinate agents from moral responsibility for their acts.

The problem with assigning moral individual responsibility in the modern hierarchical organisation is that responsibility is organised in such a way that the final responsibility for the outcome of an action falls on the person who stands highest in the chain of authority and not on the person who actually performed the act (Thompson, 1987:41). On the other hand, it becomes impossible to expect the commander of a battalion or the head of a large

bureaucratic organisation to be morally responsible for each action that his or her soldiers or subordinates have committed. The implication is that the hierarchical notion of accountability precludes personal and moral responsibility, which makes it impossible to hold any person in particular morally responsible for an outcome (Thompson, 1987:43).

There are three characteristics of the modern hierarchical organisation that make individual moral responsibility impossible. First, the specialisation of separate tasks that together contribute to a particular outcome inhibits individuals having full knowledge of the organisation's activities so that those who have knowledge of a crime may not have the ability (influence or power) to do anything about it, whereas those who do have the ability (leaders, supervisors etc.) may not have the necessary insight into the actions taking place further down in the hierarchical chain of activities to realise that something is wrong (Thompson, 1987:69). For instance, the Chief administrator of a government department cannot realistically be expected to know of a corruption scheme at the lowest levels of his administration.

Second, the way in which tasks are performed involves a "routinization" process through which the performance of routines exculpates the acting individual from the standard requirement of *mens rea* (conscious intention). This is something that accountability mechanisms such as criminal law normally require in order to hold someone (intentionally and) morally liable for an outcome that they have caused (Thompson, 1987:71). A factory worker packing bottles for a pharmaceutical company cannot, for instance, be expected to know that one of the ingredients of the medicine he or she is packing is an illegal chemical that causes health hazards to its users.

At this point a further distinction between 1) *internal* accountability and 2) *external* accountability for an act which involves the commissioning of crime in authority structures can be made. External accountability refers to a bottom-up accountability whereby subordinates must report to their superiors on the execution of their mandates or delegated authority. To the extent that they do this, it implies that their superiors are morally responsible and detracts from their own moral responsibility as autonomous agents. Internal accountability is top-down: superiors may be held accountable by the wider moral and political community for the execution of policies which they have initiated, which is closely related to *indirect* moral responsibility.

Consequently, accountability in the modern hierarchical organisation is diverted along external and internal lines of responsibility. With internal accountability, a subordinate is responsible for his or her own assigned duties, which may include the supervision of other subordinates under his or her command. However a subordinate is in turn accountable to the head of that organisation/department who is responsible for assigning the different duties and employing and firing workers according to their performance and qualifications. Thus the internal accountability is organised along a strict vertical line of responsibility. With external accountability, therefore, the accountability of the outcome of every action does not reside with the doer, but with the person who answers to external constituencies in charge. Thus the external accountability of the outcomes which the organisation as a whole produces is organised differently, i.e. the leader or head of an organisation/department is not held *personally or morally* responsible for what goes on under his or her leadership, but should any action lead to misconduct then he or she is *answerable*, in other words held liable by external constituencies, e.g. a Minister of Parliament is accountable for his Department, but is not regarded as personally or morally responsible for the actions that take place in the Department. It is, therefore, common in liberal Western democracies for a leader to voluntarily assume “full responsibility” if or when serious misconduct or failure to deliver has been found out in his or her organisation, even if he or she had no direct part in them.

However, a careful look at *what kind of responsibility* a leader assumes reveals that holding individuals responsible for the outcomes of actions in the hierarchical organisation does not amount to personal moral responsibility. The result is that neither the leader nor the servant or soldier can strictly be held morally responsible. Whereas the leader is accountable, he or she is not morally or personally responsible for the acts of others. Conversely, the servant or soldier may be seen as accounting for the consequences of his or her own acts while he or she is relieved from being personally and morally responsible for them.

Political accountability is another aspect of role responsibility but is more complex because it involves two roles simultaneously.

Hierarchical accountability emerged historically out of the ruler's need to delegate tasks of the ruling household to others. This delegation of tasks eventually grew to the granting of authority and discretion on behalf of the ruler. Thus bureaucratic accountability developed as a set of challenges facing rulers related to monitoring responsiveness, verifying performance of tasks and assessing blame for accountable actions (Romzek and Dubnick, 1998:6).

Hierarchical accountability refers to a special kind of delegated authority, which may be democratic or non-democratic in nature. The basic idea of such accountability is based on the hierarchical model and refers to the idea that a functionary, delegation or institution with delegated authority is answerable to report to a superior authority on how that power is exercised (Robertson, 2004:3). In addition, the sovereign executive power can itself be held politically accountable. Democratic political accountability refers to the premise that elected government officials are granted discretionary power to act on behalf of their constituency to whom they in turn are accountable for the decisions that they make (Hickok, 1995:9 and Mulgan, 1992:531 – 532).

The democratic notion that government is accountable to the people is relevant in two different senses. In one sense, an elected political agent is answerable to his or her constituency on behalf of whom he or she is expected to act in their best interests. On the other hand, a politically elected agent is bound by a definitive mandate to act according to the policy of the party which the agent represents. The fact that political representatives are at the same time acting as independent actors as well as acting in the place of others creates, however, a dilemma in holding political agents accountable for their acts.

The American political philosopher, Hanna F. Pitkin (1967), named this dilemma "the dual concept of political representation." According to Pitkin (1967:59), the problem of holding political representatives accountable is related to the fact that they are both acting "instead of" as well as "to the benefit of" the people. The classical statement of this problem is that of the 18th century British Parliamentarian, Edmund Burke, who in his speech to Parliament in 1774 made a distinction between the *nature of the interests* with which the (British) politician is concerned on the one hand and, on the other, his or her simultaneous role as a *delegate*, acting under the instructions of the electors (Mulgan, 1992:531). While the latter involves acting

under the instructions of the electors and following their views wherever possible, the former involves the representative acting as an independent advocate of the electors' interests, without necessarily following their views on how their interests should be furthered (Mulgan, 1992:531). In other words, an elected politician is both a *(bound) representative*, promoting the interests of his or her constituency, as well as an *(independent) agent*, capable of autonomous action and judgement, acting in his or her constituency's interests (Pitkin, 1967:155 – 156). Ideally, these dual roles should never conflict, so that logically no representative can act in his or her constituency's interests contrary to the constituency's wishes (Pitkin, 1967:155). However, Pitkin concedes, this conflict is an inevitable and an "unsolvable paradox" of political representation due to the discretionary power which distinguishes political action from autonomous independent action (Pitkin, 1967:150).

Pitkin suggests that a possible reconciliation of the two notions of representation would be to make possible rules for and assessments of *what* the political representative does and *how* he or she does it. What the representative does may then be in his or her principal's interest (as an agent for a political party or the state), but *the way* he or she does it remains responsive according to the principal's wishes (Pitkin, 1967:121).

The duality of political representation also plays itself out in the two principal roles that Ministers of government inhabit. They are "internally accountable" to the chief executive of government (the Prime Minister or President) and ultimately to Parliament. This means that the President or Prime Minister may remove from their positions Ministers who do not perform their jobs satisfactorily (Mulgan, 1993:536). A political representative may also be internally accountable to the political party to which he or she belongs and thus be expected to make decisions in line with the party's policy objectives. On the other hand, the relationship between the Party leadership and Ministers of Parliament to the electorate is an "external" one, in which the representative is expected to make decisions in the best *interests* of his or her constituents (Romzek and Dubnick, 1998:9). Therefore there is a fundamental difference between *Ministerial accountability* (internally answerable to Parliament and the Chief Executer) and *political responsibility* (externally responsible for decisions and outcomes of policy directives).

The monitoring of responsiveness (to the constituency's interests) in a democratic state is based on popular elections in which representatives who have not been sufficiently responsive

are not re-elected (Romzek and Dubnick, 1998:9). However state agents have a special legal standing due to the fact that the state is invested with *sovereign immunity* which means that the state, under international law, is immune from legal process in the court of another sovereign. A government may in addition be immune within its own legal system (Thompson, 1987:79). This dual immunity invokes a practical paradox in holding government officials accountable to the law while they are themselves the ones who make the law (Thompson, 1987:87). This should, however, not be an obstacle in a constitutional democracy in which no one is above the rule of law.

Although political agents are invested with authority to act for others in their capacity as representatives, they can still be held personally responsible for the decisions that they make and the essential impact they have on other people's lives. Political accountability and moral responsibility are crucial precisely because democratic representatives claim to act for others while also serving themselves (Walzer, 1974:76). The paradoxical nature of political action is, however, that when it comes to government, "doing the right thing" in utilitarian (as opposed to absolutist) terms often involves "morally wrong actions" when considering the best interests of a group of people (as opposed to a single individual) (Walzer, 1974:63). This is the essence of the problem named "dirty hands." Walzer argues that the problem of "dirty hands" in politics can at least be reduced by examining the appropriate kind of moral condemnation and/or punishment for the immoral acts which follow from politicians' decision-making power, which will enable the moral community in which and for whom the politician acts to set moral and legal rules for political action (Walzer, 1974:76). Walzer's conclusion is that the risks that politicians take in making choices and decisions on behalf of and in the interests of others (and themselves) should be that when they do something "wrong" it carries a price that the representative, when held accountable, is bound to pay (Walzer, 1974:82).

According to Walzer, the moral dilemma of political action has been tackled by three distinctly different perspectives on political morality: the neoclassical, the Protestant and the Catholic traditions (Walzer, 1974:76). The neoclassical view is posed by Machiavelli's *The Prince* (1515) in which a politician's deceit and cruelty are necessary evils and justified by the good results he achieves (Walzer, 1974:77). The Protestant view is represented by Max Weber's essay "Politics as a Vocation" (1919) in which the well-meaning politician has taken it on him or her to pay the price of suffering a guilty conscience in order to serve the higher

goals of political ends. The dilemma of the moral cost and price of his or her actions are fought out in an inner tension felt entirely by him or her alone (Walzer, 1974:79). Thus, it does not lead to any form of accountability. The Catholic tradition is illustrated by Albert Camus' play, *The Just Assassins*, set in 19th century Russia in which a group of terrorists accept the death penalty for having attempted to kill the very authorities which now condemn them to death (Walzer, 1974:80). In this way, the political actor has accepted the price to be paid for his or her actions and, in doing what he/she felt he/she justly had to do in order to reach his/her goals, he/she no longer suffers but accepts the penalties for his/her well-meaning intention (Walzer, 1974:80). This represents a form of accountability because, by accepting to submit to the social rules or laws of the society in which their actions took place, the actors accept that they are liable for their actions to that society.

Neither of the first two traditions holds the perpetrator *accountable* from a moral community point of view; the politician is either already justified prior to acting for the ends he attempts to bring about (Machiavelli) or allowed to make his or her own calculation of the costs and benefits of his/her actions and assumed to suffer in silence with his/her own conscience, which constitutes a form of moral responsibility or moral agency (Weber). The problem with these two perspectives is that none of them attempts to *hold* the politician *responsible or accountable* for his or her acts, Walzer argues (1974:79). In the neoclassical tradition, the politician acts with blanket impunity, and in the Protestant tradition "the inner suffering" of the politician is determined by his own capacity for suffering as opposed to the society's moral code for the cost of his actions (Walzer, 1974:81). Weber famously distinguishes between the civil servant's "pure ethics of absolute ends," where "the good" is striven for exclusively through "good means" by conscientiously following orders by superior authorities, and the politician's "ethics of responsibility," where every decision of the politician must be taken with responsibility for its consequences (Weber, 1970:95 and 126). However, although Weber's "ethics of responsibility" implies a certain moral responsibility of the politician as a moral agent, it does not imply that the politician should be held accountable (by anyone else but himself) for his decisions (Weber, 1970:127). Thus, the Catholic tradition, according to Walzer (1974:80), offers the perspective that most closely matches the need for the moral community to *hold* any perpetrator that infringes on its norms responsible. According to Walzer this offers the best solution to the dilemma of moral and political accountability because it upholds the idea that political action carries responsibility. By being prepared to accept the consequences of his or her actions within the rules of a moral

community (in Camus' case, the rules of the authorities against which the dissidents are rebelling), the politician proves to the wider moral community that he not only takes this responsibility seriously but is also willing to pay the price for the consequences (in other words subject him- or herself to the sanction predetermined by the society's rules) (Walzer, 1974:81).

What makes a politician accountable, argues Walzer, is the consequence of the immoral acts by politicians being 1) socially expressed (as opposed to confined to the individual's consciousness) and 2) socially limited (as opposed to left to the endless and indiscriminate suffering of the individual conscience) (Walzer, 1974:79).

1.4 Guilt Charged from Without and Guilt Charged from Within: The Four Notions of Guilt

The German philosopher, Karl Jaspers⁵, writing in the immediate aftermath of the Second World War, explored the boundaries between the political and legal social expressions of the notion of "guilt" and the personal moral and metaphysical transformation of the realisation of guilt in post-conflict societies after mass atrocities.

His essay, "The Question of German Guilt" (1947), is particularly relevant to the previous distinction between the ways in which moral, legal and political responsibility are linked. It deals with the relevant senses in which one may hold individuals accountable, and in particular with the relation between moral agency and holding a moral agent responsible.

In summary, Jaspers argues that there are four notions of guilt, which are separated and interlinked and meet with different consequences. These are: 1) *criminal guilt*, 2) *political guilt*, 3) *moral guilt* and 4) *metaphysical guilt* (Jaspers, 1947:31 – 32).

⁵ First a medical doctor, Jaspers' extensive research in psychopathology led to his post as Professor of Philosophy at Heidelberg University, from which he was forced to resign in 1935. He remained silently opposed to the Nazi regime and returned in 1945 to a position as one of the central leaders of the new liberal intellectual elite in Germany after the end of the war (Introduction, *The Question of German Guilt*, translated by E. B. Ashton, The Dial Press, New York, 1947).

1.4.1 *Criminal Guilt*

Criminal guilt is individual guilt for individual acts that can be objectively proven and which violate unequivocal laws. This concept of guilt is thus related to the sense of legal liability discussed above according to which individuals are subject to the rule of law. The determination of criminal guilt rests upon the jurisdiction of a court of law through formal proceedings based on the assumption that the individual acted under his or her own free will (Jaspers, 1947:31). Criminal guilt is met with punishment (Jaspers, 1947:36).

1.4.2 *Political Guilt*

Political guilt relates to the deeds of statesmen for which they, as well as the citizenry of the state, are guilty (Jaspers, 1947:31). Political guilt is shared by the constituency represented by the political actor. However, the constituency does not share his or her *moral* or *criminal* guilt (Jaspers, 1947:61 – 62). Jaspers thus makes a crucial distinction between *collective liability* for the actions of the state and *individual legal liability* and *moral responsibility* for the actions of individuals.

1.4.3 *Moral Guilt*

Moral guilt can only be attributed to the individual before his/her own conscience. Unlike individual criminal guilt, individual moral guilt can only be charged from within an individual's consciousness (Jaspers, 1947:32). In terms of the previous discussion, Jaspers' notion of moral guilt is similar to the previous notion of responsible agency. Thus in Jaspers' term moral guilt only exists within and for individuals capable of self-reflective analysis and conscious thinking (Jaspers, 1947:63). Moral guilt may result in repentance and change, which in turn have direct implications for the individual's course of action and way of life (Jaspers, 1947:36). In this way, moral guilt is closely linked to political and criminal guilt, since moral agency is a prerequisite for claiming criminal and political guilt (Jaspers, 1947:75).

Metaphysical guilt is the lack of unconditional solidarity with human beings so that, when one individual's human dignity is disgraced by another, every individual who witnesses it or has knowledge of it is guilty of not preventing it from happening (Jaspers, 1947:32). Jaspers argues that, because metaphysical guilt is connected to our very membership of the human race, it is inevitable, just as membership of a moral community and citizenship of a state. Jaspers' sense of metaphysical guilt is influenced by the idea of accountability to a higher law, that of God, which presupposes a shared, innate sense of responsibility for human consciousness (Jaspers, 1947:75).

Jaspers distinguishes between four different senses of guilt, i.e. (1-4 above) which involve two essential kinds of relation: guilt as charged "from without" (a moral community) and guilt as charged "from within" (an individual's conscience) (Jaspers, 1947:39). Guilt charged from without relates to that kind of guilt which is attributed to individuals either as subjects to the law or as citizens of the state in which they reside. The former kinds of guilt involving violation of norms that the moral community sanctions through a legal system lead to *criminal guilt* (Jaspers, 1947:39 – 40). The latter kinds of guilt relate to the consequences of conflicts in which the state engages with other states and may result in the *political guilt* of all the citizens of that state due to their implicit liability as subjects⁶ (Jaspers, 1947:42).

Guilt charged from within relates to the kinds of guilt that can only be felt by the individual itself through his or her moral consciousness by acknowledging 1) the responsibility for his or her own actions and 2) the realisation that individuals have a common responsibility to the wider human community. The former self-realisation through the discipline of conscientious self-scrutiny of one's own responsibility for one's own actions leads to *moral guilt*. The latter unlimited solidarity with other human beings and the realisation of the common responsibility for preventing injustice leads to *metaphysical guilt* (Jaspers, 1947:78 – 79).

⁶ Jaspers' political guilt should, however, be carefully distinguished as political guilt in *liberal democratic states* where citizens have participatory rights (such as free elections) in the governing of the state, as opposed to totalitarian regimes or dictatorships where citizens have no effective power in the governing of the state (Jaspers, 1947:35). This will be discussed in greater detail below.

Jaspers argues that individuals can only be held accountable for guilt that can be charged from without, in other words *in relation* either to the law or to the power of other nation states to impose their rule on the defeated state after conflict (Jaspers, 1947:73). Moral guilt by itself is not sufficient to hold an individual to *account to others* because it can only be judged and dealt with on an individual basis (Jaspers, 1947:74). This distinction is relevant to the previous distinction between *holding someone responsible* as an essentially *relational* concept (to someone else or according to some criteria outside oneself), on the one hand, and, on the other, *being responsible* (responsible agency) as an essential characteristic of a moral and rational agent and a prerequisite for holding someone responsible. Morally and metaphysically, the individual can only judge him- or herself, since moral consciousness is a quality which resides in the individual and not in a collective group of individuals (Jaspers, 1947:40). Jaspers' distinction thus relates back to the previous analysis where it was argued that a fundamental prerequisite for holding individuals responsible and accountable is the assumption of individuals' moral independence as autonomous actors.

Thus, individuals can be held accountable by the moral community in which they reside through a system of law or by another moral community after violation of its right not to have its sovereignty interfered with. This distinction between *holding individuals criminally accountable* through power on the one hand and by political means on the other relates to the previous distinction between "the rule of law" and "the rule of men."

Jaspers' notion of political guilt differs from that of political accountability discussed above in the sense that the latter applies to individual political agents and their accountability relation to either their party leadership or Parliament or the wider constituency whereas Jaspers' notion is similar to the notion of *liability responsibility* in which an individual is necessarily liable as a member of a moral community. This is similar to Walzer and Pitkin's notions of the political actor being *liable* to the electorate as well as being held morally responsible. In other words, as *citizen members* of a political state, all citizens share the same responsibilities and are thus in this sense guilty and liable for the affairs of "their state." Jaspers' notion of political guilt thus rests on the principle of sovereignty: that the citizens of a state are the ultimate source of authority for the governing of the state, hence "the people" (electorate) are ultimately answerable for the way they are governed (Jaspers, 1947:62).

Political guilt, argues Jaspers, is also caused by failing to be aware of the inherent power relationships in all societies which require a moral individual to support the power which strives for what is morally right (Jaspers, 1947:34). Therefore, in a strict sense, political liability cannot be evaded, just like someone who is a member of a community is by implication subject to its norms although he or she may not agree with or join political actions⁷ (Jaspers, 1947:61 – 62).

Writing specifically in the context of Germany's immediate situation post-World War Two, the consequence of political liability, argues Jaspers, are (in the case of an inter-state war as that of World War Two) entirely decided by the victor who may charge the defeated state with reparation costs, loss or restriction of political power and rights or may even choose the destruction, deportation or extermination of the vanquished state's citizens (Jaspers, 1947:36). Thus, whereas the legally liable is subject to the rule of law, the politically liable is subject to the force and power of the victor, i.e. the rule of men (Jaspers, 1947:37).

Jaspers' notion of political guilt is, therefore, closely related to the notion of "victor's justice," a term which has been used to describe the Nuremberg international military trial of the major German war criminals held by the Allied forces after the war because it served accountability to the law as well as accountability to the victors for the war.

Jaspers' notion of political liability subject to the victor's force and choice would, however, not be appropriate for the particular moral community engaged with rectifying past wrongs based on the respect for (equal) human rights with which this mini-dissertation is concerned. A moral community that values human rights will seek to address past violations through a common agreement to rectify past wrongs or through a system of law that is applied equally to all as opposed to discriminate decisions by the victors of a conflict.

⁷ Jaspers' notion of political guilt is therefore particularly relevant to the context of post-conflict societies in which the atrocities have taken place under a democratically elected regime whose crimes were legal at the time of commission and where most of the population has participated or collaborated (similar to communist regimes). Paradoxically, however, those who are willing to struggle for justice may face the impossible choice of risking their lives for a noble cause that is not going to have any effect, or to comply with a corrupt regime in order to stay alive (Jaspers, 1947:71 – 72). None of the two courses of action may escape political liability, though, as with Camus' "The Just Assassins" discussed above, the former course of action may alleviate the actors of their metaphysical and moral guilt.

The next chapter will review the historical context in which the Nuremberg trial took place and investigate the implications it had for holding individuals accountable for gross human rights violations.

Chapter Two

The Nuremberg Precedent – Accountability in Transitional Contexts

2.1 A Brief History of Individual Accountability for Gross Human Rights Violations

The idea that government agents could be held accountable for atrocities against the citizens under its rule was, until the 20th century, considered to be contrary to the very principle of sovereign government (Held, 1995:75). The traditional conception of the sovereign ruler included the discretionary power to grant amnesties, which was typically used to protect state agents and ensure their impunity to the law (Slye, 2002:175). The Westphalian convention, dating back to 1648 and the end of the Thirty Years War, established sovereign states as the creators and sole holders of legitimate law against which no other party, except another sovereign state, could make a claim (Held, 1995:75). Under the influence of the positivist school of thought, the purpose of international law was to treat the sovereign state as its primary subject and to regulate the relations between sovereign states. Individuals were unprotected as subjects of international law, except in relations to acts by governments against other sovereign nationals as this was seen as an affront by one sovereign against another (Ratner and Abrams, 2001:4). The overall historical pattern was therefore that governments and their agents could act against their own citizens with effective immunity to the law⁸.

The second attempt to impose legal accountability for war crimes and political atrocities on political and military leaders took place after World War I just prior to the negotiations of the Versailles Peace Treaty of 1919 (the first attempt was the British handling of Napoleon Bonaparte in 1815 after the Hundred Days War (Bass, 2002:37 – 38).) A Commission of Responsibilities with representation by international lawyers from the British, French, Italian, Japanese and American states proposed the criminal prosecution of the German Kaiser

⁸ The only considerable exception to this pattern was the attempts to abolish slavery, though not for its offence to any state but for its offensive nature.

Wilhelm II and that it should be the duty of Germany to prosecute its political and military leaders for war crimes (Marrus, 1997:3). However, the provisions under the Versailles Treaty never materialised. The Allies' lack of military action opened the way to a successful refusal by the German government to subject its own leaders and soldiers to the humiliation of war crimes trials in their own courts and the Netherlands' refusal to extradite the Kaiser. The result was thus that the few trials being held in Leipzig were ineffective; the defendants were either acquitted or let off with light sentences (Bass, 2002:59).

The lessons of these failed attempts to hold political and military leaders accountable for war crimes and other political atrocities were brought back into the fore with the ending of World War II, when the Allied forces faced anew the imperative question of what to do with the surrendered war criminals. The unprecedented extent and inhuman nature of the atrocities involved in the mass crimes of war and the genocide of 6 million Jews generated a need for an international condemnation of and reckoning with the Nazi affront against liberal values, humanitarian ideals and the rule of law (Taylor, 1992:21). This need was rooted in a general repugnance and moral outrage against Nazism as a political force which had implemented international policies of systematic mass murder and disregard for human life (Marrus, 1997:1). The efforts to bring the responsible leaders and their henchmen to account for their actions culminated in an International Military Tribunal set in Nuremberg (IMT) during 1945 – 1946, which still remains the historical paradigm for holding individuals, including political leaders and state agents, accountable under the law for their contribution to morally reprehensible crimes.

The key principle established by the Nuremberg Tribunal was that individuals remain accountable for their actions despite any alleged claim that they were acting under orders from a higher authority in the commission of crimes, regardless of whether they are government agents or acting under the supremacy of state law. Although the Nuremberg trial has been criticized as “victor’s justice” (there were no similar sanctions taken against the victors of the war for their gross human rights violations, for instance the British bombing attacks on German cities and the notorious atomic bombs in Hiroshima and Nagasaki which killed hundreds of thousands of civilians (Falk, 2001:82)), Nuremberg’s greatest achievement

remains that it was the first ever serious attempt to create a new international order with a commitment to universal human rights and world peace⁹ (Shklar, 1986:155 - 157).

Following the watershed of this development, two major changes took place. First, international law began to hold *individuals* criminally accountable for gross human rights atrocities and violations of the laws of war which previously had been attributed to the entity of the state. Secondly, a new area of international human rights began to develop which prescribed limits upon a government's conduct towards its own citizens, effectively limiting the previously thought unlimited legal power of sovereign states in domestic law (Ratner and Abrams, 2001:5). In this way Nuremberg's profound impact on international law created a precedent for states in transition to democracy, allowing the successor regimes under international law to prosecute and punish leaders and official agents of its previous government for gross human rights violations. Although there are some serious practical, political and legal impediments to applications of the Nuremberg model (which will receive more attention in Chapter Four), the overall effect of the Nuremberg trial was that it endorsed the right of individuals to hold the previous regime accountable through criminal prosecution for acts of gross human rights violations (Wise, 1999:64).

In an important sense, the continuing significance and relevance of the Nuremberg model of accountability is the topic of this dissertation. The Nuremberg trials established the prosecution and punishment of individual perpetrators as a historical precedent and model for holding individuals accountable for gross violations of human rights. So much so that it is often assumed that the retributive justice of criminal prosecution is the only meaningful sense in which individuals may be held accountable for gross violations of human rights and that amnesty is *ipso facto* equated with impunity. This dissertation's aim is to examine whether criminal accountability under the law is the only meaningful sense of accountability or whether, in certain circumstances, conditional amnesty may present a possible alternative. This amounts to an investigation of the continuing relevance of the Nuremberg model for dealing with gross violations of human rights in post-conflict societies in the last half of the 20th century. Thus, this chapter will examine the following question:

⁹ The 20th century has seen the proliferation of international tribunals such as the ICTY, the ICTR and the ICC that are significantly different from the IMT at Nuremberg. The Nuremberg trial is in the context of this dissertation discussed in relation to its contribution of condemning gross human rights violations and promoting human rights which is consistent with these later developments. This general trend or tradition holds that individuals should be held accountable for gross human rights abuses and that this is a universal responsibility.

What are the relevant precedents and implications of the Nuremberg trial for post-conflict societies in holding individuals accountable for gross human rights violations?

2.2 The Creation of the International Military Tribunal at Nuremberg

The Nuremberg trial originated in a joint declaration on German atrocities by the political leaders of the Allied forces - i.e. Britain (Churchill), the United States (Roosevelt) and the Soviet Union (Stalin) – on behalf of the 32 United Nations member states at the Moscow Conference on November 1st in 1943. This stated that German officers and members of the Nazi party responsible for atrocities, massacres and executions during the war would be sent back to the countries in which these crimes took place to be judged by “the new, liberated governments” (Wright, 1972:4). The Moscow Declaration stated that “[t]he major criminals whose offences have no particular geographical localisation will be punished by the Allies.” These offences referred specifically to those committed systematically on a large, international scale (Wright, 1972:4). The actual trial was made possible by the total surrender of Germany on May 7th 1945 (Meltzer, 1999:20). The proposal to set up an International Military Tribunal drawn up by the Chief of Council for the United States, Justice Robert H. Jackson, was signed at the London Agreement on August 8th 1945 by the United States, Britain, France and the Soviet Union (acting on behalf of the United Nations). The London Agreement included the Charter of the International Military Tribunal, which established the procedure and the jurisdiction of the tribunal (Wright, 1972:5).

The Charter provided for a fair trial of 22 defendants¹⁰ (including Goering, Hitler’s Deputy, and top military leaders) with the right to their own defence, to give any explanation and to present evidence to support their defence against the charges (Wright, 1972:15). Seven were sentenced to prison terms varying from ten years to lifetime and the remaining twelve were sentenced to hang (Wright, 1972:6). All those sentenced to hang were found guilty of the

¹⁰ Of the 22 defendants the Tribunal decided that one of the defendants (Gustav Krupp Bohlen) was too sick to be tried and one defendant (Robert Ley) had committed suicide while in custody (Wright, 1972:5 – 6). Thus, of the 22 indicted only 20 actually tried.

most serious charge, crimes against humanity. The general significance and implications of the trial will be discussed in the following section.

2.3 The Charges and their Implications

The jurisdiction of the tribunal covered the following three charges committed by persons, either as individuals or as members of organisations, as defined under Article 6 (cited by Wise, 1999:55):

- 6 a) Crimes Against Peace:
“Planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy.”

- 6 (b) War Crimes:
“Violations of the laws and customs of war” such as “murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.”

- 6 (c) Crimes against Humanity:
Defined under Article 6 (c) of the Charter as “murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.”

Understanding the impact of the Nuremberg trial on the concept of accountability in the post-Nuremberg era requires recognition of the extent to which the notions of *crimes against peace*, war crimes and *crimes against humanity* underlying these charges were derived from

established principles in international law and/or the Just War tradition or amounted to the invention of new violations and thus the generation of new and diverse precedents (Teitel, 1999:44 – 45). Nuremberg's historic innovation was threefold. First of all, it did not only hold soldiers or officers accountable for war crimes but also prosecuted *government members* and other state agents. Secondly it included acts committed against a government's *own nationals* in addition to those committed against civilians in occupied territory. And thirdly, it held that such crimes were considered a matter of *international concern* – including times of peace (Wise, 1999:55, 57 and 59).

Teitel argues that the Nuremberg trial contributed to a reconceptualisation of accountability for human rights violations by shifting the focus in three main areas: 1) from collective to individual responsibility, 2) from national to international jurisdiction and 3) from humanitarian law applying only to situations of war to that which includes times of peace (Teitel, 1999:53). The significance of this reconceptualisation is best understood in the historical context in which it took place, i.e. in a state-centred worldview that supported the principles and rules of the Westphalian system. This upheld the idea of a society of states constitutes the fundamental principle of world politics according to which any intervention in a state's treatment of its own nationals was considered a serious violation of that state's sovereignty (Wise, 1999:60; Held, 1995:75). With respect to 3), it is safe to say that although the charge of crimes against humanity was limited to apply only in connection with war under the Nuremberg Charter, international customary law and international treaties have since then nevertheless widely accepted that accountability for crimes against humanity applies in peacetime as well¹¹ (Wise, 1999:63). The implication of these shifts was that international law was no longer regarded as a body of law pertaining exclusively to states but also applied directly to responsible individuals, even to state agents who under the previous notion of absolute sovereignty could count on immunity from the law (Wise, 1999:64). This led, moreover, to pressures to entrench citizenship rights not sufficiently provided for by traditional international law in a new framework of contemporary international humanitarian law applicable to all world citizens (Held, 1995:223). It is to these two important reconceptualisations of international law that we will now turn to discuss in greater detail: 1)

¹¹ This may thus be an instance where the actual procedure and judgement of the Nuremberg Tribunal differ from precedents set by it. The Genocide Convention accepted the crime of genocide to apply in peacetime as well, though there has been controversy about crimes against humanity applying in peacetime, for instance in the Tadic case under The International Criminal Tribunal for the Former Republic of Yugoslavia (ICTFRY) (Wise, 1999:63.)

individuals as *legal subjects* under the law and 2) state agents as *individually accountable* for gross human rights atrocities.

2.3.1 *Legal Accountability*

The kind of accountability sought by the Allied victors was not political or moral but legal accountability, invoking criminal punishment (Teitel, 1999:45). However, it was the moral and political impact of criminal prosecution which led to the final decision of the Allies to deal with the Nazi regime through law. Henry L. Stimson, U.S. Secretary of War from 1940 to 1945, argued that the Allies had three different courses available to them after capturing the Nazi leaders: release, summary execution or trial (Stimson, 1972:114). While release was unthinkable, summary executions had been advocated by many, particularly the British government. Despite strong popular support for the option of summary execution, this solution was not chosen in the end because it was precisely the kind of “justice” the Nazi regime itself had chosen. In order to not only morally condemn but also distance themselves from Nazi justice, the Allies eventually agreed on a judicial procedure, and thus on prosecution and trials, in order to “give dignity and method to the ordinary conscience of mankind” (Stimson, 1972:115). This was, as Justice Jackson’s commented, “one of the most significant tributes Power has ever paid to Reason” (Jackson quoted in Stimson, 1972:115). Thus the Nuremberg trial constituted a marked shift from the earlier distinction between the rule of men, where it could be difficult to distinguish justice from vengeance, and the rule of law, where accountable justice is sought. Jackson remarked on the importance of this shift in his opening speech at the trial:

The former high station of these defendants, the novelty of their acts, and the adaptability of their conduct to provoke retaliation make it hard to distinguish between the demand for a just and measured retribution, and the unthinking cry for vengeance which arises from the anguish of war. It is our task, as far as possible, to draw the line between the two. We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow.

(Selection of Jackson’s opening speech reprinted in Baird (ed.), 1972:22 – 23)

The Nuremberg tribunal established the precedent that crimes against humanity and crimes against peace could be prosecuted by any state and held against any state governments or their

agents while accountability for the crimes of citizens of a state were no longer confined within national, sovereign borders but constituted an international or universal matter. Thus, the Nuremberg trials implicitly introduced the principle of universal jurisdiction for crimes against humanity (Teitel, 1999:50; Wright, 1972:35). By charging the Nazi leaders for crimes against humanity, and by doing so through a criminal prosecution based on due process, the trial at Nuremberg also set important legalistic precedents and standards for subsequent trials and for treating similar crimes and their perpetrators (although no Allied forces or government agents were ever tried) (Baird, 1972:19 and 23).

2.3.2 *Individual accountability*

The Nuremberg tribunal's understanding of accountability for gross human rights violations represents a historical shift from the old notion of collective or state sovereignty to a notion of individual accountability (Teitel, 1999:47). This was a significant departure from the prevailing international law, which had viewed acts of individual government agents as being immune from any law, protected by the principle of the sovereign state as the sole holder of legitimate law (Wise, 1999:59). In relation to military organisation, the hierarchical notion that responsibility rests with the superior, otherwise known as the principle of *respondeat superior* or "command responsibility," could no longer be used as a defence by subordinates in the context of following orders (Teitel, 1999:47). Hence, the significance of the Nuremberg Tribunal's conception of individual accountability is reflected in the result that two central defences to culpability were eliminated: 1) acts of state (state immunity) and 2) due obedience defences (superior orders) (Teitel, 1999:48; Ratner and Abrams, 2001:6 – 7).

Article 8 of the IMT Charter stated that superior orders were prohibited as legal defence to the charges brought against the defendants¹² (Dinstein, 1965:147). This completely ruled out the previously accepted defence of *respondeat superior* for war crimes according to which the subordinate soldier could plead not guilty for having committed an act under orders by a superior commander in charge (Wright, 1972:37 and Dinstein, 1965:136). The prosecution of the defendants was based on the principles of "manifest illegality" and "personal knowledge." The manifest illegality principle made the proviso that the execution of an obviously criminal

¹² For an extensive examination and analysis of the prosecution and the defence arguments on this subject in the Nuremberg trial, see Dinstein (1965.)

order does not exonerate one from criminal responsibility (Dinstein, 1965:128). The personal knowledge principle was that a soldier who carried out an act without an order would be punished if he had prior knowledge of its illegality (Dinstein, 1965:134). The implication of these principles was, however, that lack of acquaintance with the law would help preclude offenders from criminal conviction. This was criticised by the council of defence for the SD (The Security Service Branch) on the grounds that it made it possible for an offender who acted without an order to plead mistake of law whereas an offender who acted under orders would be denied the excuse of obedience to orders (Dinstein, 1965:134 – 135). However, the prosecution relied on absolute liability for the manifest illegality of acts to show that the excuse of obedience to orders was not valid (Dinstein, 1965:144). This line of argument was accepted in the judgement of the tribunal, which also ruled out the “Führerprinzip,” the argument that Hitler’s command had been the only legitimate law of the German Reich and that the defendants thus acted on compulsion (Dinstein, 1965:144). However, the judgement of the Nuremberg trial stated that superior orders were not relevant in relation to criminal guilt for crimes against humanity but may be taken into account in mitigation of punishment *when moral choice was impossible* (Dinstein, 1965:147).¹³ In practice the IMT established the precedent for international humanitarian law that a crime against humanity cannot be defended on the grounds that it was committed by a subordinate following orders¹⁴ (Ratner and Abrams, 2001:136).

The Nuremberg tribunal also defined individual accountability in terms of collective categories of membership in three criminalised organisations: the Gestapo, the SS and the Leadership Corps. Based on American law of conspiracy, the tribunal created a mechanism for linking individual and organisational responsibility by determining the criminality of organisations making up the Nazi regime on the grounds of a single set of proceedings of the leadership (Teitel, 1999:47). However, membership of these criminal organisations would only serve as grounds for prosecution if it had been voluntary and the alleged member had

¹³ Although no provision for a moral choice test was made in the Charter and no further specification was spelled out in the judgement, according to Dinstein (1965:149) the French translation of the judgement provides more clarity in the specification of “no moral choice” to mean “no moral liberty” and “impaired faculty of choice” although controversy about the interpretation of the judgement on this issue remains¹³ (Dinstein, 1965:152).

¹⁴ However, by logical implication, according to the principles of *nullum crimen sine lege* (no crime without the presence of law) and *mens rea* (criminal consciousness), the Nuremberg precedent of disallowing superior orders as a defence against accountability for crimes against humanity is in conflict with the implications of these two basic principles which prohibit the retroactive application of criminal law and ignorance of the law as defence if the defendant could not have reasonably known the illegal nature of the act (Ratner and Abrams, 2001:136; Dinstein, 1965:135).

knowledge of the organisation's criminal objectives. In the follow-up trials, these precedents were used to "bootstrap" individuals into convictions based on membership in classified criminal organisations. Widespread post-war de-nazification policies also used purges of ex-members and collaborators of Nazi organisations from employment in the new state as legal punishment. By prosecuting and purging ex-members of non-state organisations, the Nuremberg IMT affirmed the principle that citizen members are liable with respect to state action¹⁵ (Teitel, 1999:48). This principle is relevant to the previous discussion of norms imposed on the individual moral agent as a member of a moral community¹⁶. Such membership is a prerequisite for any moral community to claim accountability of a moral agent for his or her actions, and serves as a ground on which moral agents may be called to account for their acts whenever they contravene the morals of the community in which they live. Hence the Nuremberg notion of relating individual accountability to collective responsibility illustrates the previously discussed notions of a *shared political responsibility as citizen* (to the state) and an *individual moral duty as a moral agent* (to a moral community).

These duties and responsibilities, specifically founded by a world dominion of liberal-democratic states, were further internationalised and standardised through the establishment of the United Nations in 1945, which encompassed the Nuremberg's reconceptualisation of individual accountability under international humanitarian law. The Universal Declaration of Human Rights (1948) marked an irreversible change in how individuals worldwide would be seen as *world citizens*, bearers of rights but also accountable as subjects. Henceforth everyone, including state agents, was considered directly liable for his or her human rights atrocities by virtue of being a member of "the (moral) world community of individuals" according to liberal and democratic norms¹⁷ (Ratner and Abrams, 2001:7; Wise, 1999:65). Thus the Declaration entailed new duties and responsibilities for governments as well as individuals in the post-Nuremberg context, one of whose most controversial precedents would be the limit to sovereign immunity.

¹⁵ The American follow-up trials moved to incorporate elites supporting the Nazi regime, such as the business sector and professionals (Teitel, 1999:48).

¹⁶ See Chapter One 1.3.1.3: Membership and subject responsibility.

¹⁷ This precedent was stated by the U.N. War Crimes Commission in 1948 (Ratner and Abrams, 2001:7). It should be noted here that, although this "world community" was perceived as the entire world, it more specifically reflected the ideology of liberal, democratic states and would thus exclude other world views, such as that of the Muslim world.

2.4 The Legacy of the Nuremberg Precedent

It would be nearly 50 years after Nuremberg before individuals were again prosecuted by an international tribunal for human rights violations (the International Criminal Tribunal for the Former Republic of Yugoslavia (ICTY) in 1994) (Wise, 1999:63). This illustrates the inaction and unwillingness of governments to prosecute and punish human rights violations in the last half of the 20th century (Ratner and Abrams, 2001:8 and 331). It also illustrates the continuing hold of the traditional Westphalian framework based on the assumption of state sovereignty in international law¹⁷. On the other hand, the end of the Cold War brought a resurrection of the democratic and liberal ideals underlying the Nuremberg precedent.

Two distinct developments spurred a worldwide awareness and demand for protection of human rights: on the one hand the formation of international criminal tribunals in response to the genocides in the Former Republic of Yugoslavia and Rwanda in the early 1990s and, on the other hand, a worldwide series of transitions to democracy in which accountability for past human rights violations were pressed for.

The genocides in the former Republic of Yugoslavia and Rwanda in the early 1990s prompted worldwide support among governments to seek criminal accountability of the perpetrators, which led to the establishment of two international tribunals (the ICTY in 1994 and the ICT for Rwanda in 1994). The creation of a permanent international criminal court (the ICC), signed by 120 nations in Rome in 1998 and ratified in April 2002 by the required number of 60 states, reflects the pinnacle of a growing body of international humanitarian laws and institutions at the turn of the 21st century (Ratner and Abrams, 2001: 8-9).

Contrary to this development the transitions from autocratic rule to some form of democracy beginning in South America in the early 1980s, following on the break-up of communism in Eastern Europe in the late 1980s and extending to parts of Africa, Central America and Asia from the early 1990s, were notably characterised by a general state practice of granting and enforcing amnesties in apparent opposition against this development in the Post Cold War era (Slye, 2002:176).

¹⁷ A major exception concerned South African apartheid, which was declared a crime against humanity by the UN in the 1970s, though this did not result in an actual international tribunal.

These transitions were enabled through the mobilisation of human rights movements in civil society and, in keeping with the Nuremberg precedent, demanding that the former regimes are held to account for their past violations of human rights (Falk, 2001:126). However, these regime changes also brought new obstacles for states seeking accountability for past human rights crimes.

These obstacles are particular to intra-state post-conflict situations (as opposed to inter-state conflicts) where the previous regime still demonstrates its power over the military and the oncoming political leadership. A typical way in which previous governments have used their legal power and physical force is by blocking accountability measures against them, either by enacting self-amnesty laws, which ban the new regime from future prosecution for any past crimes, or by way of negotiating an amnesty through a compromise with the new regime before stepping down (Slye, 2002:240 – 241).

First of all, the granting of such state amnesties to state agents who had perpetrated gross human rights violations was in direct conflict with the Nuremberg precedent and the basic principles of the new international humanitarian law because it blocked all attempts to seek accountability for past human rights crimes and atrocities.

Secondly, the recent development of conditional amnesties, accompanied by a public investigative inquiry to disclose the facts of past human rights violations, raises the question whether such conditional amnesties can amount to a form of accountability which publicly acknowledges the violations that took place even if they provided indemnity against prosecution and punishment for these human rights violations (Slye, 2002:246 – 247). The further question thus arises whether this form of conditional amnesty can meet the democratic and liberal ideals underlying the Nuremberg precedent, and ultimately whether a conditional amnesty can be compatible with the accountability sought through prosecution and punishment in the Nuremberg ethos. This is the specific focus of this dissertation. A closer investigation of what practical consequences the obstacles to prosecution and punishment in the recent transitions to democracy have had on the Nuremberg precedent will be returned to in Chapter Four, together with a specific analysis of the normative objectives required by accountability (i.e. justice) in transitional justice.

In the following chapter individual accountability in relation to “crimes of obedience” (i.e. gross human rights violations executed in response to the obligation of following orders in authority structures) will be investigated. This discussion will specifically focus on post-Holocaust socio-psychological research, which has informed a new understanding of the way in which individual moral autonomy is obscured through authoritative structures and norm-systems. It will, furthermore, review the Argentine Due Obedience Law as a legal framework for taking crimes of obedience into account when holding individuals accountable for the mass execution of gross human rights violations.

The context of this inquiry is the recent South African amnesty conditions for granting amnesty for gross human rights violations with political objectives. This is a controversial contradiction of the Nuremberg precedent that obedience to orders is not an excuse for individual accountability for human rights violations. The South African amnesty conditions may therefore provide a new precedent regarding individual accountability. Whether this will measure up to the accountability of the Nuremberg model will be considered in Chapter Five.

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Chapter Three

Crimes of Obedience: Individual Moral Autonomy under Authority Structures

3.1 The Nuremberg Precedent and Social Science Research: Conflicting Frameworks for Due Obedience

The Nuremberg IMT established the dominant precedent in international humanitarian law that *due obedience* is not acceptable as a justification for crimes against humanity.

The Nuremberg precedent based its due obedience model on the implicit assumption that individuals as moral agents remain capable of autonomous action under authority structures and that they may accordingly be held responsible and accountable for crimes of obedience.

This assumption of effective moral autonomy in authority structures has been challenged by the outcomes of relevant social science research over the following decades, starting with Milgram's "obedience experiments" in the 1960s.

Milgram and other socio-psychological researchers into crimes of obedience have demonstrated that it cannot simply be assumed that ordinary individuals are capable of autonomous moral agency under authority structures¹⁸. Social science of this kind thus raise fundamental questions as to *how* due obedience is effectively constructed in relation to authority.

In the light of this and the Nuremberg precedent of individual accountability for crimes of humanity, this chapter will be concerned with the implications of social science research for individual responsibility and accountability for crimes of obedience.

The outcomes of the socio-psychology research of Milgram and others into crimes of obedience demonstrate that the majority of individuals is not as capable of autonomous moral agency in authority structures as assumed by the Nuremberg precedent.

¹⁸ Kelman and Hamilton (1989), Sabini and Silver (1982), Mixon (1989). For a comparative study of obedience to authority experiments since Milgram see Blass (ed) (2000) and Miller (1986).

Nevertheless, from a moral and criminal law perspective these empirical findings regarding the prevalence of crimes of obedience under authority structures do not justify them. A quote from Sabini and Silver's research on crimes of obedience illustrate this point clearly:

The task of making something understandable *is* to make us see how it could have happened by showing how it is akin to something we can already grasp. There is a tendency to slide from understanding to excusing. We are accustomed to think that once we have understood how someone came to do something, we can forgive. In this case, we cannot allow understanding to mislead us to excuse or forgive. [their italics] (Silver and Sabini, 1982:87)

Taken together, this poses a serious dilemma: on the one hand the social research findings on crimes of obedience do not justify them; on the other hand, these social research findings are evidently relevant to the force of the Nuremberg model, which cannot simply continue to assume that individual moral agency is possible under authority structures when that is not the case.

The question thus becomes: what are the implications of such social science research into crimes of obedience for individual accountability? This chapter will therefore investigate the following question:

How do authority structures construct due obedience and what implications does it have for individual moral responsibility and holding individuals accountable for crimes of obedience?

This chapter will proceed to first introduce the paradoxical concept of "crimes of obedience" and secondly discuss the construction of moral autonomy under authority structures and the dilemmas it poses for holding individuals accountable for their acts. The third part of this chapter will concern the obedience experiments by Stanley Milgram, first published in 1963. The fourth part of this chapter will focus on two relevant implications of the Milgram and other social science studies for the issue of accountability: 1) the assumptions of moral autonomy under authority structures underlying the Nuremberg precedent and 2) the implications of holding individuals who act under authority structures accountable for gross human rights violations. The fifth and last part of this chapter will briefly discuss the Argentine Due Obedience Law as an alternative to the Nuremberg model which attempts to adjudicate individual accountability in the commissioning of gross human rights violations

under authority structures. The Argentine soldiers operated under similar legal commissioning of crimes to that of the Nazi Germany soldiers and officials, but whereas Nuremberg expected those subordinates acting under superior orders in Nazi Germany to have rejected orders to commit gross human rights violations, the Argentine due obedience laws took cognisance of the inherent legal, moral and political restrictions of moral choice for subordinates who acted strictly on command.

First, however, the following section will introduce the notion of crimes of obedience.

3.2 Crimes of Obedience: Implications for the Nuremberg Precedent

Kelman and Hamilton (1989:46) define a “crime of obedience” as “an act performed in response to orders from authority that is considered illegal or immoral by the larger community” (Kelman and Hamilton, 1989:46).

The Nuremberg IMT was particularly important for shaping new contemporary socio-psychological approaches to the modern organisation of large-scale authorised crime. Significantly, it called attention to the fact that the Holocaust was not the result of exceptional or monstrous depravity but had depended on routine obedience by millions of people (Mixon, 1989:7). Hence, whereas the world had expected to find “evil” characters and an immense racial hatred behind the works of the individuals who had carried out the tasks required for the genocide, the post-war trials revealed that the majority of workers in the Nazi regime had been ordinary people diligently and conscientiously “doing their jobs.”¹⁹

Socio-psychology research attempting to explain the acts of obedience which contributed to the Holocaust has found that the socio-psychological effect of authority structures is to construct due obedience in such a way that individuals act under the impression that they are

¹⁹ The image of the obedient Nazi servant with no bad conscience was epitomised in Hanna Arendt’s analysis of the “banality of evil” in the case of one of the major post-war trials of Adolf Eichmann in Israel: “*The trouble with Eichmann was precisely that so many were like him, and that the many were neither perverted nor sadistic, that they were, and still are, terribly and terrifyingly normal. From the viewpoint of our legal institutions and of our moral judgement, this normality was much more terrifying than all the atrocities put together, for it implied (...) that this new criminal (...) commits his crimes under circumstances that make it well-nigh impossible for him to know or to feel that he is doing wrong.*” (Arendt, 1977:276).

not responsible for acts which they are ordered to perform (Mixon, 1989:19; Miller, 1986:180 – 181; Kelman and Hamilton, 1989:137; Silver and Sabini, 1982:53).

The problem with Nuremberg's ruling on crime of obedience is that it held subordinates who acted under orders accountable with the belief that (any) individuals *should* know the "illegality" of such orders, whereas socio-psychology studies (as will be discussed below) have demonstrated that, under a perceived legitimate authority setting, it is by no means made clear how individuals acting as subordinates could know this (Kelman and Hamilton, 1989:46).

Thus the central dilemma which the mass organisation of "legal crime" poses to holding individuals accountable for gross human rights violations is that authority structures (involving command superiority) effectively construct the individual responsibility of the actor of an order as acting out the will of another and that this person *thus carries no moral responsibility for it* (Mixon, 1989:10). This idea fundamentally contradicts the very assumption of moral autonomy upon which modern moral and legal notions of holding individuals accountable depend.

This new understanding has put the previous assumptions of the moral autonomy of individuals acting under authority structures in a new light. Hence, with regards to these findings, the question for post-conflict societies attempting to hold perpetrators accountable for gross human rights violations is to what extent individuals who carried out orders under such authority structures *can or should be held accountable*²⁰. In order to adopt this knowledge into legal frameworks of adjudicating liability it is necessary to have a better understanding of how moral autonomy in authority structures is constructed.

3.3 The Construction of Moral Autonomy in Authority Structures

Legal structures and the hierarchical function of authorisation by rank in the modern administration of mass violence serve to create a legitimate setting in which subordinates may have every reason to regard their orders as legitimate and thus morally justified (Kelman and

²⁰ This dilemma coincides with the Nuremberg tribunal's own statement that in cases where moral choice had been impossible, mitigation of punishment should be considered as discussed in Chapter Two.

Hamilton, 1989:47). Precisely because “crimes of obedience” are committed when there is an inherent ambiguity in the authoritarian construction of the legality of immoral acts, a proper distinction between “an act of obedience” and “a crime of obedience” can only be made by claiming that the actor *should have known* that the order was immoral or illegal (Kelman and Hamilton, 1989:47). Hence, the notion of “liability responsibility” as discussed in Chapter One fundamentally works on the presumption that individuals are *subjects* or *members* of a particular legal order or moral community and implicitly expected to know the social or legal rules. Individuals are thus *held accountable* in their capacity as moral agents in relation to the rules of a particular legal territory or the norms in a particular community by sharing its common (social) space, *even when they do not in effect have knowledge that certain acts are illegal*.

However, there exists a moral grey zone in those cases where an individual is faced with a situation in which he or she feels that there is no other alternative or that he or she is obligated to follow orders. These are instances in which an individual is faced with a moral dilemma; he or she has, on the one hand, an obligation to the perceived immediate legitimate authority and on the other a liability as a member of the wider moral community (or subject of a higher authority, such as God) outside the authority structure in which the individual is situated (Kelman and Hamilton, 1989:48).

It is precisely in this moral dilemma that the immediate authority structure plays a crucial part in limiting the individual’s autonomy as a moral agent by defining the relationship between the superior as someone who gives certain orders to subordinates and the subordinate as someone who acts on those commands (Kelman and Hamilton, 1989:55). Thus, authority structures create the impression (or reality, through physical force) that, in so far as the subordinate is accountable for his or her own acts to his or her superior, he or she carries no moral responsibility for them. This is in essence part of the definition of a “legitimate authority,” or the right (and the power) of an authority within a certain social structure to exercise authority over others (Kelman and Hamilton, 1989:55). However, Kelman and Hamilton argue (1989:56) that legitimacy fundamentally depends upon the members’ acceptance of it as such within the social setting or structure in which it occurs. Thus, so long as the members of this social setting accept the legitimacy of certain orders, this *perceived* legitimacy effectively works to justify the obedience of such rules. Conversely, the

fundamental requirement of *disobedience* to authorities is a countervailing set of norms which do not accept this legitimacy (Kelman and Hamilton, 1989:57).

However, despite the religious and historical availability of normative support for disobedience to gross human rights violations (e.g. the Christian faith and the Universal Declaration of Human Rights of 1948), it is by no means clear that disobedience is psychologically available to those most in need of it: actors in crimes of obedience and those who stand in judgement over them. I.e. the theoretical and moral availability of the right to say no to such crimes under due obedience is meaningless if the right is not perceived or appropriately translated into judgements under pressure (Kelman and Hamilton, 1989:76).

The most controversial and famous obedience studies were conducted by the American Yale professor, Stanley Milgram, who observed 1000 individual subjects from 1960 to 1963 (Miller, 1986:2). Originally designed to discover the effects of a situation (environment) involving a perceived authority on obedience, Milgram found instead that the majority (65 percent) of “everyday people” involved as subjects in his experiment responded with faithful obedience to the instructor (Milgram) in the experiment to execute electric shocks on another individual²¹ (Mixon, 1989:3).

3.4 The Milgram Experiments and “the Agentic State”

Milgram viewed the experimenter (the instructor) as representing a legitimate authority, one who “is perceived to be in a position of social control within a given situation” (Milgram, 1974:142 – 143 in Blass, 2000:39). What Milgram found, in his own words, was that “there is a propensity for people to accept definitions of action provided by legitimate authority. That is, although the subject performs the action, he allows authority to define its meaning”

²¹ The controversy surrounding the Milgram experiment was due to its research ethics and the deception involved in the methodology of testing how far people will go when ordered to impose harm (electric shocks) upon another person (although the shocks were faked and the individual they were instructed to shock was not harmed) (Miller, 1989:4). Nevertheless, the importance of the Milgram experiments was that the results confirmed that individuals in a perceived legitimate authority setting *do not feel responsible* for actions which they are ordered to perform by a higher authority and thereby do not perceive themselves as morally responsible for their own acts ordered by an authority. Milgram’s controversial obedience experiments and his unexpected findings led to considerable further investigations and discussions. On the one hand, other social scientists set out to test Milgram’s experimental findings in various ways; on the other hand, there has been intense discussion of the correct interpretation and the precise implications of his findings on crimes of obedience and the implications these findings on moral responsibility and accountability.

(Milgram, 1974:145 in Blass, 2000:39). Milgram found, moreover, that under such perceived authority, a fundamental shift takes place in the individual from a state of moral autonomy to what Milgram named “the agentic state”²², in which individuals under a perceived legitimate authority relinquish responsibility to the authority and therefore follow his or her orders without taking into account the morality of the order (Blass, 2000:39). What happens, according to Milgram, is that the individual feels responsible *to* the authority directing him or her but no responsibility *for* the content of the actions that the authority prescribes (Blass, 2000:39).

Briefly stated, Milgram’s obedience experiment was situated in a university laboratory setting and, with the experimenter by their side, voluntary subjects were told that the purpose of the experiment was to examine the effects of punishment on learning (Miller, 1989:5). The subjects were innocently put into a role-play as “the teacher” in a fixed draw with “the learner” being played by an actor. In an adjacent room, the learner was strapped to a chair with electrodes attached to his arms. The teacher was instructed to read the first word of a word pair together with associated words, and the task for the learner was to connect the correct word pairs (Miller, 1986:5). In front of the teacher was a shock generator with a panel consisting of 30 switches, each corresponding to voltage ranging from 15 to 450 volts. Verbal labels on the last switches indicated “intense shock,” “extreme intensity shock,” and “danger: severe shock” and the last two levers were marked “XXX” (Miller, 1986:7). Every time the learner answered incorrectly or gave an invalid response communicated through a phone, the teacher was instructed to administer electronic shocks with increasing intensity (Miller, 1986:5). The teacher was informed that, “although the shocks can be extremely painful, they

²² Milgram eventually explained “the agentic state” in terms of a genetically based “fatal flaw nature has designed unto us” (Milgram, 1974:188 in Mixon, 1989:3). According to Milgram, the agentic state is biologically based and due to a human inadequacy of thinking and acting autonomously when this reality is challenged by outer authority structures (Mixon, 1989:3). The ultimate consequence of this state is that the individual enters a state of mind which prevents him or her from acting autonomously and thus relinquish their perception of own responsibility of their actions (Mixon, 1989:9; Blass, 2000:39). Milgram’s determinist perspective is one of the controversial aspects of his experiments. Thus, a major contrasting view among socio-psychologists to Milgram’s theory is that individuals do not relinquish their own moral consciousness under an “agentic state” of mind but are *made to believe* that they are acting morally correct according to the response which the situation calls for. This point of view argues that, by understanding how learned morals and authoritative situations affect the human psyche, human consciousness can be brought to awareness of the countervailing set of norms that permit and justify disobedience (Kelman and Hamilton, 1989:63; Sabini and Silver, 1982:51; Mixon, 1989:10).

cause no permanent tissue damage to the learner” (Miller, 1989:7). In moments when the subjects were hesitant about administering shocks or would turn to the experimenter, the experimenter as authority figure in charge of the experimental setting would respond with a standard set of one to four increasingly strident prods to encourage, pressure and finally demand that the teacher should go on (Miller, 1986:7). If the teacher continued to shock the learner up to 300 volts, the learner would pound on the wall, scream and refuse to continue the experiment. After this point the learner’s responses would no longer appear on the indicator light.

Failure to respond was considered a faulty answer, and the teacher was still instructed to press the level (Miller, 1986:8). Thereby the psychological dilemma explained above was simulated in that the subject involved would face two simultaneously felt obligations: one to obey and satisfy the experimenter’s (i.e the authority figure’s) expectations of the requirements needed for the fulfilment of his experiment, and the other the subject’s own wish or moral tension about not harming “the learner” (Miller, 1986:15).

The result of the experiments was that 65 % of the total 40 subjects tested during 1960 – 1963 administered the shocks to the last voltage (Miller, 1986:9). Milgram tested in all 1000 subjects up until 1965 in similar simulated situations, but the initial 65 % result of obedience remained unchallenged (Miller, 1986:9).

In his book, *Obedience to Authority*, Milgram related the moral conflict of his experiments as intimately linked to the dilemmas faced by subordinates acting as soldiers or bureaucrats in mass killings or genocides such as the Vietnam War and the Holocaust (Miller, 1986:181 – 182). The basic dilemma, argues Milgram, can be captured in the situation where an individual is told by a legitimate authority to act against a third individual (Milgram, 1974:177, quoted in Miller, 1986:181). The Milgram studies thus presented a plausible explanation of how human behaviour could be swayed during the Holocaust to violate the most fundamental of fellow human being’s needs without questioning the legitimacy or the objectives of their actions (Miller, 1986:179). For instance, Milgram related the subjects in his experiment to the people who carried out Hitler’s commands, both being willing to allocate responsibility to something “higher” in command. Whereas “science” was the justification for his experiments, a “hygienic process against Jewish vermin” was the rationale of the Holocaust (Miller, 1986:182). In addition, Milgram addressed the role of “silence” in the

process of destructive obedience, which evidently also played a role in the obedience experiments. He compared the fact that in Nazi Germany it was considered an act of discourtesy to talk about the killings (especially among those most intimately involved in them) with subjects in the experiment exhibiting embarrassment or discomfort when objecting to what they were told to do (Milgram, 1974:187 in Miller, 1986:182).

Sabini and Silver (1982:46) have also found in their studies of obedience that individuals normally feel inhibited to initiate moral reproach in a situation in which they are passers by (witnesses) to “something wrong” happening (e.g. a mother beating up her child). In these situations, Sabini and Silver argue, individuals are hesitant to act because 1) intervention may imply reproach and 2) action to intervene forces attention on the person who intervenes and the reason for intervening (hence, a questioning of his or her authority to intervene), which calls upon the socially accepted moral interpretation of what or who is justified in the situation (since legitimate authority as discussed above fundamentally depends on a general consent by those which it concerns) (Sabini and Silver, 1982:47). What in effect is happening is that an individual faced with a moral dilemma will look for the “objective” and thus “correct” way of acting according to the “general interpretation” (i.e. norms) of people in that situation or moral community. Ironically, therefore, the socio-psychology research studies show that, as moral agents, individuals are intimately aware of being accountable according to the prevailing norms (i.e. legitimate authority) of the society in which they live, even to the extent that they do not question that authority in the face of their intuitive resistance to denigrating treatment of fellow human beings, unless they have an explicit or implicit authority relationship with them in which *they* can act as the authority (Sabini and Silver, 1982:38 – 40).

These and other similarities showed that what Milgram called “the agentic state” correlates with what the social sciences know about individuals committing gross human rights violations under legitimate due obedience, which is what Nuremberg rejected as a legitimate excuse for criminal accountability.

3.5 Implications of Milgram's Obedience Experiments:

Obedience as a Learned Moral Norm

Socio-psychology academics such as Kelman and Hamilton (1989:136), Sabini and Silver, 1982:66, Mixon, (1989:3 and 11) and Blass (2000:53), argue that obedience is a learned reaction deeply rooted in hierarchical authority structures, which denies individual thinking and obscures individual responsibility for acts under orders. Perceived legitimate authority and scientific expertise are significant factors which, in a situation of “illegal” or “immoral” commands by authority figures, create the illusion that individuals owe their actions to others and have no choice but to comply with the commanding authority's orders (Blass, 2000:53). This powerful perception leads to the individual not seeing him- or herself as responsible for the acts that he or she performs in response to orders (Blass, 2000:53).

The implication of this is that a distinct difference develops between the subjectively perceived morality of the situation and the objective morality of the situation. This distinction may be compared to that made in the initial analysis in Chapter One between *being responsible* and (others) *holding someone responsible*²³. I.e. it could be argued that the subjective perception (or not) of *being* responsible should not be confused with the objective morality of the situation. In other words, an agent can be morally responsible for his or her actions even if he or she does not *perceive* him- or herself as responsible. However, in the case of *holding* someone responsible, the position may be different. Due to the *relational* nature of holding someone responsible, an individual's responsibility in relation to an authority (e.g. law or commander) is defined according to that authority's rules and/or obligations. However, this position is more complicated as it may involve not only *implicit* obligations and duties but also the role of other parties, especially of the authority figures involved, which may also be morally relevant. In effect, therefore, in so far as an individual judges a situation primarily from the *perception* of the obligation he or she may or may not have in relation to an authority, it does not interfere with the objective responsibility which he or she may be held accountable according to by e.g. international humanitarian law.

For instance, Milgram's subjects perceived their duty in the experiment as owing their actions to the experimenter (as they had voluntarily consented to take part in the experiment with the

²³ See section “1.3.1 Responsible Agency and Holding an Agent Responsible.”

explicit understanding that they were merely assistants in an experiment concerning the effect of punishment on learning). With respect to the subjects' intuitive interpretation of their role as being accountable to the experimenter, they perceived their own moral autonomy as limited to fulfilling the task they were set (by the experimenter) to do. The result was that their subjectively perceived autonomy was limited to their relationship to the experimenter (i.e. "the experimenter is in charge, my role is to do as I am told and not question his instructions"), whereas their objective responsibility as moral agents for their own acts irrespective of their relationship to the experimenter was, strictly speaking, not altered (i.e. "the experimenter instructs me to push the level, but if I do that I may seriously harm another person and I will be responsible for the consequences").

Another psychological effect of moral autonomy under authority structures demonstrated in Milgram's experiments and subsequent socio-psychology experiments concerns the ways in which an individual gradually gets involved in responding to commands, so that in a sense an individual can get psychologically or emotionally "entrapped" by his or her initial behaviour to obey or perform further commands. Routine behaviour under authority structures is typically characterised by the logic of entrapment; the effect of failing to object to orders to commit inhuman or accept denigrating treatment of others results in "moral drift" in the individual (altering of the individual's own morality to accept harming others) because the moral precept of the situation remains unclear when it is not challenged (Sabini and Silver, 1982:49).

In order to understand why individuals respond with obedience to orders although it may be contrary to their own wants or desires, one needs to understand, Sabini and Silver (1982:61) argue, why individuals who commit crimes of obedience do not feel or perceive themselves as *personally and morally responsible* for their behaviour. "Morality" is generally perceived by individuals as an objective phenomenon that exists beyond the individual's wants, interests and control (for instance that of the moral community which the individual resides) (Berger and Luckmann, 1967 in Sabini and Silver, 1982:68). Most individuals faced with a moral dilemma in a particular situation therefore tend to consider which moral principles govern that particular situation (by asking "what *should* I do?") before his or her own desires (by asking what do I *want* to do?). Therefore, by responding positively to commands, individuals believe that they are responding correctly by negating their personal inclinations in favour of doing their objective "duty". This moral dilemma derives from the classical distinction made in

moral philosophy by Kant²⁴ between subjective *inclinations* and moral *duties* (Kant, 1956:66). As with the traditional Christian conception of “temptations” which have to be resisted in order to do what is morally right according to God’s law, the Kantian conception of morality in practice opposes one’s subjective *inclinations* to one’s objective moral *duties*. Kant argues that individuals have a moral duty to do what is right for the common good, which treats every individual as an end in him- or herself, and that this essentially necessitates a practical and rational constriction of one’s own inclinations (Kant, 1956:64).

Ironically and paradoxically, in cases of crimes of obedience this may result in a reversal in which agents come to see the moral thing to do as involving an override of their subjective inclinations to act in human solidarity with their victims and invest the “illegal” and “immoral” orders of authority figures with the status of objective duties. Sabini and Silver (1982:45) refer to this conflict as “preference versus principle”: “[t]hat actors treat judgments of the moral character of an act as objective makes it possible to doubt that the assessment they have reached is correct. The doubt, we have argued, can lead to the inhibition of the expression of one’s position” (Sabini and Silver, 1982:46).

The implicit consequence of failing to object or make a moral reproach is that the individual who witnesses the violation taking place is him- or herself (implicitly) consenting to the (immoral) action (Sabini and Silver, 1982:49 – 51). Zimbardo’s famous simulated prison experiment to study prison dynamics using American high school students as “guards” and “prisoners” in 1973 showed that when immoral behaviour is not sanctioned it is also allowed to escalate. The experiment which was to go on for two weeks had to be ended after only six days due to the emotionally charged, antagonistic and brutal way in which some guards started treating the prisoners which was not challenged by the other guards (Sabini and Silver, 1982:51).

Sabini and Silver (1982:62) argue that the way responsibility is construed in hierarchical structures such as bureaucracies thus confuse *technical* responsibility with *moral* (or legal) responsibility. Whereas “*technical responsibility*” is internally decided within the organisation’s confines of rank, the “*moral responsibility*” of an act goes beyond the rank- and role definitions of individuals in an organisation and remains with the responsible

²⁴ Kant’s moral philosophy was briefly introduced in Chapter One under section “1.2 The Religious and Philosophical Notion of Accountability.”

individual. In other words, while subordinates are reassured that the responsibility for their actions are in the hands of their superiors, this is mistakenly based on technical, internal and organisational responsibility (Sabini and Silver, 1982:63). This distinction correlates with the previous distinction made in Chapter One between the *internal* and *external* notions of accountability²⁵. An *internal* notion of accountability relates to the strictly defined organisational responsibility which an individual has in terms of his or her position, role or duty, which is constricted and defined along the organisation's own divisions of responsibility. An *external* notion of accountability relates to the responsibility which is not defined by the organisation but by those who answer for the actions taken by the organisation. Thus, when moral responsibility is attributed to the individual for his or her own actions, he or she will externally (i.e. morally) remain accountable and/or responsible even though internally and technically his or her responsibility and/or accountability may be defined according to limited role responsibilities which may not incur moral or legal responsibility.

A crucial mistake is thus made when lack of accountability is excused under the premise that an order is *legitimate* or issued by a *legitimate authority*. If we consider the subjects in Milgram's experiment, it is clear that the majority viewed their responsibility as limited to their *internal accountability* relationship to the experimenter as legitimate, and that the experimenter was holding the *external accountability* for the consequences of the experiment, i.e. the morality (and legal consequences) of the actions of the subjects under instructions. The crucial mistake these subjects made was that they viewed their objective autonomy (and thus responsibility) as a moral agent as subject (and thus limited) to the presumed legitimate authority of the experimenter.

Hence, in authoritative role relationships, there is an *implicit misunderstanding* that the authority carries the responsibility for what he or she has ordered (Kelman and Hamilton, 1982:59). Thus, if the premise for holding someone accountable is based on the assumption that he or she knew that either the order or the authority who issued to order was illegitimate or morally wrong, the crucial consequence of holding individuals accountable under such circumstances is that the premise upon which holding those individuals accountable is false.

²⁵ See Chapter One section 1.3.4 Role Responsibility and Accountability in Hierarchical Organisations.

However the right with which an authority may issue an order and be conceived of as “justified” crucially depends on the acceptance of the members in the social context in which the authority exist (Kelman and Hamilton, 1982:60). The right to give an order thus depends on whether the members of the social context in which it takes place *perceive* it as legitimate. E.g. if the German bureaucrats implementing the Holocaust conceived Hitler, the Nazi regime and their institutional superiors as legitimate, what are the consequences for their own accountability?

The Argentine due obedience framework for prosecuting some of those responsible in the previous military dictatorship for gross human rights violations presents one possible option for taking into account the limitations of moral autonomy under authority structures in a legal framework of accountability.

3.6 The Argentinean Due Obedience Law: A Legal Framework of Accountability for Moral Obedience under Authority

First, a brief account of the historical context is needed in order to understand the circumstances in which a practical intervention to determine the degrees of involvement in crimes in the Argentine case was called for.

The military dictatorship that ruled Argentina from 1976 to 1983 was institutional in that it involved the armed forces as a whole. Its inspiration was ideological and responded to a threat (left-wing ideology) to its power by not only destroying the combat ability of the enemy but also its militants²⁶ (Zalaquett, 1995:21).

By the end of 1982, the military dictatorship had become completely discredited due to the loss of the Malvinas (Falklands Islands) War, the denunciations of acts of corruption and horrendous detailed stories of human denigration in the local newspapers (Nino, 1995:420). Raúl Alfonsín was voted President and promised to investigate the human rights violations during the “dirty war” and bring to trial not only the military leaders who presumably gave

²⁶ The character of the repression that followed under the Argentine military juntas included concerted, secret military actions which resulted in thousands of “disappearances,” massive use of detention without trial, torture and other human rights abuses (Zalaquett, 1995:21)

orders to abduct, torture and kill subversives and the officers who committed the worst excesses but also guerrilla leaders (Nino, 1995:420). However, it was politically impossible for the new government to impose a short time period for the trials due to the strong public pressure for retributive justice (Nino, 1995:421)²⁷.

The final attempt by Alfonsín was a proposed due obedience law in 1987 which clearly defined the limits of accountability for military ranks which did not hold decision-making capacities. Although the Alfonsín government was forced to resign due to the economic crisis and terrorist attack two years later, the due obedience law received wide support among the majority of the military (Nino, 1995:426 - 427).

The Argentine Due Obedience Law established that, without proof to the contrary, those who at the time of perpetration had the rank of chief officers, subordinate officers, officials and soldiers of the armed, security, police and prison forces were exempt from prosecution by virtue of having followed orders. These subordinates were deemed to have acted under duress, in subordination to superior authority without the possibility of resisting or refusing to follow those orders and examining their lawfulness²⁸ (Argentine Due Obedience Law of June 4th 1987 in Kritz, 1995:507).

²⁷ One of the legal dilemmas in the preparations for prosecution was the military code's establishment of a defence of due obedience. Although this military code was useful in limiting the scope of military officials to be tried, it also had the undesirable effect of letting off many middle-ranking officers who complied with orders to commit gross human rights violations (Nino, 1995:423). The legal precedent of interpreting due obedience presupposed the excuse of mistake as to the legitimacy of the order given. This gave Alfonsín the gap to create a bill that would interpret the code of law on obedience in such a way that it would strike a balance between an outrageous literal interpretation and an excessively harsh interpretation (Nino, 1995:423 – 424). However, the draft bill was substantially altered by Congress before its enactment, which exposed a much larger group of soldiers to prosecution. The consequence was years of delays, which produced more unrest and fear in the military and eventually provoked a radical and real threat of further violence and unrest in 1987 (Nino, 1995:425). This serious threat to the new democratic government is known as the "Easter Uprising" as it took place in the Easter week of 1987. The military launched "Operation Dignity" in order to preserve the armed forces against the radical government and accomplice generals. The operation included a military garrison, supported by some of the military fundamentalists known as "the painted faces." Alfonsín went by helicopter to the garrison and succeeded in obtaining the surrender of the rebels. However, despite the "happy ending," the new government soon realized that the Supreme Court refused to define the limits of due obedience, thus effectively suspended the trials of the rebels, which eventually gave way to increased pressure from the military (Nino, 1995:425 – 426).

²⁸The Supreme Court of Argentina, Buenos Aires upheld the constitutionality of the law and confirmed that the law only applied to service-connected acts (i.e. requiring the specific activities of military authority and related to the specific functions of the armed forces) and when the order is not patently illegal, is given by a superior officer within the sphere of authority (service-connected) and points to the execution of an act which is also within the sphere of competence of the subordinate officer (Argentina: Supreme Court Decision on the Due Obedience Law of June 2nd 1987 in Kritz, 1995:511 and 523 – 525).

Alfonsín identified three categories of perpetrators of the previous military dictatorship: 1) those who had planned the repression and given the accompanying orders; 2) those who had acted beyond the scope of their orders; and 3) those who strictly complied with their orders (Alfonsín, 1993:15; Nino, 1996:63). Alfonsín believed that, whereas the first two categories deserved punishment, the third group should be given the opportunity to reincorporate themselves into the new democracy (Nino, 1996:63). The first category was distinguished by virtue of its constituents' capacity to make decisions according to rank and command structures. The second and third groups were distinguished by examining the due obedience-defence in military law (Nino, 1996:64).

Although the Alfonsín government acknowledged that due obedience is not a viable excuse for gross human rights violations, it upheld the position that an exception should be made in the particular historical context of the "dirty war." Two reasons were given for this choice. First, the atrocities during the dirty war had been committed "within a climate of compulsion and amid an intense propaganda campaign that aimed to legitimise violence" (Nino, 1996:64). Second, an important reason for limiting punishment to those who acted in excess of their orders was that it supported the idea that those who followed orders were given a chance to cooperate in the democratic polity, which was in line with an overall general policy that emphasised punishment not as a retributive but as a means to protect the future social order (Nino, 1996:64).

The distinctions of accountability introduced in the Argentine due obedience framework present a possible answer to the dilemmas posed by due obedience in hierarchical organisations. By excusing those officials without discretionary authority who had strictly followed the rules and the orders of the day, the Argentine due obedience law takes into account the crucial context of the (perceived) legitimate social environment in which subordinates act under authority. Without justifying or accepting the right of such authorities, the Argentine due obedience law acknowledges the strict compliance required by military service and that soldiers who ostensibly or expressly refused orders to obey service-connected orders without a justified reason would be punished (Argentina: Supreme Court Decision on the Due Obedience Law of June 2nd 1987 in Kritz, 1995:510).

The Argentine attempt to construct a legal framework of accountability for moral obedience under authority structures acknowledged the findings of the social sciences concerning the

construction of individual autonomy under authority structures. It acknowledged the obstruction of the individual's perception of own moral autonomy under authority structures, which, furthermore, may or may not be physical or legal (i.e. physical force/punishment and/or prosecution for not obeying orders). It also acknowledged that individuals under such circumstances act morally, politically and legally "correct" according to the norms and laws of the society at the time and that they therefore cannot be expected to have known the illegality of their acts. Moreover, individuals acting under obedience tend to have a subjective view that their acts are legitimate and therefore that they are not accountable for them (since the authority under which they are acting has effectively limited their experience of themselves as morally autonomous agents).

The implication for accountability of the Argentine Due Obedience Law was that it managed to target those most responsible under such circumstances, i.e. those who acted in excess of their expressly ordered commands and those who held a position which allowed for discretionary authority (i.e. decision-making), or who clearly knew the orders to commit certain atrocities to be illegal. This framework for holding individuals who act under strict authority structures accountable is thus, when compared to the Nuremberg model, more realistic with respect to the problems posed by due obedience.

The Argentine experience of the real, physical threat of a military coup and political backlash also illustrate the need for political compromise between the old regime and the new in order to ensure a peaceful social transformation in transitional states. Whereas the Nuremberg model requires prosecution and punishment *exclusively* as means to accountability, recent transitional justice practices have developed other non-retributive means of accountability, i.e. conditional amnesty accompanied by a truth process.

The following chapter will raise the question whether punishment as a means to accountability could be achieved via other (non-punitive) means. This will require an analysis of the dominant positions on transitional justice according to the basic criteria for holding individuals accountable as investigated in Chapter One.

Chapter Four

Transitional Justice and Conditional Amnesty as Non-retributive Means to Justice

4.1 Amnesty and Transitional Justice

This chapter will investigate the practical and political context in which amnesty has been used by transitional states in the last three decades as well as the debate in transitional justice and international relations literature concerning the objectives of dealing with past mass gross human rights violations in relation to the need for justice and human rights.

The recent developments of conditional amnesty together with truth processes suggest that transitional states seek non-punitive means to accountability as a means to overcome the practical and political obstacles to prosecution and punishment. *However, it is not clear whether or in what sense conditional amnesty achieves a measure of accountability, or whether this is compatible with the accountability sought through prosecution and punishment.*

In order to answer this question, we need to clarify the criteria and objectives of accountability in general. Though this has not been directly addressed, there is a considerable body of work by scholars in the field of international law and transitional justice on how to reconcile the tensions between the international obligation to hold perpetrators accountable for gross violations of human rights and the possible need to accommodate peace and stability in transitional contexts²⁹. There are three main positions in this discussion: 1) The Prosecution and Punishment Position, 2) The General Amnesty Position and 3) The Truth Process Accompanied by Amnesty Position.

Against the background of this debate we may thus attempt to formulate a normative framework in the ethos of a liberal-democratic worldview which may serve as a basis for assessing the level and degree of accountability sought through the South African amnesty in Chapter Five.

²⁹ The main scholars in this debate are: Alex Boraine (2000); André du Toit (2000), Pricilla Hayner (2001); Carlos Nino (1996); Diane Orentlicher (1995); Steven Ratner and Jason Abrams (2001); Naomi Roht-Arriaza (1997); Ronald Slye (2002); Paul Van Zyl (1999) and Charles Villa-Vicencio and Erik Doxander (2003).

Thus the focus of this chapter will be threefold. First, it will clarify the practical, political and moral obstacles to prosecution and punishment in post-conflict transitional contexts. Secondly, it will distinguish between three different types of amnesty and analyse how the scope and criteria of amnesty compare to the basic criteria of holding individuals accountable. Thirdly and finally, this chapter will outline the main positions in the transitional justice and international law literature which address the accountability objectives for transitional states in the aftermath of mass gross human rights violations. This will provide a normative framework for accountability objectives for transitional states in which prosecution and punishment is not the only means of accountability, i.e. justice needs in transitional states.

4.2 Amnesty and the Obstacles to Prosecution and Punishment

“Amnesty” is a sovereign act of oblivion granted to perpetrators guilty of past offences (De Zayas, 1992:148). Historically, amnesty is a relatively uncontroversial legal mechanism by which an offender is granted exception from punishment for the offence of which he or she is guilty³⁰ (Slye, 2002:174). Amnesty has been used for various purposes throughout history and has often been employed both at the start of and during wars in order to recruit troops and at the end of wars in order to cultivate peace and reconciliation (Slye, 2002:174). E.g. amnesty clauses have been frequently found in peace treaties, such as the Westphalia Peace of 1648 and the Treaty of Peace and Amity between Great Britain and France of 1814 after the Napoleonic wars, and signify the will of the parties to apply the principle of *tabula rasa* to past offences (De Zayas, 1992:148 – 149). Thus, amnesty has played an important role in self-determination as it expresses the will of a sovereign to distance itself from past atrocities. This is also expressed through the royal or “divine” pardon of crimes, which is the sole prerogative of the sovereign (De Zayas, 1992:149).

An amnesty forecloses punishment and thus *retrospectively* regards past crimes as void, which, in the case of a general amnesty, effectively annuls the crime. Conversely, a pardon

³⁰ There are important differences between different kinds of amnesty, which will be discussed in greater detail in the next section, e.g. the distinction between general amnesty (providing immunity for all wrongful acts), limited amnesty (providing immunity only for some, e.g. politically motivated offences) and conditional amnesty (limiting the number of offenders who are granted amnesty on condition that certain conditions are met) (De Zayas, 1992:148).

which spares a convicted offender from prosecution is *prospective* by only annulling the sanction (punishment) and not the offensive action (Orentlicher, 1995:410). Thus, some international law analysts argue that because amnesty annuls the offence it is more objectionable than a pardon, which only annuls the punishment of the offender after he or she is found guilty (Orentlicher, 1995:410).

The idea of amnesty is the opposite of the notion of the just punishment of offenders (De Zayas, 1992:148). However, there are three major obstacles to prosecution and punishment as a means of achieving individual accountability for gross human rights violations:

1. *Political constraints* related to the need for peace and stability to ensure the transition to a new democratic regime.
2. *Practical constraints* related to lack of legal and material resources required for prosecution of human rights violations.
3. *Moral choices* related to the political will and moral choices societies make in choosing a form of redress of their violent past.

4.2.1 *Political Constraints*

The need for peaceful coexistence in post-conflict societies among divided perpetrator and victim/survivor populations creates a moral and political barrier to retributive processes due to the feared antagonistic effect prosecutions may have in a society already conflict-ridden and in which the divide between guilty and innocent is blurred (Morris, 1997:30; Van Zyl, 2000:43; Zalaquett, 1995:4).

In a transition to a new regime there is often a need to share political power with the previous responsible perpetrators, military or governors who are still in positions of relative power and are needed to ensure a stable transition but who also were responsible for ordering and/or carrying out mass human rights violations under the previous regime. This makes prosecution an unviable option (Morris, 1997:30; Nino, 1995:418).

Argentina and South Africa are two examples of this dilemma. In the Argentine transition the threats of a military insurrection was a major obstacle to prosecuting perpetrators of gross

human rights violations committed under the former military regime³¹ (Morris, 1997:30). In South Africa threats from the former military to withdraw its support during the negotiated settlement placed considerable constraints on the prospects for possible prosecutions of perpetrators (Morris, 1997:30).

4.2.2 *Practical Constraints*

A second obstacle is the practical and legal resources required to implement the prosecutorial process of a large number of perpetrators (Morris, 1997:30). In the context of large scale atrocities of human rights, not only are a large number of perpetrators involved but there is also many degrees of involvement of direct and indirect contributors of actual events and actions. Prosecuting every individual involved poses not only practical difficulties but also requires extensive financial, physical and human resources, which are scarce in war-torn or exhausted post-conflict societies (Morris, 1997:30). The genocides in Rwanda and the former Yugoslavia in the early 1990s illustrate the economical and practical impossibility of trying tens to hundreds of thousands of cases of vast numbers of gross human rights violations (Rosenberg, 1999:352).

Besides the political risk of a revolt that may overturn the efforts to call perpetrators to account for their past deeds, post-conflict societies seldom have a functioning judiciary equipped to prosecute human rights abuses (Young, 2002:433). A strong argument against an absolute obligation on states to prosecute perpetrators of human rights violations is, therefore, that prosecution may undercut the very efforts to establish a justice system needed to uphold and protect human rights in the future (Slye, 2002:184; Nino, 1995:418).

4.2.3 *Moral Choices*

Transitional states are often faced with serious moral dilemmas, which require them to make crucial choices. Thus, accountability measures are conditioned by national will and priorities (Morris, 1997:30). While, in terms of the Nuremberg precedent, international law makes it

³¹ For examinations of the Argentinean transition and resulting amnesty, see Nino (1995) and Zalaquett (1995).

clear that states do have an international duty to prosecute breaches of human rights, national prosecution is subject to the initiative of the sovereign to take the necessary steps to recognise that such breaches took place and to take steps to investigate, adjudicate and eventually prosecute the perpetrators (Young, 2002:434).

The means by which states seek accountability are also conditioned by the values the society wishes to emphasise. E.g. in the case of the Spanish transition from the dictatorship of General Franco for instance, amnesia (forgetting) and amnesty (forgiving) were valued above holding the perpetrators of the past violations accountable (Aguilar, 2001:98)³³. In South Africa, reconciliation and restorative justice were valued above a purely retributive objective of dealing with the past (Hayner, 2001:39).

In order to answer the question whether conditional amnesty may be compatible with the objectives of transitional justice, it is also necessary to distinguish between different types of amnesty.

4.3 Three Types of Amnesty

Three main types of amnesties can be distinguished according to the degree and level of accountability achieved³⁴:

1. *General Amnesty and Blanket Amnesty*
2. *Conditional Amnesty and Partial Amnesty*
3. *Accountable Amnesty*

³³ Also see Andrew Rigby's treatment of the Spanish transition in "Amnesty and Amnesia in Spain" pp. 73 – 79 in *Peace Review: A Transnational Quarterly*, Volume 12, No. 1, March 2000.

³⁴ The following typology is a further development of the rough typology of amnesty given in footnote 31.

4.3.1 *General Amnesty and Blanket Amnesty*

General and blanket amnesties are characteristic of the kind of amnesty granted in Latin American countries in the late 1970s and early 1980s and the primary example is the Chilean amnesty passed in 1978 (Slye, 2002:249; Young, 2002:441).

A common feature of general and blanket amnesties is that they are concealed and anonymous and typically self-appointed by a regime that has been involved in long-standing human rights abuse (Slye, 2002:240). Thus, the purpose is to ensure that prosecutions are barred once the regime has relinquished its power (Young, 2002:442). These kinds of amnesty are also typically applied in a widespread manner, that is, they contain no procedural requirements and apply to the beneficiaries through a group characteristic, as opposed to identifying individuals, and indiscriminately cover a vast array of different kinds of crime over a long period of time, regardless of the beneficiaries' motives or objectives in committing the crimes (Young, 2002:442; Burke-White, 2001:482; Slye, 2002:241).

Characteristic of general and blanket amnesties is also that they involve an indemnification, which in effect annuls the crimes as well as absolves the perpetrators from punishment. They preclude the further criminal as well as civil liability of the recipients and provide little or no information concerning the past abuses (Slye, 2002:241). Such amnesties may help diminish or end a violent conflict (thus, they may be the result of a political compromise ending violent conflict), but they are not seen as a genuine expression of a will to come to terms with the past as they do not depend on democratic consent or include any official initiative to establish investigations about the past crimes or provide any relief to the victims (Slye, 2002:241).

In so far as general or blanket amnesties discard any accountability process there is therefore no sense in which these amnesties could be compatible with accountability (Young, 2002:443; Slye, 2002:240³⁵; Burke-White, 2001:482).

³⁵ Slye names this category "amnesic amnesties" (Slye, 2002:240).

4.3.2 *Conditional Amnesty and Partial Amnesty*

Unlike blanket or self-amnesties, compromise amnesties are restricted (that is, made conditional upon fulfilment of certain requirements or partial, i.e. only covering certain crimes). Conditional and partial amnesties can also be the result of a political compromise (Slye, 2002:241).

Conditional and partial amnesties are thus qualified in relation to their restrictions as to the acts (e.g. exhibiting a particular motive) that they cover and/or to the categories or groups of people to which they apply (Slye, 2002:242). Such qualifications usually have the benefit of providing some knowledge of past crimes and some acknowledgement of their existence, for instance through an officially appointed investigatory truth commission, though the investigations are usually general and not focused on individual incidents or individual perpetrators and victims (Slye, 2002:241).

Conditional and partial amnesties may not be immune to civil suits and the prosecution of those found responsible for acts not covered by the amnesty (Slye, 2002:242). Victims may, therefore, legitimately object to amnesties in such cases and pursue and seek prosecution or some form of minimal relief (Slye, 2002:242).

Since this type of amnesty provides and accompanies official initiatives to remedy the consequences in the form of investigatory process and is limited in scope, it achieves some remedy to victims and, in the case of partial amnesty, is discriminating about holding some perpetrators accountable for the past crimes (Slye, 2002:242 – 243). An example of this is the Argentine amnesty in 1985, which only sought to prosecute the highest strata of military leaders of the previous military dictatorship through the Due Obedience Law, which was passed in order to excuse the obedience to orders by lower-grade soldiers³⁶ (Burke-White, 2001:493).

³⁶ See Chapter Three section “3.5 The Argentine Due Obedience Law: A Legal Framework of Accountability for Moral Obedience under Authority”.

4.3.3 *Accountable Amnesty*

Accountable amnesty is the most narrowly defined conditional amnesty. While bearing similar characteristics of conditional amnesties, accountable amnesty is a type of amnesty that achieves some level and form of accountability by imposing a form of public disclosure on the recipients concerning their past crimes. Accountable amnesties are limited in scope with respect to both the crimes that they cover and the recipients to which they apply (Slye, 2002:245). Recipients thus qualify for amnesty through individual applications for non-personal crimes subject to the scrutiny and adjudication of a quasi-legal committee in a public procedure. The identity of the perpetrators and details concerning their offences therefore become known. Amnesty for disclosed crimes is also limited so that the applicant may be subject to public and/or civil prosecution in the case that their application is declined (Burke-White, 2001:486).

This type of amnesty therefore provides more than minimal relief to victims (Slye, 2002:245). Accountable amnesties are created democratically and have a high degree of national consent and participation (Burke-White, 2001:493). Their purpose is to facilitate a peaceful transition to democracy and/or facilitate a transition to a more human rights friendly regime (Slye, 2002:246). Hence, they are aimed at achieving some form and level of accountability through a public investigatory process with a high degree of involvement by the public and victims of the crimes concerned, who are given space to question and challenge the amnesty (Slye, 2002:245).

This form of amnesty also provides some concrete form of reparation to the victims, for instance in the form of payment by the state (Slye, 2002:245).

The most prominent example and the only one of its kind that comes close to qualify as an accountable amnesty is the South African amnesty. Provision for it was made by South Africa's Interim Constitution of 1993 and it was consolidated as the "Promotion of National Unity and Reconciliation Act" by the new Parliament in 1994 (Burke-White, 2001:494, Slye, 2002:246). Although accountable amnesties do not formally punish their recipients, they provide a different kind of accountability on the basis of the public acknowledgement they demand of the responsible perpetrators. This offers an alternative to the traditional approach of retributive justice as a means of accountability (Slye, 2002:246).

The following section will investigate the three main positions in transitional justice literature regarding the objectives of accountability for transitional states after mass gross human rights violations. For the purpose of this dissertation, they are called:

1. *The Prosecution and Punishment Position*
2. *The General Amnesty Position*
3. *The Truth Process Accompanied by Amnesty Approach*

4.4 The Transitional Justice Literature: A Normative Framework for Justice in Transitional States

This section will investigate these three positions with the aim to analyse the implications of each in terms of three basic criteria for holding individuals accountable (as investigated in Chapter One). The basic criteria are:

1. *Relational*: a person is held accountable to someone or something, implying either an authority or rule of law
2. *According to some criteria*: a person is held accountable either in terms of his or her delegated authority or in terms of a rule of law procedure
3. *Sanction*: holding a person accountable involves a possible sanction.

4.4.1 The Prosecution and Punishment Position

4.4.1.1 The Nuremberg Precedent

In addressing gross human rights violations, the prosecutorial model aims to achieve retributive justice through three concrete means: investigation, adjudication and punishment (Slye, 2002:186).

Investigation, involving the ascertaining of truth or factual knowledge relevant to the crime, adjudication as the process by which an individual's responsibility for the offence is

established, and punishment as a means by which the offender is sanctioned represents three main objectives: truth, responsibility and accountability (Slye, 2002:187).

In terms of our previous analysis of the basic criteria for holding individuals accountable, the prosecutorial model is relational in that it holds individuals accountable to the rule of law and works in accordance with the procedural requirements of due process in adjudicating responsibility. Thirdly, it also involves a sanction (punishment) in cases where an individual is found guilty of the charge of transgressing the law. Thus, the prosecutorial model fulfils all three basic criteria for holding individuals accountable to the law (Orentlicher, 1995:384). (One of the principal scholars who has taken the prosecution and punishment position is Diane Orentlicher (1995:375).)

4.4.1.2 *Lustration / Purges*

Alternative means, such as deprivation of political rights, excluding employment in public office (purges/lustration), deprivation of pension rights, and subjecting those perpetrators with civil responsibilities to civil suits, are lesser degrees of (and alternatives to) punishment, (Zalaquett, 1995:13, Mendez, 1996:230). However, in terms of the three basic criteria of accountability, lustration does not hold individuals accountable to the rule of law in which an accused can defend his or her case. Widely used in post-communist regimes in Eastern Europe after the end of the Cold War, lustration was used as a simple mechanism of sanctioning the previous officials under the communist rule by indiscriminately barring them from employment in the state (Rosenberg, 1999:348). E.g. in some parts of the former East Germany, women who had dished out food in the Stasi cafeteria would be ineligible to sweep streets (Rosenberg, 1999:348).

4.4.2 *The General Amnesty Position*

4.4.2.1 *A Political Compromise*

The general amnesty position is divided between (a) the political compromise-objective and (b) the practical compromise-objective. The political compromise-objective does not aim to

achieve accountability but argues that a political compromise with the previous authoritarian regime that involves a blanket or general amnesty is the price that has to be paid in order to make way for a peaceful transition to democracy when such a compromise is called for (Nino, 1995:418). One of its central proponents is the late Argentine professor Carlos Nino (1995).

The general amnesty position argues that, in transitions where the previous regime retains substantial political and military power, the political transition to a democratic regime should be prioritised above retributive justice, which is likely to trigger a political backlash (Nino, 1995:418). Fundamentally, the general amnesty position prioritises other values than the prosecutorial model, i.e. reconciliation as a means of bringing together different opinions in a political system such as a democracy is valued above retribution as a means of punishing previous wrongs according to the rule of law.

According to the general amnesty position, democracy is essential for the future protection of human rights and as a foundation for the establishment of rule of law as a mechanism to prevent violent means of solving conflict (Nino, 1995:419). This position thus values political transformation as a means to rule of law, as opposed to the rule of law as a means to political transformation (the prosecutorial position).

Spain is the only example where a general amnesty and amnesia granted for the gross human rights violations committed at a large scale under the dictatorship of General Franco was generally approved and accepted by the society as a whole and in which the lack of accountability for the previous crimes did not cause any serious disturbances to the democratic transition (Aguilar, 2001:92 – 118).

However, general amnesty forecloses the possibility of civil suits and impedes investigation into past violations. It also rules out an adjudication process whereby responsible perpetrators may be identified (Burke-White, 2001:482). In addition, a general amnesty provides the perpetrators with legal immunity against further attempts at holding them accountable. Thus, since blanket and general amnesties preclude prosecutions of the worst and most serious violations of human rights as well as of the most responsible perpetrators, they do not fulfil any of the three basic criteria for holding individuals accountable (Slye, 2002:187; Van Zyl, 2000:53; Cassel, 1997:219; Zalaquett, 1995:9).

Post-conflict societies often do not have the resources needed for an immediate, full monetary compensation to victims (Morris, 1997:30). On the other hand, commitment towards the establishment of institutions dedicated to building a human rights culture, such as educational institutions and a general health-care system, may bypass the identificatory and definatory problems of direct monetary compensation and target the more general population of beneficiaries and systemised victims. These commitments value e.g. the importance of economic stability and equality above that of targeting the breach of specific individual rights. Mahmood Mamdani (1998:13) is one of the scholars who has pointed out that, in societies that have been deeply engrossed in long-term political, social and economic inequality, accountability measures need to address the wider population of beneficiaries and victims of structural violations of basic human rights instead of viewing human rights in isolation of the wider social and economic context. An example would be the pass laws and forced removals of ethnic groups during the South African apartheid regime.

Reparation is thus seen as a crucial component of both the restorative and preventative objectives of accountability measures in the sense the restoration of previous inequalities is more easily achieved in a socially and economically equal society and it would be better equipped to prevent future conflict (Zalaquett, 1995:10 – 11; Slye, 2002:245).

Uruguay's transition in 1984 is an example in which a peaceful transition to civilian rule from the previous military dictatorship was the paramount objective (Zalaquett, 1995:28). The Colorado Party, with Julio Sanguinetti inaugurated as new President in 1984, granted the old regime general amnesty. This is similar to the acceptance of amnesia as in Spain, although in Uruguay the gross human rights violations were acknowledged through reparative measures and laws passed to facilitate the return of thousands of Uruguayans in exile, giving back the former jobs of people who had been dismissed for political reasons and reimbursing former political prisoners for imprisonment (Zalaquett, 1995:28 – 29).

4.4.3 *The Truth Process Accompanied by an Amnesty Approach*

4.4.3.1 *A Truth Process Accompanied by General Amnesty*

The truth process accompanied by an amnesty argues for a restorative justice approach to past gross human rights violations. This approach argues that the need and right of victims or victims' families to know the truth is central to the justice needs in transitional states and that an investigative public procedure is more important and better satisfies the particular justice needs in transitional states/post conflict societies after mass gross human rights violations (Zalaquett, 1995:6 – 9). Such an investigative public procedure would be a way of morally sanctioning and imposing the norms of the society on past wrongdoers by making a public redress of the wrongs committed.

The Chilean human rights activist and scholar, José Zalaquett, is one of the foremost advocates of a “truth and justice as far as possible”-approach (Zalaquett, 1995:8). He argues that knowing the truth and redressing past wrongs are restorative in the sense that these functions attempt to restore moral dignity to those victims or victim's families who previously suffered deprivation of basic human rights (Zalaquett, 1995:6 – 7). Truth about the past provides a foundation for understanding and reconciling divisions among people, cultures and ideologies. The strongest argument of this approach is that a quasi-judicial official and public investigation and adjudication of crimes that exclude punishment as a sanction may better suit the justice needs in transitional states coming out of a past of vast scale gross human rights violations than prosecution and punishment (Slye, 2002:246; Zalaquett, 1995:12 – 13; Nino, 1995:419).

When crimes under a previous regime which denied or kept them secret become public knowledge and officially acknowledged as truth, the truth ensures that future denial is no longer possible³⁷ (Zalaquett, 1995:7).

³⁷ An inquiry into the facts about how crimes were committed also exposes the lines of authorisation, details of planning, and how orders were made and executed which is a crucial prerequisite to a fair adjudication of responsibilities, understanding of obligatory forces (where crimes were committed under orders) and unravelling of the power of secret networks such as death squads, which often function on the sideline of authorised crime under repressive regimes. E.g. former South African President F.W. de Klerk denied that he ever had any knowledge of the existence of the secret police death squad at Vlakplaspas under the Apartheid regime (Gottschalk, 2002:250).

However, the truth process accompanied by a blanket or general amnesty nevertheless does not fulfil the three basic criteria for holding individuals accountable. In so far as a truth process achieves some of the fundamental justice needs of a transitional state and provides some relief to victims in terms of “truth findings,” it may achieve some of the basic requirements of justice in such societies/states. However, as argued above, it is essential that the truth process is officially acknowledged and made public for it to achieve the targeted objective of the moral restoration of victims’ dignity (Zalaquett, quoted in interview by Roht-Arriaza, 1999:197).

4.4.3.2 *A Truth Process Accompanied by Conditional Amnesty*

A truth process accompanied by a conditional amnesty, on the other hand, may claim to achieve some form of accountability by holding perpetrators accountable to someone (thus, fulfilling the relational criteria). This would be achieved by the perpetrators having to apply individually to a quasi-judicial jury and holding them accountable according to some set of a quasi-judicial conditions, e.g. fulfilling certain requirements, such as full disclosure of the acts for which amnesty is applied for (as was the case in the South African conditional amnesty). When, in addition, this process is public and officially sanctioned, it may be argued that it also to some extent achieves the sanctioning of the wrongdoers through moral condemnation. This, however, presupposes that the community in which the wrongdoers are being held accountable holds the same moral values as the quasi-judicial body adjudicating the responsibility for their past crimes. A (public and officially sanctioned) truth process accompanied by a conditional amnesty restricting amnesty to individual perpetrators and holding them accountable according to some criteria by a quasi-judicial body does comply with the three basic criteria for holding individuals accountable in so far as it incurs a *possible* sanction. Thus, in so far as holding individuals accountable requires a sanction, the objectives of this approach are comparable to the prosecution and punishment position.

The restorative justice approach argue that acknowledgement of past crime and the suffering of human indignity of victims is an important way in which perpetrators may be held

accountable in a highly unjust society where victims formerly were denied basic dignities of fundamental human rights³⁸ (Simpson, 2002:230; Du Toit, 2000:123).

Finally, this chapter has argued that there are serious political and practical obstacles for transitional states to prosecute and punish past perpetrators for mass gross human rights violations committed under the previous authoritarian regime. These obstacles confront societies with crucial moral choices when attempting to hold these perpetrators accountable and also safeguard a peaceful transition to a democratic regime and human rights. According to our previous analysis of the basic criteria of holding individuals accountable in Chapter One, the Prosecution and Punishment Position and the Truth Process Accompanied by Conditional Amnesty are the only ones that make it possible to hold individuals accountable given the specific criteria as discussed above.

This chapter has observed four main objectives from these three positions, which act as a *normative framework* of accountability objectives for transitional states:

1. That the policy adoption of accountability measures *satisfies popular sovereignty*. (Thus, that it carries legitimacy. E.g. this rules out self-appointed amnesties (Slye, 2002:245; Zalaquett, 1995:9; Van Zyl, 2000:52; Cassel, 1997:219)
2. That past perpetrators be held individually accountable to a judicial or quasi-judicial officially sanctioned body according to just criteria, which makes possible the *adjudication of responsible individuals*. (Slye, 2002:245; Van Zyl, 2000:53; Cassel, 1997:219; Zalaquett, 1995:6)
3. That the previous mass gross human rights violations be investigated in order to bring out disclosure of previous crimes that have previously been denied, and that the previous governments' record of crimes be made *public knowledge and officially acknowledged*. (Slye, 2002:245; Van Zyl, 2000:53; Cassel, 1997:219; Zalaquett, 1995:6)

³⁸ Such acknowledgement may achieve the societal need for moral redress and reconciliation, however where such measures do not include legal redress they forsake the victim's right to legal protection of human rights under international law (Slye, 2002:182). Thus, a strong argument has been made in favour of a requirement for states to provide the victim a chance to challenge and question the decision to grant the perpetrator immunity for the offence (Slye, 2002:245).

4. That *reparation measures* or compensation be offered to survivors, victims or victims' families. This requirement also involves the restoration or establishment of institutions that ensure equal representation, protection of rights etc. Such measures, although they do not specifically target former disadvantaged groups, are specifically advantageous to weakened groups in the society in general. These measures are particularly advised when deprivation of fundamental human rights and social and economic rights have been denied to a part of the population over a long period of time and caused deep inequalities in a society. (Slye, 2002:245; Van Zyl, 2000:53; Cassel, 1997:219; Zalaquett, 1995:10)

The final chapter will investigate to what extent and level the South African conditional amnesty process is comparable to the prosecutorial model.

Chapter Five

Conditional Amnesty and Accountability: The South African Case

5.1 The Significance of the South African Amnesty

In the light of the Nuremberg precedent, the South African amnesty is the latest and most controversial amnesty law. The South African criteria for amnesty were based on precisely the opposite premise to that of the Nuremberg precedent. One of its central *requirements* for amnesty was that the applicant had to have acted in the execution of an order, or on behalf of or with the approval of a political organisation, institution, liberation movement or the former state of which the applicant had been a member or a supporter (Republic of South Africa, Act No. 34 of 1995, Sec. 20 (2) (3) (e)).

In doing so, the South African government accepted due obedience as a legitimate excuse for gross human rights violations if the perpetrator could prove that he or she did not act with moral autonomy but in line with an official political ideology, motive and policy in committing the offence.

Compared with previous truth commissions, the South African TRC and amnesty process excels in four particular areas: its democratic crafting, its public nature and process, its investigative and quasi-judicial powers, and its integrated goal of reconciliation (Hayner, 2001:36-39), providing the most consistent alternative to the traditional framework of retributive justice (Popkin and Bhuta, 1999:110). These aspects of the South African amnesty has made it a reference point for a different kind of amnesty process, which is not a general or blanket amnesty but individual and conditional on full disclosure involving a public process and public hearings for victims (Hayner, 2001:33).

The special significance of the SA amnesty is thus twofold: on the one hand the innovation of an individual amnesty conditional on full disclosure raises the prospect of an accountable amnesty, while on the other hand its use of amnesty, and more specifically the requirement of a political objective, goes directly against the Nuremberg model. For these reasons the South African amnesty provides an especially relevant test case for the main problem of this thesis, i.e. whether or in what sense amnesty can be comparable with accountability.

This chapter will first briefly sketch the transitional context of the South African amnesty and then examine the goals, functions and objectives of the South African Truth and Reconciliation Commission (TRC), which were established by the Promotion of National Unity and Reconciliation Act (Republic of South Africa Act No. 34 of 1995, hereafter referred to as “the TRC Act”) in 1995 with the mandate to grant amnesty to perpetrators of gross human rights violations for the past 34 years.

More specifically, the following analysis will examine the significance and objectives of the South African amnesty process in terms of the TRC’s own interpretation as stated in its Interim Report of 1998 and the Supplementary Volumes, including the findings and recommendations of the Amnesty Committee as handed to President Thabo Mbeki in March 2003. The TRC’s own interpretation is fundamental to understanding the reasons and goals of the South African amnesty and, in turn, how accountability was thought to be achieved.

The final section of this chapter will review the TRC amnesty criteria, discuss its implications for individual accountability, and consider whether and to what extent the criteria set by the South African amnesty can comply with the basic criteria for holding individuals accountable and can fulfil the justice objectives required by transitional states/post-conflict societies in the aftermath of vast scale gross human rights violations as discussed in Chapter Four.

Thus the focus of this chapter is:

- 1. What is the significance of the South African amnesty in relation to individual accountability for mass gross human rights violations and due obedience to orders**
- 2. What were the main objectives of the amnesty process (as conducted by the Truth and Reconciliation Commission)**
- 3. To what extent, level and degree did it achieve individual accountability that may be comparable to prosecution and punishment**

First however, a historical background leading up to the political settlement of the apartheid struggle will be given as a starting point from which the goals, objectives and finally criteria of the amnesty can be discussed and analysed.

5.2 The Transitional Context: A Political Settlement

The granting of amnesty in South Africa in 1994 for the human rights violations that took place under 40 years of racial discrimination, for the atrocities committed by both the former apartheid regime and the opposition movement needs to be understood in the context of the political settlement which paved the way for the creation of a new Constitution based on democratic rule (Van Zyl, 1999:649).

White domination had prevailed for more than 200 years since the colonial conquest of the South African land, beginning with the first migration of white settlers to the Cape in the mid-17th century. White supremacy and minority rule was further entrenched after Union in 1910 and significantly through the National Party's apartheid policy that legalised racial separation after 1948 (TRC Report Vol. 1, Ch. 2, 1998:40; Boraine, 2000:141).

Apartheid systematised racial discrimination through the deprivation of the basic political, social and economic rights of the majority non-white population with detailed regulations restricting their movement, education, work, residence and personal relationships (Boraine, 2000:141; TRC Report Vol. 1, Ch. 2, 1998:30 - 32).

By the late 1980s and the early 1990s, the liberation movements commanded the support of the overwhelming majority of South African citizens. In addition, the liberation struggle gained international support for the call for democracy and as a result South Africa was subjected to a concerted international campaign of economic sanctions, as well as athletic, academic, scientific and cultural boycotts (Van Zyl, 1999:649).

Nevertheless, the anti-apartheid resistance movement and liberation struggle were unable to overthrow the apartheid state as it could be contained, for the most part, by security forces (Van Zyl, 1999:649). Consequently, it took the ruling minority and the majority a four year long negotiation process convened through the CODESA (Convention for a Democratic South Africa) in order to reach the final settlement of the Interim Constitution in 1993. (McGregor, 2001:33).

Outsider observers have called the four-year South African negotiation process, which resulted in the democratic elections in 1994, “a miracle” (McGregor, 2001:33). However, to South Africans the transition was characterised by years of bargaining in the context of ongoing bloody violence, the eruption of which into full-scale civil war was only avoided due to the unique balance of power or stalemate between the anti-apartheid resistance movements and the former government (McGregor, 2001:33; Van Zyl, 1999:648).

The nature of the South African negotiated transition was thus that of a political compromise between a powerful minority regime which did not harbour a genuine will to achieve democracy and the mass liberation movements which had not been successful in removing the previous regime from power by military force (McGregor, 2001:33; Van Zyl, 1999:649). Based on mutual dependency, the two sides arrived at a commitment to a political settlement that emphasised democracy and reconciliation as the overarching cornerstones for a future of coexistence (McGregor, 2001:34).

According to Samuel P. Huntington’s worldwide empirical study of different types of democratic transitions, three typologies can be made: “transformations,” “replacements” and “transplacements” (Huntington, 1995:66). According to Huntington’s study, the implications for transitional justice suggest that in “replacements,” where an overthrow of a regime takes place, successful prosecutions of the former regime for their atrocities is made possible,

whereas in “transplacements,” which involve a negotiated settlement, the option of prosecutions is usually blocked due to the balance of power, and the transition to democracy is thus typically facilitated through political deals on amnesty (Huntington, 1995:81)³⁹. Thus, according to Huntington’s study (1995:81), if we compare the political transitions within which the South African TRC (“transplacement”) and the Nuremberg (“replacement”) were located, the options and possibilities for successful prosecutions were thus much greater in the Post-World War Two context than after the political settlement in South Africa.

Amnesty also was a necessary component of the South African negotiated settlement: prosecution of perpetrators of human rights violations amongst the previous government and its military and police was impossible as they included the personnel needed to implement prosecutions and to safeguard free elections (Van Zyl, 1999:650). Without securing the agreement of the military and security forces of the former regime, it would not have been possible to proceed to the founding democratic election in 1994. However, these security forces included many of the perpetrators of political atrocities, and they required amnesty as the price for agreeing to safeguard the elections (Boraine, 2000:143). Thus the Interim Constitution of 1993 recognised that amnesty for the past human rights abuse was necessary in order to secure a (peaceful) transition to the new democratic elections and to bring all sides of the previous conflict into the nation-building enterprise (Van Zyl, 1999:649).

According to Rosenberg’s distinctions between “a regime of criminals,” “a criminal regime” and “ethnic conflict,” South Africa profoundly harboured a mix of all three elements⁴⁰, although the apartheid system essentially had the characteristics of a criminal regime, which was institutionalised and required widespread societal compliance (Rosenberg, 1999:339, 349 and 352). Thus, in the case of dealing with a prior *regime of criminals* with relatively clear-cut distinctions between perpetrators and victims, the question at issue would primarily be that of *individual* accountability (of the individual perpetrators), which may also satisfy the

³⁹ In “transformations” the authoritarian regime is stronger than the opposition and thus plays the decisive role in ending the regime and transforming it into a democratic system. However, the opposition might gain strength in the process or at least exercise some amount of pressure to liberalise the state. Thus, the distinction between “transplacements” and “transformations” is fuzzy (Huntington, 1995:65). Hence, according to Huntington’s study the option or possibility of successful prosecution of the authoritarian regime is not greater in “transformations” than in “transplacements” (Huntington, 1995:81). In so far as the liberation movement in South Africa was unable to overthrow the apartheid government and the apartheid government initiated talks with liberation leader Nelson Mandela while still in prison and the liberation movement thus exercised a great amount of pressure during the democratisation process, the South African transition also bears elements of “transformations”.

⁴⁰ See a brief introduction of Rosenberg’s authoritarian regime classifications in Chapter One under section 1.1, “The Quest for Accountability after Gross Human Rights Violations.”

needs of victims. However, in the case of a *criminal regime* where the distinctions between perpetrators, victims, collaborators, bystanders and beneficiaries are not so clear-cut, it is not so certain that it would be appropriate to have only a perpetrator-focused accountability. In this case it may be more appropriate to extend the quest for accountability beyond individual perpetrators (to possibly include collaborators, beneficiaries etc) and devise other means to deal with the truth needs of victims.

The challenge for the founders of the new South African Constitution was thus to deal with a past in which violence was widespread, deep as well as targeted at specific groups divided along complex racial, ethnic and political lines (Rosenberg, 1999:352 – 353). The appropriate approach therefore required a means of accountability which would concern the wider society of responsible bystanders, collaborators and beneficiaries as well as the particular perpetrators involved in heinous crimes (Rosenberg, 1999:353; TRC Report, Vol. 1, Ch. 5, 1998:130).

Given the great number of political atrocities committed and covered up under Apartheid and during the anti-Apartheid struggle, there was a great need for the disclosure of the truth about these crimes (TRC Report Vol. 1, Ch. 5, 1998:128). On the other hand, the prosecution of the perpetrators (according to Rosenberg and Huntington's classifications) would not necessarily be the most effective way of establishing the truth about such atrocities; indeed, the threat of prosecution inhibited disclosures by the responsible perpetrators (TRC Report Vol. 1, Ch. 5, 1998:123). Since amnesty was part of the political settlement, the question was whether the amnesty process could be structured in a way that would facilitate the disclosure of truth about the atrocities by making this a condition for amnesty (TRC Report Vol. 1, Ch. 5, 1998:118). This resulted in a novel attempt to integrate accountability into an individualised and conditional amnesty process with a public truth process that would publicly disclose investigations, evidence and witness accounts of past violations.

Conditional amnesty was thus considered a middle path, or "the third way," between the options of the prosecutorial model of the Nuremberg Tribunal on the one hand and general amnesties allowing total immunity on the other (Boraine, 2000:141; Van Zyl, 1999:648; TRC Report Vol. 1, Ch. 5, 1998:118). This option, both in relation to the nature of the previous regime and the nature of the transition, was arguably a favourable way of optimising the possibilities for holding the perpetrators of past gross human rights violations accountable within the practical and political realities.

For our purposes, the relevant question is whether such amnesty conditional on full disclosure would amount to a form of accountability comparable to that sought by criminal prosecution. Thus the next two sections will investigate what exactly were the objectives, functions and specific criteria of the South African amnesty.

5.3 The Goals, Objectives and Functions of the South African Conditional Amnesty: Reconciliation, Truth and Accountability

The Interim Constitution of 1993 marked the beginning of a historical shift from the apartheid regime to a new democratic form of government based on the rule of law and equality of human rights. The Postamble of the Interim Constitution stated:

This Constitution provides a historic bridge between the past of a deeply divided society (...)

The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife in the past (...)

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 victimisation.

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.

(Constitution of the Republic of South Africa Act No. 200 of 1993 in Government Gazette, 1994:180)

Although the Interim Constitution did not state *how* amnesty was to be granted, it did provide the *objectives* of granting amnesty; namely “in order to advance ... reconciliation and reconstruction” (Constitution of the Republic of South Africa Act No. 200 of 1993 in Government Gazette, 1994:180). Thus, whereas the new Constitution established the foundation for a new liberal democratic legal and moral order based on equal human rights for all South African people, it left it to Parliament to provide “the mechanisms, criteria and procedures, including tribunals, if any” for amnesty (Constitution of the Republic of South

Africa Act No. 200 of 1993 in Government Gazette, 1994:182).

In 1995, the new democratically elected Parliament then specified these mechanisms, criteria and procedures with accountability as an evident objective by the adoption of the TRC Act.

The founders of the new Constitution emphasised the need to morally condemn the past injustices as well as the need for a future peaceful co-existence based on democracy and respect for equal human rights. This called for an accountability process that had elements of both a “forward-looking” as well as a “backward-looking” approach and which emphasised *restorative* as opposed to *retributive* means to reconcile the divisions of the past (see excerpt from the Preamble in the previous section) (TRC Report Vol. 1, Ch. 4, 1998:49).

1. Reconciliation

Reconciliation was thus viewed by the founders of the TRC as both a *process*, making reconciliation possible, and a *goal*, securing the foundation of a future based on respect for fundamental and equal human rights (TRC Report, Vol. 1, Ch. 5, 1998:106).

The objectives of the Commission shall be to promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past....⁴¹ (The TRC Act, Sec. (2) (3) (1))

Truth and accountability were primary means by which justice through reconciliation and peace among the people of South Africa could become possible. Thus, the TRC Act mandated the Commission the following:

2. Truth:

(To establish) as complete a picture as possible of the causes, nature and extent of the gross violations of human rights which were committed during the

⁴¹ The Truth and Reconciliation Commission stated further that its aim was to facilitate reconciliation as a restoration of the relationship between offender and victim at three different levels: at the inter-personal realm, at the local community realm and on a national level. The central focus of the restorative justice process of South Africa was nevertheless participation by the immediately affected parties; that is, the victim and the offender (TRC Report, Vol. 1, Ch. 5, 1998:107 – 108, TRC Report, Vol. 1, Ch. 5, 1998:126).

period from 1st March 1960 to the cut-off date [10th May 1994⁴²], including the antecedents, circumstances, factors and context of such violations, as well as the perspectives of the victims and the motives and perspectives of the persons responsible for the commission of the violations, by conducting investigations and holding hearings. (TRC Act, Sec. (1) (3) (1) (a))

To the objective of truth the Commission's objective was also to "establish ... and (make) known the fate or whereabouts of victims and by restoring the human and civil dignity of such victims by granting them an opportunity to relate their own accounts of the violations of which they are the victims, and by recommending reparation measures in respect of them" (TRC Act, Sec. (1) (3) (1) (c)).

3. Accountability:

(To facilitate) the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective and comply with the requirements of this Act. (TRC Act, Sec. (1) (3) (1) (b))

Finally, the Commission was set to compile the collected information in all three areas in a final report providing "as comprehensive an account as possible of the activities and findings of the Commission"⁴³ (TRC Act, Sec. (1) (3) (1) (d)).

For these three main purposes, the TRC was invested with special powers such as subpoena and search and seizure in order to comply with its objectives (TRC Act, Sec. (2) (5)). The three different main objectives (reconciliation, truth and accountability) were divided into three and carried out by three different sub-committees of the TRC, which were inter-dependent and together comprised the Commission:

1. The Human Rights Violations Committee

Objective:

Investigation of human rights violations

Role:

⁴² Actually the Postamble stipulated the cut-off date as 6 December 1993. This was later amended after some controversy.

⁴³ The TRC's findings were presented in a five-volume report and handed to President Nelson Mandela on the 29th October 1998.

“(I)nstitute the inquiries into gross human rights violations”; gather the information and receive the evidence and testimonies from victims, determine facts concerning such abuses and record allegations and complaints of gross violations of human rights” (TRC Act, Sec. (3) (14) (1)). The Human Rights Violations Committee was also made accountable to the overall Commission by being required to submit a comprehensive report of all its activities and findings (TRC Act, Sec. (3) (14) (2)). In cases where it found that a gross violation of human rights had taken place, it was responsible for referring the matter to the Committee on Reparation and Rehabilitation (TRC Act, Sec. (3) (15)).

2. The Amnesty Committee

Objective:

Adjudicate accountability and grant amnesty for gross human rights violations

Role:

Adjudicate and facilitate the granting of amnesty to persons who make full disclosure of all the relevant facts associated with a political objective and whose applications otherwise comply with the requirements of the Act (TRC Act, Sec. (4) (20) (1) (a) – (c)). The specific criteria for the granting of amnesty will be discussed in detail below.

3. The Reparation and Rehabilitation Committee

Objective:

Reparation and rehabilitation of victims

Role:

Consider matters referred to it (by the other committees and the investigative unit) concerning gross human rights violations and make recommendations which include appropriate measures for reparations to victims (TRC Act, Sec. (5) (25)). To this end the Reparation and Rehabilitation Committee’s role was to make findings regarding “any person who is in the opinion that he or she has suffered harm as a result of a gross human rights violation” (TRC Act, Sec. (5) (26)). Its activities, findings and recommendations were to be compiled in a comprehensive report submitted to the Commission, the implementation of which would depend on the consideration and enactment by Parliament (TRC Act, Sec. (5) (25)).

The TRC Act also set out the specific requirements for the procedure under which amnesty was to be granted. In accordance with the stipulation in the Postamble, amnesty was restricted to a specific time period (1st March 1960 –10th May 1994) and applied to politically motivated gross human rights offences where the Amnesty Committee was satisfied that the applicant had made full disclosure of the relevant acts. The names of the persons granted amnesty would be made public and, once granted amnesty, the successful applicant may not be held criminally liable for the act(s) for which he or she was granted amnesty⁴⁴ (TRC Act, Sec. (20) (3 – 7)).

Thus the three essential criteria for amnesty were: 1) individual applications, 2) political objective and 3) full disclosure.

1. Individual Applications:

Amnesty applied to individual applicants who had made sworn statements and applied by submitting by 14th December 1997 formal application forms concerning crimes committed within the time period of 1st March 1960 (the month in which the Sharpeville massacre took place, signifying the beginning of the armed struggle between the liberation movements and the apartheid government) and 10th May 1994 (the inauguration of President Nelson Mandela as the first democratically elected President of South Africa). These procedures provided a formal and equal basis for further investigating applications for amnesty (TRC Act, Sec. (20) (1); TRC Report Vol. 6, Ch 1 2003:8; TRC Report Vol. 1, Ch 6, 1998:156).

2. Political Objective:

Amnesty was restricted to gross human rights violations committed with political motivations in the context of the struggle of the past. The aim of this requirement was to preclude amnesty from common crimes, crimes committed with personal malice and/or personal gain (TRC Act, Prelude; TRC Act, Sec. (1) (20) (2) (f); TRC Report, Vol. 6, Ch. 1, 2003:7).

⁴⁴ In total the amnesty committee received 7115 amnesty applications. Of these, 1167 (just over 13 %) received amnesty and 5505 (77,3 %) were refused. Most of the amnesty applications (5489) were dealt with administratively in chambers where the committee was satisfied that it was clear-cut and where the offence did not concern a gross human rights violation (TRC Report Vol. 6 Sec. 1 Ch. 2, 2003:22, 36, 47). The majority of the cases dealt with in chambers were refused on the grounds that the offence was not associated with a political objective (TRC Report Vol. 6 Sec. 1 Ch. 2, 2003:36; Vol. 1 Ch. 10, 1998:276). The remaining 1626 were dealt with in public hearings. 2548 hearings were held (the discrepancy is caused by the fact that some applicants appeared more than once) of which 1167 amnesties were granted and 806 denied.

3. Full Disclosure:

Amnesty was restricted to perpetrators who would provide full disclosure of the crime(s) for which they applied. The aim of this requirement was to provide victims' families with knowledge of the whereabouts and graves of their beloved ones, as well as provide the information needed for allocating responsibility for the crimes and establishing the causes, nature and consequences of the violent conflict of the past (TRC Act, Sec. (20) (1) (c); TRC Report Vol. 6, Ch 1 2003:10).

5.3.1 *The Task of Defining, Identifying and Adjudicating Political Objective*

The problem with defining politically motivated crime arises in international law as a result of the exception made to politically motivated crime in extradition treaties⁴⁵ (Keightley, 1993:339). There is no international consensus on the definition, interpretation and application of politically motivated crime (Slye, 2000:179).

The guidelines for adjudicating political objective in the National Unity and Reconciliation Act were derived from those formulated on the basis of the predominant jurisprudence of extradition law in Europe and elsewhere by the internationally acclaimed Danish ex-President of the European Commission on Human Rights, Carl Nordgaard when acting as an external international jurist for the parties involved in the negotiation for independence of Namibia from South Africa in 1989 (Keightley, 1993:344; TRC Report, Vol. 6, Sec. 1, Ch. 1:8). The context of the South West African Peoples' Organisation's (SWAPO) struggle against the occupation of the South African government had similar features to that of the South African apartheid struggle. Prior to the political settlement, Namibia had been in a state of war and the human rights offences involved indiscriminate violence against civilians. Thus there was a need to distinguish politically motivated acts which were committed to further the aims of the struggle although there would be no blanket indemnity for such acts (Keightley, 1993:346).

However, the Nordgaard principles recognised that there was no clear line demarcating combatants from civilians, since combatants were not wearing uniforms. The Nordgaard

⁴⁵ "Political exception" clauses in treaties between states are common and their effect is to exempt a state from its extradition obligations where the person is alleged to have committed a political offence (Keightley, 1993:339 – 340).

principles thus served as a relevant guideline for the adjudication of amnesty in the South African context in which a violent struggle had been waged between the majority of the population's oppressed civilians and a powerful minority government (Keightley, 1993:346). The guiding principles adopted from Nordgaard for determining political objective as stipulated in the TRC Act were that the following needed to be taken into consideration:

- a. *The motivation of the offender who committed the act, omission or offence*
- b. *The context of the act; whether the act, omission or offence was committed in the context of a political uprising, disturbance or reaction thereto*
- c. *The legal or factual nature of the act, omission or offence; specifically in relation to the gravity of the act, omission or offence*
- d. *The object or objective of the act, omission or offence; specifically whether the act, omission or offence was primarily directed at a political opponent or State personnel or State property as opposed to individuals and private property*
- e. *Whether the act, omission or offence was committed on the order of, on behalf of or with the approval of the political organisation, institution, liberation movement or body of which the person was a member, agent or supporter*
- f. *The relationship between the offence and the political objective being pursued; specifically whether the act, omission or offence was proportionate to the political objective being pursued, as opposed to acting out of (i) personal gain, such as money or anything of material value and (ii) personal or ill-willed malice.*

(TRC Act, Sec. (20) (2) (a) – (f) in Keightley, 1993:345)

The South African Interim government made three important amendments with regard to the original Nordgaard principles. The first was in relation to the second criterion regarding whether the offence was committed in the context of a political uprising or disturbance, where “reaction thereto” was added (TRC Act, Sec. (20) (2) (b) in Keightley, 1993:347, here as “(ii”).

The second amendment was with regard to the fourth criterion, where the term “government” in Nordgaard was replaced with “political opponent” (TRC Act, Sec. (20) (2) (d), Keightley, 1993:347, here as “(iv”).

The third important amendment was the addition of the one criterion, (the fifth one listed above), which reads: “whether the act, omission or offence was committed in the execution of an order of, or on behalf of, or with the approval of, the organisation, institution, liberation movement or body of which the person who committed the act was a member, an agent or a supporter.” (TRC Act, Sec.(20) (2) (e)).

There were three crucial implications for the adjudication of responsibility and definition of political offence of these amendments. Firstly they extended the definition of political offences to cover acts committed against political opponents other than the government (Keightley, 1993:347). Thus, members of one political organisation who had committed offences against a rival political organisation would be eligible for amnesty (Keightley, 1993:347). Secondly, all the amendments favoured government agents who had committed offences against political activists and would thereby also be eligible to apply for amnesty (Keightley, 1993:347). Thirdly and significantly, contrary to the Nuremberg precedent, atrocities committed on behalf of or with the approval of a political organisation were accepted as acts committed with a political motive that therefore served as an excuse to make offenders who acted under orders eligible for amnesty.

In essence, these criteria were based on the notion that political motivation resides in the person’s (political) *duties* and the *expressed or implied authorisation* from a political authority and applied to anyone who acted with reasonable grounds for *believing* that he or she was doing so in the course and scope of his or her implied or expressed authorisation from the relevant political authority (TRC Act, Sec. (20) (2) (c)).

5.4 The Implications of Favouring Politically Motivated Crime

In different ways the criterion of political objectives for amnesty is problematic: in an important sense this amounts to privileging or favouring *political* violence over other kinds of

violence such as criminal or personal violence. This would be the case where the perpetrators of gross human rights violations which had been committed with political objectives would qualify for amnesty and the perpetrators of criminal or personal violence would not.

There are two general problems with so favouring politically motivated gross human rights violations. The first is related to the implications of favouring politically motivated human rights violations in a society which seeks to establish a human rights culture in which no one is above the law. This falls short of establishing the norm that *all* violations of human rights are categorically ruled out by effectively implying that *politically motivated* human rights violations can be justified or excused. (We will return to these implications below.)

The second problem relates to the specific decisions which the Amnesty Committee made in applying this criterion and the theoretical and practical difficulties it inevitably encountered in defining and adjudicating politically motivated crime as distinct from criminal or other non-political violations of human rights (Slye, 2000:175 and 181; Fullard and Rousseau, 2003:205 – 213; Simpson, 2002:245).

By privileging politically motivated gross human rights violations and acts committed as orders, on behalf of or in the support of a particular political organisation or ideology, the South African amnesty in effect departed from and contradicted the basic tenet of international law established by the Nuremberg trial that following orders is an illegitimate claim of defence for which no exception can be made (TRC Act, Sec. (20) (2); Slye, 2000:180 – 181; Simpson, 2002:245). From a general restorative and preventative perspective, such privileging may be justified on the grounds that the violence associated with a particular political objective is bound to lose its justificatory force once a society undergoes political change and it becomes possible to resolve conflict by non-violent means (Slye, 2000:181).

However, Simpson (2002:245) has pointed out that such “privileging” of political violence nevertheless has the negative effect of denigrating and masking the relevance of other factors such as race, class or gender as relevant dynamics in understanding the dominant patterns of gross violations of human rights under apartheid. The problem with prioritising politically motivated gross human rights violations as eligible for amnesty is that it by implication finds political violence less objectionable than non-political violence (Slye, 2000:181).

In the context of the South African amnesty process, the direct consequence of this interpretation is that individuals could use political organisations' stated aims as an excuse for having committed gross human rights violations using the argument that they believed that these acts furthered the organisations' cause on the one hand, and on the other, that political leaders could deny moral responsibility for having ordered gross human rights violations where such orders were made implicitly and no evidence of explicit orders existed. Former defence minister, Magnus Malan, who did not apply for amnesty, was for instance acquitted after an unsuccessful and costly state prosecution for the ordering of gross human rights violations due to lack of evidence, and no "hard evidence" was found to prove that former President P. W. de Klerk had ordered similar acts or even been aware of the existence of the C1/C10 unit of the Security Police situated at Vlakplaas, the apartheid government's notorious death squad (TRC Report Vol. 1, Ch. 5, 1998:123; TRC Report Vol. 6, Sec. 1 Ch. 4, 2003:58 – 62; Gottschalk, 2002:241 and 250).

Granting amnesty for human rights atrocities committed with a political objective also places a fair amount of power with the former state, political parties and political organisations (Slye, 2000:180). Thus amnesty to perpetrators who disclosed their crimes often depended on the acknowledgement by political leaders that such orders had been given (Slye, 2000:180). However, in practice few political leaders came forward to the TRC and accepted responsibility for having ordered such atrocities. As Simpson argues, "(t)he simple political narrative that remains is striking in the way it cleanses both liberation politics and state violence – associated as they were with the fortunes of particular political parties and movements – of the criminal pathologies of South Africa's particular social dislocation" (Simpson, 2002:245).

The authorised version of the past (of the TRC Report), argues Simpson, "ignores the extent to which the apartheid system that criminalised politics simultaneously politicised crime" (Simpson, 2002:245). Due to the complexity of the historical patterns of conflict, dislocation, dispossession and industrialisation under Apartheid, the motivations for criminal acts were typically complex and not easily identified or legitimised along political lines (Simpson, 2002:245). Where proof of authorisation was missing and an act was determined as political according to whether it was consistent with the general ideology of the political organisation, the lines of responsibility remained blurred (Slye, 2000:180). Hence, restricting amnesty to politically motivated crime raises a moral and practical dilemma. On moral grounds it goes

against the notion that every individual is responsible for his or her own actions will in practical terms it becomes difficult to define “political motivation.” On the practical side of this dilemma we know from the social sciences that although individuals are responsible for their own actions, they can not always be held accountable for (all of) them, particularly in relation to acts committed in response to orders.

The dilemma with which this thesis has sought to grapple is which criteria may be useful for determining individual accountability.

The South African amnesty chose to base such criteria on the perpetrators’ political aspiration in the past conflict. However the definition of what constitutes “political objective” turned out to be a double-edged sword; on the one hand, political accountability did not address individual accountability for obedience to orders, since such acts, omissions or offences were accepted as “political motivation” committed as part of a “political objective.” On the other hand, political accountability offered an opportunity for political leaders to deny their involvement as instigators and not accept responsibility for having ordered and commanded gross human rights violations, since very little evidence could be brought against their explicit, implicit and factual participation. Where the TRC was successful in compiling sufficient evidence for bringing some of these leaders to court for having either denied their responsibility or failed to apply for amnesty, political and moral unwillingness, lack of resources and overload of present and persistent common crime in the society made such prosecution impossible at the end of the amnesty process (TRC Report, Vol. 1, Ch. 5, 1998:132; Tutu, Foreword in TRC Report, Vol. 6, 2003).

It could thus be argued that the South African amnesty provisions, by making political motivation a criterion for granting amnesty for disclosed gross human rights violations, in effect restored the traditional defence of “superior orders,” thus setting itself against the basic precedent established by the Nuremberg Tribunal.

To those who regard Nuremberg as the paradigm for establishing individual accountability for human rights violations, this must amount to nothing less than an explicit rejection of individual accountability for human rights violations. Thus Ronald Slye, for example, argues that, by granting amnesty to an offender on the basis that he or she acted with a political objective, i.e. under orders or a higher authority, “the South African amnesty weakens the

principle that an individual is morally and legally responsible for the consequences of his or her own actions” (Slye, 2000:181).

Against this, we argued above that the basic requirement of amnesty conditional on full disclosure did imply a form of individual accountability even if this did not amount to criminal accountability. The key question is what this form of individual accountability amounts to, especially if this is also combined with the more specific criterion of having political motivation for the human rights violations disclosed.

By granting amnesty for politically motivated human rights crimes, the South African amnesty process accepted that, in their capacity as members, employers, supporters and political leaders of various political organisations, individual political actors subscribed to the political objectives of those organisations but should not be held liable for the overall moral or political aims of the movements and organisations to which they belonged as they would be for their own individual and personal aims. The implication is that perpetrators of human rights violations could be held individually accountable, if at all, only for the means by which they sought to achieve political goals (TRC Report Vol. 6, Sec. 1, Ch.3, 2003:647).

It may be noted that this would roughly correspond to the approach taken by the Argentine Due Obedience law, which in this respect also departed from the Nuremberg precedent⁴⁶. The implication is also that there is no provision for accountability at the level of the overall political objectives of the organisations or movements concerned.

Here the analysis of the moral dilemma of “dirty hands” by Walzer and Thompson discussed in Chapter One is relevant in so far as there appears to be an acceptance that, in political conflicts such as civil war or liberation struggles, the overall political objectives will necessitate the use of “evil means” such as killings in the course of an armed struggle. Accordingly, the South African amnesty process sought to indemnify offenders who could prove that their human rights violations were politically motivated by virtue of their position as representatives as well as the representative nature of their goals.

⁴⁶ See above Chapter Three section 3.5 The Argentine Due Obedience Law: A Legal Framework of Accountability for Moral Obedience under Authority.

In the final analysis however, the crux of the attempt to achieve accountability in the South African conditional amnesty is related to the requirement of full disclosure.

Conclusion

Accountability through Disclosure: Public Acknowledgement and Moral Censure

Insufficient attention has been paid to the key question whether, or to what extent, conditional amnesty amounts to a form of accountability. Instead commentators have been more concerned with issues of truth versus justice. They have, for instance, focused on the trade-off of indemnity for human rights abuses in exchange for full disclosure (Van Zyl, 1999) and the carrot-and-stick dynamics of the threat of criminal prosecutions when amnesty was not obtained (Simpson, 2002).

The question is, more precisely, whether, or in what sense, the requirement of full disclosure might be considered to be a form of accountability even if it is not followed by punishment. This was highlighted by the approach adopted by the TRC. For the TRC the achievement of accountability fundamentally depended on the understanding that the disclosure of gross human rights violations meant that they were implicitly censured as “wrong”.

Here one needs to distinguish between the moral condemnation of crimes on the one hand and the criminal and political sanctions of the responsible offenders on the other.

Regarding the moral condemnation of crimes, a further distinction needs to be made. *Responsibility* should not be confused with acknowledging that someone should be *held accountable* for the offence. E.g. someone could accept responsibility for an offence without accepting that they should be held accountable for it. But, while the amnesty criteria did not require a formal apology or sincere moral repentance by the offender (who would thereby admit that he/she should be held accountable) the objective was nevertheless to hold him/her accountable by implicitly being subject to moral censure. Hence, acknowledging culpability without repentance would nevertheless allow for moral censure.

Thus, by publicly declaring the nature of their offences, applicants would effectively acknowledge their culpability⁴⁷, i.e. that they are deserving of censure and therefore in some sense accountable. For this to work the full disclosure of their killings, tortures etc. would need to take place within a moral context in which they would be understood as gross human rights violations.

In this regard, the significance of making full disclosure as a requirement for amnesty is that it is a way of asserting that the culpability of perpetrators of human rights abuses is not only a matter of privately or personally *being* responsible as an individual moral agent (such as in the Weberian sense of the suffering servant, see Chapter One). The requirement of full disclosure effectively insists that the amnesty applicant is a member of a moral, civil and political community and accountable to that community. This sense of a moral community needed to be created by the TRC.

A shortcoming of the TRC process is that it gave priority to politically motivated crimes that are difficult to define. It was difficult to hold perpetrators accountable according to political objectives and to identify and adjudicate responsibility. It was, on the one hand, possible for the most responsible perpetrators, i.e. those who instigated, planned and ordered the commission of gross human rights violations, to deny responsibility whereas, on the other hand, those who actually executed gross human rights violations were not held criminally accountable due to the fact that they did so under orders and were therefore eligible for amnesty. The result was often that the buck did not stop anywhere.

Theoretically the founders of the new South African Constitution and the TRC could have considered other possible forms of civil and political sanctions, e.g. lustration or purges based on a quasi-legal due process. Thus one could conceive of an amnesty process conditional on full disclosure that does not result in criminal punishment but does involve exclusion from defined public and political positions in future. This kind of lustration would necessarily be coupled with a legal process that can prove individuals guilty and in which they have a right to defend themselves.

Significantly the South African amnesty process did *not* result in civil or political sanctions of

⁴⁷ "Culpable: ... Deserving censure; blameworthy." (Brown, 1993:568).

this kind, leaving the possible moral censure or condemnation as the only relevant sanction. The condition of full disclosure did impose a form of public accountability but without either criminal or civil or political sanctions involved. This amounts at best to liability for public condemnation of moral guilt.

Moreover, the significance of due process with regard to amnesty hearings meant that the requirement of full disclosure amounted to a quasi-judicial *determination of guilt* even if no punishment resulted, as opposed to a form of *public shaming* where no acknowledgement of guilt was needed. In a certain sense, therefore, the amnesty hearings provided a forum for *morally condemning* the perpetrators for their morally heinous acts. Thus, in so far as the disclosures required for the amnesty process took the quasi-legal form of due process and specifically involved individual accountability, these could thus be argued to be concerned with (*moral*) *guilt* and not with communal shaming⁴⁸.

This framework accepts that acknowledgement of accountability for human rights abuses does not necessitate punishment but can equally be achieved by requiring offenders to disclose and acknowledge their responsibility for the offences they have committed (TRC Report Vol. 1 Ch. 5, 1998:119). Thus, while general or blanket amnesties had traditionally been equivalent to bestowing impunity on the perpetrators of political atrocities, the innovation of the South African individual amnesty conditional on full disclosure makes it possible to have some form of accountability built into the amnesty process.

⁴⁸ In this connection it might be relevant to consider that some applicants, e.g. the ANC leadership, were prepared to submit *collective* applications making disclosures for which they were prepared to accept *collective responsibility* but not individual accountability. Significantly, the TRC was not prepared to accept these applications, thereby insisting on the primacy of individual accountability. An interesting question might be whether, from the point of view of such collective applications, those involved were prepared to subject themselves to communal sanctions, and even to possible public shaming, but did not accept individual accountability and guilt. For a case study of the 37 ANC applications see McGregor, "Individual Accountability in South Africa: Cultural Optimum or Political Façade" pp. 32 – 45 in *The American Journal of International Law* Vol. 95 No. 32 2001. These applicants assumed responsibility for all acts committed by ANC members in execution of the policy decisions of the organisation without identifying any specific acts. The amnesty committee first granted the 37 amnesty in 1997. Following a review application in court by the TRC, 27 were denied amnesty on the grounds that they did not disclose individual involvement in the specific cases (Fullard and Rousseau, 2003:203).

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