

**The Plea Agreements Process in the International Criminal Tribunal
for the former Yugoslavia in the light of the Amnesty Process in the
Truth and Reconciliation Commission in South Africa**

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of the degree of Master of Philosophy in Justice and Transformation

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Abstract

While many countries are facing difficulties in implementing transitional justice mechanisms, designed mainly to include different stakeholders in the process, in very few contexts have perpetrators been perceived as active participants who represent a potential resource to the process. This study examines and compares two contexts in which this has been so. Its central objective is to understand to what extent the practice of plea bargaining with perpetrators of war crimes at the International Tribunal for the Former Yugoslavia (ICTY) contributed to the process of establishing the truth about past abuses and to compare this with probably the most controversial aspect of the Truth and Reconciliation Commission in South Africa (TRC) - granting of amnesty to the responsible for the atrocities during apartheid. Drawing on both contexts, this study argues that that acknowledgment given by perpetrators potentially constitutes a legitimate and in some contexts crucial transitional justice mechanism. The study has not examined all the issues relating to these processes, recognizing their complexity in both the historical development of the field of transitional justice and the specific features of the process in each context. The study was developed at two levels, firstly through a normative analysis of the aims and objectives of the plea bargaining process at the ICTY and amnesty process at the TRC and secondly, through historical and factual investigation of the processes and outcomes in relation to the criteria set out for processes ICTY and TRC adopted. The main aim was to analyze what were the outcomes of these two processes in terms of contributing to the process of establishment of truth.

Recognizing that these processes were inherently different from each other – one being implemented in criminal trials, and other in truth commission, it is important to note that these have been the only two examples to date to include a form of compromise with perpetrators as one of their main strategies for the process of establishing truth. While recognizing that serious criticism have been made against both institutions for this compromises, this study concludes that any truth process, if trying to be comprehensive, will have to include perpetrators, because only they can provide the most important element in dealing with the human rights violations and the one most difficult to be obtained - acknowledgment by those who actually committed the crime.

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Chapter 1 – Introduction

1.1. The objective of truth processes in post-conflict societies

The objective of this thesis is to understand to what extent the practice of plea bargaining and acceptance of guilty pleas as developed by the International Tribunal for the Former Yugoslavia [ICTY] actually contributed to the process of establishing the truth about past abuses by comparing this practice with the full disclosure condition for the granting of amnesty at the Truth and Reconciliation Commission in South Africa [SATRC]. In order to understand this, it is first necessary to understand what the process of establishment of truth in a post-conflict society actually represents and what the normative framework of the process is.

After a period of oppression characterized by massive and systematic human rights violations, or after a violent conflict, as a consequence of developments of human rights movement, the need to deal with the legacy of the past crimes and abuses became one of the first requests and challenges put before new democratic governments by their own citizens, mainly those that survived suffering during human rights violations. Among other mechanisms transitional societies implemented, such as prosecuting responsible, reforming abusive institutions and repairing damages done to victims, establishment of truth have emerged as a process which is not only needed, but necessary if a society decides to face the legacy of crimes from the past. Establishing truth about past atrocities in a post-conflict or post-authoritarian society is important not only because of truth itself, but as a precondition for other mechanisms of transitional justice. In order to punish those responsible for atrocities, we need to know what crimes to punish and establish facts about crimes in order to establish accountability of the person indicted before the court of law. If measures for reparations are to be instigated, it has to come after some form of truth-finding process which is necessary to determine who should benefit from the reparative measures and what was the nature of the damage inflicted upon them – truth processes determine who the victims are and what kind of reparations

are necessary. Establishing truth about crimes is also a precondition for reforms of institutions – in order to establish which institutions and their members took an active role in atrocities so as to be able to remove them from these institutions. Establishing truth in a post-conflict setting is of crucial importance for preventing denial as well as lies about crimes that former regime or conflicting sides can spread or nurture – if truth about crimes is ignored, as Zalaquett argued, ‘inevitably the void would be filled with lies or with conflicting, confusing versions of the past’.¹ Finally, establishing truth can provide a form of social catharsis necessary for the acceptance of victims’ suffering and condemnation of abuses by the majority within a society, therefore having a significant role in preventing the crimes from happening again.²

Establishing truth through different bodies has long been accepted as a practice needed after a violent conflict or massive human rights violations. Additional to that, the process of establishment of truth has become an integral part of international legal standards, and fulfilling the right to truth has been defined as a state obligation by international courts and different UN bodies. The first legal document, that clearly defined that states have ‘a duty to investigate facts’ about crimes of enforced disappearances was the judgment of the Inter-American Court of Human Rights in the Velasquez Rodriguez case.³ In the report “The administration of justice and the human rights detainees - Question of the impunity of perpetrators of human rights violations (civil and political) prepared for the Sub-Commission on Prevention of Discrimination and Protection of Minorities Commission for Human Rights of the UN, Louis Joinet, one of the most prominent experts in international law, defined legal rights that belong to victims of human rights abuses. According to Joinet, these are the right to know, the right to justice and the right to reparations.⁴

¹ Jose Zalaquett, “Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations,” *Hastings Law Journal*, (1992): pp. 1433.

² Ibid.

³ Case of Velasquez-Rodriguez v. Honduras, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988).

⁴ UN Sub-Commission on the Promotion and Protection of Human Rights, *Question of the impunity of perpetrators of human rights violations (civil and political)*, (26 June 1997), E/CN.4/Sub.2/1997/20..

These rights do not belong exclusively to victims – Joinet argued that the whole society has a right to know what happened in the past:

“This is not simply the right of any individual victim or his nearest and dearest to know what happened, a right to the truth. The right to know is also a collective right, drawing upon history to prevent violations from recurring in the future. Its corollary is a “duty to remember” on the part of the State: to be forearmed against the perversions of history that go under the names of revisionism or negationism (...) These, then, are the main objectives of the right to know as a collective right.”⁵

In 2005, Diane Orentlicher, an independent expert on the question of impunity appointed by the UN Commission on Human Rights, reviewed international law and practices that state employ in order to combat impunity in a post-conflict or post-authoritarian setting. Orentlicher defined the principle of the right to know, stating that “[every] people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes. Full and effective exercise of the right to the truth provides a vital safeguard against the recurrence of violations.”⁶ More importantly, Orentlicher stressed the victims’ right to know: “victims and their families have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victims’ fate.”⁷

Orentlicher also listed measures states must introduce in order to fulfill the right to know, including ‘measures necessary to ensure the independent and effective operation of the judiciary, to give effect to the right to know’, including truth commissions or

⁵ Ibid.

⁶ Commission on Human Rights, *Report of the independent expert to update the Set of principles to combat impunity*, (February 8, 2005), UN Doc. E/CN.4/2005/102/Add.1,

⁷ Ibid, Principle 4.

commissions of inquiry ‘to establish the facts surrounding those violations so that the truth may be ascertained and to prevent the disappearance of evidence’.⁸

Hence, fulfillment of the right to truth has slowly developed from being a choice that is implemented by governments that are willing enough, into being understood as the obligation of states emerging from conflict or massive human rights violations periods. The United Nations continued to develop this understanding of a right to truth and truth processes. In 2006 the United Nations Office of the High Commissioner for Human Rights concluded that ‘the right to the truth about gross human rights violations and serious violations of human rights law is an inalienable and autonomous right, linked to the duty and obligation of the State to protect and guarantee human rights, to conduct effective investigations and to guarantee effective remedy and reparations’.⁹ Additionally, it was re-affirmed that the right to truth has its roots in international humanitarian law, primarily with regards to families of victims of enforced disappearances,¹⁰ but also with regards to other serious human rights violations, such as extrajudicial executions and torture.¹¹ This has been upheld by many relevant instances – from the UN Security Council, UN General Assembly, UN Secretary General, the Parliamentary Assembly of the Council of Europe, the General Assembly of the Organization of American States, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Court of Human Rights, etc.¹² The UN Office of the High Commissioner for Human Rights study report of 2006 stated that the right to truth is deeply rooted in international law and it is “recognized in several international treaties and instruments as well as by national, regional and international jurisprudence and numerous resolutions of intergovernmental bodies at the universal and regional levels”.¹³

⁸ Ibid, Principle 5.

⁹ ECS, Commission on Human Rights, Study on the right to the truth, Report of the Office of the United Nations High Commissioner for Human Rights, (8 February 2006) E/CN.4/2006/91.

¹⁰ “The principle of the right to the truth for relatives of missing persons, including the victims of forced disappearance, is explicitly codified in international humanitarian law in article 32 of the Additional Protocol I to the Geneva Conventions, of 12 August 1949.” Ibid, par.6.

¹¹ Ibid, par.8.

¹² Ibid, par.12-32.

¹³ Ibid, par.55.

The report closely connects the right to the truth with other rights that belong to victims of human rights violations, such as the right to an effective remedy, the right to legal and judicial protection, the right to an effective investigation, the right to a hearing by a competent, independent, and impartial tribunal, the right to obtain reparation, the right to seek and impart information, etc.¹⁴ However, the right itself does not belong to victims exclusively – it also belongs to society which ‘has the right to know the truth about past events concerning the perpetration of heinous crimes, as well as the circumstances and the reasons for which aberrant crimes came to be committed, so that such events do not reoccur in the future’.¹⁵

Finally, the report defined what the right to truth encompasses – it represents ‘knowing the full and complete truth as to the events that transpired, their specific circumstances, and who participated in them, including knowing the circumstances in which the violations took place, as well as the reasons for them. In cases of enforced disappearance, missing persons, children abducted or during the captivity of a mother subjected to enforced disappearance, secret executions and secret burial place, the right to the truth also has a special dimension: to know the fate and whereabouts of the victim’.¹⁶

Mechanisms for fulfillment of the right to truth are not only truth-seeking bodies, such as truth commissions, or commissions of inquiry, but also international criminal tribunals, national criminal tribunals, national human rights institutions and other administrative bodies and proceedings.¹⁷ As suggested by the UN Office of the High Commissioner for Human Rights: “Judicial criminal proceedings, with a broad legal standing in the judicial process for any wronged party and to any person or non-governmental organization having a legitimate interest therein, are essential to ensuring the right to the truth.”¹⁸

¹⁴ Ibid, par.42.

¹⁵ Ibid, par.58.

¹⁶ Ibid, par.59.

¹⁷ Ibid, par.61.

¹⁸ Ibid.

Most importantly for our purposes, the issue of making compromises with perpetrators in different forms, and their relation with the fulfillment of the right to truth for victims was also analyzed. The UN Report concluded that ‘amnesties or similar measures and restrictions to the right to seek information must never be used to limit, deny or impair the right to the truth’.¹⁹

Before discussing whether making compromises with perpetrators could actually contribute to the process of establishing truth, the basic question is what the process of establishing truth represents in a broader societal context. Truth processes are instigated in post-conflict society in order to establish an accurate record of abuses and wrongdoings of the past – to discover and clarify what happened in the past and formally acknowledge crimes that were committed in the past.²⁰ In the majority of these experiments, truth processes in the form of truth and reconciliation commissions or other types of investigative commissions and bodies, criminal prosecutions of responsible, reparations’ programmes and vetting procedures, include establishing facts about crimes from the past, revealing information that were either silenced or denied about abuses that victims survived. In order to unearth these hidden stories about crimes from the past, truth processes typically rely on victims’ testimonies, i.e. the stories of those who suffered the most, establishing overall patterns of violence and giving voice to those who were silenced during abuses.²¹

However, when most facts about crimes are uncovered and represented in public, it is vital for the society that these facts are also acknowledged.²² As Priscilla Hayner recorded, there is a strong argument that truth processes do not so much find new truths, or uncover something completely unknown, as much as breaking the silence about ‘widely known but unspoken truth’: “The official and public recognition of past abuses serves to effectively unsilence a topic that might otherwise be spoken of only in hushed

¹⁹ Ibid, par.60.

²⁰ Priscilla Hayner, *Unspeakable truths: transitional justice and the challenge of truth commissions*, 2nd ed, (New York: Routledge, 2011), 20.

²¹ Ibid, 20.

²² Elizabeth Kiss, “Moral Ambition Within and Beyond Political Constraints: Reflections on Restorative Justice” in *Truth v. Justice: The Morality of Truth Commissions*, eds. Robert I. Rotberg and Dennis Thompson, (New Jersey: Princeton University Press, 2000), 71.

tones, long considered too dangerous for general conversation, rarely reported honestly in the press, and certainly out of bounds for the official history taught in schools.”²³

Acknowledgment of truth about crimes is crucial mainly for victims that suffered – while they know what happened, and many facts established by commissions or courts of law, vetting programmes or reparation measures are not unknown to them, the confirmation of their claims is what represents the most important value of such a truth process. In this way, knowledge is officially sanctioned, it becomes part of the ‘public cognitive scene’, and what used to be denied now becomes truth.²⁴

The main question that this thesis wants to understand is what the contribution of plea bargaining process as a form of compromise with perpetrators, through their acknowledgment, as designed by the ICTY might be to the process of establishing the truth. For that purpose, it has to be examined with the help of only one similar process of compromises with perpetrators until now, the amnesty process at the SATRC. It is important to ask to what extent the contribution of granting conditional amnesty by the SATRC was understood as part of a process of establishing of truth, and what that contribution was. It will be examined through looking at the goals and objectives of the SATRC, as defined by its founding act, the Promotion of National Unity and Reconciliation Act [PNUR]. In order to understand the contribution of granting amnesty to the establishment of truth process, the purpose and the procedure as defined by the Act shall be analyzed.

1.2. General problem: Acknowledgment of past abuses

One of the most common problems that societies in transition from an authoritarian regime to democracy or from conflict to peace face is the problem of how to secure an acknowledgment of massive human rights violations and crimes that were committed during the previous regime or conflict. In many such cases, abuses were massive and

²³ Hayner, 20.

²⁴ Hayner, 21.

systematic, victims have been denied truth about the facts about crimes and/or access to justice, while perpetrators who committed atrocities continue to enjoy impunity while denying the truth about their part in such atrocities and continuing to contest claims about their accountability. Therefore, attempts to achieve acknowledgment of past crimes have been seen as necessary not only to create an accurate historical record, but also to challenge claims that these crimes never happened, to ensure that victims receive some satisfaction for the suffering they had endured and that perpetrators face accountability for the abuses that were committed. When these attempts are official, they receive enormous public attention enabling the abuses to become publicly known and officially acknowledged. Society as a whole and victims particularly need public acknowledgment of past state crimes.²⁵

The importance of an official acknowledgment of abuses in a post-conflict society or a society that experienced massive human rights violations in the past has been emphasized by the philosopher Thomas Nagel who made a distinction between knowledge about and acknowledgment of the past. “[Acknowledgment is] what happens and can only happen to knowledge when it becomes officially sanctioned, when it is made part of the public cognitive scene”.²⁶ While knowledge of past crimes exists in some way in a post-conflict society, mainly among perpetrators and victims themselves, and to some extent among the wider community, on the official level there is often a lack of will to acknowledge and official denialism continues. The refusal to acknowledge state crimes is a political issue. Firstly, this is because the refusal to acknowledge victims’ suffering in public is a demonstration or a result of the political power that perpetrators may still hold or enjoy some form of protection within the new government. Such denial represents a double violation for victims, political and legal. Victims re-suffer the pain inflicted on them while their human and civic dignity is repeatedly denied since that pain is not acknowledged as legitimate. Secondly, the refusal to acknowledge past abuses represents not only an assertion of power by the perpetrators but also the incapability of the state to

²⁵ Stanley Cohen, *States of Denial – Knowing about Atrocities and Suffering*, (Cambridge: Polity Press, 2001), 225.

²⁶ Quoted in Lawrence Weschler, “A Miracle, A Universe: Settling Accounts with Torturers”, in *Transitional Justice: How emerging democracies reckon with former regimes*, Vol.1, ed.Neil Kritz, (Washington DC: United States Institute for Peace, 1995), 492.

deal with past state crimes. Thirdly, without official acknowledgment of past abuses, transitional states show a lack of commitment to the establishment of truth, ensuring accountability and finally to moving the society into the process of reconciliation, thus opening a space for such crimes to reoccur.

1.2.1. Models of transitional justice and acknowledgment

After a period of oppression or violent conflict, a growing number of countries and societies have been choosing to deal with past atrocities and their impact on present efforts to move forward. Dealing with the past thus is, in general, especially significant for victims of past crimes and their families, who often express their need to know what happened to their loved ones, to know who made them suffer and to have someone admit responsibility for what happened. Victims, but also society in general request some form of official acknowledgment of the facts about these crimes and accountability for crimes committed. The acknowledgment of crimes also constitutes an acknowledgment of victims as such – not to deny their stories and question their claims on suffering they have experienced.

Acknowledgment presents one of the most important issues of transitional justice.²⁷ It represents one of the common goals of all the measures that societies faced with the legacies of past atrocities and state crimes instigate, i.e. the various processes of dealing with the past in order to know what happened and to admit what happened. There are different models of “dealing with the past” developed by transitional societies over recent decades, involving different configurations of truth processes and forms of acknowledging accountability: trials, truth commissions, mass disqualifications and reform of institutions, reparations, memorializations, apologies, reconciliation, etc.²⁸ In recent years, the term ‘transitional justice’ has come into use to fully describe all these

²⁷ André du Toit, “The Moral Foundations of the South African TRC – Truth as Acknowledgment and Justice as Recognition”, in *Truth v. Justice: The Morality of Truth Commissions*, eds. Robert I. Rotberg and Dennis Thompson, (New Jersey: Princeton University Press, 2000), 132.

²⁸ Luc Huyse, “Justice After Transition: On the Choices Successor Elites Make in Dealing with the Past”, in *Transitional Justice: How emerging democracies reckon with former regimes*, Vol.1, ed. Neil Kritz, (Washington DC: United States Institute for Peace, 1995), 104-114; Hayner, 7-10.

different activities.²⁹ Some introduction to these different models is needed in order to see how they contribute to acknowledgement, as groundwork for the larger goals of this thesis.

Truth commissions are state-established institutions focused either solely or at least chiefly on discovering the facts about past political offences and recovering the truth about state crimes denied during the conflict or period of oppression. They are victim-centered bodies, basing their reports' findings primarily on victims' accounts, thus acknowledging the truth based on accounts of those whose truth was denied.³⁰ Truth commissions provide victims a stage to tell their mostly untold stories of suffering and human rights violations they endured, and by doing that, they present one of the most effective models in obtaining public acknowledgment since victims are given an official recognition of their account of the violations they suffered. Truth commissions also typically have power to propose other measures to obtain acknowledgment, by recommending prosecutions of responsible individuals, reparations for victims and other policies of institutional reform to governments. This can help to repair damage inflicted on victims as well as strengthen the rule of law by leading to the reform of abusive institutions and the adoption of new laws in accordance with respect for human rights, etc. They also contribute to establish accountability – truth commissions, especially following the model of the SATRC, had significant powers to identify perpetrators, 'name and shame' them publicly, and eventually recommend them to judicial authorities for prosecutions.³¹

The criminal prosecution of responsible individuals and trials is the traditional way of establishing the accountability of the perpetrators of political atrocities and state crimes, especially through trials of state agents by national courts but, if states are unwilling or the conflict is still on-going, also through international courts.³² Criminal prosecutions

²⁹ Mark Freeman, *Truth Commissions and Procedural Fairness*, (Cambridge: Cambridge University Press, 2006), 4.

³⁰ Freeman, 16.

³¹ Hayner, 93-94.

³² The second model was instigated in the case of former Yugoslavia in which the International Criminal Tribunal for former Yugoslavia was established in 1993 by the Security Council of the United Nations.

also function as forensic truth processes with regard to establishing the detailed facts about crimes after a strict process of examining the evidence of the guilt or innocence of the accused perpetrators. They may also contribute to acknowledgment, since prosecuting those responsible implies that a state does acknowledge that the crimes occurred, and acknowledge that the practice of the past regimes or during a violent conflict were wrong and unlawful. However, they do not accomplish much by way of acknowledgement of the context that led to the crime occurring or acknowledging, in any complete way, the truths felt to be important by victims about past political crimes – victims are typically treated as ordinary witnesses at these trials. The focus of criminal justice trials rests almost solely on perpetrators.

Mass disqualifications, such as the lustration models employed in post-communist Eastern European countries, do not significantly contribute to acknowledgment. Blanket disqualification of persons connected to an organization or engaged in activities of denunciation to police,³³ mainly conducted by ministries of interior affairs, or commissions for lustration does not achieve acknowledgment of accountability or truth about past crimes since they are usually conducted without full transparency and sometimes based on questionable sources.³⁴ However, new models of institutional reforms such as vetting processes, which emerged recently in different transitional societies, are usually “aimed at screening public employees or candidates for public employment to determine if their prior conduct (including, most importantly from a transitional justice perspective, their respect for human rights standards) warrants their exclusion from public institutions”³⁵. According to the Secretary-General of the United Nations “vetting usually entails a formal process for the identification and removal of

Geoffrey Robertson QC, *Crimes against Humanity: Struggle for Global Justice* (London: Penguin Group, 2006), 378.

³³ Herman Schwartz, “Lustration in Eastern Europe”, in *Transitional Justice: How emerging democracies reckon with former regimes*, Vol.1, ed. Neil Kritz, (Washington DC: United States Institute for Peace, 1995), 467.

³⁴ Schwartz uses the examples of Poland 1992 where new government attempted to discredit its political opponents through publishing a list of alleged collaborators using unreliable sources and unqualified staff. Ibid, 464-465.

³⁵ Alexander Mayer-Rieckh and Pablo de Greiff, *Justice as Prevention: Vetting Public Employees in Transitional Societies*, (New York: Social science research council, 2007), accessed February 28, 2012, http://www.ssrc.org/workspace/images/crm/new_publication_3/%7B57efec93-284a-de11-afac-001cc477ec70%7D.pdf, 17.

individuals responsible for abuses, especially from police, prison services, the army and the judiciary”³⁶. Comparatively, this formal process is usually public and transparent, and include participation of different groups in society.³⁷ While purges did not contribute significantly to acknowledgment, it can be argued that vetting procedures, with their public and transparent procedure, conducted with respect to human rights standards, and with the purpose to establish who should be removed from institutions for human rights violations in the past, do contribute to the official acknowledgment that certain individuals representing institutions were involved in human rights violations.

Contribution to acknowledgment present one of the most important goals of reparations programmes, material or symbolic, individual or collective, court or administrative, not only as the form of satisfaction, but also as part of the process of “verification of the facts and full and public disclosure of the truth” as defined by the UN General Assembly Resolution 60/147’s Principle 22.³⁸ The processes of commemoration and memorialization, as well as formal and official apologies have received serious attention and became increasingly popular in post-conflict societies, and not only in these – developed societies often use these forms, especially apologies, in order to correct certain historical injustices that happened long before.³⁹ Commemorating the victims of past crimes through building memorials, naming streets and declaring days of remembrance are more readily achieved in a post-conflict society destroyed by wars than by financial compensation, and represent a significant means to acknowledge and empower marginalized communities, as in South Africa.

³⁶ UNSG, The rule of law and Transitional Justice in Conflict and Post-conflict Societies, (23.August 2004), S/2004/616.

³⁷ Ibid.

³⁸ UNGA, Forms of reparations are: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition, as defined by the UN General Assembly in 2005. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, (16 December 2005) A/RES/60/147.

³⁹ Elazar Barkan calls this phenomenon a “victims culture”. Elazar Barkan, *The Guilt of Nations: restitution and negotiating historical injustices*, (New York: W.W.Norton & Company, 2000), 7. Some of examples are apologies that were offered by the USA government for the eradication of Native Americans, slavery, drug experiments on black prisoners, etc. Stanley Cohen, *States of Denial – Knowing about Atrocities and Suffering*, (Cambridge: Polity Press, 2001), 247.

It may thus be concluded from the previous analysis that all models of transitional justice may in different ways contribute to the acknowledgment of past abuses.

1.2.2. Thesis statement

The complex interaction between these different elements / mechanisms of transitional justice and acknowledgment indicate the need for a more rigorous analysis of different models of transitional justice employed to contribute to or achieve acknowledgment. A systematic comparative analysis is beyond the limitations of this thesis – and hopefully will be a project for the future. For now, let it be sufficient to focus primarily on one such mechanism, used in response to violations perpetrated during the conflicts in the 1990s in the Balkans, introduced especially to establish facts and obtain acknowledgment in their respective cases, i.e. that of plea-bargaining agreements.

The contention of this thesis is that acknowledgment of past abuses by perpetrators potentially constitutes a legitimate and in some contexts crucial transitional justice mechanism. In practice, the acknowledgment by a perpetrator of committed abuses can most successfully be obtained through some form of plea-bargaining involving acknowledging the truth about past abuses in exchange for avoiding prosecution for human rights violations. This assumes that perpetrators' acknowledgments of past abuses contribute to the process of establishment of truth, and thus serve as a precondition for a process of reconciliation fostering peace and stability in a society otherwise burdened with ongoing contestations about the truth of past abuses.⁴⁰

It can be argued that the acknowledgement of truth about and responsibility for abuses, specifically coming from those who instigated, ordered and committed them presents the clearest break from the criminal practices of the past and can contribute to reconciliation. As Alex Boraine stated in 2002 in his testimony at ICTY's hearing when former Bosnian Serbs leader, Biljana Plavšić, pleaded guilty for crimes committed during Bosnian conflict:

⁴⁰ *Prosecutor v. Biljana Plavšić/Plavšić*, pg.600 of English provisional transcript, 17 December 2002. Available at: <http://www.un.org/icty/transe3940/021217IT.htm>. Accessed on: 10 February 2008.

“I have no doubt that admissions of responsibility, particularly from civilian and military leaders, I think that's key, can help prevent basic points of fact from continuing to be a source of conflict or bitterness. And this, of course, in turn, can help to reduce tensions in society and thereby facilitate peaceful coexistence or reconciliation, so there is a potential to break the cycle of violence and create a more sustainable peace as a result.”⁴¹

Therefore, some form of compromise with perpetrators that will provide truth may be necessary to secure the acknowledgment of those that committed the most heinous abuses, and to prevent that many facts about crimes may remain covered while those co-responsible go unpunished. It is the contention of this thesis that by securing acknowledgement of truths from those who committed crimes or participated in them by plea-bargaining agreements, we can significantly and effectively contribute to an official acknowledgment of past atrocities.

1.2.3. Problem statement and research questions: perpetrators' acknowledgment

The International Criminal Tribunal for former Yugoslavia (ICTY) was established in 1993 for the prosecution of persons responsible for serious violations of international humanitarian law committed on the territory of the former Yugoslavia since 1991.⁴² Although established as a criminal court with the clear purpose to prosecute perpetrators, the founders of the Tribunal understood its potential as a mechanism for process of reconciliation in the Balkans contributing to ‘restoring and maintaining peace’:

“Its mission is to promote reconciliation through the prosecution, trial and punishment of those who perpetrated war crimes, crimes against humanity and genocide. By ensuring that people are held individually responsible for the crimes they committed, the International Tribunal must prevent entire groups – be they national, ethnic or religious – from being stigmatised and must ensure that others

⁴¹ Testimony of Alexander Boraine, *Prosecutor v. Biljana Plavšić*, pg.600 of English provisional transcript, 17 December 2002. Available at: <http://www.un.org/icty/transe3940/021217IT.htm>. Accessed on: 10 February 2008.

⁴² Security Council Resolution 827, (25 May 1993), S/RES/827.

do not resort to acts of revenge in their search for justice. (...) Finally, by establishing the legal truth on whose basis society can take shape, the International Tribunal must prevent all historical revisionism.”⁴³

Significantly, the practice of compromises with perpetrators through plea bargaining was at the beginning rejected by the ICTY, and was considered incompatible with the goals of the Tribunal – goals that differ significantly from the typical objectives of criminal proceedings – namely, to restore the peace and maintenance of peace and stability and restoration of the rule of law in former Yugoslavia. Additionally, the goal of prosecuting those held to be most responsible was supposed to break the cycle of violence in the region, enhance reconciliation and establish a historical record that would prevent the denial of crimes that were committed, thus taking the form of a truth process.⁴⁴ However, after its case-load increased significantly, the ICTY began implementing a plea bargaining practice firstly in order to resolve cases more efficiently, but also to shed more light on complex cases and to create a more comprehensive historical record.⁴⁵ It can be argued that the main reason that stood behind the decision to introduce a plea bargaining practice at the International Criminal Tribunal for former Yugoslavia was in accordance with the goals of the ICTY: the effort to achieve acknowledgment of perpetrators, thus fostering reconciliation.

Alex Boraine, during a sentence hearing in the case of Plavšić, who pleaded guilty at the ICTY, “when someone who is in a significant leadership position actually makes the break, as has been done in this case, and can prompt - and who knows whether this will help or not - but there is a potential, at least, of prompting other leaders to come forward.

⁴³Claude Jorda, “The ICTY and the Truth and Reconciliation Commission in Bosnia and Herzegovina” speech made on 12 May 2001 in Sarajevo; ICTY Press Release The Hague, 17 May 2001. Available at: <http://www.icty.org/sid/7985>. Accessed on: 22.12 2012.

⁴⁴Michael Scharf, “Trading Justice for Efficiency: Plea Bargainig and International Tribunals”, *Journal of International Criminal Justice* 2 (2004): 1072-1073.

⁴⁵Alan Tieger and Milbert Shin, “Plea Agreements in the ICTY”, *Journal of International Criminal Justice* 3, (2005): 671.

[It's] also true that her statements could (...) help catalyze or initiate a process of honest truth-telling and acknowledgement throughout former Yugoslavia.”⁴⁶

The only similar transitional justice initiative that included some form of compromises with perpetrators was the SATRC. This commission was established for similar reasons – one of them being to create an accurate record of what happened during the apartheid era in order to counter distorted and partial history of South Africa.⁴⁷ This was attempted by introducing a rather controversial process of granting amnesty to perpetrators on condition of full disclosure which was basically an offer of immunity from criminal prosecution to perpetrators in exchange for truth.

The discussion in this thesis will examine a model that was set up in order to achieve acknowledgment and contribute to truth about crimes after a period of violent conflict through perpetrators' admittance responsibility for the crimes they were indicted for - a plea bargaining practice at the ICTY. A useful lens for this examination is the only similar process used in a post-conflict society, the amnesty process at the SATRC. This thesis shall not examine all the issues relating to these processes, recognizing their complexity in both the historical development and specific features of the process in each case, but will try to focus on a few, selected questions.

While these two practices were implemented in two different transitional contexts – one was introduced in criminal prosecutions at an international tribunal while the other was introduced in a truth and reconciliation commission -- the objectives of these two practices were, broadly stated, to help establish sufficient truth to work with. The ICTY was not exclusively dedicated to justice and the TRC was not only concerned with truth. While the ICTY's mandate was focused on accountability through prosecuting individuals for their crimes, the Tribunal also served as a forensic truth process, emphasizing its feature of establishing facts. On the other hand, the SATRC was focused on truth as acknowledgement, however it also tried to establish a form of accountability for those that committed abuses during apartheid era. Looking at the ICTY plea

⁴⁶ Testimony of Alexander Boraine, 17 December 2002. Available at: <http://www.un.org/icty/transe3940/021217IT.htm>. Accessed on: 10 February 2008.

⁴⁷ Alex Boraine, *A Country Unmasked*, (Cape Town: Oxford University Press Southern Africa, 2000), 287.

bargaining process through the lenses of the SATRC can be mutually illuminating for a better understanding of both processes, and a comparative analysis can raise important questions in relation to both SATRC and the ICTY.

The main object of this thesis is to examine whether a plea bargaining process as created by the ICTY, when compared to the conditional amnesty created by the South African SATRC, is in theory compatible with the principle of truth in transitional justice: Is employing the compromise of truth for justice in this way in accordance with the broader goals of transitional justice in post-conflict societies? More specifically, one of the objectives of this thesis will be to understand to what extent a practice of plea bargaining and the acceptance of guilty pleas by the ICTY, compared with full disclosure as condition for amnesty at the SATRC, actually contributed to the process of establishment of truth. The main question remains - do these practices constitute a form of an acknowledgment? This shall be answered through looking at the aims, objectives and practices that were set out during establishment of these bodies, and analyzing the reasons for introducing these practices. Finally, both these practices were introduced as necessary in order to create a more accurate historical record, but the question remains how the facts about crimes given by perpetrators are supposed to contribute to creation of an unbiased historical record. By examining this issue, this thesis shall at the end discuss how the exchange for truth relates to the objective of truth as acknowledgment in post conflict society.

Chapter 2 – Background accounts of the ICTY and SATRC

2.1. The International Criminal Tribunal for former Yugoslavia

2.1.1. The establishment of the Tribunal

In 1993, while the devastating conflict in Bosnia was raging on the UN Security Council, in an attempt to stop inter-ethnic atrocities and re-establish peace in the former Yugoslavia, adopted the UN SC resolutions 808 and 827 and thus established the *ad hoc* International Criminal Tribunal in the Hague for the prosecution of persons responsible for the serious violations of international humanitarian law committed on the territory of the former Yugoslavia since 1991.⁴⁸

2.1.2. The jurisdiction of the Tribunal

According to its Statute, the ICTY has a mandate to prosecute persons responsible for serious violations of international humanitarian law committed on the territory of the former Yugoslavia since 1991. The Tribunal is prosecuting those responsible for grave breaches of the Geneva Conventions of 1949.⁴⁹ The Tribunal also has the power to prosecute persons violating the laws or customs of war.⁵⁰ Article 4 of the Statute provides

⁴⁸ Security Council Resolution 827, (25 May 1993), S/RES/827.

⁴⁹ As defined by the Article 2 of the Statute of the ICTY there are: “wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly, compelling a prisoner of war or a civilian to serve in the forces of a hostile power, wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial, unlawful deportation or transfer or unlawful confinement of a civilian, taking civilians as hostages.” International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Updated Statute of the International Criminal Tribunal for the Former Yugoslavia (September 2009),

⁵⁰ These include, but are not limited to “the employment of poisonous weapons or other weapons calculated to cause unnecessary suffering, wanton destruction of cities, towns or villages, or devastation not justified by military necessity, attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings, seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science, plunder of public or private property. Ibid., Article 3.

the Tribunal with the power to punish genocide.⁵¹ Genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide are all acts that are punishable at the ICTY.⁵² The Tribunal also has the power to punish crimes against humanity.⁵³ All of these crimes have long been established in international law but the ICTY brought certain innovative components.⁵⁴

The Tribunal has the power to prosecute persons based only on individual responsibility, unlike its predecessor Nuremberg, whose mandate included offences by organizations and associations.⁵⁵ The Article 7 of the Statute defines individual criminal responsibility, thus continuing some of the important features of Nuremberg, such as the non-existence of sovereign immunity and the existence of command responsibility. According to the Article 7, para.2 “the official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment”.⁵⁶ The crimes of subordinates remains a responsibility of their superior commander, “if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators

⁵¹ According to the ICTY Statute, genocide are all these acts: “the killings of members of the group, causing serious bodily or mental harm to members of the group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent births within the group, and forcibly transferring children of the group to another group – if all these acts were committed with “intent to destroy, in whole or in part, a national, ethnical, racial or religious group”. Ibid., Article 4 (2).

⁵² Ibid., Article 4 (3).

⁵³ Which include “murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial and religious grounds and other inhumane acts directed against any civilian population”. Ibid., Article 5.

⁵⁴ Genocide was defined in the Convention on the Prevention and Punishment of Genocide in 1948, Geneva Conventions I-IV and Additional Protocols I-II are part of the international law since 1949 and 1977, and enjoy universal acceptance since 2006. Crimes against humanity were defined by Nuremberg Charter, but the understanding of when they can happen, whether or not in connection with an armed conflict, and what acts constitute these crimes, became the subject of widening argument not only among the judges of the ICTY, but within broader academic circles. Violations of the laws and customs of war were defined in the IV Hague Convention in 1907. Laws and Customs of War on Land (Hague IV), 1907. Available at: <http://www.yale.org/lawweb/avalon/lawofwar/hague04.htm>. Accessed on 7 January 2008.

⁵⁵ Statute of the ICTY, Article 7 (1).

⁵⁶ Ibid., Article 7 (2).

thereof.”⁵⁷ As in Nuremberg, the fact that an accused person acted under an order of a Government or of a superior officer did not relieve him or her of criminal responsibility but provided him or her with a mitigation of punishment.⁵⁸

2.1.4. Achievements of the Tribunal

In its work, the ICTY reached several important decisions, which had a significant impact on the development of international criminal and international humanitarian law. One of the first decisions of the ICTY implied a broadening of the definition of the crimes against humanity.

Crimes against humanity were defined by the Charter of the International Military Tribunal in Nuremberg, but although the Charter envisaged these crimes to be punished whether they were committed before or during the war, the judges at Nuremberg actually refused to convict Nazis for crimes committed against Jews in Germany in the period before 1939.⁵⁹ The creators of the ICTY Statute at first went down the same path as the Nuremberg judges, but in its Decision on the Defence Motion for interlocutory appeal on jurisdiction in the case of Dusan Tadic, in October 1995, the Appeals Chamber firmly established an opinion that “it is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed, as the Prosecutor points out, customary international law may not require a connection between crimes against humanity and any conflict at all.”⁶⁰

⁵⁷ Ibid., Article 7 (3).

⁵⁸ Ibid., Article 7 (4).

⁵⁹ “The Tribunal therefore cannot make a general declaration that the acts before 1939 were crimes against humanity within the meaning of the Charter, but from the beginning of the war in 1939 war crimes were committed on a vast scale, which were also crimes against humanity; and insofar as the inhumane acts charged in the Indictment, and committed after the beginning of the war, did not constitute war crimes, they were all committed in execution of, or in connection with, the aggressive war, and therefore constituted crimes against humanity.” Nuremberg judgment, Persecution of the Jews, 30 September and 1 October 1946.

⁶⁰ Decision on the defence motion for interlocutory appeal on jurisdiction, 2 October 1995, par.141. The *Prosecutor of the Tribunal against Dusko Tadic*. Case No IT-94-1-A.

In addition to this important conclusion, the Appeal Chamber in the same case also broadened the understanding in the Statute of the ICTY that war crimes can happen only during an international armed conflict. The perception was that these kinds of violations comprise only the violations of international rules of war conduct and international armed conflict, but are not applicable in internal conflicts.⁶¹ The Appeals Chamber's decision in the Tadic case changed the usual perception by establishing that war crimes can be committed in internal armed conflicts, defining that "an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply on the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there."⁶² These two decisions of the ICTY, although not in the Statute of the ICTY, broadened the definition of crimes against humanity and of war crimes, and will have an important consequence for future prosecutions of crimes committed either in an international conflict or during a civil strife.

Probably one of the most important achievements of the ICTY and its most significant case was the trial of Slobodan Milošević, the first head of state to be prosecuted for crimes of genocide, crimes against humanity and war crimes.⁶³ The trial of Slobodan

⁶¹ Decision on the defence motion for interlocutory appeal on jurisdiction, 2 October 1995, par.70. *The Prosecutor of the Tribunal against Dusko Tadic*, Case No IT-94-1-A, par. 96-127.⁶² Decision on the defence motion for interlocutory appeal on jurisdiction, 2 October 1995, par.70. *The Prosecutor of the Tribunal against Dusko Tadic*, Case No IT-94-1-A, par.70.

⁶² Decision on the defence motion for interlocutory appeal on jurisdiction, 2 October 1995, par.70. *The Prosecutor of the Tribunal against Dusko Tadic*, Case No IT-94-1-A, par.70.

⁶³ Although one of the first objections was that he could not be prosecuted because of his right to sovereign immunity, since he was the President of Serbia and Yugoslavia, this was immediately excluded since the article 7 (2) of the ICTY Statute did not allow for sovereign immunity. His other objections, the argument on unlawfulness of the ICTY, because it was established by the Security Council and not by General Assembly, was rejected as unsustainable since the Security Council acted under the power of Chapter VII of the Charter. As for the claim of unlawfulness of his transfer, since the Constitutional Court of Serbia declared the transfer of Slobodan Milosevic was illegal since the Constitution of Serbia did not allow for

Milošević, began in February 2002, and lasted until his death in March 2006.⁶⁴ However, although unfinished, this trial was one of the most serious events in international justice – it opened the door for other heads of state to face similar charges, and therefore has become a significant precedent.

2.2. Truth and Reconciliation Commission in South Africa

The first institution that involved perpetrators in a process of dealing with past crimes and aimed at securing their acknowledgement of past political atrocities was the SATRC.

After almost 50 years of apartheid and centuries of racial domination in South Africa, the country entered a process of transition to democracy at the beginning of the 1990s. The path to democracy was impossible without addressing the crimes from the past – crimes committed by a state system instigated with a purpose to preserve domination of whites over non-whites in South Africa. Apartheid was long before defined as crimes against humanity by international community. The United Nations General Assembly defined apartheid as a crime against humanity for the first time in 1966⁶⁵, and went beyond this in later resolutions, which declared apartheid as a violation of the UN Charter.⁶⁶ Apartheid enforced the system of white domination over the non-white population of South Africa on political, social, economical, residential, educational, territorial basis.⁶⁷

the transfer of Serbian citizens to other country, this was also rejected as unsustainable, since the ICTY is the UN court (and not any other country's).

⁶⁴ There are certain issues in respect of which the Milošević trial were criticized. Firstly, there was the length of the trial, due to the overloaded indictments. A second problem was presented by the decision of the Trial Chamber to hear all three indictments (for crimes in Kosovo, Bosnia and Croatia) together, which among other things, seriously slowed down the trial. The trial was marked by a series of tragic misfortunes which caused delays, including the death of the presiding judge, Richard May; and the defendant's constant bad health manifested in his high blood pressure and poor heart condition, which made the Trial Chamber decide to sit only three days per week, as it wanted to give the defendant four days per week to rest and recover.

⁶⁵ General Assembly, The Policies of Apartheid of the Government of the Republic of South Africa, (16 December 1966), 2202A (XXI).

⁶⁶ General Assembly, International Convention on the Suppression of the Crime of Apartheid, (30 November 1973), 3068 (XXVIII)., This resolution came into force on 18 July 1976.

⁶⁷ Alex Boraine, "Truth and Reconciliation Commission in South Africa: The third way", in *Truth V. Justice: The morality of truth commissions*, edited by Robert I Rothberg and Dennis Thompson, (Princeton: Princeton University Press, 2000), 141.

To the crimes of apartheid were added the state crimes and human rights violations during the decades of anti-apartheid conflict following the Sharpeville massacre in 1960. However, the need for a peaceful transition after decades of conflict and human rights violations, resulted in a negotiated settlement and South Africa emerged with a creative model to address past state crimes. The first model proposed, that of blanket amnesty, preferred by political, military and police representatives of the former regime, was rejected by representatives of African National Congress (ANC).⁶⁸ The second option, that of the ‘Nuremberg model’ of prosecution and trials was more acceptable to the liberation movement; however, prosecutions of all those responsible for crimes during apartheid were perceived as impossible, due to several reasons. Firstly, it was acknowledged by many from the ANC leadership that the ‘Nuremberg’ approach could jeopardize the prospects for a peaceful transition through negotiations.⁶⁹ Secondly, peace itself would be in danger, since security forces that were securing the negotiation process and first democratic elections were against any kind of prosecutions.⁷⁰ Thirdly, the whole institutional system of apartheid was not dismantled before the democratic elections and majority of judges, prosecutors and police officers were still those who were appointed by the apartheid regime and in majority, helped maintaining this system of inequality and institutional human rights violations. Relying on them to conduct criminal investigations against politicians, army and police members who committed those violations would present a great danger to the prospects of securing fair trials and possible convictions.⁷¹

Therefore, the third model was adopted, the one that did not make anyone fully satisfied, but was a result of a compromise – a truth and reconciliation commission, with two major characteristics. Its first goal was to establish truth relying on statements of victims and witnesses, and victims’ voices heard at public hearings.⁷² Its second objective was to give conditional amnesty to perpetrators in exchange for truth.⁷³ It can be argued that these

⁶⁸ Ibid, 143.

⁶⁹ Alexander L. Boraine, “South Africa’s Amnesty Revisited”, in *The Provocations of Amnesty: Memory, Justice and Impunity*, edited by Charles Villa-Vicencio and Eric Doxtader (Cape Town: Institute for Justice and Reconciliation, 2003), 170-172.

⁷⁰ Ibid, 172.

⁷¹ Ibid.

⁷² Promotion of National Unity and Reconciliation Act, 1995, article 3.1.(a).

⁷³ Promotion of National Unity and Reconciliation Act, 1995, art.3.1.(b).

objectives were designed to help restoring the dignity of victims and survivors and allow society to begin healing and reconciling. It is also important to stress that the second feature of the TRC - amnesty - was vital for the peace process in South Africa.⁷⁴ The amnesty issue was perceived as crucial for the success of the South African peaceful transition, that some argue that in this case it was not a question, whether amnesty would be implemented, but the type and extent of it.⁷⁵

The crucial role of amnesty in the reconciliation process presented such an important part of establishing democracy in South Africa that the Preamble of the Interim Constitution in 1993, entitled 'National Unity and Reconciliation', defined that the divisions from the past, marked with human rights violations and injustices can be resolved only '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.'⁷⁶ In order to achieve that, '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.'⁷⁷ Parliament was given the power to adopt a law that would determine the mechanisms, criteria and procedures through which amnesty shall be dealt.⁷⁸

After many debates and discussions, not only within South Africa, but also through learning from other countries that went through similar experiences, such as Chile and Argentine, the Minister of Justice, Dullah Omar announced the formation of a truth commission.⁷⁹ It was agreed that the most suitable model for South Africa to deal with the past wrongdoings and injustices shall be the SATRC. The process that led to the adoption of the legislation was open, transparent and inclusive, unprecedented in

⁷⁴ Jeremy Sarkin, *Carrots and Sticks: The TRC and the South African Amnesty Process* (Antwerp-Oxford: Intersentia, 2004), 32.

⁷⁵ Ibid., 35.

⁷⁶ Interim Constitution of South Africa, Act 200 of 1993.

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Alex Boraine, "Truth and Reconciliation Commission in South Africa: The third way", 145.

previous examples of truth commissions.⁸⁰ One of the things that differentiated this commission from previous examples was the very active role that civil society played during the selection process, but also in discussing the model of the future commission.⁸¹

The bill establishing the SATRC was adopted in Parliament in June 1995, and President Nelson Mandela signed it into law in July 1995.⁸² After a few months of selection of commissioners', the Promotion of National Unity and Reconciliation Act came into effect in mid-December 1995, when the SATRC was established and set to work.⁸³

Its main goal was to promote national unity in South Africa and reconciliation in order to overcome the conflicts and divisions from the past. It was to be achieved through “establishing as complete a picture as possible of the causes, nature and extent of the gross violations of human rights which were committed during the period from 1 March 1960 to the cut-off date, 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”⁸⁴. Another important power given to the TRC in order to achieve its goals, was the power to grant an amnesty to persons “who make full disclosure of all the relevant facts relating to acts associated with a political objective committed in the course of the conflicts of the past during the said period”.⁸⁵ The Commission was also given power to provide victims with an opportunity to narrate the violations they suffered through “establishing and making 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”.⁸⁶ The

⁸⁰ One of the most important criticism was the decision of President Mandela to appoint two commissioners that were not shortlisted by the selection panel. Sarkin, *Carrots and Sticks*, 57, Boraine, *A Country Unmasked*, 74.

⁸¹ Alex Boraine, , “Truth and Reconciliation Commission in South Africa: The third way”, 145, Sarkin, *Carrots and Sticks*, 53.

⁸² Sarkin, *Carrots and Sticks*, 55.

⁸³ Boraine, *A country unmasked*, 71.

⁸⁴ Promotion of National Unity and Reconciliation Act, 1995, article 3.1.(a).

⁸⁵ Ibid, article 3.1.(b).

⁸⁶ Ibid, article 3.1.(c).

TRC was suppose to fulfil its goals by “compiling a report providing as comprehensive an account as possible of the activities and findings of the Commission (...) and which contains recommendations of measures to prevent the future violations of human rights.”⁸⁷

The Commission had three main sub-committees, the Committee on Human Rights Violations, with the task to investigate human rights violations, the Committee on Reparation and Rehabilitation, with a task to deal with matters in relation to reparations and the Committee on Amnesty.⁸⁸ Unlike the first two, which were composed of commissioners appointed by the chairperson of the SATRC, Desmond Tutu, the Amnesty Committee was firstly composed of three judges appointed by President of South Africa and presided over by one of them, and two commissioners that were appointed after consultation with the SATRC.⁸⁹ By the end of the amnesty process, the Committee was expanded with 19 more people, judges, advocates and attorneys to deal with the amount of work the Committee was facing.⁹⁰ The Committee on Amnesty was given strong powers – to grant an amnesty from criminal prosecution if an applicant fulfils certain conditions. However, unlike any other commission before this one, who acted after, or resulted in a blanket amnesty⁹¹, the South African model of amnesty became a synonym for an accountable or conditional amnesty.⁹²

⁸⁷ Ibid, article 3 1.(d)

⁸⁸ Boraine, *A Country Unmasked*, 85.

⁸⁹ Article 17 (2), Promotion of National Unity and Reconciliation Act, 1995.

⁹⁰ Sarkin, *Carrots and Sticks*, 68.

⁹¹ Boraine, *A Country Unmasked*, 269.

⁹² Ronald C. Slye, “The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law: is a Legitimate Amnesty possible?” *Virginia Journal of International Law*, 43 (1), (2002): 246.

Chapter 3 – Background to plea bargaining and conditional amnesty

3.1. Background to plea bargaining

3.1.1. History of plea bargaining

Plea bargaining is usually understood as negotiation at a court of law over dropping some of the charges of the indictment, reduction of charges or reduction of sentence in exchange for admission of guilt, giving up an appeal or providing cooperation and/or information to the prosecutor in another criminal case as a witness. The practice of plea bargaining began in adversarial legal systems, but it is gaining more attention in civil-law countries with inquisitorial systems.⁹³

A plea bargaining practice was first introduced in courts of law primarily as a tool to deal with the practical problems that prosecutors faced, such as overwhelming caseloads, efforts to increase efficiency in order to make time for other issues, obtaining additional information from defendants who pleaded guilty, etc.⁹⁴ The practice of plea bargaining emerged in Anglo-American jurisdictions, but was relatively rare until the second half of the 19th century.⁹⁵

The practice of accepting guilty pleas originally emerged in England in the 17th century as a tool for mitigating excessively harsh punishments.⁹⁶ There is no clear agreement among scholars as to what the main reason was that stood behind the usage of plea bargaining in adversarial systems. While jurists usually consider extensive caseload as the main reason for the introduction of the practice of plea bargaining, many historians consider that plea bargaining was a response to

⁹³ Italy is the country that showed most interest in applying and adjusting the practice of plea bargaining within its domestic system. Stefano Maffei, “Negotiations on ‘Evidence’ and Negotiations on ‘Sentence’”, *Journal of International Criminal Justice* 2 (2004): 1050/1069.

⁹⁴ George Fisher, *Plea Bargaining Triumph: A history of plea bargaining in America* (Stanford: Stanford University Press, 2003), 40-62.

⁹⁵ Nancy Amoury Combs, “Copping a Plea to Genocide: the Plea Bargaining of International Crimes”, *University of Pennsylvania Law Review*, Vol.151, No.1 (2002):12.

⁹⁶ James E. Bond, *Plea Bargaining and Guilty Pleas* (New York: C.Boardman Co., 1975), in: Combs, Combs, “Copping a Plea to Genocide”:13.

“increasingly complex trial procedure.”⁹⁷ According to Combs, changes that occurred in English criminal procedure 18th century - the defendants were eliminated as a testimonial resource, the dominance of evidentiary objections, and the development of the privilege against self-discrimination -- all contributed to the increasing complexity of the adversarial system.⁹⁸ All of these, supported by expert witnesses testimonies and cross examination of witnesses transformed speedy and efficient trials into a time-consuming and complex system, thus presenting a fertile ground for the introduction of plea bargaining.⁹⁹

On the other hand, the practice of plea bargaining emerged in the mid-19th century in the United States of America, as a result of “the caseload boom”, which was caused by the tremendous growth of crime, as George Fisher argues, and perhaps as a result of improved policing methods, which produced more arrests, that led to more prosecutions, while more defendants began to exercise their right to appeal from lower tribunals to higher instances, as well as coming to the court with lawyers.¹⁰⁰ All of these factors had a significant impact on already burdened public prosecutors. Fisher also argues that prosecutors’ case-load was overburdened since the majority of them worked as part-time public prosecutors and gained only part-time salaries, if any for their service. Therefore, they had strong reasons to embrace the practice of plea bargaining.¹⁰¹

The first cases in which plea bargaining was deployed were cases involving liquor and alcohol.¹⁰² The reason for this was that only in liquor cases prosecutors had the power “to dictate sentences by manipulating charges”,¹⁰³ so that this did not depend only on judges. The decision to introduce plea bargaining in liquor cases was also possibly accelerated by the fact that most of these cases were *victimless* cases – if there was no injured party which could intervene and refuse bargained

⁹⁷ Combs, “Copping a Plea to Genocide”, 13.

⁹⁸ Ibid, 15.

⁹⁹ Ibid., 16.

¹⁰⁰ Fisher, *Plea Bargaining Triumph*, 40-41.

¹⁰¹ Ibid., 42.

¹⁰² Ibid., 49.

¹⁰³ Ibid.

justice, a plea bargain was more possible.¹⁰⁴ However, since plea bargaining was also practiced in murder cases, though to a far lesser extent, it can be argued that the prosecutor's ability to manipulate sentencing was a sufficient condition for charge bargaining, or to exercise their right not to prosecute.¹⁰⁵

In contrast to the prosecutors, judges were somehow reluctant to accept this newly established practice and their unwillingness accounted for the lack of plea bargaining in cases other than liquor or murder.¹⁰⁶ At the outset of the practice of plea bargaining, judges were generally not involved. One of the reasons was surely the fact that they did not have the same workload, since they could process only as many cases as prosecutors could present to them. On the contrary, since in liquor cases prosecutors could promise to obtain a reduction of sentence through a manipulation of the charges, judges were troubled in engaging in practice which touched on "a symbol of judges' great authority and esteem" which sentencing power certainly was.¹⁰⁷

The interest of the third party of the plea bargaining process, defendants, lay in a simple difference between possible severe sentence if a defendant was found guilty or a more lenient sentence promised by the prosecutor if a defendant pleaded guilty. Defendants with a legal counsel could possibly get a form of concession from a prosecutor, but only in liquor cases. In cases with capital charges, such as murder, or rape, the practice of plea bargaining did not evolve until the mid-1800s, since pleading guilty for these charges almost surely meant death. However, improved policing and evidence gathering increased the number of convictions in capital cases, which could account for the increase in guilty pleas for these cases around the 1850s.¹⁰⁸ Another important change happened in

¹⁰⁴ Ibid., 59.

¹⁰⁵ Ibid., 59.

¹⁰⁶ Ibid., 51.

¹⁰⁷ Ibid., 57.

¹⁰⁸ Ibid., 102.

the mid- 19th century – the prosecutors were stripped of the power to charge-bargain with defendants, and therefore could not promise anything.¹⁰⁹

The history of plea-bargaining in continental or inquisitorial systems is somewhat different. While the adversarial system has the form of a contest between two opposing sides which present the evidence to a passive and neutral judge who establishes facts, the inquisitorial system is a form of inquiry led by a judge, based on the collection of evidences compiled by government officials who conducted the investigation.¹¹⁰ Unlike the Anglo-American system, the continental system is more focused on establishing the truth and, compared to the adversarial system, considerably faster and more efficient, which could be the reason why the practice of plea bargaining never developed to the same extent as in adversarial legal systems.¹¹¹ In most continental systems, plea bargaining still does not exist – a trial is held even after a defendant has made a full confession of guilt. Several other features of continental system also contribute to the conclusion that this system does not allow for pure plea bargaining as it exists in adversarial system. First of all, prosecutors in the continental system are granted a lesser amount of discretionary powers than in adversarial system, and are bound by law in certain countries to prosecute all serious crimes.¹¹² However, certain European countries have changed their own systems by including more adversarial features.¹¹³ France and Netherlands have certain features of plea bargaining, but only in less serious crimes while Germany has adopted a bargaining over confessions in either non-violent crimes and/or complicated financial and drug cases.¹¹⁴

¹⁰⁹ Ibid., 103.

¹¹⁰ Combs, “Copping a Plea to Genocide”, 30.

¹¹¹ Ibid., 37.

¹¹² Ibid., 38.

¹¹³ One of the features of these changes in Italy that resemble to plea bargaining is a form of agreement between a defendant and a prosecutor about the sentence in less serious crimes, but with a very significant change – a defendant is not bound to admit guilt. Ibid., 39.

¹¹⁴ In Germany, a defendant may admit the guilt, but it will not prevent a court to try to find the facts necessary to convict. Only in cases where this confession is detailed and sufficient according to the court, then the court will consider it as enough to render a judgment. Ibid., 40-42.

The introduction of adversarial system features, such as a form of a plea bargaining in continental systems were a result of both a rise of petty crime and financial crimes, and reforms adopted either voluntarily or imposed by the European Court of Human Rights.¹¹⁵

However, these examples do not mean that the practice of plea bargaining is firmly established in the continental system, and plea bargaining in most continental systems is limited to petty crime, and is not permitted in most serious or violent crimes.¹¹⁶

3.1.2 Values and problems of plea bargaining

One of the most important, if not the most significant value of the plea bargaining practice is its contribution to the efficiency of trials. At least, this factor was crucial in determining two out of three court actors interest in plea bargaining: prosecutors and judges were interested in making courts work more effectively and lessening the caseload pressure on a court. After prosecutors introduced this practice to ease their underpaid work in order to have enough time to deal with more lucrative activities, judges, pressed with the same challenge, also engaged in the sentence bargaining.¹¹⁷

Another important motive for accepting plea bargaining by judges and prosecutors was that of victory in the trial.¹¹⁸ Prosecutors' usage of plea bargaining secured them with victories in cases, and judges supported plea bargaining because it secured them from appeals and reversal of trials.¹¹⁹ The increased number of appeals and more reversals of trials persuaded judges and prosecutors of the usefulness of plea bargaining - for prosecutors more appeals meant more prosecutorial work, while reversal brought reputational damages to

¹¹⁵ Among others, the European Court of Human Rights demanded that European countries allow defendants a right to question more the witnessed appearing before them, as well as demanding the limitation of the role of judges, in order to appear more impartial. Ibid., 43-45.

¹¹⁶ Ibid., 45.

¹¹⁷ Fisher, *Plea Bargaining Triumph*, 175-176.

¹¹⁸ Ibid., 176.

¹¹⁹ Ibid., 176.

judges, “prosecutor and trial judge valued it as a means to guard their reputations from the scent of fecklessness or incompetence.”¹²⁰ As for criminal defendants, plea bargaining was the safe tool to escape uncertainty and avoid the strictest sentences. Through plea bargaining the system protects itself from factual and legal errors¹²¹, the defendant eliminates any formal doubt of guilt by acknowledging it, and by repudiating the right to trial and the right to complaint, there is no possibility to any court declaring error on the appeal.

Plea bargaining was thus adopted in the mid-19th century as a practice to ease the work of court of prosecutors and it was slowly and somewhat reluctantly accepted by judges, defenders and defendants.¹²² Now, plea bargaining has become so dominant among other mechanisms in adversarial judicial systems, that a 1992 survey showed that guilty pleas accounted for 92% of all convictions in state courts,¹²³ while according to the United States Supreme Court Reports, 95% of all criminal convictions are reached by admissions of guilt.¹²⁴

While we can argue that plea bargaining has become accepted as a practice mainly to ease the work of different court actors, there is and always was a number of serious controversies following the employment of the practice of plea bargaining. Among them, one of the most important was whether plea bargaining practice may not actually violate the rights of defendants who are pleading guilty. When agreeing to plead guilty, a defendant is actually giving up the right to trial, one of the most important civic rights.¹²⁵ The question that needs to be posed is under which conditions we can reject this criticism – how we can secure that

¹²⁰ Ibid., 178.

¹²¹ Ibid.

¹²² Ibid., 195-201.

¹²³ D.D. Guidorizzi, “Should We Really ‘Ban’ Plea Bargaining? The Core Concerns of Plea Bargaining Critics”, 47 Emory Law Journal (1998): 753, in Michael Scharf, “Trading Justice for Efficiency” 11.

¹²⁴ Brady v United States, 397 United States Supreme Court Reports (US) 742, at 752, n.10 (1970), in Michael Scharf., “Trading Justice for Efficiency”: 11.

¹²⁵ Suzann R.Thomas Buckle and Leonard G.Buckle, *Bargaining for Justice: Case Disposition and Reform in the Criminal Courts* (New York: Praeger, 1977), 19.

waiving one of the most important rights, such as the right to trial, is done in a legal and rightful manner? There are several arguments posed in the literature regarding this legal challenge, and most of them encompass the precondition that plea bargaining needs to be made knowingly and voluntarily.¹²⁶ In practice, this means that the person who is waiving his or her right to trial and enters a plea agreement is not coerced into the agreement and that he or she understands the significance of the guilty plea.¹²⁷ The standard is that the person that is entering a plea agreement should be advised about the nature of the charges against him or her, and given an accurate advice on the consequences if he or she enters a plea agreement.¹²⁸

3.2. From blanket amnesty to conditional amnesty

Amnesty has long been accepted as a means to resolve different kinds of issues in societies throughout human history. However, for the purposes of this thesis, the focus shall be on amnesties that were introduced in order to resolve disputes between conflicting sides following war and civil conflict and mostly was implemented in order to pacify situations of ongoing violence, or show clemency to enemies in order to create peaceful future. One of the first such amnesties was introduced in ancient Greece, when amnesty was implemented in Athens to resolve issues from the civil war.¹²⁹ Ever since then, throughout history, it presented a legitimate tool for the resolution of conflicting situations. In the 20th century, amnesty became, especially during the 1970s, in Latin American countries under dictatorial regimes, what Louise Joinet called ‘a symbol of freedom’, since it was seen as a tool for the liberation of political prisoners.¹³⁰ However, as soon as democratic transitions in these countries began, amnesty turned into a tool to avoid accountability and ‘to protect individuals from accountability for some of the worst

¹²⁶ Ibid, 20.

¹²⁷ Ibid.

¹²⁸ Ibid.

¹²⁹ Adriaan Lanni, “Transitional justice in ancient times”, *University of Pennsylvania Journal of International Law*, Vol. 32, No. 2, (2010): 552-553.

¹³⁰ ESC Commission on Human Rights, The administration of justice and the human rights of detainees: Question of the impunity of perpetrators of human rights violations (civil and political), (2 October 1997) E/CN.4/Sub.2/1997/20/Rev.1.

human rights atrocities in the history of humankind'.¹³¹ As Louise Joinet argued in the report Question of the impunity of perpetrators of human rights violations (civil and political) that she prepared for the UN Commission on Human Rights: "Amnesty, the symbol of freedom, was more and more seen as a kind of "insurance on impunity" with the emergence, then proliferation, of "self-amnesty" laws proclaimed by declining military dictatorships anxious to arrange their own impunity while there was still time."¹³² It can be argued, as Samuel Huntington pointed out, that what happened during this period 'was shaped almost exclusively by politics, by the nature of the democratization process, and by the distribution of political power during and after the transition'.¹³³ According to Huntington, there are several reasons why in this wave of democratization, amnesties were acceptable: first, the majority of pre-1990 democratizations were 'transformations', where reformists in positions of power in authoritarian regimes initiated liberalisation; secondly, even in the case of replacement of old regimes, members of the old regimes could seriously jeopardize newly elected democratic governments, in the case of potential prosecutions; and thirdly, the issue of amnesty was part of a negotiated settlement between old and new regimes.¹³⁴ In several countries in Latin America members of military juntas, anticipating democratic transitions and their own ouster from power, proclaimed amnesty laws, trying to prevent potential prosecutions for abuses they were responsible for. In some other countries, as in Uruguay, new democratic governments declared amnesty after the democratic transition.¹³⁵ Augusto Pinochet imposed a general amnesty for all the crimes and human rights violations committed by military and security forces prior to that time.¹³⁶ This self-amnesty law and other factors, such as the strong political role that Pinochet still played in post-transitional Chile, as well as unreformed military forces, prevented prosecutions and accountability for crimes committed during the military rule era. Argentina also

¹³¹ Slye, "The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law: is a Legitimate Amnesty possible?": 175.

¹³² Ibid.

¹³³ Samuel P. Huntington, "The Third Way: Democratization in the Late Twentieth Century", in *Transitional Justice: How emerging democracies reckon with former regimes*, Vol.1, ed. Neil Kritz, (Washington DC: United States Institute for Peace, 1995), 69.

¹³⁴ Ibid., 70-78.

¹³⁵ Jamal Benomar, "Justice After Transitions", in *Transitional Justice: How emerging democracies reckon with former regimes*, Vol.1, ed. Neil Kritz, (Washington DC: United States Institute for Peace, 1995), 37.

¹³⁶ Ibid.

struggled with the issue of amnesty, which after some early prosecution initiative in the mid-1980s, prevented prosecutions of those responsible for crimes committed during the period of the military junta.¹³⁷

However, with the increased role of the human rights movement, amnesties for human rights violations, as in Argentina or Chile, have been evaluated as unacceptable. As Ronald Slye argues, those that objected the use of amnesties have focused on international law, customary international law, and decisions by international and regional tribunals.¹³⁸ Their main argument is that amnesties are unacceptable under international law, since there are numerous international treaties that precisely define that states have obligations to prosecute those responsible for human rights violations.¹³⁹ The four Geneva Conventions (1949) provide that “Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts” or else extradite them for trial in another jurisdiction.¹⁴⁰ In addition to this, the Convention on the Prevention and Punishment of the Crime of Genocide (1948) prescribes that “the Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish”.¹⁴¹ The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) proscribes that “an order from a superior officer or a public authority may not be invoked as a justification of torture”¹⁴² and also obliges its signatories to make all acts of torture

¹³⁷ Hayner, *Unspeakable Truths*, 46.

¹³⁸ Slye, “The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law: is a Legitimate Amnesty possible?": 175.

¹³⁹ *Ibid.*, 179-181.

¹⁴⁰ Article 49, Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949, Article 50, Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 12 August 1949, Article 129, Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949, Article 146, Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.

¹⁴¹ Article 1, Convention on the Prevention and Punishment of the Crime of Genocide, 1948.

¹⁴² Article 2 (3) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984.

offences under their national criminal law, and to arrest, punish or extradite perpetrators¹⁴³.

However, there have been different types of amnesties, and democratic transitions or transitions from conflict to peace, which demanded some kind of amnesty, in order to prevent the resurgence of the conflict and abuses. Ronald Slye defines four types of amnesties, applied until now: amnesic amnesties, compromise amnesties, corrective amnesties, and accountable amnesties.¹⁴⁴

The first type, amnesic amnesties are those that are usually blanket self-amnesties, whose main characteristics are ‘concealment and anonymity’. Persons covered by this type of amnesty are usually not identified, but treated as part of the group, such as members of the army, or security forces, and this type of amnesty does not provide any information about the crimes, for which the amnesty is instigated. They apply to their recipients ‘regardless of their specific motive or objective and identify eligible persons through group characteristics’. And as Slye argued, ‘amnesic amnesties provide no relief to victims, and correspondingly impose burdens on victims’, ‘they are not a genuine expression of societal grace or forgiveness’, and mostly, they are not ‘remedial, and may be designed to diminish an armed conflict or civil unrest’.¹⁴⁵

The second type of amnesty, compromise amnesty can also be the result of a compromise of conflicting sides in ending a conflict or replacing a regime responsible for human rights violations, and they can provide some form of redress.¹⁴⁶

¹⁴³ Article 8, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984.

¹⁴⁴ Slye, “The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law: is a Legitimate Amnesty possible?": 240-247.

¹⁴⁵ Ibid., 240-241.

¹⁴⁶ As Slye argued: “A compromise amnesty is usually restricted in some way--restricted in the acts to which it applies, to the people for whom it is applicable, or to the motives or objectives of eligible persons. A compromise amnesty may apply only to a group of people defined by their status, to a class of acts regardless of the status of the perpetrator, or to those individuals or acts exhibiting a particular motive or objective. The existence of such qualitative requirements means that compromise amnesties may result in some form of truth or accountability” Ibid., 241.

The third type of amnesty is corrective amnesty, which is designed to either pacify a situation after a conflict, or correct a previous injustice. As Slye pointed out, the first type ‘usually occurs after a dramatic change in the social and political environment; for example, the lifting of a state of emergency, or the end of an internal or international armed conflict’, while the other is ‘a reversal of an injustice-an injustice created by an illegitimate law, or by mistaken or fabricated facts’, usually in situation where political opponents were prosecuted for political reasons.¹⁴⁷ However, Slye rightly argues that the second type of corrective amnesty is in its nature illegitimate: “granting amnesty to a prisoner of opinion is tantamount to an implicit acknowledgment that his conduct was criminal, whereas it is really the authority responsible for the penalty, being guilty of unlawful detention, [that] might be granted amnesty. The proper remedy for such an injustice is the reversing of a judgment or retroactively repealing an illegitimate law”.¹⁴⁸

And finally, the fourth type of amnesty that Slye defines is an accountable amnesty. This type of amnesty provides a form of accountability and a measure of relief to victims. Slye stipulates the following conditions for an amnesty to be defined as accountable:

“First, it must be democratic in its creation. (...) Second, it must not apply to those most responsible for war crimes, crimes against humanity, and other serious violations of international criminal law. Third, it must impose some form of public procedure or accountability on its recipients (...) Fourth, it must provide an opportunity for victims to question and challenge an individual's claim to amnesty. Such an opportunity could be, but need not be, in a public forum. Fifth, it must provide some concrete benefit, usually in the form of reparations, to victims. (...) Sixth, and finally, it must be designed to facilitate a transition to a more human rights friendly regime, or as part of a comprehensive program of reconciliation aimed at addressing long-standing and serious societal tensions and injustices.”¹⁴⁹

¹⁴⁷ Ibid., 243-244.

¹⁴⁸ Ibid., 244.

¹⁴⁹ Ibid., 245-246.

This type of amnesty is considered accountable since it is individual, looking at beneficiaries individually, and not as part of the group. They do not cover war crimes, crimes against humanity, or other serious violations of international criminal law. They are restricted to acts which were committed with a particular motive or objective. They usually follow or are designed together with other state initiatives to address human rights violations, providing a form of a remedy for victims, contribute to the process of establishing truth and serve the process of reconciliation.¹⁵⁰

This type of amnesty are not the result of compromised justice, although they might seem as such. However, although they serve to avoid formal and legal punishment, 'they are more likely to provide an admission and acknowledgment from a perpetrator than a traditional trial'.¹⁵¹

¹⁵⁰ Ibid., 246.

¹⁵¹ Ibid.

Chapter 4 - Plea bargaining practice at the ICTY

4.1. Causes of introducing plea bargaining at the ICTY

In 2001, the ICTY, based on a hybrid of the common-law and civil-law systems, began to experiment with the practice of plea bargaining. Initially the practice had been rejected by ICTY representatives. The first President of the ICTY, Judge Antonio Cassese, explained what reasons stood behind the decision to reject the use of plea bargaining in the beginning at the existence of the ICTY:

“The question of the grant of immunity from prosecution to a potential witness has also generated considerable debate. (...)However, we always have to keep in mind that this Tribunal is not a municipal criminal court but one that is charged with the task of trying person accused of the gravest possible of all crimes. The persons appearing before us will be charged with genocide, torture, murder, sexual assault, wanton destruction, persecution and other inhumane acts. After due reflection we have decided that no one should be immune from prosecution for crimes such as these, no matter how useful their testimony may otherwise be.”¹⁵²

The practice of plea bargaining was rejected by the majority of the Tribunal officials at the beginning as being clearly incompatible with the goals of the ICTY. Its leaders at the time considered that the Tribunal had been created as a mainly retributive mechanism for prosecuting those responsible for violations of international humanitarian law that would ‘contribute to ensuring that such violations are halted and effectively redressed’.¹⁵³

¹⁵² Statement made by the President Made at a Briefing to Members of Diplomatic Missions, IT/29, 11 February 1994, reprinted in V. Morris and M.P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia, Vol. 2* (Irvington-on-Hudson, New York: Transnational Publishers, Inc., 1995), 649 - 652.

¹⁵³ Security Council Resolution 827, (25 May1993), S/RES/827.

Despite this, the first ‘guilty plea’ was entered by Dražen Erdemović in May 1996, though not as a result of any negotiations between the prosecutor and defence.¹⁵⁴ The first guilty plea resulting from negotiations between the defendant and the prosecutor was the guilty plea entered by Stevan Todorović in the case of Bosanski Šamac. In this case, the prosecutor did not only bargain over sentence, but introduced the concept of charge bargaining.¹⁵⁵ Beside Erdemović and Todorović, another four accused pleaded guilty or negotiated pleas with the Office of the Prosecutor until December 2001, when the rule 62*ter*, which set up the procedure of plea bargaining, was adopted by the permanent judges of the ICTY into the Rules of Procedure and Evidence.¹⁵⁶ The practice of charges and sentence bargaining between the prosecutor and defendants became the usual and fully accepted practice of the court, mandated to prosecute most serious violations of human rights in former Yugoslavia.

While the practice of plea bargaining had been rejected as unacceptable at the beginning of the ICTY’s work, after 2001 it became one of the most prevalent powers that the prosecution used in handling the at the ICTY. The practice was initially unacceptable as being in contradiction with the mandate of the ICTY.¹⁵⁷ As Michael Scharf argues, “[t]he crimes within the Tribunal’s jurisdiction were simply seen as too reprehensible to be bargained over”.¹⁵⁸ The mandate of the ICTY was established for “the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991” in order to “put an end to such crimes and to take effective measures to bring to justice the persons who are

¹⁵⁴ Erdemović’s plea was not a result of the traditional plea negotiations with the Office of the Prosecutor, since he made a voluntary confession of his guilt in his first appearance. Statement of Dražen Erdemović at the hearing of 31 May 1996, pg.26 of English provisional transcript. Available at: <http://www.un.org/icty/transe22/960531ID.htm>. Accessed on: 06 March 2008.

¹⁵⁵ Decision on Prosecution Motion to withdraw Counts of the Indictment and Defence Motion to withdraw pending Motions, *Prosecutor v. Stevan Todorović*, Case No. IT-95-9-PT,

¹⁵⁶ Rule 62*ter*. Rules of Procedure and Evidence, ICTY. (28 February 2008), IT/32/Rev. 41.

¹⁵⁷ Scharf, “Trading Justice for Efficiency: Plea Bargaining and International Tribunals”: 1071.

¹⁵⁸ *Ibid.*

responsible for them”, and finally to “contribute to the restoration and maintenance of peace”.¹⁵⁹ However, after a relatively slow beginning when the Prosecutor of the ICTY was able to prosecute only low level perpetrators and several mid level officers more accused were arrested and transferred to the ICTY following the democratic changes in Croatia and former Yugoslavia in 2000,. Pressured by an increased number of cases to prosecute, and facing complicated trials of the most senior political leaders, such as Slobodan Milosevic former president of Yugoslavia and Serbia, Biljana Plavšić, member of the collective and expanded Presidencies of the Bosnian Serb Republic, and many others, the practice of plea bargaining began to be an accepted practice at the ICTY.

After the democratic changes in Croatia in 1999 and Serbia in 2000, the new democratic governments began arresting and transferring persons indicted at the ICTY. New governments in these countries were under serious pressure from the international community which made cooperation with the ICTY, especially arrests and transfer of indicted persons a compulsory prerequisite for the necessary financial support and potential integration into the European Union. That significantly increased the number of persons transferred from the region and facing prosecutions at the ICTY.¹⁶⁰

In addition to this, the ICTY faced a serious pressure from the international community, and especially the United States, the main donor of the court, which insisted that the ICTY finish its work by the end of 2010, which required the Tribunal to complete all investigations by the end of 2004, all trial activities at first instance by the end of 2008, and all work by 2010.¹⁶¹

Together with the increased number of cases, the complexity of crimes for which persons were indicted presented an additional problem facing ICTY prosecutors. The crimes processed at the ICTY encompass cases with tens of

¹⁵⁹ Security Council Resolution 827, (25 May 1993), S/RES/827.

¹⁶⁰ Until the end of 2000, only four cases against four indictees were completed by Trial and Appeals Chambers, and 12 more perpetrators were in the process before the Appeals Chambers.

¹⁶¹ Scharf, , “Trading Justice for Efficiency”: 6; Julian A. Cook, III, “Plea Bargaining at The Hague”, *Yale Journal of International Law*, Vol. 30, (2005): 475.

thousands of dead civilians and soldiers, and forcible displacement of millions of people in the former Yugoslavia. As Tieger and Shin argued, “with such a vast crime base, even the most rigorous selection of the 'most serious' of cases would significantly burden an entire national judicial system for a lengthy period.”¹⁶² Specifically, the Tribunal had to process very complicated cases of political leaders, with a huge crime base in large geographic areas, lengthy time periods and countless victims.¹⁶³ This kind of cases presented significant financial, temporal and staffing challenges to the ICTY’s capacity, and proved to be extremely costly and time-consuming.¹⁶⁴ As one scholar pointed out, “Tribunal proceedings consequently take forever and cost the moon”.¹⁶⁵ One of the additional problems that arose during the trials of political and military leaders were the investigations of complex links between perpetrators, formal and informal chains of commands, usually exacerbated by the lack of documentary evidences. Access to witnesses was also limited because of “a continuing climate of intimidation and fear, domestic political hostility to cooperation with the Tribunal, and even bureaucratic obstacles”.¹⁶⁶

Following the introduction of this practice to the ICTY, different groups, from victims association to human rights organization, raised serious criticisms of the Tribunal for plea bargaining with perpetrators. A first criticism was that plea bargaining practice was simply incompatible with the nature of crimes that were prosecuted at the ICTY - crimes which the Tribunal was tasked to prosecute were perceived as ‘egregious’, and for persons indicted for these crimes to have a chance to receive lenient sentences through plea bargaining was inconceivable and inappropriate for a war crimes tribunal.¹⁶⁷ There has been criticism that this practice could jeopardize the establishment of an accurate historical record by the

¹⁶² Tieger and Shin, “Plea Agreements in the ICTY”: 668.

¹⁶³ Only the indictment against Slobodan Milosevic encompassed the time period between 1991 and 1999, three areas of Croatia, Bosnia and Herzegovina and Serbia (Kosovo), and dozens of thousands of victims.

¹⁶⁴ Tieger and Shin, “Plea Agreements in the ICTY”: 668.

¹⁶⁵ Combs, “Copping a Plea to Genocide”: 153.

¹⁶⁶ Tieger and Shin, “Plea Agreements in the ICTY”: 669.

¹⁶⁷ Cook, “Plea Bargaining at The Hague”: 476.

Tribunal.¹⁶⁸ There were also some concerns that introduction of the plea agreement practice, which was unfamiliar to defense attorneys coming from the former Yugoslavia, could jeopardize due process.¹⁶⁹

On the other hand, those who supported the practice argued that the plea bargaining practice secured the criminal responsibility of each of those who pleaded guilty for egregious crimes. Additionally, persons entering a guilty plea agreed to testify against other persons indicted before the ICTY, providing valuable accounts of the crimes.¹⁷⁰

Taken together the above considerations, especially combined with the practical reasons for resolving the burden of costly, complicated, time and staff consuming trials overcame the critics, made plea bargaining, a solution for the ICTY to deal with the problems of caseload volume and complex cases.

4.2. Plea bargaining process at the ICTY – Procedure

The eventual procedure and rules regarding the plea bargaining practice were adopted and developed by establishing and then developing precedents in the course of the actual proceedings of the ICTY.

Thus already in 1996, Dražen Erdemović, a soldier of the Bosnian Serb Army pleaded guilty and confessed his participation in genocide and killings of Bosniak men and boys in the eastern Bosnian city of Srebrenica in July 1995. Following him, Goran Jelisić, the former commander of camp Luka, one of the Bosnian Serbs' most notorious camps, pleaded guilty for some of the crimes he was indicted for. These two instances only involved negotiations over recommendations for the sentences that the accused was supposed to receive.¹⁷¹

¹⁶⁸ Ibid.

¹⁶⁹ Ibid., 501.

¹⁷⁰ Ibid.

¹⁷¹ Nancy Amoury Combs, *Guilty Pleas in International Criminal Law: Constructing a Restorative Justice Approach* (Stanford: Stanford University Press, 2007), 60-62

In the cases of another 18 defendants who pleaded guilty at the ICTY, guilty pleas came as a result of charge bargaining – when prosecutors agreed not to include certain crimes in the indictment of the accused, or dismissed charges that were already part of the indictment in order to obtain the accused’s guilty plea.¹⁷² Using this procedure, the 18 defendants pleaded guilty at the ICTY.¹⁷³ Among these persons were mostly army and police officials, commanders of camps, but also prominent political leaders of Croatian and Bosnian Serbs.

The rule 62*bis* of the Rules of Procedure and Evidence of the ICTY stipulated the necessary conditions for accepting the guilty plea from the defendant, following the confessions of previously mentioned defendants – Dražen Erdemović and Goran Jelisić. They both confessed some of the crimes they were responsible for, and the Office of the Prosecutor of the ICTY, entered into negotiations with them. Both were sentenced for crimes to which they had confessed – Dražen Erdemović was sentenced to five years imprisonment, while Goran Jelisić was sentenced to 40 years imprisonment.

¹⁷² *Ibid.*, 63

¹⁷³ Those were Milan Babić, Predrag Banović, Miroslav Bralo, Ranko Češić, Miroslav Deronjić, Damir Došen, Miodrag Jokić, Dragan Kolundžija, Darko Mrđa, Dragan Nikolić, Momir Nikolić, Dragan Obrenović, Biljana Plavšić, Ivica Rajić, Duško Sikirica, Milan Simić, Stevan Todorović, Dragan Zelenović. See: *Prosecutor v. Milan Babić*, (Judgement on Sentencing Appeals), IT-03-72-A, (18 July 2005); *Prosecutor v. Predrag Banović*, (Sentencing Judgement), IT-02-65/1-S (28 October 2003); *Prosecutor v. Miroslav Bralo*, (Judgement on Sentencing Appeals), IT-95-17-A (2 April 2007); *Prosecutor v. Ranko Češić*, (Sentencing Judgement), IT-95-10/1-S (11 March 2004); *Prosecutor v. Miroslav Deronjić*, (Judgement on Sentencing Appeals), IT-02-61-A (20 July 2005); *Prosecutor v. Damir Došen et al* (Sentencing Judgement), IT-95-8-S (13 November 2001); *Prosecutor v. Miodrag Jokić*, (Judgement on Sentencing Appeals), IT-01-42/1-A (30 August 2005); *Prosecutor v. Dragan Kolundžija et al* (Sentencing Judgement), IT-95-8-S (13 November 2001); *Prosecutor v. Darko Mrđa* (Sentencing Judgement), IT-02-59-S (31 March 2004); *Prosecutor v. Dragan Nikolić* (Judgement on Sentencing Appeals), IT-94-2-A (4 February 2005); *Prosecutor v. Momir Nikolić* (Judgement on Sentencing Appeals), IT-02-60/1-A (8 March 2006); *Prosecutor v. Dragan Obrenović* (Sentencing Judgement), IT-02-60/2-S (10 December 2003); *Prosecutor v. Biljana Plavšić* (Sentencing Judgement), IT-00-39&40/1-S (27 February 2003); *Prosecutor v. Ivica Rajić* (Sentencing Judgement), IT-95-12-S (8 May 2006); *Prosecutor v. Duško Sikirica et al* (Sentencing Judgement), IT-95-8-S (13 November 2001); *Prosecutor v. Milan Simić* (Sentencing Judgement), IT-95-9/2-S (17 October 2002); *Prosecutor v. Stevan Todorović* (Sentencing Judgement), IT-95-9/1-S (31 July 2001); *Prosecutor v. Dragan Zelenović* (Judgement on Sentencing Appeals), IT-96-23/2-A (31 October 2007).

Between 1997 and 1999, and due to some of the problems that arose during the Erdemovic and Jelusic cases, the judges of the ICTY refined the procedure of plea bargaining:

“If an accused pleads guilty in accordance with Rule 62 (vi), or requests to change his or her plea to guilty and the Trial Chamber is satisfied that:

- (i) the guilty plea has been made voluntarily;
- (ii) the guilty plea is informed;
(Amended 17 Nov 1999)
- (iii) the guilty plea is not equivocal; and
- (iv) there is a sufficient factual basis for the crime and the accused’s participation in it, either on the basis of independent indicia or on lack of any material disagreement between the parties about the facts of the case, the Trial Chamber may enter a finding of guilt and instruct the Registrar to set a date for the sentencing hearing.
(Amended 10 July 1998, amended 4 Dec 1998).”¹⁷⁴

Another set of rules was adopted in order to regulate proceedings of plea bargaining and negotiations between an accused and the prosecutor. The rule *62ter* adopted in 2001 decided that the prosecutor and the defence may agree, after the accused enters a guilty plea, that the prosecutor can:

- “(i) apply to amend the indictment accordingly;
IT/32/Rev. 37 54 6 April 2006
- (ii) submit that a specific sentence or sentencing range is appropriate;
- (iii) not oppose a request by the accused for a particular sentence or sentencing range.”¹⁷⁵

However, additional provision of the rule *62ter* shows that judges of the ICTY were preserving their control over the implementation of plea bargaining practice at the international court charged with the duty to prosecute the most serious

¹⁷⁴ Rule *62bis*, Rules of Procedure and Evidence, ICTY. (28 February 2008), IT/32/Rev. 41.

¹⁷⁵ Rule *62ter*, Rules of Procedure and Evidence, ICTY. (28 February 2008), IT/32/Rev. 41.

violations of international law. According to the B provision of the rule 62*ter* Trial Chambers shall not be bound by any agreement between the prosecutor and a defendant.¹⁷⁶ In cases where a plea agreement had been reached by the parties, the Trial Chamber could require “the disclosure of the agreement in open session or, on a showing of good cause, in closed session, at the time the accused pleads guilty in accordance with Rule 62 (vi), or requests to change his or her plea to guilty”.¹⁷⁷ In the sentencing procedure in cases of guilty pleas the Prosecutor and the defence were empowered to submit any relevant information that can assist the Trial Chambers in deciding the appropriate sentence.¹⁷⁸

By far the most problematic provision of the Rules of Procedure and Evidence is the rule 62*ter* (i), which gave authorization to the Office of the Prosecutor to amend the indictment in the process of plea bargaining with defendants, which had a charge bargaining as its consequence. It is natural and acceptable practice that in some cases, prosecutors may have the power to withdraw charges due to the problems with evidentiary deficiencies, or problems to secure reliable witnesses. However, in some of the cases before the ICTY this practice of the prosecutors had severe consequences and was heavily criticized. In three very important cases, against already mentioned Plavšić, but also two senior commanders of the Bosnian Serb Army, Momir Nikolić and Dragan Obrenović, prosecutors withdrew charges of genocide, the gravest of the crimes within the mandate of the ICTY, while these three defendants pleaded guilty for crimes against humanity. This had a serious impact on the plea bargaining process at the ICTY, which was very seriously criticized, not only by victims and human rights activist, but by the Trial Chambers of the ICTY as well.

¹⁷⁶ Ibid.

¹⁷⁷ Ibid.

¹⁷⁸ Rule 100 (A), Rules of Procedure and Evidence, ICTY. (28 February 2008), IT/32/Rev. 41. In addition to this rule, as every sentence at the ICTY, the sentences for defendants who pleaded guilty are part of a judgment, presented in public and in the presence of the convicted person. Rule 100 (B), Rules of Procedure and Evidence, ICTY. (28 February 2008), IT/32/Rev. 41.

Another provision for the plea bargaining process that caused many criticism was the sentence bargaining, which also experienced several phases. In the beginning, the sentences that were recommended by the ICTY prosecutor's office were so modest and lenient, that as Combs argues, "it was not clear that there existed any sentencing differential between conviction after trial and conviction after a guilty plea"¹⁷⁹. However, after several cases of quite moderate sentences imposed on some defendants, judges of the ICTY started practising their right not to be bound by agreement between the prosecutor and defendants, and a harsher policy in sentencing was practiced.¹⁸⁰

As the practice developed, several other features were included in the plea bargaining process at the ICTY. Firstly, and most importantly, the prosecutors demanded that some level of cooperation between defendant and prosecutors' office has to be included. Defendants were asked to provide information in all cases that were connected to their case, and to testify against other defendants, therefore supporting prosecutions of other persons.¹⁸¹ Additionally to that, the practice of public apologies and expression of remorse to victims of the crimes they admitted responsibility for, became a usual ritual at the ICTY.¹⁸²

¹⁷⁹ Combs, *Guilty Pleas in International Criminal Law*, 71.

¹⁸⁰ This was clearly shown in the case of Momir Nikolić, where the Trial Chamber decided not to impose sentence in accordance with recommendation of the Office of the Prosecutor, that suggested that Nikolić receives a punishment between 15 to 20 years imprisonment and sentenced Nikolić to 27 years. Combs, *Guilty Pleas in International Criminal Law*, 76-77.

¹⁸¹ Combs, *Guilty Pleas in International Criminal Law*, 90.

¹⁸² *Ibid.*

Chapter 5 – Conditional amnesty at the Truth and Reconciliation Commission in South Africa

5.1. The Amnesty process at the Truth and Reconciliation Commission in South Africa – Procedure

According to the PNUR of 1995, the SATRC’s Amnesty Committee had the power to offer a conditional amnesty “to persons who make full disclosure of all relevant facts”¹⁸³, in relation to “an act associated with a political objective committed in the course of the conflicts of the past”¹⁸⁴. Any person had a right to submit an application for amnesty, however, it was prescribed that the Committee would give priority to applicants who are in custody, after consultation with the Minister of Correctional Services.¹⁸⁵ One of the most important features of the Amnesty Committee was that, with some stipulated exceptions, amnesty applications had to be heard at public hearings, and the Committee had an obligation to inform (besides the applicant) any victim or person implicated in a particular case of their right to be present at the hearing, to adduce evidence and to submit any article to be taken into consideration.¹⁸⁶

There were a number of criteria that needed to be met in order for an applicant to be granted amnesty. The Act prescribed that when:

“(a) the application complies with the requirements of this Act;

(b) the act, omission or offence to which the application relates is an act associated with a political objective committed in the course of the conflicts of the past in accordance with the provisions of subsections (2) and (3); and

¹⁸³ Promotion of National Unity and Reconciliation Act, 1995..

¹⁸⁴ Article 20 (b), Ibid.

¹⁸⁵ Article 18, Promotion of National Unity and Reconciliation Act, 1995..

¹⁸⁶ Article 19 (4), Promotion of National Unity and Reconciliation Act, 1995.

(c) the applicant has made a full disclosure of all relevant facts, it shall grant amnesty in respect of that act, omission or offence.”¹⁸⁷

The Committee also took the following criteria into consideration when deciding on whether a particular act, omission or offence were associated with a political objective, starting with the motive of the person who committed the act, omission or offence and the context in which these occurred, as well whether these were committed ‘in the course of or as part of a political uprising, disturbance or event, or in reaction thereto’.¹⁸⁸ Besides that, the criteria were also ‘the legal and factual nature of the act, omission or offence, including the gravity of the act, omission or offence’ and the object or objective of the act, (...) and in particular whether the act, omission or offence was primarily directed at a political opponent or State property or personnel or against private property or individuals’.¹⁸⁹ Particularly important criteria was whether the person who committed the act was a member, an agent or a supporter of the organisation, institution, liberation movement or body’ in the execution of an order of, or on behalf of, or with the approval of.¹⁹⁰ It was also important that the act, offence or omission were not committed for personal gain or ‘out of personal malice, ill-will or spite, directed against the victim of the acts committed’.¹⁹¹

Important feature was that amnesty was defined as individual and not collective – every applicant’s amnesty had to be considered on an individual basis.¹⁹² Applicants were divided into four categories –persons who participated personally in human rights violations, secondly, persons who gave orders for the violations to be committed, thirdly persons who created a climate in which these violations could be committed and lastly persons who failed to act against or punish those responsible for violations.¹⁹³ As previously said, in majority of cases applicants had to appear before the Amnesty

¹⁸⁷ Article 20 (1) Promotion of National Unity and Reconciliation Act, 1995.

¹⁸⁸ Article 20 (3), Promotion of National Unity and Reconciliation Act, 1995.

¹⁸⁹ Ibid.

¹⁹⁰ Ibid.

¹⁹¹ Ibid.

¹⁹² Boraine, *A Country Unmasked*, 276.

¹⁹³ Ibid., 121.

Committee in a public hearing.¹⁹⁴ However, the Committee could direct some hearings to be held in camera, except that any victim who had an interest in such proceedings had the right to be present at such in camera hearings.¹⁹⁵

The procedure at the amnesty hearing was similar to that of criminal trials.¹⁹⁶ However, it did permit the use of hearsay evidence, called witnesses to testify and victims had a right to testify and cross-examine the applicant themselves or through their legal representatives.¹⁹⁷ Cases that involved gross human rights violations were held in public hearings, while other cases that did not involve gross human rights violations were dealt with administratively.¹⁹⁸

The decision of the Amnesty Committee was final (subject only to possible appeal to the Courts) and it could not be reviewed by the Commission.¹⁹⁹ In addition to this, the PNUR prescribed that no criminal or civil suits against those persons who were granted amnesty was possible.²⁰⁰

The amnesty process as a whole was pretty much separated from the rest of the TRC process – the process was legal, the committee was composed of lawyers, it was in a way protected from any kind of political pressures that the rest of the Commission bodies were subjected to.²⁰¹ In the beginning, the Committee was even given powers to formally grant amnesties until the legislation was amended later providing that amnesties had to be released by the full SATRC.²⁰²

The Amnesty Committee continued in operation longer than the SATRC. It held its last hearing and finalized all decisions at the end of 2001, while it published its report in 2003.²⁰³ 7116 persons applied for, while only 1167 were granted an amnesty and 145 got

¹⁹⁴ Sarkin, *Carrots and Sticks*, 61. ¹⁹⁵ Ibid.

¹⁹⁶ Ibid.

¹⁹⁷ Ibid., 72.

¹⁹⁸ Ibid.

¹⁹⁹ Ibid., 71.

²⁰⁰ Ibid., 72.

²⁰¹ Ibid., 63.

²⁰² Ibid., 75.

²⁰³ Ibid., 74.

²⁰³ Ibid., 73.

partial amnesty.²⁰⁴ Those who received an amnesty had met the criteria of the Commission in terms of its mandate from the PNUR Act. However, not all of them were involved in committing gross violations of human rights,²⁰⁵ but in lesser political offences²⁰⁶.

5.2. Amnesty process at the Truth and Reconciliation Commission in South Africa – Criteria

In terms of the PNUR Act the Amnesty Committee had the power to offer a conditional amnesty to applicants who satisfied its criteria, i.e. “to persons who make full disclosure of all relevant facts”²⁰⁷, in relation to “an act associated with a political objective committed in the course of the conflicts of the past”²⁰⁸. These two criteria, that of full disclosure and of a political objective, were perceived as the two essential factors in the process of establishing truth about crimes committed during apartheid era in South Africa.²⁰⁹ In its Report, the Commission stressed the importance of the full disclosure criterion for establishing truth:

“The legislation also required that, in order for amnesty to be granted, there should be full disclosure of the violations in respect of which it was sought. (...) This was a unique feature of the South African commission. National unity and reconciliation could be achieved only, it was argued, if the truth about past violations became publicly known.”²¹⁰

²⁰⁴ Ibid., 106-107.

²⁰⁵ These were defined as involving killing, torture, abduction, severe ill treatment or any attempt of it, conspiracy, incitement, instigation, command or procurement to commit such an act. Ibid., 108.

²⁰⁶ These included terrorism, public violence, bombings where no one was killed or injured, bomb scares, arson, robbery, damage to property, harbouring cadres, unlawful possession of weapons, escaping from the custody, public violence, sabotage, etc. Ibid., 109-110.

²⁰⁷ Promotion of National Unity and Reconciliation Act, 1995..

²⁰⁸ Article 20 (b), Ibid.

²⁰⁹ Sarkin, *Carrots and Sticks*, 249.

²¹⁰ TRC Report, Volume 1, Chapter 4, Paragraph 21.

There were other criteria, as already mentioned, but their relevance for the purposes of this thesis are not as important as the criteria of full disclosure and political objectives as the conditions for granting amnesty. However, there were also certain obvious problems in the amnesty process. Firstly, applicants were required to submit a written application on the prescribed amnesty application form.²¹¹ According to the Amnesty Committee, the problem was that many applications were not submitted on a proper amnesty application form, or that many were unsigned and/or had not been attested to by a commissioner of oaths.²¹² One of the biggest problem was that many application forms had been completed without legal assistance to the applicant or had been completed by others on behalf of illiterate persons.²¹³ However, Jeremy Sarkin points out as one of the most important problems that application forms had not been designed in the best possible manner – the application form did not ask precise questions in order to get sufficient information in order to decide on application on this level. According to Sarkin, this creayed serious problems – especially regarding the fact that the majority of the applications were resolved administratively and without public hearings, as well as by an inadequate administrative system due to the scarce human resources available to the five members of the Committee.²¹⁴ However, since the amnesty applications that involved gross human rights violations were decided in public hearings, we can conclude that the problem of imprecise forms did not have a crucial influence on obtaining full disclosure in these most serious cases.

What could have presented a more serious problem in applying the criterion of full disclosure was that there was no clear guidance as to what ‘full disclosure’ actually meant, since there were no specified provisions to this effect in the PNUR Act. However, according to Ronald Slye, this may not have been such a problem. Slye argues that lack of precise guidelines could actually have been positive, since it created some uncertainty for applicants, who could not have known precisely what information would be significant or not, and which information were already in possession of the

²¹¹ TRC Report, Volume 6, Section 1, Chapter 1, Paragraph 8.

²¹² Ibid, paragraph 9.

²¹³ Ibid.

²¹⁴ Sarkin, *Carrots and Sticks*, 69.

Commission.²¹⁵ Slye argues that “the effect of this requirement was that individual applicants had an incentive to disclose as much damaging material about themselves and their colleagues as they believed the commission’s investigative team had been able to uncover”.²¹⁶

The SATRC offered this interpretation of its application of the full disclosure criterion:

“It is important to stress, however, that the obligation to make full disclosure related only to relevant facts. This required that the Committee develop an interpretation of the phrase ‘relevant facts’. (...) The facts to be disclosed were, therefore, only those relevant to the incident in question. The interpretation adopted by the Committee required that applicants give a full and truthful account of their own role, as well as that of any other person, in the planning and execution of the actions in question. Furthermore, applicants had to give full details of any other relevant conduct or steps taken subsequent to the commission of the particular acts: for example, concealing or destroying evidence of the offence.”²¹⁷

The Commission also discussed the criticism that its interpretation of the full disclosure criterion was problematic ‘because it is perceived as having inhibited the potential of the amnesty process to contribute to the overall objective of the truth and reconciliation process, namely of establishing as complete a picture as possible of the political conflicts of the past’.²¹⁸ Critics claimed that the Commission’s interpretation and application of the full disclosure criterion did not serve the overall objective of the process in that applicants ‘were able to hold back information about incidents that were unlikely to be uncovered in the future, an attitude that frustrated the very intention of the overall process’.²¹⁹

²¹⁵ Ronald C.Slye, “Amnesty, Truth, and Reconciliation” in *Truth V. Justice: The morality of truth commissions*, edited by Robert I Rothberg and Dennis Thompson, (Princeton: Princeton University Press, 2000), 174.

²¹⁶ *Ibid.*, 175.

²¹⁷ TRC Report, Volume 6, Section 1, Chapter 1, Paragraph 25.

²¹⁸ *Ibid.*, paragraph 26.

²¹⁹ *Ibid.*

As justification for its interpretation of the full disclosure criterion, the Commission noted that there were other measures that Commission had used to compile information in order to establish a full picture about past abuses:

“It should also be pointed out that the Act gave the Commission certain general powers of investigation and subpoena, which allowed it to look further into any matters left unresolved by the amnesty process. The Committee accepts, however, that the criticism relating to possible shortcomings in the process as enacted is serious and substantial.”²²⁰

The second important criterion, that of having a political objective was closely associated with that of full disclosure - in order to be granted amnesty the applicant had to prove that the act he applied for is associated with a political objective.²²¹ The political association had to be indicated on the amnesty application form, and the Amnesty committee could grant amnesty without public hearing if the applicant gave full disclosure and proved that the act was associated with a political objective, but did not constitute a gross violation of human rights. However, when it came to applicants who went through amnesty hearings, the decision whether an act was related to a political objective was decided by the Amnesty Committee.²²²

There are certain issues that were of particular interest in deciding whether the applicants fulfilled this requirement. Firstly, the Amnesty Committee had to decide whether the applicant fulfill the criterion of membership of a political organisation, i.e. which political group the applicant was a member of. As defined in the PNUR, amnesty was granted to “any member or supporter of a publicly known political organisation or liberation movement on behalf of or in support of such organisation or movement (...)”²²³; “any employee of the State or any former state or any member of the security forces of the State or any former state in the course and scope of his or her duties and within the scope of his or her express or implied authority directed against a publicly

²²⁰ Ibid, paragraph 27.

²²¹ Article 20 (3), Promotion of National Unity and Reconciliation Act, 1995.

²²² Sarkin, *Carrots and Sticks*, 279-280.

²²³ Article, 20 (2.a), *ibid*.

known political organisation or liberation movement engaged in a political struggle against the State or a former state or against any members or supporters of such organisation or movement (...)”²²⁴; “any employee or member of a publicly known political organisation or liberation movement in the course and scope of his or her duties and within the scope of his or her express or implied authority directed against the State or any former state or any publicly known political organisation or liberation movement (...)”²²⁵; any person in the performance of a coup d' etat to take over the government of any former state, or in any attempt thereto (...)”²²⁶; and any person that associated himself or herself with the acts or crimes that were committed²²⁷, as defined by the Act as well as those who were members of these groups, who on reasonable grounds believed that he or she was acting in the course and scope of his or her duties and within the scope of his or her express or implied authority²²⁸.²²⁹

The overlap between certain sections, allowed the Amnesty Committee to interpret this section in various ways.

Sarkin analyzed the application of this set of criteria and pointed out that the Amnesty Committee interpreted it relatively widely. In the case of applications by persons applying in the case of Amy Biehl, membership in the party or liberation movement was not crucial, but their support for the party. The Amnesty Committee concluded that although applicants in this case did not act under orders or instructions of the Azanian People’s Liberation Army or Pan Africanist Congress, and were not members of APLA, they were active supporters of the PAC, and acted in order to support the liberation struggle against the State.²³⁰

²²⁴ Article 20 (2.b), *ibid.*

²²⁵ Article 20 (2.d), *ibid.*

²²⁶ Article 20 (2.e), *ibid.*

²²⁷ Article 20 (2.g), *ibid.*

²²⁸ Article 20 (2.f), *ibid.*

²²⁹ *Ibid.*

²³⁰ Amnesty applications V.S. Ntamo, (AM 4734/97), N.A.Peni (AM 5188/97), E.M.Nofemela (AM 5282/97) and M.C.Manqinqa (AM 0669/96). Sarkin, *Carrots and Sticks*, 284.

Another important conclusion made by authors analyzing the amnesty process and application of political objective criteria was that the Amnesty Committee focused on the question whether the act or offense was done under the order or on behalf of the state or political organization.²³¹ Slye particularly discussed this issue: “in practice the committee has mostly looked to whether an authorised superior in a recognised political organisation ordered the act, or whether the act was closely related to an explicit programmatic statement of an established political organisation”.²³² He goes further and argues that in the cases where political organization approved a particular act, it was more likely for the applicant to be granted amnesty, but that in the different situation, where a political organization denied approval of certain acts, amnesty could be denied to them. Slye rightly pointed out that this situation allowed for the possibility that political parties ‘might have confirmed or denied the official nature of an applicant’s activities based on their then current political interests’²³³.

However, our account of the procedure and criteria of the Amnesty process still needs to address the central question for the purpose of this thesis, i.e. the contributions made by the application of the ‘full disclosure’ and ‘political objective’ criteria to the establishment of truth about human rights abuses in the conflict of the past. To what extent, and in what ways, did the TRC amnesty process amount to a truth process? This shall be discussed in the next chapter.

²³¹ Sarkin, *Carrots and Sticks*, 299.

²³² Ronald C.Slye, “Justice and Amnesty”, in *Looking Back, Reaching Forward* edited by Charles Villavicencio and Wilhelm Verwoerd, (Cape Town: University of Cape Town Press, 2000) , , 179-180.

²³³ Ronald C.Slye, “Amnesty, Truth, and Reconciliation”, 176.

Chapter 6 - Transitional justice and truth-telling in post-conflict societies

6.1. Conditional amnesty and truth-telling at the Truth and Reconciliation Commission in South Africa

The process of establishment of truth about past human rights abuses at the SATRC involved two parallel inquiries – one conducted by the Human Rights Violations Committee, in public hearings where victims told stories about their suffering and the human rights violations they had endured, and one conducted by the Amnesty Committee, where perpetrators testified about the human rights violations they had committed and for which they required amnesty.

As noted by Boraine, “the provision of amnesty to perpetrators of gross human rights has been and remains a source of heated debate and controversy in the international human rights community”²³⁴. The SATRC provisions for granting amnesty were heavily criticized by the international human rights community, as well as by victims and representatives of victims’ association. The political party Azapo and the families of victims even took the SATRC to the court and challenged the PNUR Act’s provision for granting amnesty before the Constitutional Court of South Africa.²³⁵ Their main argument was that the PNUR Act was not in accordance with the new Constitution of South Africa. In its judgment, delivered in July 1996, the Court found that amnesty was crucial for establishing truth about past crimes and, therefore, essential for reconciliation:

“That truth, which the victims of repression seek so desperately to know is, in the circumstances, much more likely to be forthcoming if those responsible for such monstrous misdeeds are encouraged to disclose the whole truth with the incentive

²³⁴ Boraine, *A Country Unmasked*, 277.

²³⁵ Azanian Peoples Organization (AZAPO) and Others v the President of the Republic of South Africa, CCT 17/96, Constitutional Court, 25 July 1996.

that they will not receive the punishment which they undoubtedly deserve if they do. Without that incentive there is nothing to encourage such persons to make the disclosures and to reveal the truth which persons in the positions of the applicants so desperately desire..”²³⁶

The conclusion of the Constitutional Court of South Africa was welcomed by some scholars had argued that this form of amnesty represents the most sophisticated of all models of amnesties that had been seen until then,²³⁷ and - as one of the most prominent scholars in the area of amnesty Ronald Slye argued - the only one that could “come close to qualify as an accountable amnesty”²³⁸. Slye identified several conditions for an amnesty to be qualified as accountable. Firstly, the decision to establish an amnesty process has to be brought about in a democratic way meaning they cannot take the form of self-amnesty or be brought about by those who are going to be the beneficiaries of its provisions. An accountable amnesty needs to be mandated by a democratic government through a wide public debate.²³⁹ Secondly, amnesty cannot be granted to those who are responsible for crimes such as genocide, crimes against humanity and war crimes.²⁴⁰ Thirdly, this kind of amnesty demands that an applicant should be subjected to a public hearing where he would be “open to an examination” and publicly acknowledge the deeds he or she was responsible for.²⁴¹ Fourthly, victims have to have the possibility to question the requests for an amnesty by applicants.²⁴² Fifthly, this model of amnesty has to provide a form of reparations for victims.²⁴³ And lastly, it has to be a part of a wider transitional process, as a facilitator for the establishment of the rule of law and a broader reconciliation process in the country.²⁴⁴ As Slye pointed out, thus far only the South African amnesty process can be seen to fulfill these conditions. Accordingly, it can be argued that the process of amnesty at the SATRC was one of accountable amnesty.

²³⁶ AZAPO v. The President of South Africa, CCT 17/96, (1996), par.17.

²³⁷ Ibid.

²³⁸ Slye, “The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law: is a Legitimate Amnesty possible?": 246.

²³⁹ Ibid., 245.

²⁴⁰ Ibid.

²⁴¹ Ibid.

²⁴² Ibid.

²⁴³ Ibid.

²⁴⁴ Ibid.

The most important feature allowing the South African amnesty to be described as accountable is that “amnesty was exchanged for truth”.²⁴⁵ The bargain was that applicants should make a full disclosure regarding the abuses they committed or participated in. If they attempted to give only partial information, the Committee was empowered to deny them amnesty, implying that they remained liable to be prosecuted afterwards. The requirement that perpetrators give a full disclosure was very important for the South African transition – the amnesty applicants provided “very wide and detailed information not only to the Amnesty Committee but to the whole South Africa, because of the public nature of the hearings. The silence was broken and at least a measure of truth was revealed.”²⁴⁶ The TRC argued this issue in its Report:

“The amnesty process had a critical role to play in helping establish the fullest possible picture of the past political conflict in the country. To this end, amnesty applicants were legally required to give a full and truthful account of the incidents in respect of which they were seeking amnesty. They were accordingly required to make full disclosure of all of the facts relevant to the incident in question.”²⁴⁷

When an applicant was found to be untruthful, the application was refused. However, in relation to what a full disclosure required, the TRC observed:

“The obligation to make full disclosure related only to relevant facts. (...) The Committee concluded that the obligation in question related solely to the particular incident forming the subject matter of the application and did not extend to any incidents not raised in the amnesty application. The facts to be disclosed were, therefore, only those relevant to the incident in question. The interpretation adopted by the Committee required that applicants give a full and truthful account of their own role, as well as that of any other person, in the planning and execution of the actions in question. Furthermore, applicants had to give full details of any other relevant conduct or steps taken subsequent to the

²⁴⁵ Boraine, *A Country Unmasked*, 283.

²⁴⁶ *Ibid.*, 286.

²⁴⁷ TRC Report, Volume 6, Section 1, Chapter 1, Paragraph 24.

commission of the particular acts: for example, concealing or destroying evidence of the offence.”²⁴⁸

The truth spoken and revealed by perpetrators was thus seen as no less important than the truth spoken by the thousands of victims that testified at victims’ hearings. While victims’ testimonies were seen as an opportunity for victims to “unburden their grief publicly”²⁴⁹ and to explain publicly in their own language what had happened to them, the testimonies of perpetrators provided victims with knowledge to know “what did in truth happen to their loved ones, where and under which circumstances it did happen, and who was responsible.”²⁵⁰ As Boraine argued, the truth revealed through testimonies of victims and perpetrators “challenged the myths, the lies, and the half-truths conveyed and distributed at every level by the former regime”²⁵¹.

The truth-telling process in the South African TRC thus countered the prevailing official and public denials of the political crimes committed during violent conflict in South Africa. As in similar cases in Chile and Argentina, where the work of the truth commission prevented claims that the military had not killed or tortured political opponents of the regimes in these countries,²⁵² it became impossible to deny that the atrocities of the apartheid regime and the abuses by liberation movements did not happen.

As Boraine argued in the case of the SATRC “the Commission therefore unapologetically set out to try to reach a public and official acknowledgment of what happened during the apartheid era. If only to counter the distorted and partial recording of history in South Africa, it was necessary that there should be an accurate record of the period under review.”²⁵³ Besides breaking the prevailing official denial of past atrocities the TRC achieved a significant measure of acknowledgment and accountability for past atrocities, thereby countering the impunity within South Africa In the words of Boraine:

²⁴⁸ Ibid, par.25.

²⁴⁹ AZAPO v.The President of South Africa, CCT 17/96, (1996), para.17.

²⁵⁰ Ibid.

²⁵¹ Boraine, *A Country Unmasked*, 288.

²⁵² Michael Ignatieff, “Articles of Faith”, *Index on Censorship* 5 (1996) in *A Country Unmasked*, Alex Boraine, 289.

²⁵³ Alex Boraine, *A Country Unmasked*, 287.

“the truth which the Commission was required to establish had to contribute to the reparation of the damage inflicted in the past and to the prevention of it ever happening again in the future.”²⁵⁴ This aspect of searching for the truth through victims’ accounts as well as through perpetrators’ accounts was presumed to have a healing component in the process of dealing with the past. Boraine argued that “for a healing to be a possibility, knowledge in itself is not enough. Knowledge must be accompanied by acknowledgment, an acceptance of accountability. To acknowledge publicly that thousands of South Africans have paid a very high price for the attainment of democracy affirms the human dignity of the victims and survivors and is an integral part of the South African society”.²⁵⁵

The importance of full disclosure as a condition for granting amnesty to the process of establishment of truth was recognized from the outset of the SATRC process. The founding document of the SATRC, the PNUR Act, clearly accentuated how necessary it was for South Africa ‘to establish the truth in relation to past events as well as the motives for and circumstances in which gross violations of human rights have occurred, and to make the findings known in order to prevent a repetition of such acts in future’.²⁵⁶ Furthermore, the PNUR Act reiterated call in the Postamble of the Interim Constitution of South Africa:

“that the pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society; (...) that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimization; (...) that in order to advance such reconciliation and reconstruction amnesty shall be granted in respect of acts, omissions and offences associated with political objectives committed in the course of the conflicts of the past”.²⁵⁷

²⁵⁴ Ibid., 291.

²⁵⁵ Ibid.

²⁵⁶ Promotion of National Unity and Reconciliation Act, 1995.

²⁵⁷ Promotion of National Unity and Reconciliation Act, 1995.

This importance was also recognized by the Constitutional Court of South Africa, which emphasized the necessity of amnesty provisions in the PNUR Act, when deciding in the case of the Azanian People's Organization (AZAPO), Nontsikelelo Ntsiki Biko, Churchill Mhleli Mxenge, and Chris Ribeiro who had legally challenged the amnesty provisions in the Act in July 1996:

“The Act seeks to address this massive problem by encouraging these survivors and the dependants of the tortured and the wounded, the maimed and the dead to unburden their grief publicly, to receive the collective recognition of a new nation that they were wronged, and crucially, to help them to discover what did in truth happen to their loved ones, where and under what circumstances it did happen, and who was responsible.”²⁵⁸

The judges of the Constitutional court went even further – they had understood that the granting of amnesty is crucial for achieving the goals of the TRC:

“The amnesties made available to individuals are indispensable if an essential object of the legislation is to be achieved, the object of eliciting the truth at last about atrocities committed in the past and the responsibility borne for them. The primary sources of information concerning those infamies, the perpetrators themselves, would hardly be willing to divulge it voluntarily, honestly and candidly without the protection of exemptions from personal liability, civil no less than criminal. The emergence of the truth, or a good deal of that at any rate, depends after all on no fear of the consequences continuing to daunt them from telling it, on their encouragement by the prospect of amnesties to reveal it instead. The shroud of silence that has enveloped their activities for too long would otherwise go on doing so.”²⁵⁹

Thus, it can be argued that the truth process was understood not only as a process based on the accounts of victims, but also of those who participated in committing gross human rights violations, since they were the only one that could provide enough insight into the motivation of these violations in South Africa.

²⁵⁸ AZAPO v. The President of South Africa, CCT 17/96, (1996), par.17.

²⁵⁹ Ibid, par.57.

For the purposes of this thesis it can be valuable to examine the amnesty process in South Africa within the normative frame of a human right to truth. As previously said, according to the definition of the right to truth in the UN Office of the High Commissioner for Human Rights study report from 2006, the right to truth encompasses: “knowing the full and complete truth as to the events that transpired, their specific circumstances, and who participated in them, including knowing the circumstances in which the violations took place, as well as the reasons for them.”²⁶⁰

It can thus be argued that the amnesty process of the SATRC, as designed in order to obtain information about human rights violations from perpetrators, was in accordance with what international jurisprudence defined as the right to truth. Secondly, it can be argued that the process of granting amnesty and making compromises with perpetrators contributed to the process of establishment of the truth about crimes committed during the period of examination of the SATRC.

Firstly, it is important to look at the underlying purposes of the requirements of the amnesty procedure as designed by the founding act of the SATRC - the PNUR Act of 1995. As we saw in the previous chapter the Amnesty Committee had to develop the detailed more procedure and criteria for granting amnesty, but the most important of these were that the applicant for amnesty had to make “a full disclosure of all relevant facts”,²⁶¹ along with the second main requirement that “the act, omission or offence to which the application relates is an act associated with a political objective committed in the course of the conflicts of the past”²⁶².

The purpose of the first requirement of the Act for the Amnesty Committee was to obtain as much as relevant facts about past crimes as an amnesty applicant could provide to the Commission. As Slye noted, the absence of precise instructions within the PNUR Act of 1995 or from the Amnesty Committee on what the “full disclosure” actually was

²⁶⁰ ECS, Commission on Human Rights, Study on the right to the truth, Report of the Office of the United Nations High Commissioner for Human Rights, (8 February 2006), E/CN.4/2006/91, par.59.

²⁶¹ Article 20 (1.c), Promotion of National Unity and Reconciliation Act, 1995.

²⁶² Article 20 (1.c), Promotion of National Unity and Reconciliation Act, 1995.

supposed to be, could have been problematic for effective and comprehensive truth-telling. A potential consequence could have been that the absence of precise instructions as to how amnesty applicants should meet the requirement of “full disclosure” might have prevented the Commission from eliciting as much as information as there were about human rights violations in South Africa. The question can be raised how the Amnesty Committee could know whether an amnesty applicant’s disclosure was full and comprehensive, if it did not receive all the information about the events he or she applied for? But, as we have seen, Slye argues that the lack of clear guidance on this requirement along with its comprehensiveness were actually crucial to its effectiveness – applicants required to give certain specified information may well omit other important information they might volunteer, along with extraneous or irrelevant information, in response to a more open-ended requirement for “full disclosure”. It was up to the Amnesty Committee to decide on the pertinence of amnesty applicants’ “full disclosures” – the Amnesty Committee was mandated to evaluate what was relevant and important in the disclosures elicited and not just check their conformity to a pre-determined set of specified requirements. The applicants could not know the amount of information already gathered from other sources, such as victims and witnesses of crimes, by the Committee about a particular crime. The Amnesty Committee was the instance that was tasked to compare the information provided by single amnesty applicant to all the information gathered from victims, witnesses, as well as from other amnesty applicants, and then decide on the quality of information received.²⁶³ The additional value of the procedure was that the Act prescribed that any person implicated in the process, or interested in it, is to be notified of the time and the place of the amnesty hearing for that case, informed about their right to attend the hearing, but also “to testify, adduce evidence and submit any article to be taken into consideration”²⁶⁴ Therefore, during the process, amnesty applicants had the possibility to face their victims at the amnesty hearing, victims who were allowed to listen to them, and could confirm or question their claims, and potentially prove with their statements that applicants were not telling the whole truth or giving full disclosure about the events for which they had requested amnesty. Through this provision, it can

²⁶³ Ronald C.Slye, “Amnesty, Truth, and Reconciliation”, 175.

²⁶⁴ Article 19 (4.c), Promotion of National Unity and Reconciliation Act, 1995.

thus be argued that the amnesty process in South Africa was in accordance with the requirements for an accountable amnesty and contributed to the establishment of truth and fulfilling the right to truth of victims, who have a right to know the full and complete truth as to the events that transpired.

The second requirement of the PNUR Act of 1995, was that the acts or offences for which the amnesty applicants applied had to be acts “associated with a political objective committed in the course of the conflicts of the past”.²⁶⁵ This requirement in effect meant that the Amnesty committee had a power to place the facts elicited from amnesty applicants and their role in any crime committed during the period of investigation by the Commission by them into the organisational and institutional contexts of human rights violations and not treat these as isolated incidents. If observed from the normative demands of the right to truth, such as the right to know not only who participated in abuses, but also knowing the circumstances in which the violations took place, as well as the reasons for them, including the organisational and institutional contexts, this provision of the PNUR Act of 1995, allow us to conclude that these amnesty provisions were in accordance with the demands for the fulfilment of the victims’ right to truth.

Another provision of the PNUR Act of 1995 took cognizance of the right to truth, not only in regards to victims, but also to society as a whole. After granting amnesty to a particular applicant, the Commission was bound to inform the applicant and any victim about the decision of the Committee to grant amnesty.²⁶⁶ The Amnesty Committee was also obliged to submit to the SATRC a record of the proceedings, which could be used by the Commission.²⁶⁷ The Amnesty Committee also had to immediately make known and accessible to the public “the full names of any person to whom amnesty has been granted, together with sufficient information to identify the act, omission or offence in respect of which amnesty has been granted”²⁶⁸. With regard to these provisions, it can be argued that the PNUR Act of 1995 was in accordance not only with victims’ right to know the

²⁶⁵ Article 20 (1.c), Promotion of National Unity and Reconciliation Act, 1995.

²⁶⁶ Article 20 (5), *ibid.*

²⁶⁷ *Ibid.*

²⁶⁸ Article 20 (6), *ibid.*

truth and to know who participated in crimes, but also with the demand that a society “has the right to know the truth about past events concerning the perpetration of heinous crimes, as well as the circumstances and the reasons for which aberrant crimes came to be committed”²⁶⁹.

Moreover, it is valuable to look at how the SATRC actually put this provision into practice. In its final report, the Commission recorded how the information that was given by amnesty applicants was analyzed by the Commission. Firstly, members of the Research Department and the Investigation Unit of the SATRC scrutinized all applications for amnesty.²⁷⁰ These two bodies were established by the SATRC precisely in order to investigate and analyse the material that Commission was gathering. The Investigation Unit was firstly tasked to assist in the verification of statements provided by victims who were selected to testify at hearings,²⁷¹ and after a large number of statements were gathered, the Investigation Unit focused on the task of verifying and corroborating all these statements²⁷². Finally and most importantly, the Investigation Unit collaborated with the Amnesty Committee in order to corroborate information gathered.²⁷³ The Research Department was established “in order to assist with the analysis and contextualisation of the enormous amount of data, evidence and information that it received. Although the department was principally concerned with primary data received from various sources, it also considered a range of secondary sources on issues relevant to the Commission’s work.”²⁷⁴ Basically, the Research Department analyzed each statement received by the Commission and categorised it according to theme²⁷⁵ - almost all of the information gathered and received by the Commission were analysed by the Research Department. As stated in the final report, this included: “submissions made by various institutions (political parties, state structures, non-governmental organizations and so on); evidence received at the various hearings of the Commission; evidence

²⁶⁹ ECS, Commission on Human Rights, Study on the right to the truth, Report of the Office of the United Nations High Commissioner for Human Rights, (8 February 2006), E/CN.4/2006/91, par.58.

²⁷⁰ Truth and Reconciliation Report, Volume 1, Chapter 5, par.42.

²⁷¹ Ibid, par.43.

²⁷² Ibid, par.44.

²⁷³ Ibid, par.45.

²⁷⁴ Ibid, par.48.

²⁷⁵ Ibid, par.49.

received in amnesty applications and hearings; archival material; transcriptions of section 29 enquiries; interviews conducted by experts or relevant persons, and secondary material.”²⁷⁶

According to the final report of the SATRC, information obtained from the amnesty process were contained either in the written applications submitted by amnesty applicants, or obtained from the testimony given at the amnesty hearings by amnesty applicants.²⁷⁷ All of this information was then examined by the Investigative Unit and the Research Department, and classified, based on the amnesty applicant’s identity, into three groups: those that worked as agents of the previous state system or in support of the *status quo*; those that worked to overthrow the state; and the white right wing.²⁷⁸ Each sub-category of amnesty applicants was then analysed in order to identify key themes common to each group, which allowed the Commission to examine all applications and place them in relation to particular themes.²⁷⁹ Ideally this strict and interconnected procedure of bodies within the TRC in relation to information gathered from victims, witnesses and amnesty applicants allowed the evidence collected from sources such as victim statements and from hearings was meant to be integrated with the information contained in amnesty applications.²⁸⁰ As argued in the final report, “the result of this process of gathering information from a range of sources and representing a range of perspectives was a more nuanced and sophisticated analysis of the nature, causes and extent of gross violations of human rights”²⁸¹.

Still, if one of the major goals of the SATRC’s amnesty process was to establish truth about past violations, in effect to ‘exchange amnesty for truth’ the question remains to what extent this process actually contributed to the establishment of truth in practice. It is particularly important to look at the actual contribution of the two major criteria for

²⁷⁶ Ibid, par.50.

²⁷⁷ Ibid, par.53.

²⁷⁸ Ibid, par.54.

²⁷⁹ Ibid, par.55.

²⁸⁰ Ibid, par.56.

²⁸¹ Ibid.

obtaining amnesty – full disclosure and political objective -- to the process of establishment of truth.

Some commentators have claimed that the TRC amnesty process did not actually contribute that much to the uncovering of new truth about past abuses committed during apartheid and exposed little of what was previously unknown.²⁸² However, as argued by Sarkin, in key cases the full disclosure criterion did succeed in encouraging amnesty applicants ‘to reveal all relevant information about what had occurred and their role in the offences for which, they sought amnesty’²⁸³. As we have seen Slye also argued that the vague explanations of what the criterion of “full disclosure” actually meant and how it was applied by the Amnesty committee, actually did contribute significantly to the process of establishment of truth.

The second important criterion, that of having a political objective, applied by the Amnesty committee in the process of granting amnesty can be seen as even more important in contributing to the process of establishing truth by the SATRC. As Slye argued:

“The effect of the amnesty interpretation of ‘political’ is to place a fair amount of power with the state, political parties and other political organisations in decisions concerning amnesty. Whether an individual is granted amnesty or not may depend on whether the state or a political organisation admits to having ordered the action in question, or whether the action is considered consistent with the political and programmatic goals of the organisation as expressed by its governing bodies (if any) or leaders”.²⁸⁴

It can thus be argued that the application of this criterion has significantly contributed to establishment of truth. Firstly, although applicants were individuals who told the truth about what they personally did, having to meet this requirement meant establishing links between command structure, exposed orders that were given to individuals, and finally the nature of system that stood behind violence in South Africa. However, Slye concedes

²⁸² Sarkin, *Carrots and Sticks* 355.

²⁸³ *Ibid.*, 354.

²⁸⁴ Ronald C.Slye, “Justice and Amnesty”, 180.

that from a human rights perspective this principle also has negative implications in so far as it diminished the individual accountability of the amnesty applicants who committed crimes. Slye argued that “the removal of ‘following orders’ as an absolute defence established moral and legal responsibility of each individual for his acts, and asserts that individuals, including military personnel, are moral beings who not only can, but also must, discern right from wrong and act accordingly”²⁸⁵. However, if we establish truth only about acts of crimes committed by individuals, important parts of the truth about the nature of violent crimes can easily be lost – the truth about the system that stood behind the commission of crimes, the command structure of forces involved in conflict that mobilized individuals who acted upon orders or were inspired by ideology.

To summarise, it can be concluded that this type of procedure for compromises with perpetrators, the methodology for corroborating information from different types of sources, such as victims, witnesses and amnesty applicants, as designed for the amnesty process of the TRC contributed significantly to the process of establishing the truth about the crimes that were committed.

Secondly, it can be concluded that the provision of public hearings for amnesty applicants, and publishing the Amnesty Committee decisions was valuable for a society in South Africa. Boraine observed that since amnesty hearings were open to the general public, it meant it was available to the society as a whole, but also to all those interested parties that needed information obtained at these hearings.²⁸⁶ Some scholars argue that the impact of several amnesty hearings was tremendous – there was no return back to old versions of these events, or old denials – “public hearings created common knowledge about certain cases. In this way, terms such as ‘torture’ or ‘state killings’ became part of the language of a wider range of citizens instead of only those who had experienced these violations.”²⁸⁷

²⁸⁵ Ibid., 181.

²⁸⁶ Boraine, *A Country Unmasked*, 294.

²⁸⁷ Madeleine Fullard and Nicky Rousseau, “Truth, Evidence, and History: A Critical Review of Aspects of the Amnesty Process” in *The Provocations of Amnesty: Memory, Justice and Impunity*, edited by Charles Villa-Vicencio and Eric Doxtader (Cape Town: David Philip Publishers, 2003), 197.

6.2. Plea bargaining process and establishment of truth at the International Criminal Tribunal for former Yugoslavia

What is the contribution, if any of the plea bargaining process, introduced by the ICTY, to the establishment of truth about past political crimes? How did the practice of making plea agreements with persons indicted for the most serious violations of human rights by the ICTY contribute to the establishment of truth? This will be examined with reference to the mandated goals and objectives of the ICTY in relation to the plea bargaining process actually introduced by judges and prosecutors of the ICTY. In order to understand the contribution of the plea bargaining process to the establishment of truth, it will also be important to look at the procedures defined by the ICTY Rules of Procedure and Evidence.

As already said, initially the practice of plea bargaining was firmly rejected by the majority of the Tribunal officials and more especially by the Tribunal's first President as being clearly incompatible with the goals of the ICTY. In the words of the founding resolution of the UN Security Council the ICTY was established for "the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991" in order to "put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them", and finally to "contribute to the restoration and maintenance of peace".²⁸⁸

However, in time the judges of the Tribunal expanded their understanding of the purpose of the Tribunal, shifting from that of a mere retributive mechanism towards an institution that will promote reconciliation through trials. In the sentencing judgement against one of the defendants, The ICTY judges concluded that: "It was anticipated that through criminal proceedings, the Tribunal would contribute to peace and reconciliation

²⁸⁸ Ibid.

in the former Yugoslavia, and beyond, through the establishment of the truth and the promotion of the rule of law.”²⁸⁹

In effect, the practice of plea-bargaining was introduced at both the ICTY and the International Criminal Tribunal for Rwanda (ICTR) after serious pressure from the international community to expedite their work, as well as increasing efforts to obtain evidence from high-level officials. This second was particularly important for the ICTY. The ICTY was experiencing strong pressure due to the increased number of complicated cases to prosecute. Notably the ICTY succeeded in having the most prominent indictee – the former president of Yugoslavia and Serbia, Slobodan Milošević -- indicted for war crimes and crimes against humanity committed in Croatia between 1991 and 1995, and Kosovo between 1998 and 1999, and genocide committed in war in Bosnia and Herzegovina between 1992 and 1995. Milošević’s case was the most important challenge for the ICTY and for international justice – he was the first head of state ever to face trial for such crimes.

Along with the increased number of cases, the complexity of these high profile cases presented additional problems to the ICTY prosecutors. These cases involved tens of thousands of dead civilians and soldiers, as well as forcible displacement of millions of people in the former Yugoslavia. Taken together the prosecution of political leaders whose crimes touched on large geographic areas over lengthy time periods and with countless victims presented a serious challenge to the ICTY.²⁹⁰ Investigators of the ICTY were faced with difficulties in investigating the complex links and connections between perpetrators, the formal and informal chains of command between official armed forces and paramilitary units, while also facing a serious lack of documentary evidences. As Tieger and Shin argued, it was not easy to secure the necessary access to witnesses, due to the intimidation and fear among potential witnesses who might cooperate with the ICTY, as well as because of domestic political hostility in countries of the region towards

²⁸⁹ *Prosecutor v. Dragan Obrenović*, (Judgement on Sentencing Appeals), IT-02-60/2-S, (10 December 2003), par.45.

²⁹⁰ Only the indictment against Slobodan Milošević, former President of Serbia and Yugoslavia, encompassed time period between 1991 and 1999, and areas of three countries, Croatia, Bosnia and Herzegovina and Serbia (Kosovo), and dozens of thousands of victims.

the ICTY.²⁹¹ This was especially significant for securing ‘insider witnesses’, persons who had been part of the armed forces or members of the paramilitary groups and could provide information and evidences that would link high-level officials with crimes committed on the ground.

Alan Tieger and Milbert Shin, both Trial Attorneys at the Office of the Prosecutor at the ICTY, recounted the experiences of the investigators while working on these complex cases:

“Even when the OTP has been successful in compelling document production, the perpetrators of crimes on a vast scale do not always obligingly leave a clear paper trail. Access to witnesses has been similarly limited, for reasons including a continuing climate of intimidation and fear, domestic political hostility to cooperation with the Tribunal, and even bureaucratic obstacles.”²⁹²

In the circumstances it is not surprising that the main rationales used at the beginning in order to justify the introduction of plea bargaining process at the ICTY were precisely those of saving the resources and time of the ICTY given the complexity of the cases. In the Joint and Separate Opinion of Judge McDonald and Judge Vohrah in the Appeals Chamber judgment in the 1996 case of Dražen Erdemović, the first defendant that pleaded guilty at the ICTY, the Appeals Chamber judges argued that:

“This common law institution of the guilty plea should, in our view, find a ready place in an international criminal forum such as the International Tribunal confronted by cases which, by their inherent nature, are very complex and necessarily require lengthy hearings if they go to trial under stringent financial constraints arising from allocations made by the United Nations itself dependent upon the contributions of States.”²⁹³

However, after a wave of guilty pleas in 2003, when 9 out of 10 defendants pleaded guilty with some of these involving plea agreements that caused an outcry among victims

²⁹¹ Tieger and Shin, “Plea Agreements in the ICTY”: 669.

²⁹² Ibid.

²⁹³ *Prosecutor v. Dražen Erdemović*, (Joint separate Opinion of Judge McDonald and Judge Vohrah) IT-96-22, par.2.

in Bosnia due to the charge bargaining²⁹⁴, the judges of the ICTY began to shift from the importance of resource savings, and even began to openly criticize its value as the most important rationale for making plea agreements with defendants. Instead, as Combs noticed, the ICTY introduced the ‘language of restorative justice’ in explaining the reasoning behind using the practice of plea bargaining:²⁹⁵

“The Trial Chamber notes that the savings of time and resources due to a guilty plea has often been considered as a valuable and justifiable reason for the promotion of guilty pleas. This Trial Chamber cannot fully endorse this argument. (...) The quality of the justice and the fulfilment of the mandate of the Tribunal, including the establishment of a complete and accurate record of the crimes committed in the former Yugoslavia, must not be compromised.”²⁹⁶

Significantly, the contribution of plea agreements to the process of establishment of truth was recognized in more and more cases. In the sentencing judgment in the case of Biljana Plavšić, judges of the ICTY emphasized that acknowledgment of guilt is important for the process of establishing the truth:

“The Trial Chamber accepts that acknowledgement and full disclosure of serious crimes are very important when establishing the truth in relation to such crimes. This, together with acceptance of responsibility for the committed wrongs, will promote reconciliation.”²⁹⁷

Having noted this shift in the ICTY’s understanding of the contribution of the plea bargaining process to the establishment of truth as part of transitional justice and reconciliation, we need to analyze more clearly the nature of that contribution. This can be done by looking at some key features of the procedure of plea bargaining with

²⁹⁴ Cases of Biljana Plavšić, Dragan Obranovic and Momir Nikolic.

²⁹⁵ Combs, *Gilty Pleas in International Criminal Law*, 189.

²⁹⁶ *Prosecutor v. Momir Nikolić*, (Judgement on Sentencing Appeals), IT-02-60/1-A (8 March 2006) par.67.

²⁹⁷ *Prosecutor v. Biljana Plavšić*, (Judgement on Sentencing Appeals), IT-00-39&40/1-S, (27 February 2003), par.80.

particular reference to establishing truth about crimes in line with the normative frame of the right to truth.

As previously mentioned, the right to truth encompass 'knowing the full and complete truth as to the events that transpired, their specific circumstances, and who participated in them, including knowing the circumstances in which the violations took place, as well as the reasons for them. In cases of enforced disappearance, missing persons, children abducted or during the captivity of a mother subjected to enforced disappearance, secret executions and secret burial place, the right to the truth also has a special dimension: to know the fate and whereabouts of the victim'.²⁹⁸ Additionally, a post-conflict society as a whole also 'has the right to know the truth about past events concerning the perpetration of heinous crimes, as well as the circumstances and the reasons for which aberrant crimes came to be committed, so that such events do not reoccur in the future'.²⁹⁹

On closer analysis it appears that the provisions for plea bargaining at the ICTY are designed for defendants who pleaded guilty to contribute to various forms of establishment of truth. In the course of plea-bargaining agreements defendants can provide significant facts about the crimes that were committed - they can give valuable information about such crimes, the whereabouts of victims' remains, who ordered the crimes, who participated in their commitment, they can draw the chain of command and - - most significantly - they can implicate the 'big fish' with crimes on the ground. Defendants were obliged to provide statements of facts, in which they had to provide detailed information about crimes for which they pleaded guilty. Tieger and Shin, both Trial Attorneys at the ICTY, claim that "Chambers have increasingly required the submission of statements and documents that support both the acknowledgement of guilt by the accused and the indictment to which he pleaded guilty. In smaller cases, these submissions may reflect virtually the sum total of witness information on which the prosecution intended to rely. Even in cases dealing with several offences and multiple counts, the prosecution's submission of supportive material is likely to focus on the heart

²⁹⁸ Ibid, par.59.

²⁹⁹ Ibid, par.58.

of its case.”³⁰⁰ This practice presents a potentially very important contribution to the fulfillment of the right to truth, since in many cases it allowed prosecutors not only to obtain information about crimes, but also to reveal the different phases of preparation of the crimes, commitment of crimes and the role of defendants in those crimes.³⁰¹

Let us consider the provisions of plea bargaining procedure as defined by the ICTY Rules of Procedure and Evidence. Firstly, we need to understand what the power of the prosecutor to amend the indictment after agreeing on plea bargaining with the defendant actually means. We shall not go into analysing each and every case of plea agreements where this was implemented, but look at the potential contribution of this provision to the process of establishment of truth.

The power given to ICTY prosecutors to amend the charges of the indictment when a defendant agrees to admit guilt for certain crimes actually allowed the prosecutor of the ICTY to decide not to include certain charges or to dismiss charges that were already included in the indictment, in exchange for the defendant’s guilty plea.³⁰² Deciding to dismiss charges that were part of the indictment can be done for different reasons – lack of sufficient evidences to prove these crimes beyond reasonable doubt, lack of securing witnesses and a weak possibility to link indicted persons with crimes on the ground, which can often be the case with indictments against highly positioned political officials. However, in this particular case, when this process is understood also as a truth-telling process, this can also have adverse consequences. Firstly, it may distort the extent of facts that otherwise could have been established. That is due to the provision that ICTY defendants are taken to admit guilt and disclose facts only for those counts of the indictment that remain in the indictment, while other counts are dismissed, which may be taken to imply that these crimes never happened, and thus that the facts about these crimes were false. Secondly, as Sharf analyzed the plea agreement by Biljana Plavšić, it can be argued that by dismissing charges from the indictment, it can be perceived by the

³⁰⁰ Tieger and Shin, “Plea Agreements in the ICTY”: 671.

³⁰¹ Combs, *Guilty Plea in International Criminal Law* 195.

³⁰² *Ibid.*, 63.

public and victims that the prosecutor and the ICTY judges, actually admit that these crimes never took place.³⁰³

Similar concerns regarding the implications of charge bargaining were also expressed by judges of the ICTY, who particularly accentuated their concerns with the implications this might have for the process of establishment of truth:

“Most concerning to this Trial Chamber is that as a result of the negotiations entered into by the Prosecutor and defence, the final plea agreement may include provisions such that the Prosecutor withdraws certain charges or certain factual allegations. The Prosecutor may do so for a variety of reasons. In cases where factual allegations are withdrawn, the public record established by that case might be incomplete or at least open to question, as the public will not know whether the allegations were withdrawn because of insufficient evidence or because they were simply a “bargaining chip” in the negotiation process. (...) In cases where charges are withdrawn, extreme caution must be urged. The Prosecutor has a duty to prosecute serious violations of international humanitarian law. The crimes falling within the jurisdiction of this Tribunal are fundamentally different from crimes prosecuted nationally. Although it may seem appropriate to “negotiate” a charge of attempted murder to a charge of aggravated assault, any “negotiations” on a charge of genocide or crimes against humanity must be carefully considered and be entered into for good cause. (...) Once a charge of genocide has been confirmed, it should not simply be bargained away. (...) The public may be left to wonder about the motives for guilty pleas, whether the conviction in fact reflects the full criminal conduct of the accused and whether it establishes a credible and complete historical record.”³⁰⁴

However, following these serious criticisms in the case of some plea agreements based on charge bargaining, the ICTY rules for plea bargaining introduced by the Office of the Prosecutor of the ICTY, was amended to allow a plea agreement with the

³⁰³ Michael Scharf, “Trading Justice for Efficiency”: 1080.

³⁰⁴ *Prosecutor v. Momir Nikolić*, (Judgement) IT-02-60/1-S (2 December 2003), , par.63-65.

defendant only if he or she provides additional information relevant to the accountability of other defendants. Nancy Combs, who investigated all the cases of plea bargaining at the ICTY, presented a valuable analysis of cases where this demand was made by the prosecution. As she shows, in many cases of plea bargaining, defendants were obliged to provide information to the prosecution on other defendants and testify against them, when necessary, if they were asked to do that by the prosecution.³⁰⁵ In some cases, and in order to be assured that the defendants will comply with this requirement, the sentencing judgment was postponed until defendants testified in cases in which they were considered as having important information to provide.³⁰⁶

The plea agreement made between ICTY prosecutor and Momir Nikolić presents a valuable example of how this was understood:

“This Agreement is contingent upon Momir Nikolić’s voluntary decision to accept responsibility for his actions and to co-operate with and to provide truthful and complete information to the Office of the Prosecutor whenever requested. In accordance with such co-operation, Momir Nikolić agrees to meet as often as necessary with members of the Office of the Prosecutor in order to provide them with full and complete information and evidence that is known to him regarding the events surrounding the attack and fall of the Srebrenica enclave July 1995. Mr. Nikolić agrees to be truthful and candid, and to freely answer all questions put to him by members of the Office of the Prosecutor. Mr. Nikolić agrees to testify truthfully in the trial of the co-Accused in this case before the Tribunal and in any other trials, hearings or other proceedings before the Tribunal as requested by the Prosecution.”³⁰⁷

In these cases, the prosecution was willing to make recommendations about sentences only after they had evaluated their testimonies as truthful and forthright.

³⁰⁵ Combs , *Guilty Plea in International Criminal Law* 192.

³⁰⁶ Ibid.

³⁰⁷ *Prosecutor v. Momir Nikolić*, Amended Plea Agreement between Momir Nikolić and the Office of the Prosecutor, (07 May 2003), Case No. IT -02-60-PT , par.9-10.

It can be argued that the condition of testifying against other defendants for those who pleaded guilty potentially presents a very significant contribution to the process of establishment of truth, since this procedure allowed for additional and important information to be obtained in such cases, and as Combs argues, were invaluable to prosecutors.³⁰⁸

Another important feature of the plea bargaining procedure that has to be evaluated in terms of its contribution to the establishment of truth is the encouragement of defendants who pleaded guilty to express their remorse and to make official statements of remorse during trial hearings. It can be argued that these statements are not honest and truthful, since they were expressed at sentence hearings. For many, especially victims, these were perceived as nothing but attempts of defendants ‘to save their skin’ in order to receive more lenient sentences.³⁰⁹ However, these statements may also present an important contribution to the process of establishment of truth. In case of highly positioned political leaders, these statements presented not only an expression of remorse, but also provided valuable insights into the patterns of abuses committed during wars, which is essential for the proper understanding of the motives for crimes. In addition, this type of statements present a form of apology to victims, given by those who were responsible for committing crimes, and who are willing to admit that guilt.

The powerful statement of remorse by Biljana Plavšić, co-President of the Bosnian Serb leadership during war in Bosnia, was perceived as an unprecedented in the process of establishment of truth. She was the first political leader of Bosnian Serbs who did acknowledge crimes and offered an apology to victims. In her statement, Plavšić said:

“There is a justice which demands a life for each innocent life, a death for each wrongful death. It is, of course, not possible for me to meet the demands of such justice. I can only do what is in my power and hope that it will be of some benefit, that having come to the truth, to speak it, and to accept responsibility.”³¹⁰

³⁰⁸ Combs, *Guilty Plea in International Criminal Law*, 193.

³⁰⁹ *Ibid.*, 202.

³¹⁰ *Prosecutor v. Biljana Plavšić*, (17 December 2002), Case No. IT-00-39 & 40-PT, Transcript, at 609-612

Other statements of remorse were perceived by victims as important contributions to the process of establishment of truth. Emir Suljagić, a Srebrenica genocide survivor, wrote in an article after two highly positioned officers of Bosnian Serb Army pleaded guilty for crimes in Srebrenica. These two were the first officials that admitted that the massacre of Srebrenica ever happened. According to Suljagić, Momir Nikolić's confession — “in which he described in chilling detail how he helped organize the mass execution and burial and an extensive cover-up, all of which he says army superiors ordered him to carry out — punches a big hole in the Bosnian Serb wall of denial.”³¹¹ More importantly, these admissions may make a very important contribution to the process of establishment of truth and the right to know the truth. By having an opportunity to hear perpetrators who committed horrendous crimes, it can be argued that victims’ right to truth is fulfilled in a very specific way. Suljagić argues:

“But the confessions have brought me a sense of relief I have not known since the fall of Srebrenica in 1995. They have given me the acknowledgment I have been looking for these past eight years. While far from an apology, these admissions are a start. We Bosnian Muslims no longer have to prove we were victims. Our friends and cousins, fathers and brothers were killed — and we no longer have to prove they were innocent.”

Hence, admission of guilt does not only contribute to truth in providing information about crimes that were committed, their specific circumstances, participants, as well as the reasons for them, but also to one specific aspect of truth about crimes – the status of victims when crimes occurred. Victims no longer have to prove that their suffering was real; no longer have to listen to explanations that distort the full and complete truth about abuses they have survived.

³¹¹ Emir Suljagić, “Truth at the Hague”, *New York Times*, June 01, 2003, Available at: <http://www.nytimes.com/2003/06/01/opinion/truth-at-the-hague.html>. Accessed on: 17 December 2007.

Chapter 7 - Conclusion

The SATRC stated in its final report that it had dealt with four notions of truth – “factual or forensic truth; personal or narrative truth; social or ‘dialogue’ truth (see below) and healing and restorative truth”.³¹² The type of truth which is of primary interest for the purposes of this thesis is that of “factual or forensic” truth. In so far as truth commissions and tribunals are necessarily involved with establishing the truth in the sense of “facts” about state crimes and other human rights abuses committed during past conflicts factual truth must be a main preoccupation of transitional justice. In search for this truth, they typically focus on obtaining information about human rights abuses from victims, by taking statements and conducting public hearings where victims tell their stories of suffering. However, both the SATRC and the ICTY invented further and creative mechanisms in order to obtain more truth. These two institutions were either victims-oriented, as in the case of SATRC, or enjoyed strong support from victims, as in the case of the ICTY. But their attempts to obtain more information and a wider range of relevant factual truths also had to include those that could provide vital information not available from victims – perpetrators. Both bodies thus adopted ‘a carrot and a stick’ approach towards perpetrators in order to establish more truth and to create a more comprehensive account of the past as a primary goal of these truth processes. In so doing both the SATRC and the ICTY had to make compromises with perpetrators in order to establish truth and gain more knowledge about the past.

As stated in Chapter 1, the main research question of this thesis, is whether the process of plea bargaining with perpetrators introduced at the ICTY, compared to the practice of full disclosure as a condition for granting amnesty at the SATRC, contributed to the process of establishment of truth. In conclusion we can now highlight several key issues in relation to this question. As discussed in Chapter 4, it was the complexity of cases facing the ICTY, requiring investigation of complex links between perpetrators and other indicted persons, formal and informal chains of commands, and the lack of documentary

³¹² Truth and Reconciliation Report, Volume 1, Section , Chapter 5, par.29.

evidences together with other practical reasons, such as the increased number of cases and financial issues, which informed the decision of the ICTY to introduce a plea-bargaining practice. Other issues, such as the contribution of plea bargaining as a tool for securing judgments and contributing to accountability received more attention in critical assessments of the ICTY's shift to a plea-bargaining practice. By comparison, the possible contribution of the plea bargaining process to the establishment of truth has not received much attention. However, for our purposes it is important to analyse the several elements that can be argued to have made a contribution to the establishment of truth as consequences of introducing compromises with perpetrators through the plea bargaining process at the ICTY.

First, as our account in the previous chapters have shown, both the ICTY's plea bargaining and the SATRC's conditional amnesty processes, did in fact significantly contribute to the establishing of factual truths, by obtaining acknowledgments from those responsible for the atrocities they had committed. As Slye has observed, the importance of obtaining acknowledgment from those who actually perpetrated the state crimes and human rights abuses is that it may serve as confirmation of claims of victims: "The importance of the amnesty process hearings was that they provided a space in which individuals acknowledged their participation, thus providing personal and official validation of what many already knew, and making it much harder for individuals to deny the truth of the atrocities."³¹³ One of the most important benefits of obtaining acknowledgment of perpetrators, for victims particularly but also for society as a whole, is this public confirmation of past political atrocities and human rights abuses.

Secondly, obtaining full disclosures of their crimes and guilty pleas from perpetrators amount to a 'powerful acknowledgment of wrongdoing', by wrongdoers themselves.³¹⁴ This can be even more important to victims than having their suffering acknowledged by

³¹³ Slye, in Rothberg and Thompson, 182.

³¹⁴ Combs, *Guilty Plea in International Criminal Law*, 143.

those who did not cause it. As Emir Suljagić, a survivor of the Srebrenica genocide said, victims do not need to prove they were victims.³¹⁵

In short, victims' truth about state crimes and human rights abuses, which had been either concealed or denied as false or inaccurate, is confirmed by the public acknowledgment of perpetrators.

Thirdly, acknowledgment of perpetrators contributed to the ICTY and SATRC as truth processes by revealing information which had previously been unknown – such as the location of graves or victims' remains. In one of these cases, Dragan Nikolić, former commander of the camp Sušica, who pleaded guilty for crimes in this camp, was asked by mother of two missing sons, during his sentencing hearing whether he knows what had happened to her sons.³¹⁶

Nikolić accepted her request after consultation with counsel and answered to her:

“As far as her sons are concerned, (...) they were taken to Debelo Brdo and liquidated. (...) And it was in this group of people that Enis and Bernis, this lady's sons, were. I knew them well. And from what I heard, there were liquidated -- they were liquidated on that site. I don't know how far the exhumations have gone. And as the lady says, all their ID's were removed. I don't know if anything was found on the bodies; maybe some clothing. And if I remember her sons well, one of her sons was wearing a denim jacket and trousers. And should there be an exhumation, perhaps he could be recognised by his clothes. And if an exhumation takes place, I believe that's where her sons would be found.”³¹⁷

³¹⁵ Emir Suljagić, “Truth at the Hague”, *New York Times*, June 01, 2003, Available at: <http://www.nytimes.com/2003/06/01/opinion/truth-at-the-hague.html>. Accessed on: 17 December 2007.

³¹⁶ Combs, *Gilty Plea in International Criminal Law*, 192.

³¹⁷ *Prosecutor v. Dragan Nikolić*, pg.256-257 of English provisional transcript, 03 November 2003, Case No. IT-94-2.

At a more general level the perpetrators' acknowledgments obtained through the ICTY's plea-bargaining agreements and the SATRC condition of "full disclosure" for amnesty served an important function in establishing a more complete picture of past political atrocities. Acknowledgment and disclosures by perpetrators, through processes designed by the ICTY and the amnesty process at the SATRC provided important information about command structures, links between perpetrators, chains of command, institutional and organisational links, but also about generally prevailing motives and perspectives. The criteria and conditions set by both the ICTY and the TRC enabled them to obtain information on institutions and perpetrators indirectly associated with atrocities even if they did not participate in these crimes. Perpetrators pleading guilty before the ICTY were obliged to testify against other indicted persons, mainly against their superiors and associates,³¹⁸ while amnesty applicants had to fulfill the criterion of having a political objective. In this way ICTY prosecutors were able to obtain more information about crimes and to use this information in revealing complex connections between perpetrators, especially when faced with a lack of documentary evidences. Additionally, acknowledgment of perpetrators obtained at the ICTY and the TRC, provided important contribution to revealing the prevailing motives and perspectives of perpetrators. As argued by Sarkin, "without an adequate understanding of why perpetrators carry out human rights violations, little can be done to address the circumstances and structures that could allow for these violations to be recommitted in the future".³¹⁹

Another feature that needs to be addressed when analysing the contribution of acknowledgment of perpetrators through the ICTY's plea bargaining process and the SATRC's conditional amnesty process to the process of establishing truth is its contribution to the creation of historical record. Scholars have indicated that the contribution to creating a more accurate historical record has been one of the most important contributions of these practices. Tieger and Shin explained that the efficiency of plea bargaining allowed for more cases to be completed and therefore provide more

³¹⁸ Combs, *Guilty Plea in International Criminal Law*, 142.

³¹⁹ Sarkin, *Carrots and Sticks*, 360.

contributions to historical record.³²⁰ Perpetrators were obliged to submit written statements as part of their pleas in which many revealed important information, unknown until then, and which also revealed their perspectives on past events and in many cases, their motives. However, it has also been argued that in some cases, in particular the form of plea bargaining, which included charge bargaining which implied the prosecutor's removal of charges for which the defendant did not plead guilty, may actually distorted the historical record created by the ICTY. As Scharf argued in the case *Biljana Plavšić*, "she did not provide evidence related to the dropped genocide charges and the dropping of those charges may be erroneously viewed in Serbia as an admission by the prosecutor that those crimes did not take place"³²¹. Removal of charges, especially the most serious ones, while important as a tool to induce perpetrators to plead guilty, cannot be viewed as contributing to the process of establishment of truth. On the other hand, the SATRC amnesty process with its open-ended requirement of "full disclosure", served as a potentially better mechanism to obtain more information about past abuses.

Criticism of both the ICTY's plea-bargaining procedures and the SATRC conditional amnesty process remains – compromises with perpetrators are never desired models for transitional justice processes, especially from victims' perspectives. Truth commissions or tribunals which include these features will inevitably face serious challenges and allegations that they are 'trading justice for efficiency' or 'being lenient towards perpetrators'. However, if the objective of establishing the truth about past abuses is intended to be comprehensive, then any truth process will also have to include those who were responsible for crimes, because only they can provide the most important acknowledgment and the one most difficult to obtain – acknowledgment by those who actually committed the state crimes and human rights abuses concerned.

³²⁰ Tieger and Shin, "Plea Agreements in the ICTY": 671.

³²¹ Scharf, "Trading Justice for Efficiency": 1079.

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