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(«Легітимність амністії в міжнародному кримінальному праві»)

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Львів – 2021 року

Table of Contents

LIST OF ABBREVIATIONS

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment – Torture Convention

Convention on the Prevention and Punishment of the Crime of Genocide – Genocide Convention

DDR – Disarmament, Demobilization and Reintegration

DPR/LPR – the self-proclaimed Donetsk (Luhansk) People's Republic

ECCC – Extraordinary Chambers in the Courts of Cambodia

ECHR – European Court of Human Rights

ICC – International Criminal Court

ICJ – the International Court of Justice

ICRC – International Committee of the Red Cross

ICTR – International Criminal Tribunal for Rwanda

ICTY – International Criminal Tribunal for the former Yugoslavia

OHCHR – Office of the UN High Commissioner for Human Rights

OTP – Office of the Prosecutor

PTC – Pre-Trial Chamber

Rome Statute – Rome Statute of the International Criminal Court

SCSL – Special Court for Sierra Leone

TRC – Truth and Reconciliation Commission

UN – United Nations Organization

INTRODUCTION

Topicality

International criminal law has developed significantly since the end of the Cold War. The establishment of the International Criminal Court in 1998, the creation of numerous *ad hoc* tribunals and hybrid courts, which are aimed to prosecute the most serious human rights violations were expected to end the culture of impunity throughout the world. However, justice is sometimes hard to achieve. For the last few decades, amnesties have been granted even to those responsible for the gross violations of human rights.

Amnesty laws are introduced for various reasons, often they are used as a tool of peace, reconciliation and transitional justice processes. The most controversial question here is whether justice is worth giving up for achieving peace (since it is obvious that justice and peace cannot be fully achieved at the same time). Even more controversial issue is whether amnesties could be granted to the perpetrators of international crimes (genocide, war crimes, crimes against humanity, etc.). International crimes are known as those for which the imperative of punishment is the greatest and granting amnesties for them is viewed most impermissible. In addition, granting amnesties could be inconsistent with the norms of international law as states are imposed with a duty to prosecute in respect of certain international crimes.

The topic of this research is also topical for Ukraine because the amnesty is actively discussed as a possible tool for reconciliation and transitional justice processes in the context of the Ruso-Ukrainian War.

Degree of scientific development and novelty

The issue of the legitimacy of amnesties under international criminal law was addressed by many authors, for example, Michael Scharf, Louise Mallinder, Ronald Slye, Darryl Robinson and others. Louise Mallinder, apart from her academic work, has created the Amnesties, Conflict and Peace Agreement (ACPA) dataset which contains information on 289 amnesties granted as a result of ongoing conflict, peace agreement or in post-conflict regulation processes in the period from January 1990 to

September throughout the world.[1] This dataset is a major contribution to the scientific development of the issue of the legitimacy of amnesties and to this research. Yet, to my mind, the issue of the effectiveness of amnesties in peace, reconciliation and transition processes has not been examined in sufficient detail.

Objective and tasks

The main objective of this thesis is to define the factors which affect the legitimacy of amnesty under international criminal law.

In order to achieve a given objective this research aims to fulfill the following tasks:

- examine the legal nature of amnesty in international law;
- analyze amnesties through the statutes of international criminal courts and tribunals;
- clarify in respect of which international crimes there is a duty to prosecute and, thus, if amnesties could be granted for international crimes;
- define the correlation between amnesties and the fundamental rights of victims;
- analyze the role of amnesties in the Ukrainian transitional justice and reconciliation processes;
- identify the factors which affect the legitimacy of amnesties under international criminal law.

Object and subject

The object of this research is the notion of amnesty and the subject is the factors which affect its legitimacy under international criminal law.

Methodology of research

In this thesis, several methods of legal research were combined: descriptive and historical methods (for describing different state practice of granting amnesty), method of assessment (for the analysis of case-law, international instruments, customary norms, national legislation, etc.), comparative method (for comparison of different

[1] Peace Agreements Database (n.d.). Amnesties, Conflict and Peace Agreement (ACPA) dataset. https://www.peaceagreements.org/amnesties/

cases, provisions of international treaties, draft laws, etc.), methods of both deductive and inductive reasoning.

Sources

The main sources of this research are international instruments such as the Rome Statute, the 1948 Genocide Convention, the 1949 Geneva Conventions and 1977 Additional Protocols to them and others. Among other primary sources, there is the case-law of the European Court of Human Rights, the Inter-American Commission and the Inter-American Court on Human Rights, the decisions of the International Criminal Tribunal for the former Yugoslavia, etc.

The main secondary sources were the academic works of Michael Scharf, Louise Mallinder, Ronald Slye and others. In Chapter III of this research, sufficient amount of academic papers of Ukrainian scholars such as Oleh Martynenko, Arkadiy Bushenko, Mykola Hnatovskyi were used. All in all, this thesis referrers to 95 sources. They are all used as of January 1, 2021.

Structure

This thesis consists of the introduction, three chapters, sixteen subchapters, the conclusion and the list of references.

CHAPTER I. AMNESTIES IN INTERNATIONAL CRIMINAL LAW

1.1. Legal Nature of Amnesty

The term "amnesty" derives from the ancient Greek word *"amnestia"*, which means *"forgetfulness"* or *"oblivion"*.[2] Amnesty is not a new phenomenon in international law – provisions on amnesties were included in peace treaties concluded after armed conflicts since antiquity. For example, one of the first documented amnesty laws introduced by Thrasybulus, an Athenian general, during the Peloponnesian War is dated back to the year 405 BC.[3] Today the essence of an amnesty has not significantly changed: it is still used as a tool to achieve peace and as an incentive for fighting parties to lay down the arms.

Nowadays, international law does not have an agreed definition of amnesty, which is mainly because the state practice of granting amnesties differs a lot. Still, some international organizations provide their definitions of amnesty. For instance, the Office of the UN High Commissioner for Human Rights (hereinafter – OHCHR) gives us the following understanding of what an amnesty is:

> The word amnesty refers to legal measures that have the effect of: a. prospectively barring criminal prosecution and, in some cases, civil actions against certain individuals or categories of individuals in respect of specified criminal conduct committed before the amnesty's adoption; or b. retroactively nullifying legal liability previously established.[4]

The International Committee of Red Cross (hereinafter – the ICRC) defines amnesties as following:

> An amnesty generally refers to an official act on the part of the legislative or executive authority which prevents, in the future or retroactively, the investigation of a person, a group or a category of persons for certain violations or any criminal prosecutions against them, and cancels all sanctions taken against them. Thus, an amnesty can halt imminent or ongoing prosecutions, quash convictions already handed down and/or lift

[2] Scharf, Michael P. (1999). The Amnesty Exception to the Jurisdiction of the International Criminal Court. *Cornell International Law Journal*, 32(3), 507-527, p. 508. http://scholarship.law.cornell.edu/cilj/vol32/iss3/8

[3] Fomba, D., Mujib, M., Kodio, A. (2020). Amnesty Limits in International Criminal Law, *Journal of Politics and Law*, 13(2). 69-74, p. 69. https://www.researchgate.net/publication/341524472_Amnesty_Limits_in_International_Criminal_Law

[4] OHCHR. (2008). Rule-of-law Tools for Post-conflict States. In *Rule-of-law Tools for Post-conflict States* https://www.ohchr.org/Documents/Publications/Amnesties_en.pdf

> sentences already imposed. In some cases, amnesties may be granted by way of an international treaty or political agreement.[5]

Having compared these two definitions one might notice that the explanation provided by the OHCHR concentrates only on the means of granting amnesties (barring criminal prosecution or nullifying legal liability). The definition given by the ICRC goes further – not only does it explain how the mechanism of amnesty works, it also reveals the essence of an amnesty, that is for which purpose it might be granted.

The purposes of granting amnesty have crucial importance for this research, as the analysis of purposes plays a key role in distinguishing a legitimate amnesty from an illegitimate one. Purposes of amnesties can be various in every single case. If we take the situation of an ongoing armed conflict or repression, the typical purposes would be reconciliation and restoring normal relations in the life of the nation affected by such situations.[6] As well, amnesties are used during the political transition[7] (e.g. transition from dictatorship to democracy in Western Germany after World War II). According to the Belfast Guidelines on Amnesty and Accountability, depending at which stage an amnesty is introduced (ongoing conflict, negotiation process, signing peace agreements, etc.) the positive objectives of amnesties might be as follows:

a. encouraging combatants to cease hostilities and surrender;

b. persuading authoritarian rulers to hand over power;

c. building trust between warring factions;

d. facilitating peace agreements;

e. releasing political prisoners;

f. encouraging exiles to return;

g. providing an incentive to offenders to participate in truth recovery or reconciliation processes.[8]

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[5] International Committee of the Red Cross. (2019). Amnesties and International Humanitarian Law: Purpose and Scope. *International Review of the Red Cross*, 101(910), 357-363. https://www.icrc.org/en/document/amnesties-and-ihl-purpose-and-scope

[6] Ibid.

[7] Transitional Justice Institute – Expert Group on Amnesties. (2013). The Belfast Guidelines on Amnesty and Accountability. *Transitional Justice Institute at the University of Ulster*. https://www.ulster.ac.uk/__data/assets/pdf_file/0005/57839/TheBelfastGuidelinesFINAL_000.pdf

[8] Ibid.

The above list is not exhaustive. Hence, if an amnesty seeks to fulfill multiple international obligations and policy objectives (as when they are introduced to protect human rights by reducing an ongoing conflict, to ensure the stability of the transition period, to encourage individual offenders to cooperate with truth and reconciliation programs), it is more likely to be viewed as a legitimate one. On the other hand, amnesties, the main objectives of which are to achieve impunity with the neglect of the duty to prosecute and other international obligations could be considered as illegitimate ones.[9]

The purpose of an amnesty law is of utmost importance but is not the only criterion based on which we can argue its legitimacy. The type of amnesty is another significant matter. Scholars usually single out three types of amnesties: self-amnesties, blanket amnesties, and conditional amnesties.[10]

The so-called self-amnesties are almost unanimously called by the international community as illegitimate and illegal. Self-amnesties occur in a situation where a regime that seized power and is responsible for international crimes and other serious violations of human rights adopts unilaterally an amnesty to protect their officials and supporters and to shield themselves from prosecution.[11] Much criticism such type of amnesties has received in the practice of the Inter-American Court of Human Rights. For instance, in *Barrios Altos v. Peru*, Judge Cançado Trindade in his concurring opinion refers to self-amnesties as to those which *"have no legal validity under the principles of international human rights law"*.[12]

Unconditional amnesties are often referred to as "blanket" amnesties and the name totally reflects the essence of such type of amnesties. Blanket amnesties exempt broad categories of individuals from prosecution and they do not have to satisfy any preconditions including those which aim to ensure full disclosure of what they know

[9] Transitional Justice Institute – Expert Group on Amnesties. (2013). The Belfast Guidelines on Amnesty and Accountability, p. 34.
[10] Allan, Kate. (2020). Prosecution and Peace: A Role for Amnesty before the ICC. *Denver Journal of International Law & Policy*, 39(2), Article 3, p. 242. https://digitalcommons.du.edu/cgi/viewcontent.cgi?article=1178&context=djilp
[11] Transitional Justice Institute – Expert Group on Amnesties. (2013). The Belfast Guidelines on Amnesty and Accountability. *Transitional Justice Institute at the University of Ulster.* https://www.ulster.ac.uk/__data/assets/pdf_file/0005/57839/TheBelfastGuidelinesFINAL_000.pdf
[12] *Barrios Altos v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 75

about crimes covered by the amnesty or any other conditions which will serve the interests of victims. This type of amnesty has been condemned by the international community.[13] Returning to the jurisprudence of the Inter-American Court of Human Rights, it has continuously rejected the legitimacy of broad unconditional amnesties for serious human rights violations. This is because states have an obligation to investigate serious human rights violations and provide reparations to victims.[14] Of course, blanket amnesty is a questionable tool in the implementation of this responsibility.

Finally, conditional amnesties are more likely to be viewed as legitimate ones. This type of amnesty exempts an individual from prosecution only if he or she satisfies several preconditions (for instance, full disclosure of the facts about the committed offenses). A conditional amnesty often involves a prior investigation to allocate individual responsibility.[15] Though it is the most acceptable type of amnesty, everything depends on the context. An amnesty could be conditional but, at the same time, be used as a tool to reach an illegitimate goal.

Scholars often use the South African Truth and Reconciliation Commission (hereinafter – TRC), which had an authority to grant amnesties as a good example of a conditional amnesty. South African TRC granted amnesty only for politically motivated crimes, which were committed in the past, namely within the period from 1960 to April 1994. Thus, an individual who was responsible for the crime of apartheid had to prove that the crime he had committed had a political purpose.[16] Furthermore, the main precondition to have been granted an amnesty was to disclose publicly and fully the details of the crime. It was necessary because the main purpose of the Commission, according to the Promotion of National Unity and Reconciliation Act was to establish *"as complete a picture as possible of the causes, nature and extent of the gross violations of human rights which were committed … including the antecedents,*

[13] OHCHR. (2008). Rule-of-law Tools for Post-conflict States, p. 43.
[14] Transitional Justice Institute – Expert Group on Amnesties. (2013). The Belfast Guidelines on Amnesty and Accountability, p, 44.
[15] OHCHR. (2008). Rule-of-law Tools for Post-conflict States, p. 43.
[16] Bushchenko, Arkadiy & Hnatovskyi, Mykola. (2017). Baseline Study on Implementation of Transitional Justice in Ukraine. 1-592, p. 96-97 [in Ukrainian]. https://helsinki.org.ua/wp-content/uploads/2017/05/Tekst-monohrafiji-perehidne-pravosuddya.pdf

circumstances, factors and context of such violations, … by conducting investigations and holding hearings".[17] It was equally important for the Commission to locate the living victims of the racist regime in order to give them opportunity to express their views on the violations they had experienced and to compensate them for the damage they had suffered.[18]

It is important to mention that amnesties should be distinguished from pardons. Pardons are granted after the prosecution and are aimed to exempt an already convicted criminal from serving his/her sentence, wholly or partially, but it does not absolve of responsibility for the crime committed.[19] Amnesties can be granted either before or after a conviction. In case if an amnesty takes effect before a legal procedure, it shuts down any legal action or prevents the opening of a criminal investigation.[20] Moreover, pardons are granted in single cases only, whereas amnesties could be given to a group of individuals as well.[21]

According to statistics, the vast majority of amnesties are reported to be legally enforced by a special law or a decree of the head of the state. Still, a large part of amnesties is provided within a peace agreement, which needs further implementation into national legislation.[22] 1996 Sierra Leonean amnesty, which will be analyzed further in this research, falls into this category. Some amnesty provisions are even included in constitutions. Although it is an exception, not a rule, there are a few cases: Ghana (1992), Indonesia (2000), Democratic Republic of the Congo (2002), Myanmar (2008), etc.[23]

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[17] Promotion of National Unity and Reconciliation Act. (1995). Act №34, 1995. *Government Gazette*, 361(16579). https://www.gov.za/sites/default/files/gcis_document/201409/act34of1995.pdf

[18] Gulke, Adrian. (1999). Truth for Amnesty? The Truth and Reconciliation Commission and Human Rights Abuses in South Africa. *Irish Studies in International Affairs*, (10), 21-30. https://www.jstor.org/stable/30001888?seq=1

[19] Ibid.

[20] Hazan, Pierre. (2020). Amnesty: A Blessing in Disguise? Making Good Use of an Important Mechanism in Peace Processes. 1-17, p. 6. https://www.hdcentre.org/wp-content/uploads/2020/03/Amnesty-A-Blessing-in-Disguise.pdf

[21] Okwori, Arome M., Matthew Godfree. (2019). The Jurisprudence of Amnesty in Nigeria Vis- À-Vis Nigeria's International Obligations. *International Journal of Comparative Law and Legal Philosophy*, 1(3), 163-172, p. 167. https://www.nigerianjournalsonline.com/index.php/IJOCLLEP/article/view/1103/1087

[22] Martynenko, O., Semiorkina O. (2020). Amnesty and Lustration: Mechanism of Transitional Justice for the Future of Ukraine. Review of International Practice and National Legislation. Kyiv, 2020, 1-84, p. 20. http://www.ucipr.org.ua/publicdocs/amnesty2020.pdf?fbclid=IwAR3oLKznJKaEAXWFl7YaAB24seVhvtZTnMs-M-cK9nwvpfkl8BjgIBLpaUs

[23] Ibid.

The territorial and temporal limits of amnesties can vary. As to *ratione loci*, most of the national amnesty laws apply to all crimes committed throughout the territory of the state.[24] However, there may be certain exceptions. For instance, the 2009 Democratic Republic of the Congo amnesty law provided that an amnesty was to be granted to all Congolese, residing within the territory of the Democratic Republic of the Congo or abroad, *"for acts of war and insurrection committed in the provinces of North and South Kivu"* (Article 1).[25] As to the temporal scope of amnesties, they could be divided into three groups: 1) amnesty limited in time with definite dates of its beginning and end; 2) amnesty only with the definite date of its beginning; 3) amnesties only with the definite date of its end.[26]

As to *ratione personae* limits of amnesty, it is always defined in the text of the law on amnesty. It could be a rather concrete group of individuals (e.g. representatives of certain illegal armed groups, civilians, officials, etc.) or provided by general wording ("everyone who participated", "participants in events", "combatants", etc.).[27]

Ratione materiae is the most controversial issue here because international law cannot answer definitely for what crimes an amnesty could be granted. This brings us to an important issue for analysis – the legality of amnesties under international law. As mentioned above, there is no agreed definition in international law of what an amnesty is. What is even more remarkable, the international community has no common legal position on how to treat national amnesties, namely for the commission of which crimes an amnesty could be granted to an individual. The only international treaty where amnesties are encouraged is the Additional Protocol II to the 1949 Geneva Conventions. Article 6(5) of the Additional Protocol II provides: *"At the end of hostilities, the authorities in power shall endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or*

[24] Martynenko, O., Semiorkina O. (2020). Amnesty and Lustration: Mechanism of Transitional Justice for the Future of Ukraine. Review of International Practice and National Legislation., p. 26.
[25] International Committee of the Red Cross. Customary IHL Database (n.d.). Practice Relating to Rule 159. https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cou_cd_rule159
[26] Martynenko, O., Semiorkina O. Amnesty and Lustration: Mechanism of Transitional Justice for the Future of Ukraine. Review of International Practice and National Legislation, pp, 26-27.
[27] Ibid.

detained".[28] Since the Additional Protocol II is designed to protect the victims of non-international conflicts, the above provision applies only to participants of non-international armed conflicts. The existence of this provision in the Protocol could be explained from the point of view of the complex nature of a non-international conflict. As mentioned in the 1987 Commentary to the Additional Protocol II, the object of this provision *"is to encourage gestures of reconciliation which can contribute to reestablishing normal relations in the life of a nation which has been divided"*.[29] In other words, it is of high importance to resolve internal conflicts in the first place.

It is noteworthy that the Article 6(5) does not set the limits of such an amnesty – it is not clear for which exact crimes an amnesty could be granted to an individual. However, when the above-mentioned Article was adopted, the USSR expressed an opinion in its explanation of the vote, that this very provision could not be interpreted as one which will enable war criminals or people who committed crimes against humanity to escape punishment.[30] It makes a lot of sense, that a norm of international customary law has emerged which, supplements Article 6(5) of the Additional Protocol II with an exception for *"persons suspected of, accused of or sentenced for war crimes"*.[31] State practice confirms that this exception is indeed a part of an emerging international custom. For instance, in the *Special Prosecutor v. Colonel Mengistu Halemariam et al.* (1995), the Special Prosecutor of Ethiopia stressed that it is *"a well-established custom and belief that war crimes and crimes against humanity are not subject to amnesty"*.[32] A year earlier, in the *Lumi Videla Moya v. Chile* case, Chile's Appeal Court of Santiago adopted a position that *"such offences constitute grave*

[28] International Committee of the Red Cross. (1977). *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 1125 UNTS 609.
[29] International Committee of the Red Cross. Customary IHL Database. 1987 Commentary to Article 6 of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977. https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=AA0C5BCBAB5C4A85C12563CD002D6D09
[30] International Committee of the Red Cross. Customary IHL Database. Rule 159. https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule159
[31] Ibid.
[32] *Special Prosecutor v. Colonel Mengistu Hailemariam et al.*, Reply by the Special Prosecutor to the preliminary objections of defense lawyers, 23 May, 1995, p. 33. https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/39a82e2ca42b52974125673e00508144/caf1304c84be2565c125765c002e24b4?openDocument

breaches of the Convention (a reference to 1949 Geneva Conventions and Additional Protocols – authors note) are imprescriptible and unamenable to amnesty".[33]

However, here we come to the related issue. Rule 159 of customary international humanitarian law uses the "war crimes" notion in its exception. Nothing here is said about the grave breaches of the Geneva Conventions. In international law grave breaches of the Geneva Conventions are understood as war crimes commission of which entails individual criminal liability, and the states' duty to prosecute. Each of the four 1949 Geneva Conventions contains "grave breaches" provisions.[34] For example, Article 50 of the First Geneva Convention among acts which constitute grave breaches lists the following: *«willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly»*.[35]

Traditional view on the correlation of war crimes and grave breaches holds that the latter are committed only during international conflicts.[36] The same view was expressed by G. Mettraux, who added that grave breaches of the Geneva Conventions could not be committed in the context of an internal armed conflict and that is why they do not fall within the jurisdiction of the International Criminal Tribunal for Rwanda (hereinafter – ICTR).[37] This point of view leads to the conclusion that as grave breaches provision applies only in international conflicts, there is no duty to prosecute grave breaches during non-international conflicts and this opens the doors for amnesty deals. For instance, in *Prosecutor v. Dusko Tadic*, the majority of the judges of the ICTY Appeals Chamber came to the conclusion that the notion of "grave breaches" applies

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[33] Corte de Apelaciones de Santiago, 26/09/94, 'Lumi Videla Moya' Rol 5.467-94 *as cited in* Mallinder, Louise. (2008). *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide.* Oxford: Hart Publishing. P. 226.

[34] Scharf, Michael P. (2006). From the eXile Files: An Essay on Trading Justice for Peace. *Washington and Lee Law Review*, 63(1). 339-376, p. 351. https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1140&context=wlulr

[35] International Committee of the Red Cross. (1949). *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention),* 12 August 1949, 75 UNTS 31.

[36] Moir, Lindsay. (2009). Grave Breaches and Internal Armed Conflicts. *Journal of International Criminal Justice* (7), 763-787, p. 785. https://academic.oup.com/jicj/article-abstract/7/4/763/857123

[37] Mettraux, G. (2005). International Crimes and the Ad Hoc Tribunals. Oxford: Oxford University Press. P. 54 https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780199207541.001.0001/acprof-9780199207541

only to international armed conflicts. It was based on the fact that the "grave breaches" provisions imply a universal jurisdiction in international conflicts. At the same time, the state parties to the 1949 Geneva Conventions did not mean to give other states jurisdiction over serious violations of international humanitarian law committed in their internal armed conflicts.[38] Thus, war crimes committed during internal armed conflicts do not imply a universal jurisdiction. On the other hand, scholars doubt this statement; they compare war crimes in non-international conflicts with genocide and crimes against humanity, which are committed within the territory of one state, but still are subject to universal jurisdiction. Moreover, in their point of view, since there is no limitation in the Geneva Conventions, there are no sufficient basis to exclude the concept of grave breaches from application in internal conflicts.[39] From this perception, if grave breaches provisions could be applied in non-international conflicts, there is a duty to prosecute war crimes committed during internal conflicts and that makes impossible amnesty deals with regards to war crimes. Again, it is a perfect demonstration, that there is no consensus within the international community on amnesties even if we take a separate kind of international crime – war crimes. Though we have an international treaty norm and a broader international customary norm, which regulates this issue, it cannot answer all the questions and eliminate all contradictions.

To sum up with the legality of amnesties under international law: having the only provision on amnesties in Additional Protocol II to the 1949 Geneva Conventions, which is a source of international humanitarian law and, thus, covers only crimes committed during armed conflicts, gives us only an indirect understanding of what kind of amnesty is possible under international law. Without doubt, there is a lack of normative regulation of amnesties in international law. Still, some conclusions could

[38] *Prosecutor v. Dusko Tadic aka "Dule" (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction),* IT-94-1, International Criminal Tribunal for the former Yugoslavia, 2 October 1995. https://www.refworld.org/cases,ICTY,47fdfb520.html

[39] Eboe-Osuji, Chile. (n.d.). 'GRAVE BREACHES' AS WAR CRIMES: MUCH ADO ABOUT… 'SERIOUS VIOLATIONS'? 1-14, p. 8. https://www.icc-cpi.int/NR/rdonlyres/827EE9EC-5095-48C0-AB04-E38686EE9A80/283279/GRAVEBREACHESMUCHADOABOUTSERIOUSVIOLATIONS.pdf

be made through the analysis of the "duty to prosecute" concept and that will be done in Chapter II of this research.

The legitimacy of amnesties, though, is a more complex issue than legality. Correlation between legality and legitimacy was always a subject for debates in legal theory. Even more challenging is to identify the relationship between these two notions in international law. Legitimacy is an essential factor, based on which all political decisions should be taken. Of course, in a perfect world, there will be a bridge between legality and legitimacy. However, as 'perfect' is usually an unreachable goal, we have a situation where legitimacy can challenge legality. This happens mostly because there is a gap between the needs of contemporary societies throughout the world and the codified international norms that were designed to resolve the problems of those societies. Because of this, processes in international law often lack legitimacy, which is a consequence of political pressures. On the other hand, political actors cannot reject legality in favor of legitimacy: legitimacy is impossible without legality and vice versa. If there are questions to the relevance of law, the possible solution could be found in legal reform, though it is a time-consuming process.[40]

Amnesties can be viewed as legitimate if they are accepted by the local population. Without its approval, an amnesty will not have a positive long-term effect.[41] Societies often oppose granting amnesties and this is understandable as the population after conflicts becomes vulnerable and does not want to tolerate impunity. Hence, amnesties could be accepted broadly by society only if it includes parallel measures that are implemented to address victims' needs. This could be the participation of the amnesty beneficiaries in the truth-telling process, the Disarmament, Demobilization and Reintegration (DDR) processes, transitional and restorative justice programs, restitution of property illegally acquired, material or symbolic contribution to reparations, etc.[42]

[40] Popovski, V., Turner, N. (2008). Legality and Legitimacy in International Order. *United Nations University Policy Brief*, 5, 1-7. https://www.files.ethz.ch/isn/89752/PB_08-05.pdf
[41] Arnould, Valérie. (2019). Untangling Justice, Peace and Amnesties in the Central African Republic. *Africa Policy Brief*, 23, 1-11. https://www.jstor.org/stable/pdf/resrep21380.pdf
[42] Hazan, P. Amnesty: A Blessing in Disguise? Making Good Use of an Important Mechanism in Peace Processes, p. 13.

1.2. Amnesties in the Statutes of International Criminal Courts and Tribunals

1.2.1. Rome Statute of the International Criminal Court

The ICC is the only permanent international criminal court with the jurisdiction to prosecute individuals. Hence, it is important to analyze its approach towards amnesties. There is no direct reference to amnesties either in the Rome Statute or in the Court's Rules of Procedure and Evidence. The reason for such an omission is that during the Rome Conference the question of amnesties was discussed, but the parties never came to a consensus. The United States' representatives suggested that the ICC should obligatorily consider domestic amnesties when making the decision on exercising its jurisdiction or not.[43] It is hardly surprising, that the USA made such a proposal, as this country is known as one of the major opponents of the ICC. Moreover, in the past decades, it has effectively prevented the ICC from prosecuting its nationals and the nationals of other non-State parties for war crimes and other international crimes.[44] For instance, in July 2002 the USA pressured the UN Security Council to pass a resolution,[45] which approved another one-year exemption from the jurisdiction of the ICC for peacekeepers who are citizens of non-State parties.[46] Although several parties supported the United States' suggestion (for example, South Africa, with its TRC), it faced broad opposition not only from other parties but from the NGOs as well.[47] Such an inability of the participants of the Rome Conference to reach a consensus on amnesties only further highlights the incoherence of state practice on this issue.

However, the Rome Statute contains several provisions, the interpretation of which could give a sufficient reason to claim that the ICC recognizes certain forms of

[43] Mallinder, Louise. (2009). Amnesties and International Criminal Law. In *The Handbook of International Criminal Law*. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1531701
[44] Naqvi, Yasmin. (2003). Amnesty for war crimes: Defining the limits of international recognition. *Revue Internationale de La Croix-Rouge/International Review of the Red Cross*, 85(851), p. 585. https://www.icrc.org/en/doc/assets/files/other/irrc_851_naqvi.pdf
[45] United Nations Security Council. (12th July 2002). Security Council Resolution 1422 (2002). *UN Doc.* S/RES/1422 (2002)
[46] Naqvi, Yasmin. Amnesty for war crimes: Defining the limits of international recognition
[47] Mallinder, Louise. Amnesties and International Criminal Law, p. 9

amnesties.[48] Firstly, we should analyze Article 17 of the Statute, which lays out the basic principle of the relations between the ICC and its parties – the principle of complementarity. It means that the ICC can only investigate or prosecute cases within its jurisdiction only if the relevant state is unwilling or unable to do so.[49] The Rome Statute does not determine the reasons for such an "unwillingness or inability". At first sight, it could mean that any amnesty constitutes a failure by the domestic forum to investigate or prosecute and the consequent admissibility of the ICC prosecution.[50] Although Article 17 does not directly address the legality of amnesties as it concerns only jurisdictional matters of the Court, certain conclusions on the relevance of the Rome Statute for amnesties could be made.

Because of absence of the provision on amnesties in the Rome Statute, the ICC has to determine the admissibility of each case that involves national amnesties based on Article 17. Thus, the Court has the power not to take into account the national amnesty law, if it decides that it is irrelevant for the matters of international prosecution, in other words, *"unless the State is unwilling or unable genuinely to carry out the investigation or prosecution"*.[51] It has to be considered that investigation and criminal prosecution are two completely different processes that pursue different goals. This difference is also reflected in Article 17 of the Statute. Article 17(1)(b) points out that a State which has investigated a case under its jurisdiction may decide not to prosecute an individual if such a decision is not a result of the State's unwillingness or inability to prosecute.[52] Therefore, there is a requirement that the case should be at least investigated, which usually means case by case study by the authorities. And, if an amnesty precludes the individual investigation of the cases, the ICC has a jurisdiction

[48] Mallinder, Louise. Amnesties and International Criminal Law, p. 9
[49] International Criminal Court. (1998). Rome Statute of the International Criminal Court https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf
[50] Butler, Jay. (2017). Amnesty for Even the Worst Offenders. *Washington University Law Review*, 95(3), p. 610. https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=6286&context=law_lawreview
[51] International Criminal Court. (1998). Rome Statute of the International Criminal Court
[52] Ibid.

to investigate and prosecute despite national amnesty laws, even though it will almost certainly undermine the effectiveness of such an amnesty.[53]

The type of the amnesty would be of significant importance to the ICC when making a decision whether to exercise its jurisdiction despite amnesties granted on the national level. For example, it is doubtful for the case in which a blanket amnesty was introduced to pass the so-called "complementarity test".[54] As mentioned above, such type of an amnesty, most commonly, preclude any investigation or prosecution. The prosecution process is often simply prohibited by an amnesty law. Even if the main aim of a blanket amnesty was positive (e.g. the reconciliation process), we cannot call such an amnesty a legitimate one, as the means chosen to achieve that goal imply shielding all the perpetrators from responsibility. With a high probability, a case like this will be recognized as admissible for the ICC despite national amnesties.

On the other hand, a case where a conditional amnesty is introduced is more likely to be recognized as inadmissible for the ICC for the following reasons. It would be important for the Court to analyze whether there was an investigation conducted (namely, if there was an effort made to gather the evidence and ascertain the facts relating to the criminal conduct in question) either by national courts or by a form of TRC. Moreover, conditional amnesties will more likely meet the requirements of Article 17(1)(b) because unlike with the blanket amnesty, the decision not to prosecute will not be the only option, as granting such an amnesty to an individual could be rejected. At the same time, it would, probably, be difficult for a court to assess objectively, whether an amnesty was a result of unwillingness or inability to prosecute. If a conditional amnesty is provided by the TRC, like it was in South Africa, the jurisdiction decision will most probably be based on the credibility of the commission.[55] For instance, the South African TRC had sufficient support. Kofi

[53] Seibert-Fohr, Anja. (2003). The Relevance of the Rome Statute of the International Criminal Court for Amnesties and Truth Commissions. *Max Planck Yearbook of United Nations Law Online*, 7(1), 553-586. https://www.mpil.de/files/pdf3/mpunyb_seibert-fohr_7.pdf

[54] Robinson, Darryl. (2003). Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court. *European Journal of International Law*, 14(3), 481-505. http://www.vrwg.org/downloads/serving-the-interests-of-justice.pdf

[55] Ibid.

Annan, the former UN Secretary-General explained why the ICC's power to intervene under Article 17 should not apply to South African and similar cases:

> … no one should imagine that would apply to a case like South Africa's, where the regime and the conflict which caused the crimes have come to an end, and the victims have inherited power. It is inconceivable that, in such a case, the Court would seek to substitute its judgement for that of a whole nation which is seeking the best way to put a traumatic past behind and build a better future.[56]

It seems that these words clearly illustrate the distinction between a legitimate conditional amnesty (like many believe the South African case is a good example of) and "less legitimate" amnesties. In reality, it is a politically controversial and philosophical question. Hence, the ICC can recognize certain forms of amnesties and, as found out, it would most likely be a conditional amnesty. Still, as the real intents of an amnesty introduced may not be so vivid, the ICC has more than enough discretion to consider or not a national amnesty law in its jurisdiction decision.

Another provision of the Rome Statute that should be analyzed in the context of amnesties is Article 53 of the Statute. Article 53 gives discretion to the Office of the Prosecutor (hereinafter – OTP) in deciding whether to investigate or prosecute certain cases when they have been referred to the ICC by a state party or the UN Security Council.[57] To be more precise, Article 53(1)(c) instructs the Prosecutor to consider such factors as "the gravity of the crime", "the interests of victims" and if *"there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice"* when deciding whether to proceed with the case.[58] The same considerations appear in Article 53(2), which regulates the Prosecutor's decision whether to proceed with the prosecution after the conducted investigation.[59]

The true meaning of the concept of "interests of justice" is rather debatable. For instance, some authors argue that as certain indictments risk prolonging conflicts, they cannot be considered as those which serve "interests of justice".[60] Initially, the OTP

[56] *As cited in* Mallinder, Louise, Amnesties and International Criminal Law, p. 10.
[57] Robinson, Darryl. Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court, p. 486
[58] International Criminal Court. (1998). Rome Statute of the International Criminal Court
[59] Ibid.
[60] Mallinder, Louise. Amnesties and International Criminal Law

addressed the meaning of this notion in the Draft Regulations of the Office of the Prosecutor published in 2003, where experts leaned towards the idea that the OTP should decline the investigation or prosecution when it could "exacerbate or otherwise destabilize a conflict situation" or "seriously endanger the successful completion of a reconciliation or peace process".[61] As Louise Mallinder claims, this approach was applied in Uganda during 2004-2005 Betty Bigombe's peace process.[62] In that case, the Prosecutor decided to proceed with the investigation in Uganda. However, as the OTP looked if the peace process had a chance of succeeding, it adopted a "low-profile" investigation, which meant refraining from public statements and vocal outreach campaigns.[63] The effect of this "low-profile" investigation is debatable, as the ICC's presence was still notable.[64] Nevertheless, despite all the controversy, such an approach could be summed up in the demand with which the ICC agreed: "Peace First, Justice Later".[65]

Luis Moreno-Ocampo, then the ICC Prosecutor, at first, seemed to leave open the question of amnesties that might be in the "interests of justice". For example, in one of his statements he argued that alternative justice mechanisms could not be considered as criminal proceedings *per se* (while assessing the admissibility of cases before the ICC), but they are an important part of the reconciliation process in Darfur.[66] However, several years afterward, the OTP's approach to the understanding of the "interests of justice" concept has significantly changed. In September 2007 the OTP issued its Policy Paper on the Interests of Justice.[67] This paper introduces a *"presumption in favour of investigation or prosecution* wherever the criteria

[61] Human Rights Watch. (2004). The Meaning of "the Interests of Justice" in Article 53 of the Rome Statute. *Human Rights Watch Policy Paper*. https://www.hrw.org/news/2005/06/01/meaning-interests-justice-article-53-rome-statute#_ftn80
[62] Mallinder, Louise. Amnesties and International Criminal Law, p. 11
[63] Wierda M., Unger T. Bailey R., Aptel C., Cole A. T., Reiger C. (2007). Pursuing Justice in Ongoing Conflict: A Discussion of Current Practice. *International Center for Transitional Justice*, 1-26. https://www.ictj.org/sites/default/files/ICTJ-Global-Justice-Conflict-2007-English.pdf
[64] Human Rights Watch. (2008). Courting History. The Landmark International Criminal Court's First Five Years, p. 104. https://www.hrw.org/sites/default/files/reports/icc0708webwcover.pdf
[65] Wierda M., Unger T. et al. Pursuing Justice in Ongoing Conflict: A Discussion of Current Practice.
[66] Allan, K. Prosecution and Peace: A Role for Amnesty before the ICC, p.244
[67] Ibid.

established in Article 53(1)(a) and (b) and Article 53(2)(a) and (b) have been met".[68] It also mentions that the Prosecutor will use his discretion to suspend an investigation or prosecution under Article 53(1)(c) and 53(2)(c) only in exceptional situations.[69] The paper does not systematize the criteria for investigation or prosecution suspensions in those exceptional situations. However, a conclusion could be made, that a teleological interpretation should be applied to the concept "interests of justice". The Prosecutor in the paper indicates that the decisions to suspend investigation or prosecution have to conform with the "objects and purpose of the Statute".[70] According to the preamble of the Rome Statute these are to end the impunity of the perpetrators of serious crimes of concern to the international community, to prevent such crimes and to "guarantee lasting respect for and the enforcement of international justice".[71] There is an example in the paper of a possible situation when the prosecutorial action would not serve the interests of justice given by the OTP: when "a suspect's rights have been seriously violated in a manner that could bring the administration of justice into disrepute" it would be detrimental to respect for international justice.[72]

Finally, the OTP distinguishes the interests of justice and the interests of peace, as the latter, according to the policy paper, does not fall within the jurisdiction of the OTP.[73] It emphasizes that although the notion of justice within the concept of interests of justice is much broader than criminal justice in its narrow sense (retributive criminal justice), it should not be understood too broadly – as it still does not encompass issues related to peace and security. However, the paper refers to "other forms of justice" such as domestic prosecutions, truth-seeking, reparation programs, institutional reform and traditional justice mechanisms, as they conform to the principle of complementarity in "dealing with large numbers of offenders and addressing the impunity gap".[74]

[68] International Criminal Court, The Office of the Prosecutor. (2007). Policy Paper on the Interests of Justice, 1-9, p. 1. https://www.icc-cpi.int/nr/rdonlyres/772c95c9-f54d-4321-bf09-73422bb23528/143640/iccotpinterestsofjustice.pdf
[69] Ibid.
[70] Ibid., p.4
[71] International Criminal Court. (1998). Rome Statute of the International Criminal Court
[72] International Criminal Court, The Office of the Prosecutor. (2007). Policy Paper on the Interests of Justice, p. 4, supra note 8.
[73] Ibid., p.1.
[74] Ibid., p. 8.

Thus, while there is a "presumption of investigation and prosecution", the OTP recognizes other mechanisms of justice, including those which are followed by amnesties to facilitate peace and transition processes and admits that they can co-exist with the ICC investigations or prosecutions.[75] Nevertheless, the critics of the OTP's approach argue that the concept of interests of justice is still very restrictive as it excludes all issues related to peace and security. This understanding of "interests of justice" seemed too narrow and too outdated even for 2007, left alone the contemporary context of conflicts, peace and transition processes. That is why it is hardly surprising that the described approach to the concept of interests of justice met a reasonable amount of criticism. The main idea of the opposite understanding of interests of justice is that the Prosecutor of the ICC should obligatorily take into account the possible impact of the investigation or prosecution on the security of the affected communities. Besides, suspending investigation or prosecution is not equal to ignoring the situation or denying justice at all. In fact, choosing the best timing for investigation or prosecution can allow the OTP to respond to the immediate needs of affected communities, which could prevent the intensification of a conflict, for instance.[76] Therefore, according to this point of view the OTP should broaden its restrictive understanding of the interests of justice. Not considering national amnesties and other peace processes' mechanisms by the OTP could only bring about a negative attitude towards ICC and the idea of international criminal justice as a whole.

Furthermore, we should consider the practical side of how the "interests of justice" provisions may be invoked. They have never been invoked by the OTP as the main basis for its decisions.[77] According to Article 53(3)(b) of the Rome Statute if the Prosecutor decides not to proceed with the case and her decision is based solely on the "interests of justice" provision, the Pre-Trial Chamber (hereinafter – the PTC) may exercise its review power *proprio motu* and in that case, the Prosecutor's decision will not be effective unless confirmed by the PTC.[78] If the PTC does not confirm the

[75] Mallinder, Louise. Amnesties and International Criminal Law, p. 11
[76] Varaki, Maria. (2017). Revisiting the 'Interests of Justice' Policy Paper. *Journal of International Criminal Justice*, 15(3), 455-470, p. 468. https://academic.oup.com/jicj/article-abstract/15/3/455/4085323
[77] Allan, K. Prosecution and Peace: A Role for Amnesty before the ICC, p. 245.
[78] International Criminal Court. (1998). Rome Statute of the International Criminal Court

Prosecutor's[79] decision, then she must proceed with an investigation or prosecution. However, the PTC's *proprio motu* judicial control cannot be activated if the decision is not based solely on the "interests of justice" clause. Thus, if the prosecutorial decision not to proceed is based on other criteria, such as complementarity and gravity of the crime (under Article 17 of the Statute), the PTC, at the request of the State that referred the case to the ICC or the UN Security Council, may request the Prosecutor to reconsider her decision, but cannot dictate a subsequent action. It could be interpreted as if the PTC is encouraging the Prosecutor to use the "interests of justice" clause more often.[80] As a matter of fact, it is not clear why the OTP would ever invoke the "interests of justice" provision if the PTC could use its judicial review power and cancel the Prosecutor's decision not to proceed. Eventually, this may be the main reason why none of the Prosecutor's decisions not to proceed were based on the "interests of justice" provision.

The Policy Paper on the Interests of Justice is a non-binding policy document and could be amended by the next Prosecutor.[81] Current Prosecutor Ms. Fatou Bensouda has not done it yet. There is a scholarly debate on whether the ICC should stick to the current narrow approach of understanding the interests of justice or apply an expansive approach. To my mind, the solution to this legal, socio-political and philosophical dilemma lies somewhere in between. Of course, too large broadening in the interpretation of the "interests of justice" concept will risk undermining the credibility of the ICC and the whole idea of international criminal justice. Nevertheless, there might be certain situations, where there is a strong necessity not to proceed with the investigation or prosecution because it will not serve the "interests of justice". As the 2007 OTP's Policy Paper sets it, such situations can be characterized as an exception, not the rule. Therefore, beyond any reasonable doubt, the Prosecutor or the PTC in their decision should provide a detailed assessment of all relevant circumstances which influenced the decision not to proceed with an investigation or

[79] Varaki, M. Revisiting the 'Interests of Justice' Policy Paper, p. 465-466.
[80] Keller, K.J. (2015). The Pre-Trial Chamber's Dangerous Comoros Review Decision. *Opinio Juris.* http://opiniojuris.org/2015/07/17/the-pre-trial-chambers-problematic-comoros-review-decision/
[81] International Criminal Court, The Office of the Prosecutor. Policy Paper on the Interests of Justice, p. 1.

prosecution. For better clarity of what cases could potentially not meet the interests of justice provision, a new policy document should be issued (or the old one should be amended) with the detailed criteria for assessing such situations.

Finally, the role of the UN Security Council according to the Rome Statute should be identified. According to Article 16 of the Rome Statute, the Security Council has the power to request the ICC to defer the investigation or prosecution for at least 12 months in case it is a threat to international peace or security. It can be done by issuing a resolution (which has a binding character) under Chapter VII of the UN Charter.[82] Still, the ICC's action was never suspended on the demand of the Security Council.[83] However, there was an unsuccessful attempt – in 2009, the African Union demanded to invoke Article 16 of the Rome Statute in order to suspend proceedings against the Sudanese President Omar Al Bashir, who was accused of genocide, war crimes and crimes against humanity.[84] Their main argument was that further legal proceedings, namely that the arrest warrants for Omar Al Bashir and other Sudanese political leaders would jeopardize the peace process in Sudan.[85] Indeed, such arguments were partially justifiable, as issuing arrest warrants in Darfur resulted in the expulsion of foreign humanitarian aid groups, attacks on them, withdrawal of some UN peacekeepers, which in return left many Darfurians without access to water, food and health care services.[86] Nevertheless, there are substantial reasons to expect that in the future the Security Council will request a deferral from the ICC under Article 16 of the Rome Statute for the case, where truth and reconciliation processes are involved, including national amnesties. Then, the role of the Security Council could be analyzed better .

[82] International Criminal Court. (1998). Rome Statute of the International Criminal Court
[83] Allan, K. Prosecution and Peace: A Role for Amnesty before the ICC, p. 245.
[84] Hazan, P. Amnesty: A Blessing in Disguise? Making Good Use of an Important Mechanism in Peace Processes, p. 10.
[85] Allan, K. Prosecution and Peace: A Role for Amnesty before the ICC, p. 275.
[86] Ibid., pp. 246, 275.

1.2.2. Statute of the Special Court for Sierra Leone

It is important to analyze the Statute of the Special Court for Sierra Leone as Article 10 of it contains provisions on granting amnesties. However, for a better understanding of the context, it is good to start with the background.

On July 7, 1999, the Revolutionary United Front (hereinafter – RUF) and the government of Sierra Leone signed a peace agreement in Lomé (Togo).[87] Article 9 of the Lomé Agreement provided *"absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives, up to the time of the signing of the present Agreement"*.[88] Para 3 of this Article also ensured that *"no official or judicial action"* will be taken against any members of RUF in respect of anything done by them in pursuit of their objectives as members of this organization.[89] Thus, a blanket amnesty was provided for individuals, which were members of RUF and who committed crimes up to the time of the signing of the Agreement.[90] The main purpose of such a compromise between parties was to end the armed conflict which lasted for a decade.[91] It is a vivid example of a situation, where a purpose of an amnesty is positive (reconciliation and peace), but the means of achieving this purpose can be hardly called legitimate as no preconditions for the amnesty were introduced. Moreover, initially, there was no clarification of the scope of the crimes after committing which an amnesty could be granted, and this left the door open for giving amnesties for serious human rights violations. However, when signing the agreement, the Special Representative of the UN Secretary-General, Francis Okelo appended a disclaimer, stating that the amnesty provision in *"the Agreement shall not apply to international crimes of genocide, crimes against*

[87] Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone. (1999). Lomé, Togo, July 7, 1999. United States Institute of Peace, Peace Agreements Digital Collection. https://www.usip.org/sites/default/files/file/resources/collections/peace_agreements/sierra_leone_07071999.pdf
[88] Ibid.
[89] Ibid.
[90] Ibid.
[91] Meisenberg, Simon M. (2004). Legality of amnesties in international humanitarian law. The Lomé Amnesty Decision of the Special Court for Sierra Leone. *IRRC*, 86 (856), 837-851, p. 839. https://international-review.icrc.org/sites/default/files/irrc_856_5.pdf

humanity, war crimes and other serious violations of international humanitarian law".[92]

Nevertheless, the Lomé Agreement with its amnesty provision did not stop the violence, which continued until May 2001. Therefore, the government requested the UN to assist in establishing an international tribunal. Following the negotiations, the Special Court for Sierra Leone (hereinafter – SCSL) was established on 16 January 2002. It is referred to as a hybrid tribunal because it incorporates different national elements in its Statute. The SCSL's Statute was ratified by the Sierra Leonean parliament in March 2002.[93] It had jurisdiction *ratione materiae* over the crimes against humanity (Article 2), serious violations of the common Article 3 to the Geneva Conventions and Additional Protocol II (Article 3), other serious violations of international humanitarian law (Article 4) and crimes under Sierra Leonean law (Article 5).[94] As to the amnesty provision, the Sierra Leonean government agreed with the prior UN position. Article 10 of the Statute states that *"an amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in article 2 to 4 of the present Statute shall not be a bar to prosecution".*[95] This provision meant the denial to recognize the legal effects of the amnesty introduced in the Lomé Agreement and enabled the SCSL to prosecute those crimes, which were committed before the signing of the peace agreement.[96]

Along with this, the SCSL, according to Article 1 of its Statute, was mandated to pursue only those individuals *"who bear the greatest responsibility for serious violations of international humanitarian law and crimes"*.[97] Therefore, the SCSL decided to focus prosecution on a limited number of cases. As a result, there were only 13 indictments leading to 9 convictions. Still, most of the combatants were granted

[92] *As cited in* Mallinder, Louise. Amnesties and International Criminal Law, p. 12.
[93] Meisenberg, Simon M. (2004). Legality of amnesties in international humanitarian law. The Lomé Amnesty Decision of the Special Court for Sierra Leone, pp. 837-838.
[94] Statute of the Special Court for Sierra Leone, enclosure to the Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000 (hereinafter – Statute of the SCSL).
[95] Ibid.
[96] Mallinder, Louise. Amnesties and International Criminal Law, p. 12.
[97] Statute of the SCSL

amnesties, which was possible because amnesty remained part of the Disarmament, Demobilization and Reintegration (DDR) process.[98]

Later on, the SCSL invoked Article 10 of its Statute in its jurisprudence. In March 2004, the Appeals Chamber of the SCSL ruled that amnesties granted to combatants in the Sierra Leonean armed conflict by the Lomé Agreement are no bar to prosecution before it. The judges referred to the universality principle:

> …Where jurisdiction is universal, a State cannot deprive another State of its jurisdiction to prosecute the offender by the grant of amnesty, It is for this reason unrealistic to regard as universally effective the grant of amnesty by a State in regard to grave international crimes in which there exists universal jurisdiction. A State cannot bring into oblivion and forgetfulness a crime, such as a crime against international law, which other States are entitled to keep alive and remember.[99]

Including the provision of the SCSL's Statute, stating that an amnesty law is not a bar to prosecution in respect to crimes against humanity and war crimes and delivering a decision based on this prohibition was a step forward in forbidding blanket amnesties for serious human rights violations. On the other hand, some scholars claim that the Appeals Chamber's decision on amnesty is weak in its legal reasoning as it concentrates only on the principle of universality and does not pay attention to the Sierra Leone's own duty to prosecute international crimes.[100] Well, it may not be "a landmark in the development of international humanitarian law" as Meisenberg has put it,[101] but still, the Sierra Leonean case is a good example of how amnesties, that are a part of peace, reconciliation, transition and other similar processes, can coexist with international prosecutions. Moreover, amnesties granted as a part of the DDR process helped to decongest the SCSL's judicial activity as it concentrated only on the perpetrators of serious human rights abuses.

[98] Hazan, P. Amnesty: A Blessing in Disguise? Making Good Use of an Important Mechanism in Peace Processes, p. 9.
[99] Decision on challenge to jurisdiction: Lomé Accord Amnesty in Prosecutor v Morris Kallon, Brima Bazzy Kamara, SCSL-2004-15-PT-060-I, SCSL-2004-15-PT-060-II, Appeal (13 Mar. 2004), para 67.
[100] Jalloh, C.C. (2016). Judicial contributions of the Sierra Leone tribunal to the development of international criminal law. University of Amsterdam dissertation, 1-372, p. 251. https://dare.uva.nl/search?identifier=1d1d820c-84d5-4116-af0b-5f467f87cd8c
[101] Meisenberg, Simon M. (2004). Legality of amnesties in international humanitarian law. The Lomé Amnesty Decision of the Special Court for Sierra Leone. *IRRC*, p. 851

1.2.3. Extraordinary Chambers in the Courts of Cambodia (ECCC)

Similar to the Statute of the SCSL, the Law on the Establishment of the Extraordinary Chambers is another legal act which regulates the activity of a hybrid court and includes an amnesty provision. Before analyzing the amnesty provision, it is important to mention the context.

In 1994, the Cambodian government passed legislation that granted amnesties to Khmer Rouge guerrillas who defected to the government between July 1994 to January 1995.[102] The amnesty would be granted in respect to such crimes as murder, rape, pillage, destruction of private and public property and crimes against the state. However, the amnesty excluded the Khmer Rouge leaders.[103] Two years later, in 1996 the King issued a royal decree granting amnesty to the former Deputy Prime Minister of the Khmer Rouge government, Ieng Sary. The amnesty protected Sary from his conviction *in absentia* for serious violations of human rights committed while he was still in office.[104] As well as the amnesty provided by the Lomé Agreement, the Cambodian amnesties can be called blanket (1994 amnesty) and, consequently, illegitimate (both 1994 and 1996 amnesties). The initial purpose of these amnesties is to forget and conceal; they provide no accountability, benefits to victims' rights, revelations concerning criminals that benefited from these amnesties.[105]

In June 1997, the Cambodian government requested the UN to assist in prosecuting the Khmer Rouge leaders. The UN responded with a recommendation to establish an *ad hoc* tribunal. Afterward, a long period of negotiations between the UN and the Cambodian government began. Amnesty was one of the subjects of intense discussion. The UN insisted that amnesty should not be granted for the crime of genocide, war crimes and crimes against humanity. As well, previously granted amnesty should not be a bar to prosecution. This would mean revoking the 1996 amnesty granted to Ieng Sary, so the Cambodian government opposed the UN's

[102] Slye, Ronald. (2004). The Cambodian Amnesties: Beneficiaries and the Temporal Reach of Amnesties for Gross Violations of Human Rights. *Wisconsin International Law Journal,* 22(1), 99-123, p. 101. https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1552&context=faculty
[103] Mallinder, Louise. Amnesties and International Criminal Law, p. 13.
[104] Slye, Ronald. The Cambodian Amnesties: Beneficiaries and the Temporal Reach of Amnesties for Gross Violations of Human Rights, p. 102.
[105] Ibid, p. 121.

proposal.[106] Consequently, parties had to make a compromise. In the 2004 Law on the Establishment of the ECCC, Article 40 states that the Cambodian Government should not request an amnesty or pardon for any persons who may be investigated for or convicted of crimes that constitute the jurisdiction *ratione materiae* of the ECCC (Articles 3-8 of the Law). However, as to the amnesties that were granted before the enactment of this Law, it is a matter to be decided by the ECCC.[107]

Thus, the ECCC, contrary to the SCSL made a step backward: it did prohibit amnesties for international crimes, but it was given the power to define the scope of the crimes that were granted amnesties prior to the enactment of the Law, including the 1994 and 1996 amnesties. In other words, some amnesties would be nullified by the ECCC whereas others could not. The amnesty provision in the Law simply lacks consistency. For example, as to the amnesty granted to Ieng Sary, the ECCC has ruled that it does not bar the Chamber's jurisdiction (later on, he was charged for genocide by the ECCC). At the same time, thousands of Khmer Rouge guerillas surrendered under the 1994 amnesty.[108] Therefore, the main issue of the amnesty provision in the Law of the Establishment of the ECCC is that the prohibition of blanket amnesties for international crimes was not absolute.

CONCLUSIONS TO CHAPTER I

1. International law does not have an agreed definition of amnesties. Some international organizations provide their own definitions, which are helpful but do not answer all the questions. Problems of definition lead to an even more serious issue – lack of international legal regulation. Different state practice is the reason why there is no common position among the international community.

[106] Mallinder, Louise. Amnesties and International Criminal Law, p. 14.
[107] Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, with inclusion of amendments as promulgated on 27th October 2004 (NS/RKM/1004/006).
[108] Mallinder, Louise. (2009). Global Comparison of Amnesty Laws. https://www.researchgate.net/publication/228214698_Global_Comparison_of_Amnesty_Laws

2. Granting of amnesties is approved in non-international armed conflicts, according to Additional Protocol II to the 1949 Geneva Conventions. However, this rule is not absolute: there is an exception provided by a customary norm, which excludes individuals suspected of, accused of, or sentenced for war crimes. As to other international crimes, such as genocide or crimes against humanity, there is a tendency among subjects of international law to forbid granting amnesties for such crimes, but we cannot call this tendency an absolute prohibition as there is no treaty provision or emerged custom in international law. A deeper analysis of this issue will be provided in Chapter II.

3. The legitimacy of amnesty, which is a central issue in this research was also partially analyzed in Subchapter 1.1. There are several factors that could help distinguish a legitimate amnesty from an illegitimate one:

a. an amnesty must have a legitimate objective;

b. amnesty must be conditional (i.e. no blanket or self-amnesties allowed);

c. amnesty must be supported by the local population;

d. amnesty must be consistent with the norms of international law.

4. Subchapter 1.2. analyzes amnesties through the statutes of international criminal courts and tribunals: the ICC, the SCSL and the ECCC.

The Rome Statute of the ICC has no provision on amnesties, thus, the decision to intervene or not on the basis of national amnesty could be based on Article 17 or Article 53. As to Article 17, a conclusion was made that a national amnesty does not always mean unwillingness or inability of the State-party to investigate or prosecute. A case where an amnesty does not preclude individual investigation could be recognized as inadmissible for the ICC. Analysis of Article 53 of the Statute shows that as certain indictments risk prolonging conflicts, some amnesties may serve the interests of justice. However, this statement is rather debatable.

5. The SCSL Statute and the Law on the Establishment of the ECCC are two statutes of the hybrid courts, which include amnesty provisions and at the same time exclude individuals who committed international crimes from being granted amnesties. Amnesty provision in the SCSL Statute received a lot of criticism, however, it was

definitely a step forward in prohibiting blanket amnesties. Moreover, it is a bright example of how a DDR process could coexist with international prosecutions.

Amnesties granted in 1994 and 1996 in Cambodia can be hardly called legitimate, as well as the amnesty provision included to the Law on the Establishment of the ECCC. The problem is that the Law prohibited blanket amnesties for international crimes, but this prohibition was not absolute.

CHAPTER II. AMNESTY CONTROVERSY IN INTERNATIONAL CRIMINAL LAW

Granting amnesties is rather a controversial topic in international criminal law. As mentioned earlier in this research, it is mainly because there is no agreed position on this issue between subjects of international law as state practice differs a lot. As a result, there is little international regulation concerning amnesties – almost no provisions in international treaties and the customary international norm, which has not yet crystallized. Nevertheless, in the peace versus justice debate, the international community tends to choose justice by turning against amnesties. On the other hand, we cannot ignore the fact that amnesties can be an effective tool in conflict resolution and transitional justice mechanisms.

It is important to mention that in the midst of this peace versus justice debate we have little information on the real effects of amnesties in ending armed conflicts, reconciliation processes, transition periods, etc.

Lesley-Ann Daniels in her more than 30-years research on amnesties' effectiveness in conflict termination came to such important conclusions as:

- amnesties for heinous crimes are not more effective than amnesties that exclude those crimes in reaching negotiated settlements;
- giving broad amnesties during armed conflicts is not of use in ending the conflict sooner;[109]
- amnesty has its strongest impact when it is trustworthy within the local community.[110]

Since my research is done in the frame of international criminal law, I will not focus on the effectiveness of amnesties in conflict resolution and transitional justice mechanisms, as I cannot analyze amnesties that do not comply with international law. However, I admit that such findings are a boost to the international community which

[109] Daniels, Lesley-Ann. (2020). How and When Amnesty during Conflict Affects Conflict Termination. *Journal of Conflict Resolution*, 1-26, p. 20. https://journals.sagepub.com/doi/abs/10.1177/0022002720909884
[110] Ibid, p. 4

turns against amnesties and are of utmost importance to policymakers and international law scholars.

2.1. Amnesty and the Duty to Prosecute

Since there is no international treaty, that directly prohibits granting amnesties for committing serious human rights abuses, scholars argue that amnesties should be prohibited because of the existing obligations under international law to hold individuals accountable for serious human rights violations.[111] Regarding the current point of the development of international law, in particular the level of codification of international crimes, we can single out four types of crimes, which may have an international obligation to prosecute individuals for committing them. They are genocide, war crimes, crimes against humanity and torture. But before answering the question of whether there really is an international obligation to prosecute in respect of each of these international crimes, several general observations on this issue should be made.

The first one concerns the legitimacy of the duty to prosecute concept. There is strong support within the international community and international law scholars of the absolute obligation of states to prosecute particular international crimes.[112] Well, it is difficult not to agree that prosecution is the best way to fulfill the criminal justice system's objectives. On the other hand, it should be admitted that the duty to prosecute principle can't be viewed as an absolute one. As it has been already mentioned a few times in this research, prosecution goals may, in some cases, be inconsistent with the interests of the local societies which are undergoing peace and transition processes. Hence, whenever the majority of the prosecutions help to achieve the legitimate goals of the criminal justice system, at the same time, some of them may only fail to reach those goals. This is important especially considering that the international criminal justice system has limited prosecutorial resources.[113]

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[111] Mallinder, Louise. Amnesties and International Criminal Law

[112] Slye, Ronald. (2002). The Legitimacy of Amnesties under International Law and General Principles of Anglo-American Law. *Virginia Journal of International Law*, 43(173), 173-247, p. 182. https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1433&context=faculty

[113] Ibid., p. 186.

The second remark that should be made refers to the issue of the relationship between individual accountability and punishment. In respect of amnesties, accountability is often equated with punishment.[114] Some legal definitions of amnesties provide that amnesty precludes individual accountability, whereas others speak only of the exemption of punishment. However, it is of key importance to clarify which of these two notions are implied. For instance, the proponents of the restorative justice model argue that the main focus should be put on accountability in order to deemphasize the role of punishment. In other words, the notion of "accountability" does not necessarily include prosecution and punishment as it can be satisfied by other means. Since truth, knowledge and acknowledgement are among the goals of individual accountability, the minimum form of accountability can be provided through the public identification of responsibility for the crime committed.[115] Nevertheless, some international law instruments, in respect of serious human rights abuses speak not only about the obligation to investigate and prosecute but also of the obligation to punish. For example, Article IV of the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter – Genocide Convention) states that *"persons committing genocide … shall be punished"*.[116] Of course, similar wordings as in the Genocide Convention leave no room for alternative justice mechanisms, as well as for amnesties.

2.1.1. The Duty to Prosecute the Crime of Genocide

The Crime of Genocide was codified for the first time on the international level in the Convention on the Prevention and Punishment of the Crime of Genocide (1948). Nowadays, the majority of the countries in the world are parties to the Genocide Convention (the total number of parties is 152 as of November 2020).[117] However, the International Court of Justice (hereinafter – the ICJ) has identified that the provisions

[114] Slye, Ronald. (2002). The Legitimacy of Amnesties under International Law and General Principles of Anglo-American Law, p. 187
[115] Ibid.
[116] UN General Assembly, *Convention on the Prevention and Punishment of the Crime of* Genocide, 9 December 1948, United Nations, Treaty Series, 78 (1021), 277-322.
[117] United Nations Office on Genocide Prevention and the Responsibility to Protect. The Genocide Convention. https://www.un.org/en/genocideprevention/genocide-convention.shtml

of the Genocide Convention establish an international custom,[118] which means that these provisions are binding on all States, whether or not they have ratified the Convention.

Article II of the Genocide Convention defines genocide as the:

> acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group.[119]

To constitute the crime of genocide abuses should be committed with a specific intent required by Article II of the Genocide Convention – to destroy a group of people. Moreover, according to the same article of the Convention, the group of victims should be specific as well – national, ethnic, racial or religious.[120] For example, political persecution cannot be called genocide. The drafters of the Genocide Convention excluded crimes committed against "political groups" from Article II.[121] It was the initiative of the Soviet Union and other States with totalitarian regimes, which feared the interference in their internal affairs and wanted to continue to suppress political opposition.[122] Thus, many mass human rights abuses committed with the intent to destroy political opponents cannot be defined as genocide. Instead, such crimes are often defined as crimes against humanity, which, to my mind, is completely wrong and is a relic of the past. The crime of genocide and crimes against humanity are different crimes by their nature. As Philippe Sands has put it, genocide is focused on the destruction of groups and crimes against humanity – on the killing of large numbers of individuals. Thus, these two concepts have different objectives: the aim of the first one

[118] International Court of Justice. (1951). Reservations To The Convention On The Prevention And Punishment Of The Crime Of Genocide, Advisory Opinion, 1951 I.C.J. 15.
[119] UN General Assembly, *Convention on the Prevention and Punishment of the Crime of* Genocide, 9 December 1948, United Nations, Treaty Series, 78 (1021), 277-322.
[120] Ibid.
[121] Scharf, Michael P. (2006). From the eXile Files: An Essay on Trading Justice for Peace. *Washington and Lee Law Review*, 63(1). 339-376, p. 354.
https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1140&context=wlulr
[122] Ibid., p. 354, supra note 57.

is to protect groups; the other one's purpose is protecting an individual.[123] And political opposition definitely has the characteristics of a group. In fact, there have been many examples in the past of *'political genocide'*: victims of the communist regimes in the Soviet Union and Eastern Europe; victims of the Khmer Rouge regime, acts of political extermination in Uganda, Guatemala, Argentina, etc.[124] However, as these acts do not constitute the crime of genocide, the consequences in respect of the duty to prosecute will be different.

Article VI of the 1948 Genocide Convention provides that *"persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed…"*.[125] Hence, this Article establishes an adjudicatory jurisdiction to the State where the crime of genocide was committed.[126] Article VI also states that the adjudicatory jurisdiction may also belong to an international penal tribunal with the acceptance of the Contracting Parties.[127]

Although there is no such provision in the Convention, the crime of genocide is known to be a crime with universal jurisdiction. The application of the universal jurisdiction to the crime of genocide originates long before the Genocide Convention was drafted. At the beginning of the 20th century, the idea that universal jurisdiction applies a specific list of offences came out. These offences were called *delicta iuris gentium* (crimes against the law of nations). Raphael Lemkin, the prominent genocide scholar, has framed universal jurisdiction within the concept of the 'duty to prosecute or extradite', so that the country in which the accused stayed had an obligation to try them or to extradite them to another State for trial (to the State, where the crime was

[123] Coalson, Robert. (2013). What's the Difference Between 'Crimes Against Humanity' and 'Genocide?' *The Atlantic*, March 19, 2013. https://www.theatlantic.com/international/archive/2013/03/whats-the-difference-between-crimes-against-humanity-and-genocide/274167/

[124] Jones, Adam. (2013). Genocide and Political Groups (book review). *Journal of Genocide Research,* 106-109, p. 108. https://www.researchgate.net/publication/263335208_Genocide_and_Political_Groups_book_review

[125] UN General Assembly, *Convention on the Prevention and Punishment of the Crime of* Genocide, 9 December 1948, United Nations, Treaty Series, 78 (1021), 277-322.

[126] Adanan, Amina. (2019). Symposium on the Genocide Convention: Reflecting on the Genocide Convention at 70: How genocide became a crime subject to universal jurisdiction. *EJIL: Talk! Blog of the European Journal of International Law*. https://www.ejiltalk.org/symposium-on-the-genocide-convention-reflecting-on-the-genocide-convention-at-70-how-genocide-became-a-crime-subject-to-universal-jurisdiction/

[127] UN General Assembly, *Convention on the Prevention and Punishment of the Crime of* Genocide.

committed or to the State of the nationality of the accused). However, the idea of universal jurisdiction over the crime of genocide was not included into the Genocide Convention on purpose – the parties feared that it would violate the principle of State sovereignty.[128]

Despite that the Genocide Convention does not include universal jurisdiction, it does not mean that it forbids the application of this principle to the crime of genocide. This position was delivered for the first time in the *Attorney General of the Government of Israel v. Adolf Eichmann* (1961).[129] In this decision the District Court of Jerusalem has found:

> Had Article 6 meant to provide that those accused of genocide shall be tried only by "a competent court of the country in whose territory the crime was committed" (or by an "international court" which has not been constituted), **then that article would have foiled the very object of the Convention "to prevent genocide and inflict punishment therefore"**…[130]

Therefore, there is an obligation to prosecute in respect of the crime of genocide. However, according to the Genocide Convention, this obligation belongs only to a State where the crime of genocide occurred (or to an international court or tribunal if it is established or if the ICC exercises its jurisdiction, for instance). As to the universal jurisdiction – it is not viewed as mandatory. In other words, it is more a right to prosecute rather than a duty. As a matter of fact, this permissive character of universal criminal jurisdiction gives the opportunity to make amnesty deals, in certain cases, possible.

2.1.2. The Duty to Prosecute War Crimes

The validity of granting amnesties for war crimes is rather a pressing question as amnesties are often used as a tool for conflict termination and achieving peace. As was found out in Chapter I, according to Article 6(5) of the Additional Protocol II to the 1949 Geneva Conventions, amnesties are even encouraged at the end of a non-

[128] Adanan, Amina. (2019). Symposium on the Genocide Convention: Reflecting on the Genocide Convention at 70: How genocide became a crime subject to universal jurisdiction.
[129] Ibid.
[130] District Court of Jerusalem. (1961). *Attorney General of the Government of Israel v. Adolf Eichmann.* No. 40/61, para. 24. https://www.legal-tools.org/doc/aceae7/pdf/

international conflict.[131] Nevertheless, for the purposes of this research, it is necessary to analyze whether there is an international obligation to prosecute war crimes. For greater clarity, I will divide this analysis into two parts – the duty to prosecute in respect of the grave breaches of the Geneva Conventions and in respect of other war crimes.

The grave breaches of the Geneva Conventions have been partially described earlier in this research. It was found out that grave breaches include *"willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, extensive destruction of property not justified by military necessity and carried out unlawfully and wantonly"*.[132] As to the duty to prosecute, it is absolute in respect of grave breaches. And, therefore, it means that no amnesties could be granted to perpetrators of grave breaches of the Geneva Conventions. Parties to the 1949 Geneva Conventions carry an obligation to search for, prosecute, and punish those responsible for grave breaches or, at least, to extradite such persons to another state party for trial.[133]

It was as well concluded in Subchapter 1.1. that the grave breaches provisions apply only to international conflicts,[134] thus there is no duty to prosecute grave breaches during non-international conflicts and that makes amnesties possible (in certain cases even encouraged).

Thus, everything is quite clear with the impermissibility of granting amnesties for perpetrators of grave breaches: they cannot be called legal and legitimate under no circumstances. However, the same issue concerning other war crimes could use a bit more clarity. For the recent few decades, a general tendency to prosecute all war crimes, despite their gravity, has developed. However, this tendency cannot be yet equated with a total prohibition of amnesties for war crimes.[135] The reason why all

[131] International Committee of the Red Cross. (1977). *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 1125 UNTS 609.
[132] International Committee of the Red Cross. (1949). *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention)*, 12 August 1949, 75 UNTS 31.
[133] Scharf, Michael. P. (1996). Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti? *Texas International Law Journal*, 31(1), 1-41, p. 24. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3547532
[134] Moir, Lindsay. (2009). Grave Breaches and Internal Armed Conflicts. *Journal of International Criminal Justice* (7), 763-787, p. 785.
[135] Naqvi, Yasmin. (2003). Amnesty for war crimes: Defining the limits of international recognition. *Revue Internationale de La Croix-Rouge/International Review of the Red Cross,* 85(851), p. 586. https://www.icrc.org/en/doc/assets/files/other/irrc_851_naqvi.pdf

amnesties for war crimes cannot be considered invalid lies in the quite obvious fact that an amnesty could be a useful tool for ending or preventing non-international conflicts, facilitate reconciliation and transition processes, etc. In fact, this is confirmed by the existence of the already mentioned above Article 16 of the Rome Statute, which gives the UN Security Council the mandate to defer proceeding before the ICC for twelve months by passing a resolution under Chapter VII of the UN Charter. Including this provision to the ICC Statute only shows that it is admitted that unlimited prosecution for such international crimes as war crimes may threaten international peace and security.[136]

There is a great variety of legal sources which support the principle that internal legislation of a State or the judicial decisions of national courts do not exempt a person accused of international crimes (including war crimes) from individual criminal responsibility.[137] One illustration of this is the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (1968) which provided that no statutory limitations would apply to war crimes.[138] In fact, the only possible situation in which an amnesty will be considered permissible and legally bound for third states is when it is approved by the UN Security Council for the purpose of maintaining international peace and security.[139] For instance, there might be situations when the non-recognition of an amnesty would force the State to act in contravention of its obligations under the UN Charter (e.g. if this non-recognition will jeopardize international peace and security).[140]

Apparently, amnesties could not be granted for all war crimes. Although neither common Article 3 to the 1949 Geneva Conventions, nor Additional Protocol II contains provisions on grave breaches, some of the war crimes can still be considered as serious violations, for committing which no amnesty would be permissible even from the moral point of view. The International Criminal Tribunal for Rwanda was given

[136] Naqvi, Yasmin. (2003). Amnesty for war crimes: Defining the limits of international recognition, p. 592.
[137] Ibid., p. 590.
[138] Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, General Assembly Res. 2391, 26 November 1968.
[139] International Criminal Court. (1998). Rome Statute of the International Criminal Court.
[140] Naqvi, Yasmin. (2003). Amnesty for war crimes: Defining the limits of international recognition, p. 592.

ratione materiae jurisdiction over serious violations of common Article 3 and Additional Protocol II to the Geneva Conventions.[141] Similarly, the ICTY decided in the *Prosecutor v. Dusko Tadic,* that it has jurisdiction over serious violations of common Article 3.[142] In addition, Article 8(2)(c) and (e) of the Rome Statutes provides, that the ICC has jurisdiction over serious violations of the rules which apply to non-international armed conflicts.[143] Hence, according to the complementarity principle, the domestic courts will also have jurisdiction over such crimes. On the basis of this, one might assume that there is an international positive obligation to prosecute such offences and, therefore granting amnesties, in this case, would be impermissible.[144] However, it is only an assumption and a rather controversial one.

To my mind, each case is unique and whether amnesties for war crimes could be viewed as valid depends on each particular situation. There is a peremptory norm – a positive obligation to prosecute or extradite which deals with grave breaches of the Geneva Conventions. As to other serious violations of the international humanitarian law: though there is a tendency in contemporary international law towards duty to prosecute in respect of war crimes, it is still not an absolute prohibition of granting amnesties for such offences.

2.1.3. The Duty to Prosecute Torture

There are several international treaties (both universal and regional) which are aimed to prevent torture. Among them are the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter – Torture Convention), the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987), the Inter-American Convention to Prevent and Punish Torture (1985). In this subchapter, I will focus on the UN Torture Convention as it is universal in character (as of December 2020 it has 171 parties).[145]

[141] ICTR Statute, Art. 4, Annex to Security Council Res. 955 (1994), S/RES/955 (1994), 8 Nov. 1994
[142] Prosecutor v. Dusko Tadic, Appeals Chamber of the ICTY, 2 October 1995, para. 137, 35 I.L.M. 32 (1996)
[143] International Criminal Court. (1998). Rome Statute of the International Criminal Court.
[144] Naqvi, Yasmin. (2003). Amnesty for war crimes: Defining the limits of international recognition, p. 603.
[145] United Nations, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984. United Nations, Treaty Series, 1465 (p.85).

Article 1 of the Torture Convention defines the term "torture" as:

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[146]

Torture is often mentioned as a war crime or a crime against humanity.[147] For instance, the Rome Statute views torture either as a war crime or a crime against humanity (i.e. torture is not viewed as a separate crime there).[148] However, it can be asserted that torture is a specific international crime, and could be considered separately from war crimes and crimes against humanity. This is mainly because freedom from torture is a fundamental human right, as well as an absolute one.

The UN Torture Convention was created to impose positive obligations upon the parties.[149] Among them, is provided by Article 4 of the Convention obligation to criminalize torture as a distinct crime in national legislation (i.e. autonomous from torture as a war crime, a crime against humanity or any other international crime). Moreover, according to Article 6, the Convention imposes a duty to establish domestic criminal jurisdiction over the crime of torture; to take the alleged criminal offender into custody; to extradite him/her or to take other legal measures to ensure his presence.[150] The UN Torture Convention also requires its States Parties to include torture, attempt to commit torture, complicity or participation in torture, as extraditable offences in extradition treaties and stresses that the Convention is a legal basis for extradition in respect of this crime (Article 8).[151] It is also noteworthy that Article 12 of the Torture Convention provides an obligation to *"ensure that its competent authorities proceed*

[146] United Nations, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*
[147] Shabas, William A. (2006). The Crime of Torture and the International Criminal Tribunals. *Case Western Reserve Journal of International Law*, 37(2), 349-364. https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1372&context=jil
[148] International Criminal Court. (1998). Rome Statute of the International Criminal Court.
[149] Gaeta, Paola. (2008). When is the Involvement of State Officials a Requirement for the Crime of Torture? *Journal of International Criminal Justice*, 6(2), 183-193, p. 187. https://academic.oup.com/jicj/article-abstract/6/2/183/858334
[150] United Nations. (1984). *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*
[151] Gaeta, Paola. (2008). When is the Involvement of State Officials a Requirement for the Crime of Torture?, p. 187

to a prompt and impartial investigation, wherever there are reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction".[152]

It should be noted that the drafters of the Torture Convention, in respect to the above-mentioned positive obligations of the State, use only the term "torture". "Cruel", "inhuman" and "degrading treatment or punishment" are also serious human rights abuses, however, according to Article 16 of the Convention, the duty to prosecute applies only to torture. However, there still is an obligation of a prompt and impartial investigation under Article 12 in respect to cruel, inhuman and degrading treatment or punishment.[153]

Therefore, an international obligation to prosecute or extradite in respect of torture exists only for a State where this crime was committed or if the alleged offender is its citizen. Article 5 of the Torture Convention also permits to establish jurisdiction for a State, when the victim is a citizen of that State. However, based on textual interpretation of this provision, it is not mandatory due to the words: *"if a State considers it appropriate"*.[154] On the other hand, a duty to extradite the alleged offender is imposed on all States Parties to the Convention. This may lead to a conclusion that the existing obligation to prosecute or extradite prevents the States to make amnesty deals. Nevertheless, we cannot ignore the fact that there are States that have not yet ratified or signed the Torture Convention, thus they are not bound by its provisions. And, exactly this fact makes amnesty deals possible in respect of torture.

History provides a lot of examples where perpetrators of torture managed to escape responsibility and punishment for the crimes committed. A good example might be the amnesty for crimes committed by the Haitian military junta (1991-1994). Many human rights violations they were responsible for can fall into the definition of torture given in the Torture Convention. The so-called "political rapes" of the supporters of the legitimate president is the simplest example. The "political rapes" were described

[152] United Nations. (1984). *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*
[153] Ibid.
[154] Ibid.

by the UN/OAS in the following way: *"Armed men, often military or FRAPH members, burst into the house of a political activist they seek to capture. When he is not there and the family cannot say where he is, the intruders rape his wife, sister, daughter or cousin"*.[155] Such acts clearly fall within the definition of torture provided by the Convention since they:

a. were committed by the persons acting as public officials (or with their consent or acquiescence);

b. caused severe pain or severe pain and suffering and were intentionally inflicted;

c. their purpose was punishing the family members of some political activists because of their opposition to the military regime or to intimidate or coerce these activists to abandon their support of the legitimate president of Haiti.[156]

Haiti at that time was a party neither to the Torture Convention (it became its signatory in 2013), nor to the Inter-American Convention to Prevent and Punish Torture. However, some scholars might argue that the obligations imposed by the prementioned conventions are still relevant to the amnesty of the Haitian military junta.

This idea is based mainly on the 1990 Committee Against Torture decision concerning the communications submitted by the relatives of the victims of acts of torture committed by the Argentinean military authorities which were declared inadmissible since Argentina has not ratified the Torture Convention when the amnesty laws were enacted. However, *in dictum,* the Committee stated that even when the Convention has not been ratified yet, there was a general rule in international law, which obliges all states to prevent and to punish acts of torture.[157] However, as the communication was still declared inadmissible, we might make a conclusion that the Committee did not require Argentina to provide remedies for the victims of torture, but only encouraged it to do so. Moreover, it didn't concretize which exact remedy should

[155] MICIVIH Press Release, Ref. CP/94/20, May 19, 1994, reprinted in RAPE IN HAITI, supra note 17, at 6. As cited in Scharf, Michael. P. (1996). Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti? P. 23.
[156] Scharf, Michael. P. (1996). Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti? P. 23.
[157] Ibid, p. 25.

be provided, thus it should not specifically be a prosecution.[158] The same argument applies to the amnesty of the Haitian military regime – as Haiti was not a party to the UN Torture Convention, we cannot claim that Haitian authorities were obliged to prosecute acts of torture, thus the Haitian 1994 amnesty law is not a violation of international law.

There was also an interesting idea in the scholarly debate concerning the textual interpretation of the UN Torture Convention. Comparing to the wording contained in the 1948 Genocide Convention, the wording included to the Torture Convention may allow for several types of amnesties.[159] Indeed, whereas the Genocide Convention has an imperative provision that a person who committed the crime of genocide *"shall be punished"*(Article IV)[160] and demands states to *"provide effective penalties"*, (Article V)[161] the UN Torture Convention contains only a requirement that the States should submit cases involving the allegations of torture to the *"competent authorities for the purpose of prosecution"* (Article 7)[162] and that States should ensure that torture is *"punishable by appropriate penalties which take into account their grave nature"* (Article 4).[163] Thus, the main argument of this idea is that the UN Torture Convention *"does not explicitly require that a prosecution take place, let alone that punishment be imposed and served"*.[164] However, the more popular opinion is that we should not pay too much attention to the difference in the formulation used in the two above-mentioned conventions. Here we should assign significance to the teleological interpretation – the primary objective of both conventions was to ensure that those responsible for committing genocide or torture will serve severe sentences.[165] The

[158] Scharf, Michael. P. (1996). Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti? P. 25.
[159] Ibid., p.24.
[160] UN General Assembly, *Convention on the Prevention and Punishment of the Crime of* Genocide, 9 December 1948, United Nations, Treaty Series, 78 (1021), 277-322.
[161] Ibid.
[162] United Nations. (1984). *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*
[163] Ibid.
[164] Orentlicher, Dianne F. (1991) Settling Accounts: The Duty To Prosecute Human Rights Violations of a Prior Regime. *As cited in* Scharf, Michael. P. (1996). Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti? *Texas International Law Journal,* 31(1). 1-41, p. 24.
[165] Scharf, Michael. P. (1996). Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti? P. 24.

drafters of the Torture Convention thought that it would be reasonable to punish the perpetrators of torture the same as those who are responsible for serious human rights abuses.[166] Therefore, the wording used in the UN Torture Convention should not be viewed as the one that permits granting amnesties for committing acts of torture.

It appears that there is still some uncertainty as to whether there is an international obligation to prosecute acts of torture. Even if we take the European human rights protection mechanism, we will not find any consistent legal position. On one hand, there is an idea that the duty to prosecute concept in respect to torture emerged together with an underlying assumption that each of the duties imposed by an absolute right (such as freedom from torture) carries the absolute status as well.[167] On the other hand, it is admitted that this idea of treating the duty to prosecute acts of torture as an absolute obligation does not take into account other relevant interests of States – political stability, peace, reconciliation process, historical truth, institutional reform, etc.[168]

To my mind, one of the recent judgements ruled by the Great Chamber of the ECHR in *Marguš v. Croatia* concerning amnesties is illustrative of how the Court will treat amnesties for serious human rights abuses, including torture in the nearest future. In this case, the applicant was indicted in 1993 on charges of murder, torture, and several other offences he committed during the war in Croatia. In 1997 the proceedings terminated as the applicant was granted amnesty after the enactment of the General Amnesty Act. However, the decision to terminate proceedings was later overturned and the applicant was sentenced to 14 years of imprisonment. In his application, he argued *inter alia* that the State had unlawfully tried him the second time for the same offence (alleged violation of Article 4 of Protocol 7 to the European Convention on Human Rights – i.e. violation of the principle *non bis in idem*). As a result, both the Chamber and the Great Chamber of the Court have decided that there was no violation of Article 4 of Protocol 7 to the Convention. The Court observed that the applicant had been

[166] Scharf, Michael. P. (1996). Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti? P. 23.
[167] Jackson, Miles. (2018). Amnesties in Strasbourg. *Oxford Journal of Legal Studies*, 38(3), 451-474. OP-OJLS180017 451..474 (ssrn.com)
[168] Ibid., p. 467.

improperly granted amnesty for acts that are grave breaches of fundamental human rights under, on top of everything, Article 3 of the Convention (which guarantees freedom from torture).[169] Moreover, ECHR referred to the international obligation of the State to prosecute acts of torture and to the fact that that granting amnesties for such atrocities which were committed by the applicant are unacceptable:

> **A growing tendency in international law** is to see such amnesties as unacceptable because they are incompatible with the unanimously recognized obligation of States to prosecute and punish grave breaches of fundamental human rights. Even if it were to be accepted that amnesties are possible where there are some particular circumstances, such as a reconciliation process and/or a form of compensation to the victims, the amnesty granted to the applicant in the instant case would still not be acceptable since there is nothing to indicate that there were any such circumstances.[170]

Using the expression *"a growing tendency in international law"* is quite illustrative. Thus, we cannot claim that there exists an international customary norm which prohibits granting amnesties to those who committed acts of torture. In the meantime, granting amnesties to torture perpetrators is also questionable as torture has been recognized as an international crime for several decades and as freedom from torture has an absolute character.

Marguš v. Croatia, however, is not the first ECHR case which addresses the permissibility of amnesties under international law. For instance, in *Yesil and Sevim v. Turkey* the Court declared that amnesties and pardons should not apply to acts of torture or ill-treatment.[171] In *Ould Dah v. France*, the applicant was a Mauritanian officer, who was convicted in France for acts of torture (under the universal jurisdiction) despite the fact that he had been granted amnesty in Mauritania earlier. The Court, however, ruled that amnesties are incompatible with the State's obligation to prosecute such crimes as torture and, thus, found no violation.[172]

As found out before, an international obligation to prosecute acts of torture and to extradite torture perpetrators exists for the parties of the UN Torture Convention.

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[169] *Marguš v. Croatia* [GC], no. 4455/10, 27 May 2014.
[170] Ibid., para 139.
[171] *Yeşil and Sevim v. Turkey*, no. 34738/04, 5 May 2007 [in French], para 34.
[172] The Geneva Academy of International Humanitarian Law and Human Rights. (2017). *Transitional Justice and the European Convention on Human Rights*, 1-49, p. 32. https://www.geneva-academy.ch/joomlatools-files/docman-files/Transitional%20Justice%20and%20the%20European%20Convention%20on%20Human%20Rights.pdf

For those States which are not parties to the Convention and are not bound by its provisions, possibilities for amnesty deals remain open. There is a tendency in international law according to which amnesties granted to torture perpetrators are viewed as unacceptable. Regardless, I agree with an idea that the international community should still be open to plural approaches to dealing with this atrocity.[173]

2.1.4. The Duty to Prosecute Crimes Against Humanity

The term "crimes against humanity" as one of the international crimes under customary international law appeared for the first time in the joint declaration of the governments of France, Great Britain, and Russia in May 1915, as "crimes against civilization and humanity", denouncing the Turkish massacre of over a million of Armenians in the Ottoman Empire, for which the representatives of the Turkish Government would be held responsible. The first international treaty in which crimes against humanity were codified was the Charter of the Nuremberg War Crimes Tribunal.[174] Since then the notion of crimes against humanity has significantly developed, mainly under the customary international law and through the jurisprudence of international courts and tribunals such as the ICC, the ICTY, the ICTR. Many States have also criminalized crimes against humanity in their domestic legislation.[175]

However, crimes against humanity have not yet been codified in a separate international instrument,[176] unlike the analyzed above war crimes, genocide and torture. The consensus within the international community on the term "crimes against humanity" is reflected in the Rome Statute. Article 7 of the Statute contains the most extensive list of acts which may constitute this international crime.[177] According to the Statute, crimes against humanity are acts, which are *"committed as part of a widespread or systematic attack directed against any civilian population, with*

[173] Miles, Jackson. (2018). Amnesties in Strasbourg, p. 470.
[174] Scharf, Michael. P. (1996). Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti? *Texas International Law Journal*, 31(1), 1-41, p. 29. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3547532
[175] United Nations Office on Genocide Prevention and the Responsibility to Protect (n.d.). *Crimes against Humanity*. Retrieved December 3, 2020. https://www.un.org/en/genocideprevention/crimes-against-humanity.shtml
[176] Mallinder, Louise. Amnesties and International Criminal Law, p. 7
[177] United Nations Office on Genocide Prevention and the Responsibility to Protect (n.d.). *Crimes against Humanity*. Retrieved December 3, 2020. https://www.un.org/en/genocideprevention/crimes-against-humanity.shtml

knowledge of the attack".[178] There are 11 different acts listed in Article 7 of the Rome statute. Among them, there are: murder, extermination, enslavement, deportation or forcible transfer of population, torture, rape and other forms of sexual violence, enforced disappearance of persons, the crime of apartheid, etc.[179]

The prohibition of crimes against humanity is absolute, it is a *jus cogens* norm of international law, which makes this prohibition applicable to all states. Perpetrators of the crimes against humanity were traditionally treated as *hostis humani generis* (enemies of all mankind), the same term which applied to maritime pirates. Thus, crimes against humanity are subject to universal jurisdiction as well.[180] However, as already found out in this chapter, universal jurisdiction is a concept which is not mandatory in character but is rather a permissive one. Hence, the universality principle does not create an international obligation to prosecute crimes against humanity.

Nowadays, the duty to prosecute crimes against humanity is rather a tendency of contemporary international law, than a binding obligation. There are several reasons for that. The first one was already mentioned – there is no multilateral treaty provision. The customary international norm which would impose an obligation on States to prosecute crimes against humanity has not yet crystallized. According to Article 38 of the ICJ Statute, an international custom reflects a general practice and its acceptance as law (referred to as *opinio juris).*[181] However, those who insist that there is an international customary norm that precludes granting amnesties to persons who committed crimes against humanity, use for argumentation soft law as the UN General Assembly Resolutions or hortative declarations of international conferences.[182] For proving the existence of an international custom that is not enough. Consistent state practice which became general should be provided.

[178] International Criminal Court. (1998). Rome Statute of the International Criminal Court
[179] Ibid.
[180] Scharf, Michael P. (1999). The Amnesty Exception to the Jurisdiction of the International Criminal Court. *Cornell International Law Journal*, 32(3), 507-527, p. 519. http://scholarship.law.cornell.edu/cilj/vol32/iss3/8
[181] International Law Commission (2018). Draft conclusions on identification of customary international law, with commentaries. A/73/10. *Yearbook of International Law Commission, 2018,* vol. II, part II, p. 123. https://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf
[182] Scharf, Michael P. (1999). The Amnesty Exception to the Jurisdiction of the International Criminal Court, p. 520.

The contemporary state practice in respect of mandatory prosecution of crimes against humanity differs a lot. In fact, there is more than enough practice which demonstrates the opposite of the duty to prosecute – as the practice of granting amnesties to the perpetrators of the crimes against humanity. For instance, no sooner than the term "crimes against humanity" was first used (to describe the massacres of Armenians during World War I), the international community agreed to grant an amnesty to Turkish perpetrators of these atrocities.[183] Amnesties granted to the perpetrators of the crime of apartheid (which is a crime against humanity) granted by the South African TRC could be an another good example.

Therefore, we cannot argue that States are imposed with a positive obligation to prosecute crimes against humanity. Hence, if there is no such norm in international law, then all amnesties granted to persons who committed crimes against humanity can be called legal under international law. Yet, we should remember that legal does not mean legitimate. Still, great attention should be paid to the purposes of granting amnesty, its type (whether it is conditional and what are its conditions), how it is perceived by the local population. Only after analyzing all the factors that affect the legitimacy of an amnesty, we could question its permissibility.

To my mind, in the nearest future international law will give us more detailed answers on whether States have an obligation to prosecute crimes against humanity and, thus, whether amnesties for these crimes are permitted. For more than a decade the need for a separate convention on crimes against humanity has been actively discussed. This initiative is called "The Proposed Convention on the Prevention and Punishment of Crimes against Humanity". An in its text there is a provision which imposes a duty to prosecute crimes against humanity: *"The States Parties to the present Convention undertake to prevent crimes against humanity and to investigate, prosecute, and punish those responsible for such crimes"*.[184] However, since the question of the adoption of the Proposed Convention remains uncertain, we should be

[183] Scharf, Michael. P. (1996). Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?, p. 11

[184] *As cited in* Bolton, Tessa. (2014). The Proposed Convention on the Prevention and Punishment of Crimes Against Humanity: Developments and Deficiencies. *On the Proposed Crimes Against Humanity Convention*, FICHL, №18, 369-396, p. 385. https://www.legal-tools.org/doc/2edd57/pdf/

open to plural approaches regarding this indeed controversial question of the permissibility of amnesties for crimes against humanity.

2.2. Amnesty and the Fundamental Rights of Victims

Adherence to the positive obligation to prosecute international crimes or to extradite perpetrators of these crimes which was analyzed in Subchapter 2.1. is crucially important. In the present subchapter I will concentrate on the issue that is far more difficult from the moral point view. This issue is, probably, the main reason why the question of amnesties under international criminal law has so much controversy and uncertainty. This issue is the correlation between amnesties and the fundamental rights of victims.

The Inter-American Human Rights Commission and the Inter-American Court of Human Rights are famous for having addressed the legitimacy of amnesties for several times. They have singled out five fundamental human rights that amnesties violate: the right to justice; the right to truth (also referred to as an obligation to investigate); the right to judicial protection (also referred to as the right to an effective remedy); the right to a fair trial or hearing (or the right to judicial guarantees).[185]

2.2.1. The Right to Justice

The right to justice is the most general fundamental right of victims among all others above listed. Actually, all other rights derive from the right to justice.

The notion of justice is as old as humankind itself. It has too many definitions: from ancient Greek philosophers Plato and Aristotle to utilitarian Bentham and libertarian Nozick – they all have analyzed justice from different perspectives. However, for victims of serious human rights abuses or for their relatives, all these theories of justice do not matter. For them, justice has only one meaning – to see the perpetrators held responsible for the crimes committed.

[185] Slye, Ronald. (2002). The Legitimacy of Amnesties under International Law and General Principles of Anglo-American Law. *Virginia Journal of International Law*, 43(173), 173-247, p.p. 191-192. https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1433&context=faculty

Although the majority of victims and their relatives in the peace versus justice debate would choose justice, it is not the only opinion. In fact, even some victims are ready to reject their right to justice in the name of peace. For instance, several victims of human rights abuses committed by rebels in Sierra Leone said that amnesty is a price they are willing to pay for peace and reconciliation.[186] Of course, it does not reflect the majority's opinion.

The violation of the victims' right to justice was addressed several times both in domestic and international jurisprudence. For instance, Justice Richard Goldstone, the Chief Prosecutor of the ICTY and the ICTR has said that "full justice" consists of the "trial of the perpetrator and, if found guilty, adequate punishment".[187] Furthermore, the Inter-American Commission of Human Rights has expressed a legal opinion according to which amnesty which shields an individual from criminal liability violates the victim's right to justice as it does not allow the State to fulfill its obligations to investigate and punish.[188]

In the decision in the case *Carmelo Soria Espinoza v. Chile,* the Inter-American Commission defined that the right to justice should include the right to an investigation which will identify the responsibility of the persons identified as guilty; the right to prosecution of those identified as responsible; the right to punishment of those responsible; the right to receive adequate and timely compensation that includes full reparation for the human rights abuses.[189]

As the right to justice is rather a general notion, it could be better analyzed through some of its elements.

2.2.2. The Right to Truth

The right to truth could be fulfilled through the State's positive obligation to investigate crimes.[190] This right can be violated when blanket unconditional amnesties

[186] Slye, Ronald. (2002). The Legitimacy of Amnesties under International Law and General Principles of Anglo-American Law.p. 186, supra note 46.
[187] Ibid., p. 192.
[188] *Soria Espinoza v. Chile,* Case 11.725, Inter-Am. C.H.R., Report No. 19/03, OEA/Ser.L/V/II.118, doc. 5 rev. 2 (2003).
[189] Ibid.
[190] Slye, Ronald. (2002). The Legitimacy of Amnesties under International Law and General Principles of Anglo-American Law, p. 193.

or the so-called "self-amnesties" are granted. However, and what is the most interesting peculiarity of the right to truth, amnesties can even help to exercise this fundamental victims' right. At the same time, some countries prefer to abandon deliberately this right because, in their view, leaving the past in the past only helps in achieving peace and reconciliation. Perhaps, this has something to do with the etymology of the word "amnesty" (from Greek *"amnestia"* means oblivion).[191] For instance, the former President of El Salvador, Alfredo Cristiani, when giving a commentary on his country's amnesty law mentioned the importance of *"erasing, elimination and forgetting the past in its entirety"* and said that it should be granted *"in order to turn that painful page of our history and seek a better future for our country"*.[192] But the amnesty which Cristiani announced in 1993 can be hardly called legitimate. It was *"general and absolute"* (broad and unconditional) and it was granted *"without giving either time or space for an exhaustive debate on the issue at the national level"*.[193]

Amnesties rarely incorporate any form of investigation.[194] However, in some cases, the decision to grant amnesties is taken only after the completed process of investigation. For instance, the Honduran Supreme Court decided that the Honduran amnesties of 1987, 1990 and 1991 require that allegations of military involvement in human rights abuses should be obligatory investigated before ruling whether the defendants were granted amnesty.[195] Meanwhile, the Honduran amnesties were designed to hide the truth from the public.[196] Without doubt, amnesties which involve certain investigations, but do not reveal the complete facts about the crimes committed to the victims, their relatives and to societies violate their right to truth.

However, more recently amnesties began to include the truth-telling processes, which often start with the establishment of a truth and reconciliation commission

[191] Scharf, Michael P. (1999). The Amnesty Exception to the Jurisdiction of the International Criminal Court.
[192] Parada Cea y Otros v. El Salvador, Case 10.480, Inter-Am. C.H.R. 1, OEA/ser.L./V./II.102, doc. 6 (1999).
[193] Ibid.
[194] Slye, Ronald. (2002). The Legitimacy of Amnesties under International Law and General Principles of Anglo-American Law, p. 193.
[195] Canada: Immigration and Refugee Board of Canada. (2000). *Honduras: Terms and conditions of a 1991 amnesty agreement.* https://www.refworld.org/docid/3df4be3a2c.html
[196] Slye, Ronald. (2002). The Legitimacy of Amnesties under International Law and General Principles of Anglo-American Law, p. 194.

(TRC).[197] The most famous example is the South African TRC, the activity of which was described in Chapter 1. Amnesties granted by the South African TRC were conditional – revealing the information about the human rights violations was a precondition for an individual to be granted amnesty.[198] Amnesties like in South Africa, which satisfied the victims' right to know the truth are more likely to be viewed as legitimate, mainly, because they do not neglect the victims' rights. On the other hand, there is a point of view according to which the quality of the truth that comes from a trial is more appreciated than the information derived from a truth commission. The Inter-American Commission stated that an amnesty which was accompanied by the activity of a truth commission does not fulfill the obligations of the State under the American Convention on Human Rights.[199] A similar position can be found in the legal doctrine: D. Cassel, for instance, argued that the right to truth is subsumed in the right of victims and their relatives to receive the clarification of the facts concerning the human rights violations through judicial investigation and adjudication.[200]

Therefore, amnesty which includes the truth-telling process can satisfy victims' interests and fulfill their right to truth. However, sometimes truth-telling is not enough and the right to truth requires full investigation.

2.2.4. The Right to an Effective Remedy

The right to receive an effective remedy is universally recognized. Article 2(3) of the International Covenant on Civil and Political Rights imposes an obligation on States to provide an effective remedy to any person whose rights under the Covenant were violated.[201] It is recognized by regional human rights systems as well. For instance, Article 13 of the European Convention on Human Rights provides:

[197] Slye, Ronald. (2002). The Legitimacy of Amnesties under International Law and General Principles of Anglo-American Law, p.194.
[198] Ibid.
[199] Ibid., p. 195.
[200] Cassel, D. (2007). Victims unsilenced: The Inter-American human rights system and transitional justice in Latin America as cited in Egbai, U.O & Chimakonam, J.O. (2019). Protecting the rights of victims in transitional justice: An interrogation of amnesty. *African Human Rights Law Journal*, 19, 608-623, p. 612. http://www.scielo.org.za/pdf/ahrlj/v19n2/04.pdf
[201] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171

"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity".[202] However, it should be noted that the understanding of the notion of an effective remedy is not the same in different human rights systems.[203]

Since amnesties preclude almost all judicial procedures and, thus, violate the right to a fair trial, they also violate, in the majority of cases, the right to an effective remedy. The right to an effective remedy is an essential part of the right to justice. Remedies may come in various forms: not only as compensation, but also may take the form of truth, accountability and punishment.[204] Right to truth has been already discussed. Accountability and punishment are impossible if amnesty is granted. Thus, I will focus on the right to compensatory reparations.

In *Carmelo Soria Espinoza v. Chile*, the Inter-American Commission recommended the Chilean State to adapt all the necessary measures for the victims' families to receive proper compensation for the human rights violation. According to this decision, compensations should be adequate and timely. They also should include full reparation for the human rights abuses and should be fair compensation for physical, non-physical and moral damages.[205]

Receiving compensations is often impossible if an amnesty protects an individual from civil liability. However, the right to compensatory reparations may also be violated by an amnesty that only precludes criminal liability. For instance, in some countries, the information collected within criminal proceedings would be crucial for bringing a civil claim.[206] Such a conclusion was also made by an Inter-American

[202] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.
[203] Musila, Godfrey. (2004*). Whistling Past the Graveyard: Amnesty and the Right to an Effective Remedy Under the African Charter: The Case of South Africa and Moçambique*, 1-57, p. 11. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2567907
[204] Slye, Ronald. (2002). The Legitimacy of Amnesties under International Law and General Principles of Anglo-American Law, p. 196.
[205] Soria Espinoza v. Chile, Case 11.725, Inter-Am. C.H.R., Report No. 19/03, OEA/Ser.L/V/II.118, doc. 5 rev. 2 (2003).
[206] Slye, Ronald. (2002). The Legitimacy of Amnesties under International Law and General Principles of Anglo-American Law, p. 196.

Commission, in the above-mentioned decision in the *Carmelo Soria Espinoza v. Chile* case.[207]

The analysis of different practices of granting amnesties throughout the world, an interesting, but expected regularity comes out. Blanket amnesties usually preclude the fulfillment of a victim's right to receive effective remedy, whereas conditional amnesties are more likely to include certain forms of compensations. For instance, amnesties granted in Ghana, Mozambique and Angola have not permitted any compensations. However, in the South African case, a certain degree of compensatory reparations was provided.[208] Of course, this regularity cannot be considered a rule because each case is unique.

I believe that an amnesty which precludes compensatory reparations could not be viewed as legitimate. If for certain reasons, bringing a civil claim is impossible, then the mechanism of receiving compensation by victims should be thoroughly thought ahead. Such a possibility should be provided under an amnesty law (or any other legislative act which grants amnesty). If a certain form of a TRC is engaged in the peace or transition process, then this institution should have the power to order compensation to be paid to victims.[209]

CONCLUSIONS TO CHAPTER II

1. Granting amnesties for international crimes is controversial for various reasons. In this Chapter, I have focused on two aspects: the compatibility of amnesties and the duty to prosecute and the relationship between amnesties and the fundamental victims' rights.

2. The States' duty to prosecute was analyzed in respect of four international crimes: genocide, war crimes, torture and crimes against humanity. All of these crimes are subject to universal jurisdiction. However, a conclusion was made that universal

[207] *Soria Espinoza v. Chile,* Case 11.725, Inter-Am. C.H.R., Report No. 19/03, OEA/Ser.L/V/II.118, doc. 5 rev. 2 (2003).
[208] Musila, Godfrey. (2004*). Whistling Past the Graveyard: Amnesty and the Right to an Effective Remedy Under the African Charter: The Case of South Africa and Moçambique.*
[209] Ibid., p. 46.

jurisdiction does not have a mandatory character. Thus, it is rather a right to prosecute than an obligation.

3. According to the 1948 Genocide Convention, the duty to prosecute is imposed on States where the crime of genocide was committed. Since the universal jurisdiction is not mandatory, countries which are not bound by the duty to prosecute can grant amnesties. However, even if it is considered legal, it does not mean that it is legitimate to grant amnesties for genocide perpetrators.

4. There is a peremptory norm – a positive obligation to prosecute or extradite which deals with grave breaches of the Geneva Conventions. As to other serious violations of the international humanitarian law: though there is a tendency in contemporary international law towards duty to prosecute in respect of war crimes, it is still not an absolute prohibition of granting amnesties for such offences. According to Article 6(5) of the Additional Protocol II, granting amnesties at the end of hostilities during internal conflicts, in certain cases, are even encouraged because they can help to achieve peace and reconciliation.

5. An international obligation to prosecute acts of torture and to extradite torture perpetrators exists for the parties of the UN Torture Convention. For those States which are not parties to the Convention and are not bound by its provisions, possibilities for amnesty deals remain open. However, there is a tendency in international law according to which amnesties granted to torture perpetrators are viewed as unacceptable.

6. Nowadays, the duty to prosecute crimes against humanity is rather a tendency of contemporary international law, than a binding obligation. There is much uncertainty in respect the permissibility of amnesties for crimes against humanity because the customary international norm has not yet crystallized and there is no separate multilateral treaty on crimes against humanity. Thus, amnesties for crimes against humanity are, in some cases, possible, but, in general, the international community tends to turn against such amnesties.

7. Amnesties violate victims' fundamental rights. Such rights as the right to justice, the right to truth, the right to an effective remedy were analyzed in Subchapter

2.2. The right to justice is rather a general concept, thus, the right to truth and the right to an effective remedy derive from it.

8. The right to truth could be fulfilled through the State's positive obligation to investigate crimes. This right can be often violated when blanket unconditional amnesties or the so-called "self-amnesties" are granted. On the other hand, amnesties can even help to exercise this fundamental victims' right if they involve certain investigations or the truth-telling process (like it was in the case of the South African TRC). However, sometimes truth-telling is not enough and the right to truth requires full investigation.

9. The right to an effective remedy was analyzed through the victims' right to receive compensatory reparations (since other forms as accountability and punishment in their entirety are not possible). An amnesty which precludes compensatory reparations could not be viewed as legitimate. The possibility of receiving compensation should be provided under an amnesty law (or any other legislative act which grants amnesty). If a certain form of a TRC is engaged in the peace or transition process, then this institution should have the power to order compensation to be paid to victims.

CHAPTER III. AMNESTY IN UKRAINE'S TRANSITIONAL JUSTICE AND RECONCILIATION PROCESSES

3.1. Perspectives for Granting Amnesties to the Participants of the Armed Conflict in Donbas

In Ukraine, amnesty is discussed, primarily, in the context of transitional justice. Thus, the ongoing debate on the permissibility of amnesties in the context of the Russo-Ukrainian War concerns, to the large extent, the post-conflict period – the time when the question of the reintegration of the temporarily occupied territories of the Donetsk and Luhansk regions will arise. Amnesties are, as well, discussed as a part of a possible peace agreement which will contribute to conflict termination on the territory of Ukraine.

Ukrainian society has been actively discussing amnesty for quite some time - since the Russian Federation started armed aggression against Ukraine in 2014. It is not hard to notice that the issue of granting amnesties to militants in Donbas is perceived sharply negatively in the Ukrainian public discourse. This is quite understandable, because when discussing this topic, it is difficult to leave all the emotions aside as it, to varying degrees, affects every citizen of Ukraine. For a large number of Ukrainian citizens, amnesty is the synonym for total impunity because mass media often describes them this way. It is, partially, the consequence of the poor national dialogue on the issue of amnesties and the transitional justice model.

At the outset, it is noteworthy that without a national dialogue, it is impossible to implement transitional justice. Unfortunately, the issues of the permissibility of amnesties are often discussed only in the Ukrainian Parliament during the consideration of the relevant bill. However, this process should be inclusive from the very beginning: it should involve all the stakeholders concerned and the representatives of the victims of the conflict (these could be the internally displaced persons, veterans, women, families of the killed, residents of the "grey zone" and of the temporarily occupied territories, etc.). Moreover, public bodies, the media and the society should

be informed about the results of the dialogue.[210] Only such cooperation between the civil society and the State will bring positive results in defining our model of transitional justice.

Furthermore, it is important not only who is involved in the dialogue, but also how it is conducted. First of all, respect for and compliance with international law should be guaranteed.[211] Thus, it is a mistake to discuss amnesties which are illegal and illegitimate under the norms of international humanitarian and international criminal law. It is crucial to ensure the timeliness of the dialogue. In other words, when it seems impossible to guarantee the safety of participants of the dialogue and when there might be risks of manipulation or other serious threats, it is better to postpone such dialogue initiatives. In addition, increased attention should be paid to the question of legitimacy and impartiality of the organizers of the dialogue processes. Last but not least, we cannot conduct an efficient national dialogue without taking into account the context of hybrid war. It is of utmost importance to prevent political manipulation, distortion of information and immediately respond to security risks inside and outside the country.[212]

Whereas we could perceive differently the scope and the quality of the current national dialogue on the implementation of transitional justice mechanisms, it should be admitted that it is already a positive development that this dialogue exists, and some important contributions have been already made. The discussion of the principles of transitional justice was initiated by the non-governmental sector in 2015, namely by the Ukrainian Helsinki Human Rights Union. The first to support the human rights activists' initiative were the representatives from academic circles.[213] For instance, in 2016, the Institute of International Relations of the Taras Shevchenko National University of Kyiv established the research and media Center for Post-Conflict

[210] Brunova-Kalisetska, Kyselova, Martynenko. (2020). How to Integrate Dialogue into the Processes of Transitional Justice in Ukraine. Policy Brief. 1-20, p. 6 [in Ukrainian]. https://md.ukma.edu.ua/wp-content/uploads/2020/09/Policy-paper-How-to-Integrate-Dialogue-into-TJ-2020.pdf
[211] Ibid., p. 9.
[212] Ibid., p. 10.
[213] Martynenko, O. & Semorkina, O. Amnesty and Lustration: Mechanisms of Transitional Justice for the Future of Ukraine. Review of international practice and national legislation. 1-81, p. 9 [in Ukrainian]. http://www.ucipr.org.ua/index.php?option=com_content&view=article&id=1181&catid=42&Itemid=205&lang=ua

Settlement, which argued that there is a strong need for implementing transitional justice mechanisms for overcoming armed conflict and prosecuting war criminals.[214] In 2017, the Ukrainian Catholic University School of Law launched the project "Transitional Justice and Reconciliation in Ukraine". It became a platform for professional discussion of the mechanisms of transition from war to peace in Ukraine and instruments of social reconciliation.[215] During 2017, Ukrainian scholars together with the non-governmental sector took the first significant steps to introduce the terminology, approaches and various models of transitional justice. Several serious academic works were published. Among them was the first national monograph "Basic Study on the Application of Transitional Justice in Ukraine", which made a big contribution to my research as well. Another positive moment was the organization of international conferences and round tables. The legislative developments were also made. One of the initiatives was the draft law "On the Principles of the State Policy for the Protection of Human Rights in the Conditions of Overcoming the Consequences of the Armed Conflict" which was developed within the Coordination Council of the Ukrainian Parliament's Commissioner for Human Rights. In 2018, the national platforms "Dialogue on Peace and Safe Reintegration", "Women for Peace" were created.[216] And this list is not exhaustive.

On the other hand, several steps were made on the governmental level. For instance, in 2018 a model of the UN peacekeeping mission in Donbas was developed by the Ministry for Reintegration of Temporarily Occupied Territories and Internally Displaced Persons (IDPs). In the same year, the draft departmental vision of the de-occupation of Donbas was formed by the Ministry of Internal Affairs of Ukraine. In 2020, the topic of transitional justice became a part of the activities of the Legal Reform Commission at the Working Group on Reintegration of Temporarily Occupied Territories.[217]

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[214] Research and Media Center for Post-Conflict Settlement. (2016). Post-conflict Settlement for Ukraine. 1-80 [in Ukrainian]. https://helsinki.org.ua/wp-content/uploads/2016/05/POST-CONFLICT-block-ukr.pdf

[215] Ukrainian Catholic University School of Law (n.d.). *Transitional Justice and Reconciliation in Ukraine.* Retrieved December 29, 2020. http://law.ucu.edu.ua/en/transitional-justice-and-reconciliation-in-ukraine/

[216] Martynenko, O. & Semorkina, O. Amnesty and Lustration: Mechanisms of Transitional Justice for the Future of Ukraine. Review of international practice and national legislation, p. 10.

[217] Ibid.

Thus, the national dialogue on the implementation of transitional justice mechanisms has been launched. Yet, it seems like the government and the non-governmental sector together with the representatives of the academic circles do not work together. And that is a drawback, which undermines the effectiveness of the dialogue processes. The inclusivity of the dialogue is another important issue we should obligatorily pay more attention to. Finally, the results of the discussions often remain unavailable for Ukrainian citizens, and, therefore, steps should be taken to increase the awareness of these results in the society and mass media.

In the context of the above-mentioned developments in the national dialogue on the implementation of transitional justice, some important conclusions in respect of amnesties have been made. I believe that these conclusions should be the major principles our State should adhere to in deciding on the role of amnesties in our transitional justice and reconciliation processes. I will try to analyze these conclusions in the next several paragraphs.

First of all, it is a position on the type and conditions of the possible amnesty. As it has been already found out in Chapter I, blanket amnesties are inconsistent with international law and cannot be viewed as legitimate. Amnesty as a part of a peace agreement or amnesties granted in the post-conflict period should be strictly conditional. The possible conditions could be a voluntary surrender of weapons, absence of held hostages, readiness to work with law enforcement agencies of Ukraine, vacating the buildings of state authorities and local self-government, etc. The conditions should depend on the purposes of such amnesty, i.e. depending on what Ukraine wants to achieve due to the amnesties granted. And, of course, conditions of amnesties are another topic for discussion within the framework of the national dialogue on transitional justice.

Thus, the impermissibility of a blanket amnesty is a must. However, from time to time, statements of granting blanket (often called also “broad” or “general”) amnesties appear in our public discourse. For instance, in September 2020, then the first deputy head of the Ukrainian delegation to the Trilateral Contact Group in Minsk, Vitold Fokin said that *"peace cannot be expected even in the long run without a general*

amnesty".[218] This and similar statements given by the government officials are dangerous because they *inter alia* undermine the credibility of the reconciliation processes which are conducted on the governmental level. This brings us back to the current challenges of the national dialogue on transitional justice mechanism, namely the strong need for ensuring the legitimacy and impartiality of the organizers of the dialogue processes.

Finally, blanket amnesties are not supported by Ukrainian citizens (and it's doubtful it will ever change). According to a recent poll conducted by the Razumkov Centre, the vast majority of Ukrainians (63%) do not agree with the total amnesty of those who took part in the hostilities in Donbas.[219] And, as was concluded in Chapter I, amnesty which is not supported by the population cannot be viewed as legitimate.

The next principle which is of crucial importance concerns the range of criminal offenses for committing which amnesty may be granted. The position of the majority of human rights activists, international law scholars and government representatives is that amnesty could not be granted for international crimes such as war crimes, crimes against humanity, torture. I believe that Ukraine should adhere to this principle for several reasons. The first reason is the character of the armed conflict in Donbas. In November 2016, the OTP of the ICC concluded that the available information allows classifying the hostilities in Eastern Ukraine as an international armed conflict from 14th July 2014 at the latest, which continues in parallel to the non-international armed conflict.[220] Moreover, Ukraine is a party to the 1949 Geneva Conventions and the 1977 Additional Protocol I to the Conventions. It is as well bound by customary international humanitarian law applicable to international armed conflicts.[221] And, as was found out in Chapter II of this research, there is a positive and an absolute obligation to prosecute the grave breaches of the Geneva Conventions. As

[218] Tymoshenko, Denys. (22nd September, 2020). Amnesty should be part of peace agreement on Donbas – lawyer. *Radio Svoboda* [in Russian]. Retrieved December 30, 2020.https://www.radiosvoboda.org/a/30851823.html
[219] Razumkov Centre (February, 2020). *Public opinion on the situation in Donbass and ways to restore Ukraine's sovereignty over the occupied territories (February 2020 sociology)* [in Ukrainian]. Retrieved December 30, 2020. https://razumkov.org.ua/napriamky/sotsiologichni-doslidzhennia/gromadska-dumka-pro-sytuatsiiu-na-donbasi-ta-shliakhy-vidnovlennia-suverenitetu-ukrainy-nad-okupovanymy-terytoriiamy-liutyi-2020r
[220] RULAC. (n.d.). International armed conflict in Ukraine. Retrieved January 2, 2021. https://www.rulac.org/browse/conflicts/international-armed-conflict-in-ukraine#collapse2accord
[221] Ibid.

to other war crimes this obligation is not as absolute, however, for the recent few decades, a general tendency to prosecute all war crimes, despite their gravity, has developed.[222] Thus, granting amnesties for war crimes is not appreciated by the international community. To my mind, Ukraine should not only ensure the legality of amnesties under international law but be an active participant of the international law-making by supporting such "general tendencies". Apart from that, amnesties granted for war crimes will not be endorsed by the Ukrainian society and, thus, they could not be viewed as legitimate.

On the other hand, Ukraine is also a party to 1977 Additional Protocol II to the Geneva Conventions.[223] Since there is also a non-international conflict in Eastern Ukraine, should we, then, encourage, as it is provided by Article 6(5) of the Protocol, *"the broadest possible amnesty to persons who have participated in the armed conflict..?"*[224] I believe that an answer to this question may be affirmative, but with a clause that no amnesties could be granted to war criminals. Again, it is a demand of international customary norm, which supplements Article 6(5) of the Additional Protocol II with an exception for *"persons suspected of, accused of or sentenced for war crimes"*.[225]

I deliberately focused on war crimes because since there is an armed conflict in Donbas, war crimes are more likely to be committed. Other serious human rights abuses as crimes against humanity and torture can also constitute war crimes if they are committed within an armed conflict. However, we should not forget about crimes against humanity or torture committed outside the context of hostilities held in Donbas (for example, crimes committed by the representatives of the so-called "DPR" and "LPR"). Ukraine is a party to the UN Torture Convention[226] and the European

[222] Naqvi, Yasmin. (2003). Amnesty for war crimes: Defining the limits of international recognition, p. 586.
[223] RULAC. (n.d.). Non-international armed conflicts in Ukraine. Retrieved January 2, 2021. https://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-ukraine#collapse3accord
[224] International Committee of the Red Cross. (1977). *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 1125 UNTS 609.
[225] International Committee of the Red Cross. Customary IHL Database. Rule 159. https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule159
[226] United Nations, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984. United Nations, Treaty Series, 14650, (p.85). https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&lang=en

Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.[227] Therefore, Ukraine is bound by an international duty to prosecute acts of torture committed in its territory. As to crimes against humanity committed outside the context of an armed conflict, there is no such duty, but there is a tendency in contemporary international law to prosecute such crimes. Recalling what was mentioned before, Ukraine, to my mind, should not only adhere to international law norms but be a part of its trends and respond to its current challenges. That is why Ukraine should continue to stick to the position that no amnesty could be granted to those responsible for international crimes.

The impermissibility of amnesties for war crimes and other international crimes will require the Ukrainian law enforcement system to investigate and prosecute all these serious human rights violations. It will definitely become a challenge for our State as it will demand efficient coordination between the State and the non-governmental sector. As the war in Donbas is an international conflict, this makes information about the conflict difficult to access. To increase the quality of the fact-finding process, there should be created special institutions which will work together with local and international non-governmental organizations.[228] In 2020, the Ministry of Reintegration of Temporarily Occupied Territories initiated the establishment of a Centre for Documenting Human Rights Violations in the Occupied Territories of Donbas and Crimea.[229] This will definitely be a step forward in the direction of improving the quality of fact-finding processes in the Donbas region. We should remember that the information gathered is important for the fulfillment of the victims' right to truth.

Despite all of the mentioned above, we should not exclude the question of amnesties from our public discourse. And, if amnesties as part of a peace treaty and as

[227] Council of Europe (n.d.). Chart of signatures and ratifications of Treaty 126. Retrieved January 4, 2021. https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/126/signatures?p_auth=LuEZEnw7

[228] Martynenko, Oleh. (March 17, 2020). A Difficult Dialogue on Amnesty: Where to Start? *CivilM+* [in Ukrainian]. Retrieved January 4, 2021. https://civilmplus.org/uk/news/neprostij-dialog-pro-amnistiyu-z-chogo-pochinati/

[229] Ukrinform (June 5, 2020). Ministry of Reintegration of Temporarily Occupied Territories Will Document Violations of Human Rights on the Occupied Territories [in Ukrainian]. Retrieved January 4, 2021. https://www.ukrinform.ua/rubric-society/3040640-mintot-dokumentuvatime-porusenna-prav-ludini-na-okupovanih-teritoriah.html

a tool for the reconciliation process in Ukraine is still uncertain and will be decided based on the results of the negotiations and other means of peaceful settlement, the role of amnesties in the post-conflict regulation is more obvious. When the war in Donbas will come to an end, the Ukrainian judicial system will have to deal with thousands of people who took part in the activity of the illegal armed groups or the bodies of the self-proclaimed "DPR" and "LPR". With the limited prosecutorial resources, we have in Ukraine, it would be merely impossible to hold accountable and punish all those individuals. Human rights activists, academics and governmental representatives, when discussing amnesty usually mean amnesty for those individuals who are not responsible for committing war crimes and other serious human rights abuses. However, it is often misunderstood which exact acts constitute war crimes. For instance, killing a military is not a war crime (however, depends on a method of killing). However, it could constitute a criminal offence under Ukrainian national criminal legislation. Certain acts will definitely constitute crimes against the fundamentals of Ukrainian national security under the Criminal Code of Ukraine (Chapter I of the Special Section).[230] And that is why the range of crimes for which amnesty could not be granted under no circumstances should be defined. To my mind, in the respect of this issue, we should analyze all the crimes committed during the armed conflict in Donbas, in the first place, within the scope of international humanitarian law. Moreover, we should bring Ukrainian legislation in line with international humanitarian and international criminal law.[231]

Therefore, there is a position in Ukraine's public discourse that in a post-conflict period a certain number of Ukrainian citizens that took part in the activity of illegal armed groups or the bodies of the self-proclaimed "DPR" and "LPR" should be granted amnesties. However, there is no answer to the question of for what exact criminal offences (apart from war crimes) will amnesty in Ukraine be permissible. To my mind, we have to come to a consensus in the nearest future. This consensus can be

[230] Criminal Code of Ukraine, the Law of Ukraine 2341-III as of April 5, 2001 (amended as of November 11, 2020).
[231] Martynenko, Oleh. (March 17, 2020). A Difficult Dialogue on Amnesty: Where to Start?

reached only under the condition of ensuring the high quality of the national dialogue on implementing transitional justice mechanisms.

Another pressing question for the national dialogue is what authorities will be involved in granting amnesties. Ukrainian society has a very low level of confidence in the judicial system. Experts say that we will have to use both judicial and non-judicial mechanisms to restore justice. Non-judicial mechanisms could be represented by a certain form of a TRC. TRCs are usually formed after the end of the conflict and impartial international experts are widely involved. The processes of mediation and national dialogue should play an important role in the work of such a commission.[232]

There is a sufficient amount of examples of the successful involvement of non-judicial mechanisms in the reconciliation and transitional justice processes. One of them is East Timor, where after the 1999 conflict, there was a need to bring back to peaceful life members of the pro-Indonesian voluntary police (Pam Swakarsa) who had not committed serious crimes. For these reasons, a Community Reconciliation Process (CPR) was launched in 2003, initiated by the Commission for Reception, Truth and Reconciliation in East Timor (CAVR). This was a new, previously untested mechanism for the reintegration of combatants who committed minor crimes during the 1999 conflict. The main basis of the project was the high probability of achieving understanding between former police officers and their victims. The reconciliation process involved facilitated hearings held in the region, combining traditional justice, arbitration, mediation, and various aspects of civil and criminal law. Former combatants voluntarily acknowledged their involvement in the conflict, answered victims' questions, agreed to carry out community service to rebuild the destroyed infrastructure or pay compensation to victims (these agreements were approved by the court) and only then were accepted by the community.[233]

Therefore, it is for Ukraine to decide whether to involve the non-judicial mechanisms in post-conflict regulation. We should develop a national strategy on what our State's steps in the reconciliation process and in the post-conflict period should be.

[232] Martynenko, Oleh. (March 17, 2020). A Difficult Dialogue on Amnesty: Where to Start?
[233] Martynenko, O. & Semorkina, O. Amnesty and Lustration: Mechanisms of Transitional Justice for the Future of Ukraine. Review of international practice and national legislation, p. 41.

I am convinced that there is a need to decide this as soon as possible because both before conflict resolution and after, government institutions should act according to a pre-designed plan.

3.2. Analysis of the Ukrainian Legislative Initiatives on Amnesty

A priority problem for Ukraine, which may prevent us from introduction of certain amnesty models may be the lack of sufficient normative regulation. There are only a few provisions on amnesty in the Constitution of Ukraine, the Criminal Code of Ukraine and the 1996 Law of Ukraine "On the Application of Amnesty".

According to Article 92 of the Ukrainian Constitution, granting amnesty in Ukraine is possible exclusively on the basis of a special law.[234] The mechanism of granting amnesties provided for by the Law of Ukraine "On the Application of Amnesty in Ukraine" specifies in Article 7 that amnesty could be granted no more often than once a year, except for the laws on conditional amnesty and cases of individual amnesty.[235] Furthermore, according to Article 5 of the Law, granting an amnesty is permissible to stop socially dangerous group activities. In such situations the scope of an amnesty law may be extended to acts committed before a certain date after the announcement of the amnesty.[236]

The question of granting amnesty to militants in Donbas was first raised by the former President of Ukraine Petro Poroshenko at the NATO summit in September 2014. It was there that he promulgated 14 points of the Peace Plan for Donbas, where the second point was the *"exemption from criminal liability of those who laid down their arms and did not commit serious crimes"*. Later on, as a result of the Minsk talks, an agreement on the need to adopt a special law on the prevention of persecution and punishment of persons in connection with the events that took place in separate districts of the Donetsk and Luhansk regions of Ukraine was reached. As a result, Poroshenko submitted to the Parliament a draft law "On Prevention of Persecution and Punishment

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[234] Constitution of Ukraine, the Law of Ukraine №254к/96-ВР as of June 28, 1996. https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text

[235] Law of Ukraine "On the Application of Amnesty in Ukraine" № 392/96-ВР as of October 1, 1996. https://zakon.rada.gov.ua/laws/card/392/96-%D0%B2%D1%80?lang=uk

[236] Ibid.

of Participants of Events on the Territories of Donetsk and Luhansk Oblasts".[237] However, this Law never came into force.[238]

The Law provided for a conditional amnesty for a clearly defined circle of persons:

1) members of armed formations or persons involved in the activities of such formations;
2) persons who participated in activities of the self-proclaimed bodies in Donetsk and Luhansk regions.[239]

Among the conditions of an amnesty there were laying down of arms, the absence of held hostages, the release of buildings of state authorities and local governments in the occupied territories. Furthermore, the circle of persons to whom amnesty cannot be applied under any circumstances was defined. It excludes granting amnesties for 19 different criminal offences under the Ukrainian Criminal Code (under Articles 112, 113, 115, 121(2), 147(2), 149, 152, 153, 187, 201 258, 297, 348, 349, 379, 400, 442, 443, 444). Additionally, according to the Law, amnesty could not be granted to those responsible for shooting down the Malaysia Airlines Flight MH17 and those who have hindered the investigation.[240]

The Law faced a lot of critics as it the terminology used in it was not consistent with the terminology used in national legislation. For instance, exemption from criminal liability can be provided by the national legislation only in case a person commits for the first time a crime of minor gravity or negligent crime of medium gravity, except for corruption crimes (Section IX of the Criminal Code of Ukraine). Instead, the draft law provides for exemption from liability under Article 109 (actions aimed at forcible change or overthrow of the constitutional order or seizure of state

[237] Bushchenko, Arkadiy & Hnatovskyi, Mykola. (2017). Baseline Study on Implementation of Transitional Justice in Ukraine. 1-592, p. 515 [in Ukrainian]. https://helsinki.org.ua/wp-content/uploads/2017/05/Tekst-monohrafiji-perehidne-pravosuddya.pdf
[238] Draft Law "On Prevention of Persecution and Punishment of Participants of Events on the Territories of Donetsk and Luhansk Oblasts" №5082 as of September 16, 2014. http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=52183
[239] Martynenko, O. & Semorkina, O. Amnesty and Lustration: Mechanisms of Transitional Justice for the Future of Ukraine. Review of international practice and national legislation, p. 34.
[240] Draft Law "On Prevention of Persecution and Punishment of Participants of Events on the Territories of Donetsk and Luhansk Oblasts" №5082 as of September 16, 2014.

power) and Article 110 (encroachment on the territorial integrity and inviolability of Ukraine) of the Criminal Code of Ukraine, which are considered as serious crimes and in fact became the root cause of the armed conflict in eastern Ukraine and further commission of other (derivative) socially dangerous acts. Another example of inconsistency might be the term "prohibition of persecution and punishment of persons" is not provided by the legislation of Ukraine at all.[241]

Another collision is that closure of criminal proceedings and application of amnesty at the pre-trial stage of the criminal procedure contradicts Article 284 of the Code of Criminal Procedure of Ukraine which states that such acts are illegal without a report of suspicion or without statement and proof of the commission of the crime by a particular person.[242]

Apart from the Law "On Prevention of Persecution and Punishment of Participants of Events on the Territories of Donetsk and Luhansk Oblasts", which did not come into force, there are several draft laws which have not been adopted yet.[243] I will not analyze all of them because in a lot of things they replicate each other. However, several important comments in respect of some draft laws still should be made.

Draft Law №1089 (as of August 29, 2019) is quite similar to the Law "On Prevention of Persecution and Punishment of Participants of Events on the Territories of Donetsk and Luhansk Oblasts". However, it clarifies the circle of persons to whom amnesty could be granted.[244] According to Article 1 of the Draft Law these should be persons who were "citizens of Ukraine at the time of committing acts that contain indicia of criminal (administrative) offenses defined by this Law".[245] Furthermore, the Draft Law instead of defining the criminal offences for which amnesty could not be granted, singles out for committing which crimes amnesty could be granted (a total of

[241] Martynenko, O. & Semorkina, O. Amnesty and Lustration: Mechanisms of Transitional Justice for the Future of Ukraine. Review of international practice and national legislation, p. 35.
[242] Ibid., p. 36.
[243] Ibid., p. 34.
[244] Ibid., p. 37.
[245] Draft Law "On the Prevention of Criminal Prosecution, Criminal, Administrative Responsibility and Punishment of Persons Participating in the Events on the Territory of Donetsk and Luhansk Regions" №1089 as of August 29, 2019. https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=66338

49 Articles of the Criminal Code of Ukraine).[246] Experts notice that it is a more common practice.[247]

Draft laws №4519 and №3249 (revoked and withdrawn from consideration respectively)[248] were developed to grant amnesties for Ukrainian citizens who *"defended the independence, sovereignty and territorial integrity of Ukraine and directly participated in the anti-terrorist operation…"*.[249] These were important bills because it is often forgotten that crimes are committed not only by those who fight against Ukraine, but by Ukrainian military as well. However, these bills were also considered as those which contain inappropriate terminology.[250]

In conclusion, since 2014, a number of legislative initiatives were developed, however, none of which have been adopted or have come into force. Such a situation indicates: 1) significant drawbacks of these bills; 2) the lack of common vision of ways to resolve the conflict in Donbas among government officials.

As there is no special law that would provide for the amnesty of persons involved in the war in Donbass, the Security Service of Ukraine in 2015 launched a program "Waiting for You at Home", which is designed to help to return Ukrainian citizens who voluntarily decided to leave the armed formations of the self-proclaimed "DPR" and "LPR" on the controlled by Ukraine territory.[251] However, the Security Service has no authority to grant amnesty under current Ukrainian legislation. Therefore, cases are referred to courts, which decide on exemption from criminal liability, from punishment or replacement of punishment with a milder one than is provided for the relevant crime.[252] As of the beginning of 2019, more than 360 people have used this program.[253]

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[246] Draft Law "On the Prevention of Criminal Prosecution, Criminal, Administrative Responsibility and Punishment of Persons Participating in the Events on the Territory of Donetsk and Luhansk Regions" №1089 as of August 29, 2019.
[247] Martynenko, O. & Semorkina, O. Amnesty and Lustration: Mechanisms of Transitional Justice for the Future of Ukraine. Review of international practice and national legislation, p. 36.
[248] Ibid., p. 34.
[249] Draft Law on Amnesty of Defenders of the Motherland in 2015 №3249 as of October 7, 2015. http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=56716
[250] Martynenko, O. & Semorkina, O. Amnesty and Lustration: Mechanisms of Transitional Justice for the Future of Ukraine. Review of international practice and national legislation, p. 37.
[251] The Security Service of Ukraine (n.d.). "Waiting for You at Home" Program by the Security Service of Ukraine. https://sbu.gov.ua/en/pages/206
[252] Bushchenko, Arkadiy & Hnatovskyi, Mykola. (2017). Baseline Study on Implementation of Transitional Justice in Ukraine, p. 519.
[253] The Security Service of Ukraine (n.d.). "Waiting for You at Home" Program by the Security Service of Ukraine. https://sbu.gov.ua/en/pages/206

Thus, this program is only indirectly related to the amnesty and settlement of the conflict in Donbass, but rather contributes to obtaining information about the situation in the territory uncontrolled by the Ukrainian authorities.

CONCLUSIONS TO CHAPTER III

1. In Ukraine, amnesty is discussed, mainly, in two contexts:

- whether it could be a part of a possible peace agreement which will contribute to conflict termination in Donbas;
- whether it could become an effective tool of transitional justice in the post-conflict period.

2. It is impossible to discuss amnesty and other transitional justice mechanisms efficiently without a national dialogue. Effective national dialogue is inclusive from the very beginning: it should obligatory involve representatives of the victims of the conflict (these could be the internally displaced persons, veterans, women, families of the killed, residents of the "grey zone" and of the temporarily occupied territories, etc.). Public bodies, the media and the society should be informed about the results of the dialogue.

3. In Ukraine, there are positive developments in the national dialogue on the implementation of transitional justice mechanisms. However, the non-governmental sector and academic circles should cooperate more with the Ukrainian government. On the other hand, the results of the discussion should be more available for Ukrainian society.

4. Ukraine should adhere to the following principles in defining the role of amnesties in our transitional justice and reconciliation processes:

- the possible amnesty could be only conditional as the so-called 'blanket' amnesties are inconsistent with international law;
- those responsible for international crimes (as war crimes, crimes against humanity, torture) could not be granted amnesty.

5. The national legislation of Ukraine lacks sufficient normative regulation on amnesties. There is still no special law on amnesties for the participants of the armed conflict in Donbas. Since 2014, several legislative initiatives were developed, however, none of which have been adopted or have come into force. Such a situation illustrates that there are significant drawbacks in these bills (like the inconsistency of the terminology used) and that there is a lack of common vision of ways to resolve the conflict in Donbas among government officials.

CONCLUSIONS

In this research, I have made the following conclusions.

1. Amnesty is not a new phenomenon – provisions on amnesties were included in peace treaties concluded after armed conflicts since antiquity. Nevertheless, international law does not have an agreed definition of amnesties. Some international organizations provide their own definitions, which are helpful but do not answer all the questions. Problems of the definition of amnesty lead to an even more serious issue – lack of international legal regulation. Consequently, practices of granting amnesties differ from state to state. Whereas different state practice is the reason why there is no common position on amnesties within the international community.

2. In Chapter 1, several important findings were made in respect of the role of amnesties in the statutes of international criminal courts: the ICC, the SCSL and the ECCC.

The Rome Statute of the ICC has no provision on amnesties, thus, the decision to intervene or not on the basis of domestic amnesty could be based on Article 17 or Article 53 of the Statute. As to Article 17, a conclusion was made that a domestic amnesty does not always mean the unwillingness or inability of the State-party to investigate or prosecute. Thus, a case where an amnesty does not preclude individual investigation could be recognized as inadmissible for the ICC. Analysis of Article 53 of the Statute shows that as certain indictments risk prolonging conflicts, some amnesties may serve the interests of justice. However, this statement remains debatable.

The SCSL Statute and the Law on the Establishment of the ECCC are two statutes of the hybrid courts, which include amnesty provisions and at the same time exclude individuals who committed international crimes from being granted amnesties. Amnesty provision in the SCSL Statute received a lot of criticism, however, it was definitely a step forward in prohibiting blanket amnesties. Moreover, it is a bright example of how a DDR process could coexist with international prosecutions.

Amnesties granted in 1994 and 1996 in Cambodia can be hardly called legitimate, as well as the amnesty provision included to the Law on the Establishment of the ECCC. The main problem of the Law was that the prohibition of blanket amnesties in it was not absolute.

3. The consistency of amnesties with the norms of international law were analyzed through two aspects: the compatibility of amnesties and the duty to prosecute and the relationship between amnesties and the fundamental victims' rights.

4. The states' international duty to prosecute was examined in respect of four international crimes: genocide, war crimes, torture and crimes against humanity.

According to the 1948 Genocide Convention, the duty to prosecute is imposed on States where the crime of genocide was committed. Since the universal jurisdiction is not mandatory, countries which are not bound by the duty to prosecute can grant amnesties. However, even if it is considered legal, it does not mean that it is legitimate to grant amnesties for genocide perpetrators.

An absolute obligation to prosecute or extradite is imposed on states in respect of the grave breaches of the Geneva Conventions. As to other serious violations of the international humanitarian law: though there is a tendency in contemporary international law towards duty to prosecute in respect of war crimes, it is still not an absolute prohibition of granting amnesties for such offences. According to Article 6(5) of the Additional Protocol II, granting amnesties at the end of hostilities during internal conflicts, in certain cases, are even encouraged because they can help to achieve peace and reconciliation.

An international obligation to prosecute acts of torture and to extradite torture perpetrators exists for the parties of the UN Torture Convention. For those States which are not parties to the Convention and are not bound by its provisions, possibilities for amnesty deals remain open. However, there is a tendency in international law according to which amnesties granted to torture perpetrators are viewed as unacceptable.

Nowadays, the duty to prosecute crimes against humanity is rather a tendency of contemporary international law, than a binding obligation. There is much

uncertainty in respect the permissibility of amnesties for crimes against humanity because the customary international norm has not yet crystallized and there is no separate multilateral treaty on crimes against humanity. Thus, amnesties for crimes against humanity are, in some cases, possible, but, in general, the international community tends to turn against such amnesties.

5. It is rather obvious that amnesties violate victims' fundamental rights. Among these rights are the right to justice, the right to truth, the right to an effective remedy. The right to justice is rather a general concept, thus, the right to truth and the right to an effective remedy derive from it.

The right to truth is more likely to be violated when blanket amnesties are granted. This happens because the victims' right to truth could be fulfilled through a complete investigation of a crime. On the other hand, amnesties can even help to exercise this fundamental victims' right if they involve certain investigations or the truth-telling process (like it was in the case of the South African TRC). However, sometimes truth-telling is not enough and the right to truth requires full investigation.

The right to an effective remedy was analyzed through the victims' right to receive compensatory reparations (since other forms as accountability and punishment in their entirety are not possible if amnesty is granted). An amnesty which precludes compensatory reparations could not be viewed as legitimate. The possibility of receiving compensation should be provided under an amnesty law (or any other legislative act which grants amnesty). If a certain form of a TRC is engaged in the peace or transition process, then this institution should have the power to order compensation to be paid to victims.

6. Amnesty and issues related to its legitimacy are rather pressing for Ukraine. In Ukraine, amnesty is discussed, mainly, in two contexts:

- whether it could be a part of a possible peace agreement which will contribute to conflict termination in Donbas;
- whether it could become an effective tool of transitional justice in the post-conflict period.

The majority of experts are convinced that Ukraine should adhere to the following principles in defining the role of amnesties in its transitional justice and reconciliation processes:

- the possible amnesty could be only conditional as the so-called 'blanket' amnesties are inconsistent with international law;

- those responsible for international crimes (as war crimes, crimes against humanity, torture) could not be granted amnesty.

The national legislation of Ukraine lacks sufficient normative regulation on amnesties. There is still no special law on amnesties for the participants of the armed conflict in Donbas. Since 2014, several legislative initiatives were developed, however, none of which have been adopted or have come into force. Such a situation illustrates that there are significant drawbacks in these bills (like the inconsistency of the terminology used) and that there is a lack of common vision of ways to resolve the conflict in Donbas among government officials.

Meanwhile, we should remember that it is impossible to discuss amnesty and other transitional justice mechanisms efficiently without a national dialogue. Effective national dialogue is inclusive from the very beginning: it should obligatory involve representatives of the victims of the conflict (these could be the internally displaced persons, veterans, women, families of the killed, residents of the "grey zone" and the temporarily occupied territories, etc.). Public bodies, the media and the society should be informed about the results of the dialogue.

7. To conclude with, the legitimacy of amnesties is indeed a controversial topic of international criminal law. In some aspects, there are still too much uncertainty and unanswered questions. However, international law is dynamic, it is constantly developing to be ready to respond to all the urgent challenges. Meanwhile, if an amnesty is legitimate, then it could be an effective tool of peace, reconciliation and transition processes. Factors which affect the legitimacy of amnesties were defined in this research:

- they must have a legitimate objective (facilitating peace agreements, providing an incentive to participate in truth recovery or reconciliation processes, etc.);

- they must be conditional (i.e. no blanket or self-amnesties allowed);

- they must be supported by the local population;

- they must be consistent with the norms of international law (amnesties for international crimes which entail a duty to prosecute and amnesties which can seriously affect the fulfillment of the victims' fundamental rights are impermissible).

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