

## Chapter 2

# Accountability v. “Smart Amnesty” in the Transitional Post-conflict Quest for Peace. A South African Case Study

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*A broken person needed to be helped to be healed and so what the offence had disturbed should be restored, and the offender and the victim had to be helped to be reconciled. Retributive justice has often ignored the victim and the system has been impersonal and cold. Restorative justice is hugely hopeful. It believes that even the worst offender can become a better person.*

Archbishop Desmond Tutu, Address at the launch of the  
Department of Correctional Services’ Restorative Justice  
Programme, 26 November 2001

**Abstract** The concept of amnesties introduced by States today in the period of transition from conflict to democracy is much more complex, flexible and nuanced, often accompanied by transitional justice mechanisms, which can work to meet the needs of justice where formal prosecution is not possible. Conditional or “smart” amnesties meet the calls for truth, peace and justice and do not contradict the general obligation of the States under treaty or customary law to prosecute gross violations of international crimes. The example of South African amnesty model represents a remarkable innovation in contrast to previous amnesties around the world. While being an exception to a norm requiring accountability for international crimes, “smart” amnesties, reviewed on example of South African model, tailored to the post-conflict transitional society, may in fact better contribute to the establishment of peace and reconciliation in the country, serve the purposes of truth telling and better address the needs of the victims in post-conflict period.

**Keywords** Amnesty • Conditional amnesty • South African amnesty model • Reconciliation • Truth • Transitional justice mechanisms

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## Introduction

Accountability is recognised as an indispensable component of peace and eventual reconciliation.<sup>1</sup> In the aftermath of the conflicts all the States are facing the process of deciding “whether to bury the past, and thereby incentivise wrongdoers to commit to peace; or to confront the crimes of the wrongdoers, while risking the perpetuation of conflict.”<sup>2</sup> Indeed, peace and justice are sometimes incompatible goals. The very leaders who were possibly responsible for war crimes and crimes against humanity must often be invited to the negotiation table for the sacred purpose of putting an armed conflict to an end. The reference to the remedy of criminal prosecutions can in fact prolong the conflict, inevitably carrying along more human suffering. Here often amnesty<sup>3</sup> comes at stage, as it refers directly not only to the notions of accountability but also reconciliation and peace.

History shows that several political leaders of the Latin American countries by the end of the Cold War have justified the use of amnesty as crucial for the peace process<sup>4</sup> and believed that “not choosing the prosecution path was an a reasonable price to pay for ending the hostilities or bringing the authoritarian government down.”<sup>5</sup> At that time the desire for political stability simply outbalanced that of accountability. Consequently, in the past years many countries chose to enact amnesties for the perpetrators of human rights violations.<sup>6</sup> In fact, it is estimated that “[a]mnesties of one form or another have been used to limit the accountability of individuals responsible for gross violations of human rights in every major political transition in the twentieth century.”<sup>7</sup>

The opposite view presents some important considerations favouring the prosecution. The supporters of this opinion believe instead that States have a clearly prescribed by the international law obligation to prosecute and punish violations of international crimes, investigate for the truth about them, offer remedies to the

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<sup>1</sup>Cherif Bassiouni “The Need for International Accountability”, in *International Criminal Law, Volume III Enforcement*, ed. Cherif Bassiouni (New York: Transnational Publishers, 1999), 21.

<sup>2</sup>Robin Perry, “The Nature, Status and Future of Amnesties under International Criminal Law”, *Australia International Law Journal* 8 (2011): 78.

<sup>3</sup>Andreas O’Shea, *Amnesty for Crime in International Law and Practice* (Hague: Kluwer Law International, 2002), 2.

<sup>4</sup>Lisa J. Laplante, “Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes”, *Virginia Journal of International Law* 49 (2009): 917.

<sup>5</sup>For example Argentina, Chile, Haiti and Zimbabwe. Emily W. Schabacker, “Reconciliation or Justice and Ashes: Amnesty Commissions and the Duty to Punish Human Rights Offenses”, *New York International Law Review* 1 (1999) 1–2.

<sup>6</sup>E.g. El Salvador (1993), Haiti (1994), Guatemala (1996), Argentina (1986), Chile (1989), Sierra Leone (1999), Afghanistan (2005). Charles P. Trumbull IV, “Giving Amnesties a Second Chance”, *Berkeley Journal of International Law*, 25 (2007) 285.

<sup>7</sup>Ronald C. Slye, “The legitimacy of amnesties under international law and general principles of Anglo-American law: is a legitimate amnesty possible?” *Virginia Journal of International Law* 43 (2002):173, 179.

victims and remove perpetrators from their positions of power.<sup>8</sup> The principle of prosecution of violators of the laws of war was invoked first as a right to prosecute offences,<sup>9</sup> further developed into the duty to prosecute the violations of the laws and customs of war.<sup>10</sup> Today, some scholars strongly argue in favour of the prosecution,<sup>11</sup> and some are even convinced of the emerging customary duty to prosecute international crimes.<sup>12</sup> In the opinion of the supporters of this view, granting of amnesties violates this obligation and present “a cover story for amnesia and evading accountability”.<sup>13</sup>

This article is going to argue on the example of South Africa that while being an exception to a norm requiring accountability for serious violations of international humanitarian law and human rights law, “smart” amnesty does not contradict it, but, may under the circumstances better contribute to the establishment of peace and reconciliation in the country, serve the purposes of the truth telling and better address the needs of the victims in post-conflict period.

## Features and Functions of the “Smart” Amnesties

The term “amnesty”, deriving from the Greek work “*amnēstia*”, meaning “forgetfulness” or “oblivion”,<sup>14</sup> paves the way for a common erroneous misconception that granting amnesty from prosecution is equivalent to foregoing accountability and redress. It is also true that amnesties are not the same; so a clear differentiation shall be made with regard to the existence of variety of their types, range of

<sup>8</sup>Juan Mendez, “National Reconciliation, Transnational Justice, and the International Criminal Court”, *Ethics & International Affairs* 15 (2001): 26.

<sup>9</sup>For example, a right of the belligerent in war to punish the enemy combatant perpetrators of war crimes who fell into its hands. H. Lauterpacht, “The Law of Nations and the Punishment of War Criminals”, *British Yearbook of International Law* 21 (1944) 61.

<sup>10</sup>D. Schindler and J. Toman, *The Laws of Armed Conflicts* (Martinus Nijhoff Publisher, 1988), 326–334.

<sup>11</sup>Diane Orentlicher, “Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime”, *Yale Law Journal* 100 (1991): 2537, 2548–254; Cherif Bassiouni, “Introduction”, *Law and Contemporary Problems* 59 (1996): 5.

<sup>12</sup>Leila Nadya Sadat, “Exile, Amnesty and International Law”, *Notre Dame Law Review* 81 (2006): 955, 959. O’Shea, *Amnesty for Crime in International Law and Practice*, 225; Charles P Trumbull IV, “Giving Amnesties a Second Chance”, 283, 295–7; Michael Scharf, “The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes”, *Law and Contemporary Problems* 59 (1996): 43.

<sup>13</sup>Interview with Stephen J. Pope, Professor of Theological Ethics, Boston College in Chestnut Hill, Mass. (January 9, 2009). Quoted from Elizabeth B. Ludwin King, “Amnesties in a Time of Transition”, *George Washington International Law Review* 41 (2009–2010): 578.

<sup>14</sup>Norman Weisman, “A History and Discussion of Amnesty”, *Columbia Human Rights Law Review* 4 (1972): 529; Ben Chigara, *Amnesty in International Law: The Legality under International Law of National Amnesty Laws* (UK: Longman, Harlow, 2002), 8.

characteristics and consequently, their jurisdictions.<sup>15</sup> Taking note of importance to differentiate<sup>16</sup> between unconditional, or “amnestic”,<sup>17</sup> or the so-called “blanket” amnesties, and “conditional”,<sup>18</sup> or “accountable”,<sup>19</sup> or “smart” amnesties, it is undisputed that, no “blanket” amnesty, whether granted out of necessity or reconciliation, can be justified as serving the goals of restorative justice.<sup>20</sup> Indeed, the fundamental sovereign right of the States to grant amnesty has been significantly eroded by the “evolving architecture of international criminal law”<sup>21</sup> excluding blanket amnesties from the list of legitimate mechanisms allowing to address the crimes against international law whose gravity compels prosecution.

“Smart” or conditional amnesties are a particular type of amnesties that while satisfying the accountability requirements are designed to facilitate a peaceful transition and reconciliation possessing certain fundamental characteristics. Hence, the fundamental features of the “smart” amnesty are those conditions attached to it in order to improve the amnesty’s efficacy, and at the same time fulfil the State’s duty

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<sup>15</sup> Louise Mallinder, “Exploring the practice of States in introducing amnesties”. (Study submitted for the International Conference ‘Building a Future on Peace and Justice’, Nuremberg, 25–27 June 2007), accessed 17 July 2013, [http://www.peace-justice-conference.info/download/WS4-Mallinder\\_NurembergStudy\\_070502.pdf](http://www.peace-justice-conference.info/download/WS4-Mallinder_NurembergStudy_070502.pdf).

<sup>16</sup> There are several amnesty classification schemes offered by the researchers. For example, Ronald Slye’s classification of amnesties from the contextual/implementation/purpose point of view differentiates the amnesties on the basis of three criteria: substantive content of the amnesty; creation and implementation of the amnesty; purpose of the amnesty. See, Slye, “The legitimacy of amnesties under international law and general principles of Anglo-American law: is a legitimate amnesty possible?” 240.

<sup>17</sup> Slye, “The legitimacy of amnesties under international law and general principles of Anglo-American law: is a legitimate amnesty possible?” 240–41.

<sup>18</sup> Ambos Kai, “The Legal Framework of Transitional Justice” (Study prepared for the International Conference “Building a Future on Peace and Justice”, Nuremberg, June, 25–27 2007) 46, accessed 17 July 2013, <http://www.peace-justice-conference.info/documents.asp>; Shawn Fields, “Private Crimes and Public Forgiveness: Towards a Refined Restorative Justice Amnesty Regime”, *International Journal of Civil Society Law* 5 (2007): 11.

<sup>19</sup> Slye, “The legitimacy of amnesties under international law and general principles of Anglo-American law: is a legitimate amnesty possible?” 245–6.

<sup>20</sup> On the trend to consider crystallization of the prohibition of “blanket” amnesties for international crimes into customary law: Frank Meyer, “Complementing complementarity” *International Criminal Law Review* 6 (2006): 556–557; Ruti G. Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2000), 55–58; Cherif Bassiouni, “The Need for International Accountability”, 10–14, 22; Richard Goldstone, Nicole Fritz, “In the interests of justice and independent referral: the ICC Prosecutor’s unprecedented powers”, *Leiden Journal of International Law* 13 (2000): 663; Antonio Cassese, “The Special Court and international law: the Decision concerning the Lomé Agreement Amnesty”, *Journal of International Criminal Justice* 2 (2004): 1130; Laura Olson, “Provoking the Dragon on the Patio. Matters of Transitional Justice: Penal Repression v. Amnesties”, *International Review of the Red Cross* 88 (2006): 284; Douglas Cassel, “Lessons from the Americas: guidelines for international response to amnesties for atrocities”, *Law and Contemporary Problems* 59 (1996): 208.

<sup>21</sup> Perry, “The Nature, Status and Future of Amnesties under International Criminal Law”, 78.

to satisfy the legitimate victims’ demands of truth, providing for responsibility and repentance.<sup>22</sup>

Aiming at legitimacy, the following general conditions can be named here: (1) amnesties must be democratic in creation with general involvement of the public and governmental structures in the drafting process<sup>23</sup>; (2) they must exclude from application those most responsible for war crimes, crimes against humanity, and other serious violations of international humanitarian and human rights law<sup>24</sup>; (3) they must foresee a mechanism of public procedure or accountability on recipients; (4) they must give a chance to the victims to challenge an individual’s claim to amnesty and provide them with some concrete benefit, usually in the form of reparations; (5) they must be designed to facilitate a transition to a democratic regime, or represent a part of a society reconciliation mechanism.<sup>25</sup> The application of these conditions can not only ultimately lead to the effective investigation of the circumstances, revealing the truth, addressing victims’ needs for the remedy but also contribute to the prevention of a repetition of the crimes.

With respect to the implementation of “smart” amnesties, they very well may be combined with other mechanisms, such as a truth commissions or a reparation programme.<sup>26</sup> States in fact are becoming “increasingly willing to attach more reparative conditions to the amnesty.”<sup>27</sup>

### *Addressing Interests of Peace and Internal Stability*

Introduction of the “smart” amnesties in response to the ongoing violence will very much depend upon the overall political context at a given time. Sadat has suggested “it may be that amnesties are acceptable within a society only so long as they are needed to provide stability, after which time their beneficiaries need to ‘repay’ the liberty they received under duress.”<sup>28</sup> Irrespective of the immediate practical stabilizing effect of an initial amnesty granting in general, “amnesties merely delay, rather

<sup>22</sup> Mallinder, “Exploring the practice of States in introducing amnesties”, 18.

<sup>23</sup> Slye, “The legitimacy of amnesties under international law and general principles of Anglo-American law: is a legitimate amnesty possible?” 245, 246; see also Ruti Teitel, *Transitional Justice*, 102, 58; Richard Goldstone, Nicole Fritz, “In the interests of justice and independent referral: the ICC Prosecutor’s unprecedented powers”, 664.

<sup>24</sup> E.g. the UN Security Council suggested at the planning stage that court for Sierra Leone will focus only on those “who bear the greatest responsibility for the commission of crimes”. “Report of the Secretary General on the Establishment of a Special Court for Sierra Leone” (4 October 2000) UN Doc. S/2000/915, 29.

<sup>25</sup> Slye, “The legitimacy of amnesties under international law and general principles of Anglo-American law: is a legitimate amnesty possible?” 245.

<sup>26</sup> Slye, “The legitimacy of amnesties under international law and general principles of Anglo-American law: is a legitimate amnesty possible?” 246.

<sup>27</sup> Mallinder, “Exploring the practice of States in introducing amnesties”, 39.

<sup>28</sup> Sadat, “Exile, Amnesty and International Law”, 1022.

than extinguish, the opportunity for litigation and prosecution”,<sup>29</sup> postponing accountability, but not impunity.

While satisfying the immediate needs for stability and ending violence, the amnesties can overall arguably contribute to the prevention of the recurrence of the crimes and reach for the peace objective.<sup>30</sup> Indeed, amnesties often serve as a prerequisite to peace—upon receiving that amnesty promise, parties to the conflict, who otherwise might continue being engaged in hostilities, agree to sit down at the negotiating table.

### *Addressing Accountability in Transitional Period*

In the immediate aftermath of the conflict it may be logistically impossible to prosecute thousands of perpetrators for a simple reason of absence the necessary infrastructure and qualified manpower.<sup>31</sup> On legal considerations, the duty to bring perpetrators to justice arguably applies “only to persons most responsible.”<sup>32</sup> Also even when a country with drenched after the conflict economic capabilities chooses to hold trials, it can do it only for a limited number of perpetrators, and “partial justice [can] be more harmful to a country’s repair than the enactment of an amnesty.”<sup>33</sup> Robinson suggests an approach that “[t]here is *practical, legal and moral* justification for dealing with lesser offenders through truth commissions and conditional amnesties, whereas the persons most responsible—i.e. planners, leaders and those committing the most notorious crimes should still be held criminally accountable.”<sup>34</sup> Here, “smart” amnesties, possibly combined with other transitional justice mechanisms including those engrained in a country’s culture,<sup>35</sup> may indeed contribute to the peace negotiations and for this reason have been described as a potential (Snyder and Vinjamuri 2006).

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<sup>29</sup> Perry, “The Nature, Status and Future of Amnesties under International Criminal Law”, 102.

<sup>30</sup> Trumbull, “Giving Amnesties a Second Chance”, 314.

<sup>31</sup> For example, East Timor’s conflict in the 1990s resulted in the destruction of 85 % of the country’s infrastructure. See Pamposh Dhar, “East Timor: Rebuilding a Country”, *Asian Development Bank Review* 4 (2002): 4.

<sup>32</sup> *Idem*.

<sup>33</sup> See Charles Villa-Vicencio, “Why Perpetrators Should Not Always Be Prosecuted: Where the International Criminal Court and Truth Commissions Meet”, *Emory Law Journal* 49 (2000): 209.

<sup>34</sup> Darryl Robinson, ‘Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court,’ *European Journal of International Law* 14 (2003): 494.

<sup>35</sup> The *gacaca* in Rwanda is one example of a cultural form of justice. See Jeremy Sarkin, “The Tension Between Justice and Reconciliation in Rwanda: Politics, Human Rights, Due Process and the Role of Gacaca Courts in Dealing with the Genocide”, *Journal of African Law* (2001): 143–172; Maya Bolocan, “Rwandan Gacaca: and Experiment in Transitional Justice”, *Journal of Dispute Resolution* (2004): 355–400.

## Addressing Reconciliation

While considering reconciliation as a catalyst for lasting peace, amnesty, by implication if not expressly, always serves the function of reconciliation,<sup>36</sup> in particular when amnesties come as part of the democratic reform package,<sup>37</sup> or part of the peace arrangements.<sup>38</sup> In the delicate process of creation and nourishing of the reconciliation climate in the State, amnesties often play the leading role.<sup>39</sup>

The difficulty comes when trying to assess the contribution of amnesty to reconciliation. This specific issue is very much related to the fact that the views of the engaged persons or groups of persons as well as their expectations are different.<sup>40</sup> Assessing amnesty's contribution to reconciliation becomes even more complex, when it was integrated into other transitional justice programmes such as the South African Truth and Reconciliation Commission.<sup>41</sup> Additionally, reconciliation is long process by definition, so it is difficult to evaluate the impact of amnesties in the transitional stage, as it is often done.

In assessing the impact of amnesty on reconciliation, Crocker's approach<sup>42</sup> to reconciliation as a “continuum between thinner and thicker forms” can be explored here. From the thinner perspective, aimed simply to end the conflict and violence, amnesty will obviously play a constructive role, since it will influence the parties to

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<sup>36</sup>The *gacaca* in Rwanda is one example of a cultural form of justice. See Jeremy Sarkin, “The Tension Between Justice and Reconciliation in Rwanda: Politics, Human Rights, Due Process and the Role of Gacaca Courts in Dealing with the Genocide”, *Journal of African Law* (2001): 143–172; Maya Bolocan, “Rwandan Gacaca: and Experiment in Transitional Justice”, *Journal of Dispute Resolution* (2004): 355–400.

O'Shea, *Amnesty for Crime in International Law and Practice*, 26.

<sup>37</sup>E.g. the 1997 Bangladeshi amnesty was part of a peace process to encourage insurgents to stop fighting. It was accompanied by other measures to ensure greater autonomy for the peoples of the Chittagong Hill Tracts.

<sup>38</sup>E.g. the 2003 amnesty in DRC was part of an overall peace settlement and was designed to inter alia encourage insurgent participation in the future unity government.

<sup>39</sup>For discussion of the meaning of the term ‘reconciliation’, see Erin Daly and Jeremy Sarkin, *Reconciliation in Divided Societies: Finding Common Ground* (Philadelphia: University of Pennsylvania Press, 2007); Lyn S. Graybill and Kimberly Lanegran, “Truth, Justice, and Reconciliation in Africa: Issues and Cases”, *African Studies Quarterly* 8 (2004):1; Laurel E. Fletcher and Harvey M. Weinstein, “Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation”, *Human Rights Quarterly* 24 (2002): 573; Erin Daly, “Transformative Justice: Charting a Path to Reconciliation”, *International Legal Perspective* 12 (2001):73; Donna Pankhurst, “Issues of Justice and Reconciliation in Complex Political Emergencies: Conceptualising Reconciliation, Justice and Peace”, *Third World Quarterly* 20 (1999): 239; Mahmood Mamdani, *When does Reconciliation turn into a Denial of Justice?* (Pretoria: HSRC Publishers, 1998).

<sup>40</sup>Therese Abrahamsen and Hugo van der Merwe, “Reconciliation through Amnesty? Amnesty Applicants' Views of the South African Truth and Reconciliation Commission”. (Research report written for the Centre for the Study of Violence and Reconciliation, 2005).

<sup>41</sup>Daly and Sarkin, *Reconciliation in Divided Societies: Finding Common Ground*, 33.

<sup>42</sup>David A. Crocker, “Reckoning with Past Wrongs: A Normative Framework”, *Ethics & International Affairs* 13 (1999): 43.

lay down the arms and will arguably contribute to reducing the human rights violations when alleged perpetrators (potential candidates for amnesty) will run the risk of being prosecuted.<sup>43</sup> The thicker approach to reconciliation implies that former enemies “must not only live together non-violently but also respect each other as fellow citizens”, engaging processes of forgiveness and mercy.<sup>44</sup>

Uncovering the truth, engaging communities, showing the suffering of all the engaged parties to the conflict—this is only small part of the spectrum of how amnesties can actually contribute to the process of reconciliation in the aftermath of the period of violence,<sup>45</sup> and the experience to date in many countries eventually signifies an overall “positive impact of amnesties on reconciliation.”<sup>46</sup>

### *Addressing the Needs of the Victims and Their “Right to Know”*

Reconciliation and healing of the individual victims is perhaps the toughest issue for an amnesty to address, as “national policies can often do little to heal individual physical and psychological wounds of trauma”<sup>47</sup> as well as by meeting his/her individual needs and repairing the broken relationship through understanding, forgiveness, and reconciliation.<sup>48</sup> The potential for amnesty to address the expectations of victims is severely implicated by the range of needs of the victims that need to be addressed.<sup>49</sup> However there is an ultimate need that is required to be dealt by the conditional amnesty—it is the need to elicit the truth.

Addressing the fundamental right of the victims and their families to know the truth of the events occurred and the whereabouts of their loved ones, amnesties can contribute to revealing the truth behind the human rights violations; “amnesty legislation can establish truth and reconciliation commissions, which might otherwise be impossible if the perpetrators of the crimes were simultaneously prosecuted.”<sup>50</sup> Indeed, revealing the truth about the past can serve as a catharsis for post-traumatic changes in the country and “an honest accounting of past injustices is essential

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<sup>43</sup> Tom Hadden, “Punishment, Amnesty and Truth: Legal and Political Approaches” in *Democracy and Ethnic Conflict: Advancing Peace in Deeply Divided Societies*, ed. Adrian Guelke (New York: Palgrave Macmillan, 2004), 212.

<sup>44</sup> Crocker, “Reckoning with Past Wrongs: A Normative Framework”, 43.

<sup>45</sup> *Idem*, 120.

<sup>46</sup> Daly and Sarkin, *Reconciliation in Divided Societies: Finding Common Ground*, 178.

<sup>47</sup> *Idem*, 45.

<sup>48</sup> *Idem*.

<sup>49</sup> *Idem*, 48, 45.

<sup>50</sup> Trumbull notes the following: “[...] as with all criminal trials, accurate information is often buried in order to ensure the defendant receives a fair trial. Truth commissions, on the other hand, can reveal a more complete and accurate picture of the events that precipitated and facilitated the commission of the human rights abuses”. Trumbull, “Giving Amnesties a Second Chance”, 313.



before shattered societies can start to rebuild.”<sup>51</sup> The extent of the role of truth in the reconciliation process can of course be a subject for debate, at the same time there is no argument as for the recognition of the truth revealing and seeking as a critical element in the overall process of accountability.

## Possible Challenges in Amnesty Application

The amnesty choice can face quite serious legal implications. There are several critical elements, which are often being discussed and raised by various scholars and practitioners in relation to amnesties—all in the realm of the obligation to prosecute v. introducing of amnesties debate. In particular the stress being made on the provision of Article 6(5) of the Additional Protocol II of 1977 to the Geneva Convention of 1949 as well as on the issue of the recognition of domestic amnesties by international justice institutions and, in particular, by the International Criminal Court. The last one deserves some special attention.

The Rome Statute of the International Criminal Court (ICC) actually does not contain a provision on amnesty. Therefore it remains not explicitly settled whether the Court would recognise the domestic amnesty law barring the prosecution of persons accused of commissioning the crimes falling within the jurisdiction of the ICC. This situation can be considered from several angles—on the one hand, the powers of the Prosecutor with regard to the preliminary investigation and taking of certain investigative measures<sup>52</sup> and, on the other, from Articles 16, 17 and 53 of the ICC Statute.<sup>53</sup>

Hafner, Boon, Rubesame and Huston argue that, “in any event, the existing legal situation relating to crimes within the jurisdiction of the ICC denies the possibility of ICC respect for amnesties”<sup>54</sup> and further conclude that immunities, if they were originated in an amnesty might violate the fundamental responsibility of the State to prosecute.<sup>55</sup>

From another perspective, one may consider the Rome Statute being purposely ambiguous on the question of ICC exercise of jurisdiction in relation to the “amnesty

<sup>51</sup> Jonathan Tepperman, “Truth and Consequences”, *Foreign Affairs* 81(2) (2002):128.

<sup>52</sup> See Paul Seils and Marieka Wierda, “The International Criminal Court and conflict mediation”, *International Center for Transitional Justice Occasional Paper Series*, June 2005, accessed 17 July 2013, [http://www.hcdcentre.org/uploads/tx\\_news/193TheInternationalCriminalCourtandConflictMediation.pdf](http://www.hcdcentre.org/uploads/tx_news/193TheInternationalCriminalCourtandConflictMediation.pdf), 2, 7.

<sup>53</sup> See Yasmin Naqvi, *Impediments to Exercising Jurisdiction over International Crimes*, The Hague: TMC Asser Press, 2010.

<sup>54</sup> Gerhard Hafner, Kristen Boon, Anne Rubesame and Jonathan Huston, “A Response to the American View as presented by Ruth Wedgewood”, *European Journal of International Law* 10 (1999):108, 111.

<sup>55</sup> Jessica Gavron, “Amnesties in the Light of Developments in International Law and the Establishment of the International Criminal Court”, *International and Comparative Law Quarterly* 51 (2002): 115, 108.

for peace” element in deciding whether to exercise its jurisdiction. Considering this issue Michael Scharf is proposing the following approach: “in determining whether to refer to an amnesty arrangement in accordance with Article 16, 17, 20, 53 of its Statute the ICC should review the following six questions allowing to comprehensively analyse the origin of the domestic amnesty and its “compatibility” with justice purposes: 1) Do the offences constitute grave breaches of international treaties which impose a duty to prosecute? 2) Would an end to the fighting or transition from repressive rule have occurred without some form of amnesty agreement? 3) Has the State or international community instituted a mechanism designed to discover the truth about victims and attribute individual responsibility to the perpetrators? 4) Has the State provided victims with adequate reparation and/or compensation? 5) Has the State implemented meaningful steps to ensure that violations of IHL and serious human rights abuses do not recur? 6) Has the State taken steps to punish those guilty of committing violations of IHL through non-criminal sanctions, such as imposition of fine, removal from the office and other measures?”<sup>56</sup>

So the door of interpretation is open—the Statute leaves possibility for recognition of the conditional amnesties, but taking note of the development of the international criminal law the Court might in its practice also develop a zero tolerance policy towards amnesties for commission of serious crimes.<sup>57</sup>

The Court has been already tried on its abilities to address the issue of amnesty while dealing with amnesty in North Uganda. After the Ugandan government referred its case to the ICC, the Prosecutor announced the beginning of an investigation and issued warrants for seven top Lord’s Resistance Army (“LRA”) officers in October of 2005 initiating the debate on how domestic amnesty should be designed in order to satisfy the obligation of the state to prosecute grave crimes while simultaneously keeping a door open for the future amnesties.<sup>58</sup>

## South African Amnesty Model

South African amnesty model can be referred as a quintessential example of the “smart” amnesty. The granting of an amnesty was conditional and adapted to the unique context of South Africa during the *apartheid* regime lasted from 1948

<sup>56</sup> Michael Scharf, “The Amnesty Exception to the Jurisdiction of the International Criminal Court”, *Cornell International Law Journal* 32 (1999): 526. Measures as proposed by Paul Van Zyl, “Justice Without Punishment: Guaranteeing Human Rights in Transitional Societies”, in *Looking back Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa*, ed. Charles Villa-Vicencio, and Wilhelm Verwoerd, (Cape Town: UCT Press, 2000).

<sup>57</sup> See e.g. the approach, taken by the Special Court for Sierra Leone, where the Statute of the Special Court of Sierra Leone reads in Article 10: “An amnesty [...] shall not be a bar to prosecution”. Statute of the Special Court for Sierra Leone, 16 January 2002, accessed 22 October 2013, <http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnd1MJeEw%3d&tabid=176>

<sup>58</sup> Robin B. Murphy, “Establishing a Precedent in Uganda: The Legitimacy of National Amnesties under the ICC”, *Bepress Legal Series*. Working Paper, July 6, 2006, accessed 22 October 2013, <http://law.bepress.com/expresso/eps/1442>

until 1994.<sup>59</sup> Archbishop Desmond Tutu and others advanced many justifications for granting amnesty to people who had perpetuated this system of injustice for so many years.<sup>60</sup> Many argued that, because the crimes were so widespread and implicated so many South Africans, a “nationwide forgiveness and reconciliation”<sup>61</sup> was needed to move the country forward out of the era of *apartheid*. Others suggested that, given the realities of the situation, offering amnesty in exchange for truth was the best justice one could offer, and that amnesty was somewhat necessary to prevent a bloody and protracted civil war from breaking out<sup>62</sup> across South Africa in the times of transition.<sup>63</sup> Because *apartheid* violence had been carried out under such a veil of secrecy, the truth was a prerequisite for the successful prosecutions could proceed; yet without a promise of amnesty, no one would have an incentive to offer such information. Thus, given the choice between watching criminals walk free and knowing nothing of their misdeeds and watching criminals walk free but knowing what had taken place, the government had to choose the latter.<sup>64</sup>

In 1993 a series of negotiations aiming at the provision of the peaceful shift to democracy resulted in the establishment of the Interim Constitution.<sup>65</sup> Amnesty provision of the Interim Constitution granted protection from prosecution for “acts, offences associated with political objectives and committed in the course of the conflicts of the past”,<sup>66</sup> while aiming to cultivate the need for “understanding but not for vengeance, [the] need for reparation but not for retaliation, [the] need for ubuntu<sup>67</sup> but not for victimization.”<sup>68</sup>

<sup>59</sup> See Ziyad Motala, “The Use of the Truth Commission in South Africa as an Alternative Dispute Resolution Mechanism Versus the International Law Obligations”, *Santa Clara Law Review* 45 (2005): 913, 915–16; Paul Lansing and Julie C. King, “South Africa’s Truth and Reconciliation Commission: The Conflict Between Individual Justice and National Healing in the Post-Apartheid Age”, *Arizona Journal of International and Comparative Law* 15 (1998): 753, 756.

<sup>60</sup> Raymond G. Helnick, Rodney Lawrence Petersen, eds. *Forgiveness and Reconciliation: Religion, Public Policy and Conflict Transformation* (Templeton Foundation Press, 2002).

<sup>61</sup> Richard A. Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State* (Cambridge University Press, 2001), 17.

<sup>62</sup> Richard Goldstone, “1998 Otto L. Walter Lecture: International Human Rights at Century’s End”, *New York International Law Review*, 15 (1999): 241, 258.

<sup>63</sup> Michael P. Scharf, “The Amnesty Exception to the International Criminal Court”, 510; Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, 55.

<sup>64</sup> Fields, “Private Crimes and Public Forgiveness: Towards a Refined Restorative Justice Amnesty Regime”, 2.

<sup>65</sup> Constitution of the Republic of South Africa, Act No. 200 of 1993 in Government Gazette (1994), 180.

<sup>66</sup> *Idem*.

<sup>67</sup> “Ubuntu” means “feeling of common humanity” in Nguni languages (such as Xhosa and Zulu).

<sup>68</sup> Constitution of the Republic of South Africa, Act No. 200 of 1993 in Government Gazette (1994), 180.

Following the adoption of this constitutional provision, the Parliament adopted the Truth and Reconciliation Act of 1995,<sup>69</sup> which established a Truth and Reconciliation Commission (TRC). The Committee on Amnesty within the TRC had the power to grant amnesty in respect of any act or omission associated with a political objective or motive upon the condition of the amnesty applicant making full disclosure of the facts on the events occurred<sup>70</sup> (with acts committed for personal gain or out of personal malice were excluded). By those powers the Committee also demonstrated its quasi-judicial function—once granted, the amnesty, was sweeping and exempting civil as well as criminal liability.

In cases of a serious offences, the amnesty applicant had to appear in a public hearing of the Committee and admit the wrongdoings in public in the presence of his or her community members, family, media. The hearings of the Committee were often broadcasted by the media on television or radio throughout the country, and the names of the amnesty applicants were further published in both the Government Gazette and the TRC Report in a form of “social shaming.”<sup>71</sup> These hearings were “widely viewed as a kind of cathartic ritual of healing”<sup>72</sup> for the nation. An individual had to face the criminal prosecution in cases he or she did not fulfil the amnesty conditions,<sup>73</sup> however if an amnesty applicant was granted an amnesty, he or she was discharged from criminal prosecution, but was also set free from civil damages.<sup>74</sup> Controversially, “[n]either an apology nor any sign of remorse was necessary to be granted amnesty.”<sup>75</sup> This aspect was particularly controversial in relation to how survivors experienced the process.

As a result of the process, it is estimated the by the final cut-off date of 30 September 1997, the Amnesty Committee had received 7,116 amnesty applications, including from high-level members of the African National Congress, of which 849 were approved, and 5,392 were rejected as were coming from common criminals.<sup>76</sup>

The South African model became a classbook example of the unique innovation of the conditional amnesty that actually neither gave perpetrators of apartheid a full reprieve nor held them fully accountable. Moreover the actions taken by South Africa in fact illustrate the successful combination of TRC-amnesty mechanisms

<sup>69</sup> Promotion of National Unity and Reconciliation Act No. 95-34 (1995), accessed on 17 July 2013, <http://www.doj.gov.za/trc/legal/act9534.htm>.

<sup>70</sup> Michael P. Scharf, “The Amnesty Exception to the International Criminal Court”, 507, 510.

<sup>71</sup> Garkawe, “The South African Truth and Reconciliation Commission: A Suitable Model to Enhance the Role and Rights of the Victims of Gross Violations of Human Rights?” 356.

<sup>72</sup> Fields, “Private Crimes and Public Forgiveness: Towards a Refined Restorative Justice Amnesty Regime”, 21.

<sup>73</sup> See Promotion of National Unity and Reconciliation Act, para. 21(2).

<sup>74</sup> *Idem*, para 20(7).

<sup>75</sup> Hayner, *Unspeakable Truth: Confronting State Terror and Atrocity*, 43. Also Wilson, “The Myth of Restorative Justice: Truth, Reconciliation, and the Ethics of Amnesty”, 549; McCarthy, “South Africa’s Amnesty Process: A Viable Route Toward Truth and Reconciliation?” 244.

<sup>76</sup> *Summary of Amnesty Decisions, 1 November 2000*, accessed on 17 July 2013, <http://www.justice.gov.za/trc/amntrans/index.htm>. See also Antje Pedain, “Was Amnesty a Lottery? An Empirical Study of the Decisions of the Truth and Reconciliation Commission’s Committee on Amnesty”, *South African Law Journal* 121 (2004): 793.

and commitment of the country leaders to recognise that at that moment the reconciliation was more vital for the country than punishment.<sup>77</sup> Under this system, Archbishop Desmond Tutu and others hoped to achieve a form of “approximate justice”,<sup>78</sup> that both restored victims’ dignity and allowed the long divided country to reunite through a process of reconciliation.

## Evaluating Some Elements of the South African Amnesty Model

### *Legality*

In the opinion of many analysts, experts and persons involved in the process the prosecution type of justice was not an option for South Africa for a number of reasons. The most compelling being that the security forces together with right wing groups would have sabotaged the process.<sup>79</sup> In addition, the reliance to trials would have placed a huge burden on the fragile judicial system and finances of South Africa at that time. Furthermore if South Africa has adopted a criminal trial approach, “most perpetrators would never have been subject to any form of accountability as they would have had little incentive to come forward.”<sup>80</sup> On the contrary, making as full and complete disclosure as possible was in fact in the interest of the perpetrator since that significantly increased their chances of gaining amnesty.

Being enacted, amnesty, however, raised serious criticism and even became a subject of Constitutional Court review. The constitutionality of the TRC amnesty provisions was challenged by the *Azanian Peoples Organization (AZAPO) v. President of the Republic of South Africa case*,<sup>81</sup> which was brought by AZAPO and the families of a number of prominent victims of *apartheid*. The concept of restorative judgement, which the TRC has described as the “foundation of its work”<sup>82</sup> was validated

<sup>77</sup> King, “Amnesties in a Time of Transition”, 590.

<sup>78</sup> Wilson, “The Myth of Restorative Justice: Truth, Reconciliation, and the Ethics of Amnesty”, 549.

<sup>79</sup> See e.g. Desmond Tutu “What About Justice?” (Inaugural Bar Human Rights Committee Lecture at St. Paul’s Cathedral, 1 Nov. 1999.) quoted from Gavron, “Amnesties in the Light of Developments in International Law and the Establishment of the International Criminal Court”, 38.

<sup>80</sup> Garkawe, “The South African Truth and Reconciliation Commission: A Suitable Model to Enhance the Role and Rights of the Victims of Gross Violations of Human Rights?” 355.

<sup>81</sup> Judgement of the Constitutional Court of South Africa *Azanian Peoples Organization v. President of the Republic of South Africa* (1996) SA 671 (CC), accessed on 17 July 2013, <http://www.saflii.org/za/cases/ZACC/1996/16.pdf>.

<sup>82</sup> In the words of one of the key architects of the TRC, then Minister Kader Asmal: “We must deliberately sacrifice the formal trappings of justice, the courts and the trials, for an even higher good: Truth. We sacrifice justice, because the pains of justice might traumatise our country or effect the transition. We sacrifice [retributive] justice for truth so as to consolidate democracy, to close the chapter of the past and to avoid confrontation”. *Hansard Debates of the National Assembly, Second session, First Parliament* (Cape Town: The Government Printer, 16–18 May 1995), 1382.

in the decision of the Court. The judgement in general upheld the legality of the amnesty law as violating neither the Constitution nor international law. Mahmood DP conceded in his judgment: “The result, at all levels, is a difficult, sensitive, perhaps even agonizing, balancing act between the need for justice to victims of past abuse and the need for reconciliation and rapid transition to a new future.”<sup>83</sup> However, a debate is still ongoing among the scholars that revolves around the suggestion that the “South African TRC represents a failure to comply with international law obligations to punish such gross violations of human rights, as crimes against humanity.”<sup>84</sup>

### *Promotion of Peace and Reconciliation*

One of the major objectives by which the impact of any amnesty process should be measured is whether it contributed to a peaceful transition and prevented a repetition of the violence. In South Africa clearly the objective of a peaceful transition has been achieved, as a government was established without the outbreak of civil war or the secession of communities within the country.<sup>85</sup> The amnesty indeed succeeded to make a significant contribution to the revealing and restoring of the truth about the events of the past regime, helped to avoid civil war and the transfer of power was accomplished with little bloodshed. As a result, today South Africa constitutes “perhaps the most democratic, transparent government on the continent.”<sup>86</sup>

The achieved reconciliation however also received a share of criticism. Here, Wilson’s argument that retribution has been “sacrificed at the altar of truth and reconciliation”<sup>87</sup> is powerful, yet restorative justice is also no mere illusion and it had been argued extensively that the TRC did indeed adequately serve justice in a number of ways.<sup>88</sup>

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<sup>83</sup> Judgement of the Constitutional Court of South Africa *Azanian Peoples Organization v. President of the Republic of South Africa* (1996) SA 671 (CC), para. 21, accessed on 17 July 2013, <http://www.saflii.org/za/cases/ZACC/1996/16.pdf>

<sup>84</sup> Graeme Simpson, “A Brief Evaluation of South Africa’s Truth and Reconciliation Commission: Some lessons for societies in transition”, October 1998, accessed 17 July 2013, <http://www.csvr.org.za/index.php/publications/1724-a-brief-evaluation-of-south-africas-truth-and-reconciliation-commission-some-lessons-for-societies-in-transition.html>

<sup>85</sup> Maryam Kamali, “Violations: A Comparison of Transitional Justice in East Germany and South Africa”, *Columbia Journal of Transitional Justice* 40 (2001): 119. For a discussion of the factors contributing to South Africa’s political transition, see Laurie Nathan, “Accounting for South Africa’s Successful Transition to Democracy”, (Crisis States Discussion Paper no. 5, LSE, 2004).

<sup>86</sup> Rachel L. Swains, “South Africa Urges West to Ease Censure of Zimbabwe”, *New York Times*, 17 November 2002.

<sup>87</sup> Wilson, “The Myth of Restorative Justice: Truth, Reconciliation, and the Ethics of Amnesty”, 559.

<sup>88</sup> Bohler-Muller, “Against Forgetting: Reconciliation and Reparations After the Truth and Reconciliation Commission”, 470.

## *Needs of the Victims*

As it is assessed by the proponents of the amnesty process in South Africa, the “full disclosure” by the perpetrators of their actions not only provided the truth to the victims for their healing, but also allowed the victims to finally receive the information concerning the relevant criminal offence.<sup>89</sup> In some instances where victims have been killed, perpetrator’s testimony revealed to the families of the victims what had happened to their loved ones, often resulted in the recovery of their remains. The victims also could make their views known during amnesty hearings through making a statement, either orally or in writing. Amnesty process also represented a “form of accountability” mechanism for the perpetrator, and a “form of justice”<sup>90</sup> for victims. The TRC Report asserted that “discovery of the truth was essential for victims to move on and recover from the traumatic events of the past, and was, in fact, important to the process of fostering reconciliation.”<sup>91</sup>

At the same time, it is important to note that many criticised South Africa’s amnesty process for failing to adequately take victims’ needs into account,<sup>92</sup> including the needs for acknowledgements of wrongdoing, for apologies, and for retribution. Many victims claimed they were pressured by the State to forgive, thus creating the public appearance of personal forgiveness.<sup>93</sup> While the Amnesty Commission never directly commanded victims to forgive their attackers, “the ostensible—almost fanatical—promotion of forgiveness and reconciliation by the Commissioners could not but give victims the impression that forgiveness was hoped for, perhaps even expected of them.”<sup>94</sup> Even if these hearings had a significant pedagogical impact, they remained in the opinion of critics primarily an expression of a kind of “emotional window dressing”, as Richard Wilson put it, “rather than structurally transformative process.”<sup>95</sup>

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<sup>89</sup>Garkawe, “The South African Truth and Reconciliation Commission: A Suitable Model to Enhance the Role and Rights of the Victims of Gross Violations of Human Rights?” 335.

<sup>90</sup>Frederick van zyl Slabbert, “Truth without Reconciliation, Reconciliation without Truth” in *After TRC: Reflections on Truth and Reconciliation in South Africa*, eds. Wilmot James and Linda van de Vijver, (Ohio University Press, 2001), 61.

<sup>91</sup>Truth and Reconciliation Commission of South Africa Report, Volume 1, Chapter 5, para 68, <http://www.justice.gov.za/trc/report/>, (last accessed July 17, 2013). (Hereinafter TRC Report), paras. 118, 112–113. See also Piers Pigou, “False Promises and Wasted Opportunities? Inside South Africa’s A Truth and Reconciliation Commission” in *Commissioning the Past: Understanding South Africa’s Truth and Reconciliation Commission*, eds. Deborah Posel and Graeme Simpson (Johannesburg: Witwatersrand University Press, 2002), 39.

<sup>92</sup>See Wilson, “The Myth of Restorative Justice: Truth, Reconciliation, and the Ethics of Amnesty”, 547; McCarthy, “South Africa’s Amnesty Process: A Viable Route Toward Truth and Reconciliation?” 245–46.

<sup>93</sup>Wilson, “The Myth of Restorative Justice: Truth, Reconciliation, and the Ethics of Amnesty”, 548.

<sup>94</sup>Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State*, 120.

<sup>95</sup>*Idem*, 38. See also TRC Report, 110–114.



Another aspect of criticism was relating to the definition of the victim<sup>96</sup> for being too narrow. Mamdani argues the linking of the victim status only to the commission of gross human rights violations, excluded much of the victimisation that occurred under apartheid, and the link to the political objective has generally “significantly narrowed the TRC perspective.”<sup>97</sup>

Finally, the effect of the amnesty preventing victims or their dependants from bringing claims for damages against the perpetrators has been controversial. There is no doubt that for the amnesty process to be understood as a form of restorative justice, the issue of reparations is crucial.<sup>98</sup> However, the differing mandates of the Amnesty Committee and the Reparations and Rehabilitation Committee meant that whilst perpetrators could receive an immediate benefit from engagement with the TRC, victims, who are often in urgent need, would have to wait years in order to obtain reparations. In addition, many of the victims felt that reparations, once they finally began to be distributed were insufficient, particularly as they fell below the amounts recommended by the TRC and were considerably less than the amounts that could have been awarded following a successful civil claim.<sup>99</sup>

## Truth

Truth-seeking was initially one of the primary objectives of the South African TRC. As discussed above, the obligation on amnesty applicants to fully disclose all the relevant facts in relation to their crimes was viewed as a key element of the truth commission process. The TRC final report has revealed that the decision to exchange amnesty for truth itself has certainly impacted positively on efforts to prevent future human rights violations:

Disclosures made during the amnesty process [...] contributed significantly to the Commission’s understanding of the broad pattern of events during the thirty-four year mandate period. They also assisted the Commission in its analysis of key perpetrator groupings and institutional responsibility, and in the making of findings on the root causes of gross violations of human rights committed during the conflicts of the past.<sup>100</sup>

<sup>96</sup> Promotion of National Unity and Reconciliation Act 1995, s 1(1)(xix).

<sup>97</sup> Mahmood Mamdani, “Amnesty or Impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa”, *Diacritics* 32 (2002): 37.

<sup>98</sup> Jennifer J. Llewellyn and Robert Howse, “Institutions for Restorative Justice: The South African Truth and Reconciliation Commission”, *University of Toronto Law Journal* 49 (1999): 355.

<sup>99</sup> Phakathi and Van der Merwe argue that “It [...] seems that the relatively small amounts provided to victims – a lump sum of R30,000 per victim, or approximately \$4,000, paid by the government – would not be sufficient to compensate for the loss of income, loss of property, and other costs incurred as a result of the incident”. Timothy Sizwe Phakathi and Hugo van der Merwe, “The Impact of the TRC’s Amnesty Process on Survivors of Human Rights Violations” in *Truth and Reconciliation in South Africa: Did the TRC Deliver?* eds. Audrey R. Chapman and Hugo van der Merwe (Philadelphia: Pennsylvania Studies in Human Rights, University of Pennsylvania Press, 2008), 136.

<sup>100</sup> TRC Report, Volume 1, para. 68.



At the same time whilst this impacts of the amnesty has been overall beneficial to South African society, some scholars were cautious that “the TRC, by granting amnesty to confessed killers, may actually have contributed to the sense of impunity.”<sup>101</sup> In particular, the Amnesty Committee has been criticised for developing a narrow approach to the relevant facts that applicants were required to reveal. This meant that the Committee sometimes had to decide whether to grant amnesty solely on the information provided by the applicant, often not resulting in the deep investigation.

## South African Amnesty as a Model for Other Contexts

South African model was used by many States to argue that amnesty can be a vital ingredient of peace negotiations because it “stabilize[s] and consolidate[s] [...] transition.”<sup>102</sup> But the question is did this model provide a lesson that could serve as a template answer for other contexts? The answer is yes and no.

South African has been recognised as a success model for the peaceful transition from apartheid regime to democracy. As Pizzutelli argues, South African TRC “became the benchmark against which other truth commissions are measured and measure themselves.”<sup>103</sup> At the same time this model was carefully adjusted to the very specific context of South Africa and precisely for that reason the blind reproduction of the “amnesty for truth” model in different contexts will never work like it worked in South Africa. Reference to only one South African model, which is often taking place while deciding on the establishment of the transitional mechanism during peace negotiations (like in Sierra Leone, DRC, Liberia, Kenya, the USA<sup>104</sup>) will not work by definition. The critics of the model claim that for all these years the South African amnesty model was never successfully exported<sup>105</sup>—but at the same time it should not be. The key role of South African model is much deeper and lies exactly in the lessons learned from it—both positive and negative. The understanding of the contribution of the South African model to the contemporary

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<sup>101</sup> Graeme Simpson, “‘Tell no Lies, Claim no Easy Victories’: A Brief Evaluation of South Africa’s Truth and Reconciliation Commission” in Posel and Simpson, *Commissioning the Past: Understanding South Africa’s Truth and Reconciliation Commission*, 247.

<sup>102</sup> Teitel, *Transitional Justice*, 55.

<sup>103</sup> Pizzutelli, Francesca, “Moving Away from the South African Model: Amnesties and Prosecutions in the Practice of 40 Truth Commissions”. *Social Science Research Network*, January 25, 2010, accessed 20 October 2013, <http://ssrn.com/abstract=2361081>, 2.

<sup>104</sup> This was the case in Sierra Leone, Liberia, DRC and Kenya. See eg: Laura Davis and Priscilla Hayner, *Difficult Peace, Limited Justice: Ten Years of Peacemaking in the DRC*, International Center for Transitional Justice, 2009. As well as a reference to South African model has been made during the recent debates in the USA relating to the “war on terror”, e.g. Nicholas D. Kristof, “The Truth Commission”, *The New York Times*, 6 July 2008.

<sup>105</sup> Pizzutelli, “Moving Away from the South African Model: Amnesties and Prosecutions in the Practice of 40 Truth Commissions”, 33.

transitional justice system lies in analogy with the first successful international criminal institutions—the International Nuremberg and Tokyo Tribunals—both were tailor-made to the context in which they operated, to the circumstances and objectives ruling at the time, both were influenced by a myriad of nuances of those contexts and both laid the enormous inspirational foundation for development of quite different from the initial model international justice mechanisms.

## Conclusion

Even with the best interests in mind the international community cannot prevent and stop human rights violations from happening and cannot punish all the criminals under the international law. Likewise, there is no fixed and ready formula or methodology to answer the question *how* better to achieve accountability while establishing a sustainable peace.<sup>106</sup>

Traditional understandings of an amnesty as of a mere tool to send the crimes of the past into oblivion are no longer meeting the reality. National amnesties, which may once have been a matter essentially for the sovereign State, became now falling within the remit of international criminal jurisdiction. The accountability mechanisms are becoming more effective in holding the perpetrators responsible for violations of international criminal law, that results today in fewer “blanket” amnesties, which are being obstructed by international law. The concept of amnesties introduced by the States today is much more complex, flexible and nuanced, often linked with other transitional justice mechanisms, working to meet the needs of victims in the instances when the prosecution path is not possible. Indeed, “smart” amnesties, tailored to the post-conflict transitional society, meet the calls for truth, peace and justice and do not contradict the general obligation of the States under treaty or customary law to prosecute gross violations of international crimes. Moreover they are specifically designed to serve as a part of a comprehensive “reconciliation package aimed at addressing long-standing and serious societal tensions and injustices.”<sup>107</sup> This argument has been most recently supported by the 2013 Belfast Guidelines on Amnesty and Accountability, which became a result of a series of expert meetings convened by Louise Mallinder and Tom Hadden at the University of Ulster to evaluate the legality and legitimacy of amnesties in the light of the legal challenges and obligations accordance with the multiple legal obligations confronted by states going through the post-conflict stage political transition. The Guidelines deny the position of amnesty being prohibited by the international law and provide the guid-

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<sup>106</sup>As Orentlicher asks, “[g]iven the extra-ordinary range of national experiences and cultures, how could anyone imagine there to be a universally relevant formula for transitional justice?” Diane Orentlicher, “‘Settling Accounts’ Revisited: Reconciling Global Norms with Local Agency”, *International Journal of Transitional Justice* 10 (2001): 18.

<sup>107</sup>Slye, “The legitimacy of amnesties under international law and general principles of Anglo-American law: is a legitimate amnesty possible?” 245–46.

ing principles that may be used during peace negotiations while reviewing the transitional options. In particular, they come to the conclusion that “prosecution and punishment are not the only forms of accountability; amnesties can be used to facilitate selective prosecution strategies, or made conditional on participation in truth commissions, public inquiries, restorative justice, and reparations.”<sup>108</sup>

The key to success is not in a mere replication of the model, which has worked in other context, like South African one—again, it may very well not work for the desired purposes if blindly planted in a completely different reality. By itself it should not be a reason to consider the model as such being weak, but the way it was designed and implemented. However, the best practices and lessons learned from the South African model still may serve as an inspiration for the further developments, and Belfast Guidelines are a good example of that. South African model has well worked for several highly important in the transitional post-conflict society purposes, which simply were non-reachable or very slowly reachable by traditional trial mechanisms.<sup>109</sup> Any critiques of the South African amnesty process must be tempered by the acknowledgement that it arose from a delicate political compact and that it operated within a short time period and with limited resources,<sup>110</sup> and that without the amnesty, it is unlikely that the transition would have taken place. Given these conditions, the South African amnesty in many ways represents a remarkable innovation that has served for recognising that contextually oriented “smart” amnesties may contribute to the settling of peace v. justice dispute and reaching for the optimal balance between two goals.

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<sup>108</sup> “Transitional Justice Institute launches The Belfast Guidelines on Amnesty and Accountability”, *Transitional Justice Institute*, 25 October 2013, accessed 28 November 2013, <http://www.transitionaljustice.ulster.ac.uk/AmnestyGuidelinesLaunch.htm>. See more in Guideline 5 “Linking Amnesty and Accountability”. Belfast Guidelines on Amnesty and Accountability, October 2013, Belfast: Transitional Justice Institute, accessed 28 November 2013, <http://www.transitionaljustice.ulster.ac.uk/documents/TheBelfastGuidelinesonAmnestyandAccountability.pdf>.

<sup>109</sup> Louise Mallinder, “Indemnity, Amnesty, Pardon and Prosecution Guidelines in South Africa”, Working paper No 2, from *Beyond Legalism: Amnesties, Transition and Conflict Transformation*, Institute of Criminology and Criminal Justice, Queen’s University, Belfast, February 2009, 135–136.

<sup>110</sup> *Idem*, 136.

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2015, XIV, 376 p. 1 illus. in color., Hardcover

ISBN: 978-3-319-09389-5