

PART I
RESEARCH QUESTION, TERMINOLOGY AND HISTORICAL ANALYSIS

CHAPTER ONE
RESEARCH QUESTION, NATURE AND SCOPE OF THE PROBLEM

1. Introduction

The respected Colombian writer, Gabriel Mårquez, in his work, *One Hundred Years of Solitude*,¹ tells the story of a mythic village in Northern Colombia in which the inhabitants suffer from endemic dementia. The plague causes people to forget everything, even the most basic things of life. A young man tries to limit the damage by printing labels on everything: “This is a window”, “The name of our village is *Macondo*.”

Unlike the inhabitants of *Macondo*, history has not been kind enough to let us forget. This is because the history of humanity is characterised by human-made tragedies resulting in the massive suffering of fellow human beings. Millions have died as a result of wars, slavery, the Holocaust and apartheid. The level of these atrocities is such that they cannot be forgotten. The lessons of history continue to haunt us. The exposure by the media of the sufferings of detainees in concentration camps in Bosnia in 1991, and the 1994 genocide in Rwanda, not only shocked the world but raised afresh memories of the Holocaust. Like the young man of *Macondo*, humanity has been trying for several decades, without success, to establish institutional mechanisms to limit the damage and to avoid the repetition of past evils. In the words of George Santayana, “those who disregard the past are bound to repeat it.”²

¹ Gabriel Gårcia Mårquez, *One Hundred Years of Solitude* (trans. Gregory Rabassa) (1967) 1 *et seq.*

² Quoted by Roy Gutman, *A Witness to Genocide: The First Inside Account of the Horrors of ‘Ethnic*

1. 2. The Nature and Scope of the Problem

Amnesty originated as a prerogative of divine and sovereign rulers, as direct representatives of God, and it has, through the ages, been subjected to little critical scholarly or scientific analysis. This long-standing acknowledgement of the supernatural element in amnesty contributed enormously to this lack of research and critical evaluation. With the emergence of democratic government, amnesty became a touchy political subject of some peculiarity with penal, criminal and constitutional law ramifications. The advent and proliferation of international tribunals, and truth and reconciliation mechanisms, with amnesty-granting powers, has drawn in an overwhelming amount of criticism of amnesty laws on the basis that they are an affront to peace and justice in post-conflict societies. Despite this criticism, post-conflict societies continue to find amnesty a catalyst for peace and national reconciliation, and a way to deal with the legacy of past human rights violations. Moreover, this criticism ignores the history, genesis and use of amnesty under international law.

An intractable problem common to societies in transition is how to deal with the legacy of the past and pave the way for a new era. Addressing past human rights violations is indeed a daunting and challenging exercise for any nascent democracy. This challenge is characterised by conflicting interests and considerations. Should perpetrators of gross human rights violations be subjected to prosecution, or, should they be granted amnesty? What is the optimal way of achieving justice for victims of human rights violations, and due process for perpetrators? How do we balance reconciliation with the reconstruction of society? How will this impact on stability and peace? The challenges involve making hard choices between blanket amnesty and conditional amnesty, and between prosecution and reparation; choices which must recognise the need to create a culture of

human rights and accountability as opposed to a culture of impunity. Choices must be made between vengeance and peaceful co-existence, between retribution and restorative justice, between fears and legitimate expectations. Often, these decisions have a direct impact on competing needs, especially as the resources available are often limited. Factors such as these play a major role in societies in political transition.

In the wake of contemporary conflicts, two seemingly contradictory but complementary trends have emerged. One trend is a general acknowledgement that the current momentum towards a comprehensive international criminal justice system is, in itself, inadequate to deal with complex political emergencies. The other is that non-punitive mechanisms, such as truth commissions, are necessary to bring about lasting peace and reconciliation amongst the local population. The reason for this is, as Heyner correctly puts it, “partly due to the limited reach of the courts, and partly out of recognition that even successful prosecutions do not resolve the conflict and pain associated with past abuses.”³ In this sense, national reconciliation is needed to complement the weaknesses of the international criminal justice system. The role of the current *ad hoc* international criminal tribunals for the former Yugoslavia and Rwanda in bringing about justice is limited. These tribunals are unable to try all the perpetrators of violations of international humanitarian law, but usually only reach those who bear the greatest responsibility for such atrocities. Furthermore, international criminal tribunals generally fail to address reparations for the actual harm suffered by victims of war, or to engage in a pedagogical exercise capable of reconstructing national identity as a lesson for future generations. To educate, to make formally public institutional memory, to address the collective guilt of various parts of the population, and to set the historical record straight about what really happened in the past, all come within the purview of such non-

³ Priscilla Heyner, *Unspeakable Truths: Confronting State Terror* (2001) 14.

punitive measures as a truth and reconciliation exercise.⁴ However, both international criminal tribunals and truth commissions have distinct, but complementary, roles and functions.⁵

There are at least two methods commonly adopted by societies in transition. The first approach is based on retributive justice,⁶ that is, the prosecution of those responsible for past human rights violations. Such an option could take the form of a domestic prosecution or an *ad hoc* international criminal tribunal.⁷ During the period 1919 to 1994, there have been five *ad hoc* international investigation commissions⁸; four *ad hoc* international criminal tribunals⁹; three *ad hoc* tribunals for Sierra Leone¹⁰, Cambodia¹¹ and East Timor¹²; and three internationally mandated national prosecutions after the

⁴ Karl Jaspers, *The Question of German Guilt* (1948) 62. Jaspers argues that atrocities are not committed in a vacuum, but go beyond individual criminal responsibility. Hence, a society which has been a victim of widespread and systematic violations of human rights must reckon with the legacy of the past in order to deal with the “commission of countless little acts of negligence, of convenient adaptation, of cheap vindication, and the imperceptible promotion of wrong; the participation in the creation of a public atmosphere that spreads confusion and thus makes evil possible.”

⁵ Claude Jorda, “The International Criminal Tribunal for the Former Yugoslavia and the Truth and Reconciliation Commission in Bosnia and Herzegovina” ICTY Press Release JL/P.I.S/592-e, The Hague, 22 May 2001.

⁶ Howard Zehr, “Restorative Justice” in Luc Reyhler & Thania Paffenholz (eds.), *Peace-building: A Field Guide* (2001) 330.

⁷ Examples of international criminal tribunals include the International Military Tribunals of Nuremberg and Tokyo, and more recently the two UN *ad hoc* International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR).

⁸ For an historical survey see MC Bassiouni, “From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court” 10 *Harvard Human Rights Journal* (1997) 11.

⁹ *Ibid.*

¹⁰ UN SC Res. 1315 (2000).

¹¹ Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, 2 January 2001.

¹² The UN Transitional Administration in East Timor (UNTAET) passed Regulation 15 of 2000 which established a Panel with Exclusive Jurisdiction over Serious Criminal Offences Committed during the Conflict in East Timor.

First and Second World Wars.¹³ The main function of such tribunals is to prosecute those alleged to have committed gross human rights violations. It is important to distinguish modern criminal tribunals and truth commissions from some of the highly abusive post-transition tribunals whose purpose was to terrorise, purge and execute the representatives of old regimes, through processes such as *ad hoc* military tribunals.¹⁴

The second approach is based on restorative justice,¹⁵ that is, reconciliation and amnesty through a truth-telling process, which often takes the form of an official mechanism sanctioned by the state in the guise of a truth commission.¹⁶ The main purpose of a truth commission is to investigate the truth about past human rights violations within a limited time, and to issue a comprehensive official report of its findings and recommendations.¹⁷ Since 1974, there have been some twenty-one truth commissions, and the number continues to grow.¹⁸ The goals of truth commissions are many and vary from one country to another. In general, their goals include the

¹³ Hakan Friman, "The International Criminal Court: Negotiations and Key Issues" 8 *African Security Review* (1999) 3.

¹⁴ For example, the 1995 Civil Disturbances Special Tribunal, a military tribunal set up by the former Nigerian dictator, the late General Sani Abacha, to prosecute the human rights activist, leader of the Ogoni people and writer, Ken Saro-Wiwa and nine others for allegedly "procuring and inciting" murder. These were trumped-up charges intended to eliminate Ken Saro-Wiwa. The accused were denied the right to appeal against the decision of the special court. Clearly, the creation of the special court undermined the ordinary courts in Nigeria. See Michael Birnbaum, *Fundamental Rights Denied: Report of the Trial of Ken Saro-Wiwa and Others* published by Article 19, on 8 June 1995.

¹⁵ Howard Zehr, "Restorative Justice" in Luc Reyhler & Thania Paffenholz (eds.), *Peace building: A Field Guide* (2001) 330.

¹⁶ Priscilla Hayner, "Fifteen Truth Commissions - 1974 to 1994: A Comparative Study" 16 *Human Rights Quarterly* (1994) 657 at 604 argues that "most truth commissions are created at a point of political transition within a country, used either to demonstrate or underscore a break with a past record of human rights abuses, to promote national reconciliation, and to obtain or sustain political legitimacy."

¹⁷ *Ibid.* "...[a] truth commission includes four primary elements. First, a truth commission focuses on the past. Second, a truth commission is not focused on a specific event, but attempts to paint the overall picture of certain human rights abuses, or violations of international humanitarian law, over a period of time. Third, a truth commission usually exists temporarily and for a pre-defined period of time, ceasing to exist with the submission of a report of its findings. Finally a truth commission is always vested with some sort of authority, by way of its sponsor, that allows it greater access to information, greater security or protection to dig into sensitive issues, and a greater impact with its report."

promotion of national reconciliation through public acknowledgement of past injustices; the opportunity for victims to tell their stories, and to be heard, as a cathartic exercise; and to prevent future abuses of human rights by making possible the reform of the police, military, judiciary and other state institutions.¹⁹

Despite a move towards individual criminal responsibility, truth commissions have not yet fallen from favour. Following the success of the South African Truth and Reconciliation Commission (TRC), a number of countries have opted for a truth and reconciliation mechanism and have used the South African TRC as a “template”.²⁰ More recently, truth and reconciliation commissions have been, and are being, set up in Peru²¹, Nigeria²², Ghana²³, Sierra Leone²⁴, Bosnia-Herzegovina²⁵, the Federal Republic

¹⁸ Priscilla Heyner, *Unspeakable Truths: Confronting State Terror* (2001) 231.

¹⁹ See for example, Daan Bronkhorst, *Truth and Reconciliation: Obstacles and Opportunities for Human Rights* (1990); Ian Liebenberg & Abebe Zegeye, “Comparative International Perspectives: The TRC in South Africa - Some Tentative Observations” Paper presented at “The TRC: Confronting the Past Conference”, Wits University, Johannesburg, 11-14 June 1999 draws distinctions between truth and reconciliation commissions, government appointed commissions of inquiry into issues of misuse of power by the state or abuse of human rights by the ruling elite; *ad hoc* mixed approaches to deal with the past; and international tribunals; Priscilla Heyner, “Reflections on the Sierra Leone Truth and Reconciliation Commission” in *Moments of Truth in Sierra Leone: Contextualising the Truth and Reconciliation Commission*, Article 19 Forum of Conscience, August (2000), Appendix M.

²⁰ For example, the Sierra Leone Truth and Reconciliation Act 4 of 2000 has several features similar to the South African Promotion of National Unity and Reconciliation Act 34 of 1995 such as powers to subpoena individuals to appear before the Commission.

²¹ See *Final Report of the Truth and Reconciliation Commission of Peru* (2003). The Commission was set up in 2001 to investigate human rights violations committed in Peru between 1980 and 2000.

²² President Obasanjo established the Nigerian Human Rights Violations Investigation Commission in 1999 to investigate human rights violations between 1994 and May 1999. See www.truthcommission.com (accessed 21 December 2003).

²³ The National Reconciliation Commission of Ghana was established in terms of the National Reconciliation Act 611 of 2002 to investigate human rights abuses committed during the periods of unconstitutional governments (1969, 1972, 1979, 1981, 1993 and 1996).

²⁴ Sierra Leone Truth and Reconciliation Commission Act 4 of 2000.

²⁵ At the time of writing the draft law was under preparation. For more information generally, see Neil Kritz & Jakob Finci, “A Truth Commission and Reconciliation Commission in Bosnia and Herzegovina: An Idea Whose Time has Come” 3 *International Law FORUM du droit International* (2001) 50; Richard Goldstone, “Ethnic Reconciliation Needs the Help of a Truth Commission” *International Herald Tribune*, 24 October 1998, p.6.

of Yugoslavia (Serbia)²⁶, East Timor²⁷, the Democratic Republic of the Congo (DRC)²⁸, Tajikistan²⁹ and Cyprus³⁰, to mention but a few. In Estonia, in 1998, President Lennart Meri appointed an International Commission to look into the historical record of the massive violation of human rights in the region during the Soviet and German occupations between 1940 and 1944.³¹ The main purpose of the Estonian Commission was to promote national reconciliation and to redress the unresolved legacy of past abuses. As in the case of the Commission in Guatemala,³² the Estonian Commission is not a judicial or prosecutorial body, and there is no intention of instituting legal proceedings against anyone. It has now become fashionable and expected for political leaders to publicly acknowledge past atrocities as a form of atonement, and to accept

²⁶ Decision on the Formation of the Truth and Reconciliation Commission, *Federal Republic of Yugoslavia Official Gazette*, 29 March 2001. The task of the Commission is, amongst others, to conduct “investigative activities aimed at disclosing documentation on social, ethnic and political conflicts which led to war thus casting light on the chain of events and its causes.” The mandate of the Commission is expected to cover the period before the disintegration of the Socialist Federal Republic of Yugoslavia until the end of the Kosovo conflict. See Decision on the Formation of the Truth and Reconciliation Commission *Federal Republic of Yugoslavia Official Gazette*, 29 March 2001. The Commission will not have amnesty granting powers. The new government passed a law granting amnesty (excluding war crimes, crimes against humanity and genocide committed during the war) to ethnic Albanians and Serbs in Serbia, Montenegro and Kosovo who were victims of the previous regime. See, for example, the Amnesty Act of the Republic of Serbia, *Službeni Glasnik Republike Srbije*, No. 11/2001, 15 February 2001. Cf. *Address by the Registrar of the ICTY, Mr. Hans Holthuis, at the Conference "In Search of Truth and Responsibility: Towards a Democratic Future"*, 19 May 2001, Belgrade, Serbia (“...a reconciliation process which is set to understand a past conflict cannot start by declaring an amnesty for all indicted war criminals or those which may, in the future, have to be held accountable for serious violations of humanitarian law, either by the Tribunal or by the national courts.”) p.3.

²⁷ UNTAET Regulation 10 (2000).

²⁸ Section 160 of the Interim Constitution of the Democratic Republic of the Congo of 2003.

²⁹ Article 7, para 11 of the Statute of the Commission on National Reconciliation, 21 February 1997, provided *inter alia* that one of the functions and powers of the Commission was to facilitate the:

Adoption of a Reciprocal Pardon Act and drafting of an Amnesty Act to be adopted by the Parliament and the Commission on National Reconciliation.

³⁰ See *Report of the Secretary-General on his Mission of Good Offices in Cyprus* S/2004/437, 28 May 2004, Comprehensive Settlement of the Cyprus Problem, (Annex VIII: Reconciliation Commission).

³¹ *Report of the Estonian International Commission for the Investigation of Crimes Against Humanity*, January 1999, Tallinn, Estonia.

³² *Memory of Silence: Report of the Commission for Historical Clarification* (1999).

some degree of responsibility.³³

The South African Truth and Reconciliation Commission, which has probably been one of the most effective and internationally renowned truth commissions to date, may assist to explain the dilemmas and complexities of transitional justice. The Commission differed from its over twenty predecessors in several ways. However, its most notable feature was the TRC's power to grant amnesty. In its *Final Report* of 28 October 1998, to the then President, Nelson Mandela, the Commission amongst other things, acknowledged that amnesties granted for crimes of apartheid were not compatible with international law.³⁴ The Commission further concluded that even though apartheid was "perfectly legal" in South Africa, "as a form of systematic racial discrimination and separation it constituted a crime against humanity."³⁵ Equally, the Commission concluded, "the fact the apartheid system was a crime against humanity does not mean that all acts carried out in order to destroy apartheid were necessarily legal, moral and acceptable...even where the cause was just."³⁶ The Commission then pleaded with the international community to recognise its amnesty process:

The definition of apartheid as a crime against humanity has given rise to a concern that persons who are seen to have been responsible for apartheid policies and practices might become liable to international prosecutions. The Commission believes that international recognition should be given to the fact that the Promotion of National Unity and Reconciliation Act, and the processes of this Commission itself, have sought to deal

³³ The British Prime Minister, Tony Blair apologised for Britain's role in the Irish Potato Famine of 1845-1851, and Pope John Paul II apologised to the Jews for the role of the Roman Catholic Church during the Second World War. In Australia, Prime Minister John Howard was attacked by his parliament for failing to apologise for his country's policies towards the Aboriginal and Torres Strait Island peoples. See *Final Report of the Council for Aboriginal Reconciliation to the Prime Minister and the Commonwealth Parliament* (2000). In 2001, the Belgian government established a commission of inquiry to investigate the death of Patrice Lumumba in the DRC and later accepted responsibility for his death. For more on examples of public apology, acknowledgement and related issues see Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (1998) 113 *et seq*; Roy Books (ed.), *When Sorry Isn't Enough: The Controversy over Apologies and Reparations for Human Injustice* (1998).

³⁴ *Truth and Reconciliation Commission Report*, October 1998, vol. 1, p.102.

³⁵ *Ibid.*, vol.5, p.222.

³⁶ *Ibid.*, vol.2, p. 69.

appropriately with the matter of responsibility for such policies.³⁷

The Commission's view defies the traditional approach in the four Geneva Conventions of 12 August 1949, namely, that there is a duty on member states to prosecute grave breaches, which includes crimes against humanity.³⁸ As a matter of policy, it is doubtful whether third states will heed the Commission's plea and recognise amnesties granted for crimes of torture and apartheid.³⁹ Critics have also voiced the view that the amnesty process of the South African TRC is out of step with international law.⁴⁰ Similar situations are likely to arise in future. John Dugard⁴¹ describes this problem as follows:

It is unlikely that this practice [of granting amnesty] will disappear simply because of the establishment of an International Criminal Court and the assertion that there is an obligation on states to prosecute or extradite those suspected of the crimes of genocide, war crimes, crimes against humanity or torture. A powerful military may still stand unrepentant and eager to resume power in the shadow of civilian rule - as in Argentina and Chile. Or amnesty may be the price to be paid for a settlement - as in the case of South Africa. In these circumstances, amnesty holds out more hope for peace, stability and reconciliation than prosecution before national or international courts...It is hardly to be expected that a military or political leadership accustomed to international travel will willingly surrender power if it knows that its days of foreign travel are over, and that by transferring power to a civilian, democratic regime it will sentence itself to confinement within its own territory.

³⁷ *Ibid.*, vol. 5, para.144.

³⁸ Geneva Convention I (article 49); Geneva Convention II (article 50); Geneva Convention III (article 129); Geneva Convention IV (article 146). Grave breaches in terms of the four conventions include wilful killing, torture, inhuman treatment, wilfully causing great suffering or serious injury to body or health, destruction of property, unlawful treatment of civilians such as denial of fair trial and solitary confinement.

³⁹ Roman Boed, "The Effects of a Domestic Amnesty on the Ability of Foreign States to Prosecute Alleged Perpetrators of Serious Human Rights Violations" 33/2 *Cornell International Law Journal* (2000) 297.

⁴⁰ John Dugard, "Is the Truth and Reconciliation Process Compatible with International Law? An Unanswered Question" 13 *South African Journal on Human Rights* (1997) 258; Ziyad Motala, "The Promotion of National Unity and Reconciliation Act, the Constitution and International Law" XXVIII *Comparative International Law Journal of Southern Africa* (1995) 338; Ziyad Motala, "The Constitutional Court's Approach to International Law and its Method of Interpretation in the *Amnesty Decision*: Intellectual Honesty or Political Expediency?" 21 *South African Yearbook of International Law* (1996) 29; Pheno Rakate, "Reconciling Amnesties with Universal Jurisdiction in South Africa: A Response to Garth Meintjies & Juan Mendez" 3 *International Law FORUM du droit international* (2001) 42.

⁴¹ John Dugard, "South Africa's Truth and Reconciliation Process and International Humanitarian Law" 2 *Yearbook of International Humanitarian Law* (1999) 254 at 262.

Richard Goldstone⁴² puts the matter thus:

... Some of the vexed legal problems, which will confront the prosecutor, will in my view stem from amnesties approved by democratic legislatures representative of victims of gross human rights violations such as South Africa. Will neighbouring countries like Botswana and Swaziland apply for the extradition of apartheid criminals to face trial in their respective countries? Does it make any difference whether such crimes were committed as cross-border raids or on foreign soil such as the bombing of the ANC headquarters in London despite having been granted amnesty by the Truth and Reconciliation Commission? These are indeed vexed and difficult questions, which will certainly confront the ICC prosecutor.

Hence, according to Villa-Vicentio,⁴³

...It is a debate that should not be ignored. Each alternative carries within it a set of problems.

The potential tension between the International Criminal Court (ICC) and alternative forms of justice remains a moot question. This tension was evident when appeals for the recognition of amnesty were raised during the United Nations Plenipotentiary Conference for the ICC in Rome, Italy, in 1998, which resulted in the Rome Statute. No agreement was reached on how the future court should deal with efforts by states to resolve conflicts other than through prosecution and punitive justice when dealing with crimes within its jurisdiction.⁴⁴ With a number of lawsuits filed against current and former heads of states under the Belgian Law on Universal Jurisdiction for International Crimes, the concern of opponents of the ICC that universal jurisdiction over international crimes might become politicised, seems valid.⁴⁵ This politicisation poses a serious danger for amnesties such as those granted by the South African TRC. It is against this background that this study seeks to explore the question: Given the

⁴² Richard Goldstone, *For Humanity: Reflections of a War Crimes Investigator* (2000) 121-122.

⁴³ Charles Villa-Vicentio, "Why Perpetrators should not Always be Prosecuted: Where the International Criminal Court and Truth Commission Meet" 49 *Emory Law Journal* (2000) 205 at 220.

⁴⁴ Ntanda Ntseko, "The International Criminal Court: Jurisdiction and Other Issues" 10 (1) *Criminal Law Forum* (1999) 87.

⁴⁵ Political leaders subject to lawsuits by victims of international crimes under the Belgian Law before Belgian courts by victims of international crimes include PLO leader, Yasser Arafat, Prime Minister of the State of Israel, Ariel Sharon, former Iraqi President, Saddam Hussein, and the former Chad dictator,

international rules that govern, or do not govern, amnesties, how should international bodies like the ICC respond to amnesties granted as part of a negotiated peace settlement?

1. 3. Purpose of, and Rationale for the Study

In order to answer the above question, this study will firstly attempt to clarify the position in international law on amnesties granted for gross and systematic human rights violations in post-conflict societies by an examination of African state practice and *opinio juris*. With the advent and subsequent ratification of the ICC Statute and the Constitutive Act of the African Union (AU), this study will consider the efficacy of the practice of African states on the question of amnesty as a tool for peace and reconciliation during the post-conflict period. This study is important to the extent that it will establish the future place of amnesties in the settlement of armed conflicts, and the possible relationship between the ICC and alternative *fora*, such as truth commissions, in the dispensation of justice. The study will contribute to legal certainty, and, it is hoped, assist states to bring their municipal law in line with international law.

While some research on amnesty has been undertaken, state practice on this subject has been restricted to the Latin American experience, mainly because the post-conflict mechanisms in Latin America resulted in truth and reconciliation commissions. What seems to be lacking is a comprehensive study of state practice in African states, not only with regard to the circumstances which give rise to amnesty, but also with regard to its status in international law. This is important particularly in light of the fact that the African continent accounts for a number of the protracted armed conflicts in the world today. The resolution of some of these conflicts will, in one way or another, include the

granting of amnesty to those responsible for serious human rights violations. The expressed political will of African leadership to prevent future atrocities on the continent through such mechanisms as the AU and the New Partnership for Africa's Development (NEPAD) is particularly significant and hopeful. However, at this stage, it is too early to judge the extent to which such commitments are likely to be successfully implemented.

The specific aims of this study are:

- To undertake a theoretical and historical overview of the origin and development of amnesty from antiquity to the modern era;
- To examine and clarify the status of amnesty under general and specific human rights treaties and customary international law by the analysis of state practice – including *opinio juris* – with emphasis on relevant African states;
- To examine, in light of international rules that do govern (or do not exist to govern) amnesties, the extent to which international organisations like the United Nations, i.e. its principal organs and specialized agencies, have handled and influenced the development of jurisprudence regarding amnesties that formed part of a negotiated peace settlement.
- To make recommendations by proposing a set of Guidelines Regarding Amnesties for Gross and Systematic Human Rights Violations in International Law.

1. 4. Existing and/or On-Going Research on Amnesty

With the formation of new states through post-colonial independence and waves of democratisation in the late 19th century, the initial research on amnesty laws focused primarily on the municipal law (penal, criminal and constitutional law) and implications of such amnesties. For example, the doctoral thesis of Leslie Elazer Sebba, *Pardon and Amnesty: Juridical and Penological Aspects*, submitted in June 1975 at the Hebrew University of Jerusalem, Israel, is an examination of the penal aspects of amnesty and pardons within the context of the newly independent state of Israel. In the wake of the democratisation process in the late 1960s and 1970s, issues of impunity gained momentum in academic circles with the increased appearances of truth commissions in the Americas.⁴⁶

Before the end of the Cold War, civil society and non-governmental organisations lobbied governments, the United Nations, and policy makers to end the culture of impunity perpetuated by the granting of amnesties for serious violations of human rights. Consequently, in 1982/1983, the United Nations Economic and Social Council (ECOSOC) commissioned a study on the political and social aspects of impunity. The UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities undertook this study. The Commission's Special Rapporteur, Louis Joinet, submitted a number of reports on *Questions of Perpetrators of Human Rights Violations*. In his study, which he concluded in 1997, Joinet found that impunity is a serious impediment to the enforcement of human rights worldwide and proposed a *Set of Principles for the Protection of and Promotion of Human Rights through Action to Combat Impunity*

⁴⁶ For an in-depth analysis of these developments, see Priscilla Heyner, "Commissioning the Truth: Further Research Questions" 17 *Third World Quarterly* (1996) 19.

(“Joinet Principles”)⁴⁷. In 2003, the UN Human Rights Commission in its resolution 2003/72 appointed an independent expert, Diane Orentlicher, to conduct an independent study on best practices, including recommendations, to assist states to strengthen their domestic capacity to combat all aspects of impunity, taking into account the Joinet Principles.⁴⁸ Orentlicher, in her report to the Commission, concluded that the Joinet Principles as a whole have provided an influential framework for domestic measures aimed at combating impunity and recommended that the Commission appoint an independent expert to update Joinet’s Principles.⁴⁹ Similarly, in 1993, during the UN World Conference on Human Rights in Vienna, the NGO community called on member states to adopt legislation to end the culture of impunity.⁵⁰

With the advent of the ICTR and ICTY, NGOs and civil society continued to pressurise governments to end the culture of impunity and to punish those responsible for gross and systematic violations of human rights.⁵¹ A number of initiatives have been, or are currently being, undertaken by NGOs, civil society, inter-governmental bodies, learned

⁴⁷ See *Progress Report on the Question of Perpetrators of Human Rights Violations by Mr. Joinet, to the sub-Commission on Prevention of Discrimination of and Protection of Minorities*, UN Doc. E/CN.4/Sub.2/1997. The Joinet Principles are discussed in Chapter Six of this study.

⁴⁸ See *Independent Study on Best Practices, Including Recommendations, to Assist States in Strengthening their Domestic Capacity to Combat all Aspects of Impunity*, by Professor Diane Orentlicher, E/CN.4/2004/88, 27 February 2004.

⁴⁹ *Ibid.*, para. 65.

⁵⁰ *Vienna Declaration and Programme of Action, World Conference on Human Rights*, 1993, UN Doc. A/CONF./57/24, para. 60.

⁵¹ A key feature of the negotiations leading to the adoption of the Rome Treaty in 1998 was the involvement and positive contribution made by NGOs, which lobbied for the criminalisation of the use of child soldiers, rape and other sexual offences in the Treaty. Historically, gender-related crimes have been ignored in international conventions dealing with war crimes. In fact, the Geneva Conventions of 12 August 1949 do not refer to rape. The NGO community continues to play an important role in lobbying governments to ratify the Rome Treaty. The Coalition for an International Criminal Court, which represents more than 1000 lobbying groups worldwide, continues to put pressure on states and other stakeholders to speed up the process of setting up the permanent court. The NGO community has previously played an important role in influencing decision-makers to create the *ad hoc* UN Criminal Tribunal for Yugoslavia by the UN Security Council in 1993. See also Richard Goldstone, *For Humanity: Reflections of a War Crimes Investigator* (2000) 79.

societies and scholars with an interest in issues of transitional justice. At the same time, literature on this debate continues to grow.⁵²

A notable recent work with strong legal input is Angelika Schlunck's *Amnesty versus Accountability: Third Party Intervention Dealing with Gross Human Rights Violations in Internal and International Conflicts*, published in 2000.⁵³ The thrust of this work is the role third parties play in shaping the outcomes of peace settlements. Case studies examined include Eastern Europe, Latin America and South Africa.

Another recent work by Andreas O'Shea, *Amnesty for Crime in International Law and Practice: Towards the Development of Principles with Respect to Limitations on the Granting of Amnesty through Municipal Amnesty Laws from an International Legal Perspective*,⁵⁴ and its sequel, *Amnesty for Crimes in International Law and Practice* published in 2002, is an analysis of amnesty laws under modern international criminal law. It has a bias towards the Latin American experience and advocates for the international recognition of amnesty in the form of a protocol to the Rome Statute. As will be shown in this work, this study, unlike that of O' Shea, proposes a balanced approach model as a theoretical device to analyse amnesty laws and concludes that given the current move towards universal criminal jurisdiction, and the fact that the Rome Statute is the result of many attempts since the First World War to establish a permanent international criminal court, it is unlikely that states will agree on another international agreement that recognises municipal amnesty laws. Such an agreement

⁵² See Mary Penrose, "Impunity - Inertia, Inaction, and Invalidity: A Literature Review" 17 (2) *Boston University International Law Journal* (1999) 269.

⁵³ Angelika Schlunck, *Amnesty versus Accountability: Third Party Intervention Dealing with Gross Human Rights Violations in Internal and International Conflicts* (2000) 1 *et seq.*

⁵⁴ PhD Thesis, University of the Witwatersrand, 12 January 2001.

may be seen as an attempt to undermine the mandate of the ICC and international criminal prosecution in general. On the contrary, this study proposes a set of policy guidelines of non-binding legal effect as a guide to the practice of states and international organisations like the ICC when dealing with cases that involve amnesties granted as part of a negotiated peace settlement.

The amnesty debate is becoming a subject not only of increased academic analysis, research and discussion, but also an issue on the agendas of non-governmental organisations.⁵⁵ Further indication that a protocol on amnesties will not receive international support is shown in the recent codification initiatives by several non-governmental organisations, which have produced principles concerning the exercise of universal jurisdiction which reject amnesty in favour of the duty to prosecute and compensate victims for human rights violations. The latter are key elements of the balanced approach model proposed in this study. These initiatives include the *Amnesty International 14 Principles on the Effective Exercise of Universal Jurisdiction* (1999)⁵⁶ and the *Final Report of the International Law Association on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences* (2000),⁵⁷ which reject amnesties and all other forms of impunity designed to shield perpetrators of gross human rights violations.

⁵⁵ See Helen Duffy, “Amnesty Law: Recent Developments in the Establishment of International Accountability Norms in International Law”, Friday Lecture Series, Lauterpacht Research Centre for International Law, Cambridge University, 2 November 2001 (on file).

⁵⁶ AI Index; IOR 53/01/99, May 1999. See for example, principle 3 (no immunity for past offences), principle 4 (no statute of limitations), principle 6 (national laws and decisions designed to shield persons from prosecution cannot bind courts in other countries), principle 11 (interests of victims, witnesses and families must be taken into account).

⁵⁷ Committee on Human Rights Law and Practice, International Law Association, London Conference (2000).

Similar notable NGOs initiatives are the *Princeton Principles on Universal Jurisdiction* (“Princeton Principles”). These principles, adopted by leading international law experts in August 2001 at Princeton University USA, are an attempt to clarify issues of universal jurisdiction with regard to gross human rights violations.⁵⁸ Of the fourteen Princeton principles, principle seven rejects amnesties for serious crimes under international law.⁵⁹ A sister set of principles, the *Cairo-Arusha Principles on Universal Jurisdiction* were adopted in 2002 by African scholars and also rejected amnesties for serious human rights violations on the African continent.⁶⁰ The *Brussels Principles Against Impunity and for International Justice* (2002)⁶¹ adopted by the Brussels Group of International Jurists, rejects amnesties and upholds the rights of victims to seek protection and to obtain redress and reparations.⁶² Principle 10 (1) & (2) of the Brussels Principles, in part, provides:

1. Measures of amnesty, pardon and other such measures may not undermine the obligation imposed on states by international law to investigate serious crimes, to bring the presumed authors to justice and to grant redress to the victims.
2. This principle applies at the end of armed conflicts and in processes of reconciliation or transition to democracy.

Lastly, the International Centre for Transitional Justice (ICTJ), based in New York City, seeks to promote accountability by giving assistance to countries which have just

⁵⁸ Stephen Macedo (ed.), *Princeton Principles on Universal Jurisdiction* (2001) 1 *et seq.*

⁵⁹ Principle 7 – Amnesties provides:

1. Amnesties are generally inconsistent with the obligation of states to provide accountability for serious crimes under international law...
2. The exercise of universal jurisdiction with respect to serious crimes under international law...shall not be precluded by amnesties which are incompatible with the international legal obligations of the grantig state.

⁶⁰ Reprinted in *Africa Legal Aid Quarterly* October/December (2002).

⁶¹ The 23 Principles were adopted at a Colloquium, “The Fight Against Impunity: Stakes and Perspectives”, Brussels, Belgium, 11 March 2002 (on file with the author).

⁶² *Ibid.*, Principles 16 & 24.

emerged from mass atrocities, repressive regimes, or armed conflict, to respond effectively to gross human rights violations. The ICTJ is currently undertaking a long-term project on *Countering Amnesties: Preserving the Right to Justice*, which examines why amnesty laws have undermined the prosecution of gross human rights violations globally.⁶³

The difference between the works mentioned above and this study, is that the former deal with the question of amnesties as *one* aspect of universal jurisdiction. This study attempts to develop a model specifically *for* amnesties based not only on state practice, but also on the interpretation of peace agreements, human rights treaties and other recent legal instruments such as the Constitutive Act of the African Union and the Statute of the ICC.

1. 5. Limitations of the Study

There are at least two limitations encountered by this study. Firstly, the inaccessibility of the legislation and rulings of the municipal courts of African countries was a serious impediment. As a result, only two countries could be examined as detailed case studies, namely, South Africa and Sierra Leone. Secondly, the choice of countries studied here is informed by the extent to which democratisation has been consolidated. Although peace processes are underway elsewhere in Africa (Sudan, the Democratic Republic of the Congo (DRC), Burundi and Somalia) the democratisation processes in these countries have not yet sufficiently crystallised to allow reliable conclusions. In the DRC and Burundi, for example, pockets of resistance continue to erupt from time to time despite the efforts of the United Nations, regional and other international role players to bring

⁶³ On the work of the ICTJ see <http://www.ictj.org/>.

about peace in the Great Lakes region. There are legitimate fears of renewed attacks on Rwanda by rebel forces, such as the *Interhamwe*, that uses the DRC as its springboard. The Great Lakes region remains volatile and unpredictable. However, amnesty is one of the key features of the peace agreements in the DRC and Burundi, and where appropriate, reference will be made to these developments.

Finally, the topic of amnesty can be approached from several different disciplines. These include international relations, peace studies, political science, military science, *etc*, and it would be interesting from a military science perspective, to establish why the military engage in armed conflicts or commit human rights violations for which amnesty is later sought. However, this study will focus only on the extent to which international law recognises or limits the granting of amnesties.

1. 6. Outline of Chapters

The study is divided into three main parts, each made up of three chapters. The study has a total of nine chapters.

Part I explains the research problem, its scope, the terminology used in the study and outlines the historical genesis and evolution of amnesty in classical and contemporary international law.

Part II examines the tensions raised by amnesty and justice and their efficacy as tools for peace and justice in transitional democracies; the basis for granting amnesty under both treaty and customary international law; and lastly, evaluates and critiques the role of the United Nations, i.e., principal organs, subsidiary and specialised agencies, in the

development of the law that governs amnesties granted for gross human rights violations.

Part III discusses modern state practice on amnesty laws with specific reference to South Africa and Sierra Leone. The study sets out the conclusions and recommendations drawn from modern state practice, and then charts the way forward with a set of proposed guidelines on amnesties.

Finally four appendices are included, which are examples of amnesty agreements/laws: one passed by the British colonial administration in Natal in 1902 during the Anglo-Boer War; a recent amnesty agreement reached by warring parties in Burundi; a public notice on amnesty by Paul Bremer III, the Administrator of the Coalition Provisional Authority in Iraq (2003); and lastly the Amnesty Law No. 2 for 2004 passed by the Iraqi Transitional Government of Prime Minister, Iyad Allawi, on 7 August 2004.

CHAPTER TWO

CONCEPTUAL CLARIFICATIONS AND THE MEANING OF AMNESTY

A text without a context is a pretext
Jesse Jackson

1. Introduction

There is no doubt that, in both literature and peace agreements, there has been confusion about the precise meaning and usage of the concept “amnesty” *vis-à-vis* similar terms used, rightly or wrongly, to characterise: “acts of forgiveness/forgive and forget,” “act of mercy or clemency”, “statute of limitation”, “general pardon,” “immunity,” “impunity,” “indemnity” and “oblivion.”

Broadly, these concepts indicate a change of attitude, which occurs when a sovereign elects not to exercise a legal claim against an offender, with the result that all or some of the possible punitive consequences of a criminal conduct are removed. The sovereign has several options, and acts of clemency or forgiveness may take different forms - partial, conditional or absolute - depending on the circumstances of each case.

It is common to see these concepts used interchangeably with amnesty, and sometimes to express the same idea. This confuses and conflates the purpose, understanding and precise meaning of amnesty and other associated concepts.⁶⁴ Although there is some overlap, these concepts do not always mean the same thing and hence warrant clarification. Without providing an exhaustive list, the purpose of this chapter is to clarify key concepts associated with amnesty, which are commonly used in the literature and which result in confusion and misunderstanding. The meaning of gross and systematic human rights violations, and the relationship between human rights law and

⁶⁴ For an in-depth analysis of the various concepts associated with amnesty see Kathleen Moore, *Pardon*,

international humanitarian law, is also examined. Finally, working definitions of amnesty and gross and systematic human rights violations are formulated.

2.1. The Meaning of Amnesty

It is trite to say that the concept of amnesty granted at the end of hostilities, appears to have existed in most societies.⁶⁵ Etymologically, the term “amnesty” derives from the Greek⁶⁶ word “*amnesia*” which means “loss of memory or an act of oblivion/forgetfulness.”⁶⁷ Hence, in etymological terms, the oldest term is “oblivion” and it appears frequently in old peace treaties to denote forgiveness granted to a group of persons guilty of crimes committed during a war.⁶⁸ In the *Encyclopaedia of Human Rights*, amnesty is defined as:

... the absolution, or overlooking, by a government of an offense of a political nature, such as treason or rebellion, frequently on condition that the offender resume his or her duties as a citizen within a prescribed period.⁶⁹

The *Dictionary of International Law and Diplomacy* defines amnesty as:

...immunity for acts done during the war without sufficient authority or in excess of authority. Provision for these matters is usually included in the treaty of peace.⁷⁰

Mercy, and the Public Interest(1989) 1 *et seq.*

⁶⁵ In French and German, for example, the term “amnestie” is used. In Spanish, the term “amistiar” means “to grant an amnesty to” and “amnistiada” is a person to whom amnesty has been granted. *Russian* uses “amnestija”. In Kiswahili, a language widely spoken in West Africa, the word “kusamehe/msamehe” which generically means pardon, or amnesty, is used. In Arabic, the term “*El Alfo*” is used to denote amnesty. In Hebrew, the term “*Hanina*” is used for both amnesty and pardon, except that the epithet “*klallit*” (“general”) is used to denote the generality of amnesty. The historical origins of amnesty are discussed extensively in Chapter Three of this work.

⁶⁶ Phillip Gave, *Webster’s Third New International Dictionary of the English Language* (1981).

⁶⁷ Henry Black, *Black’s Law Dictionary* (1990) 44.

⁶⁸ Edmund Osmanczyk, *The Encyclopedia of the United Nations and International Relations* (1990) 142; P.F Simon, “La clause d’amnistie dans les traites de la paix” 26 *Revue Generale de Droit International Public* (1919) 12.

⁶⁹ Edward Lawson, *Encyclopaedia of Human Rights* (1996) 73.

⁷⁰ Melquiades Gamboa, *A Dictionary of International Law and Diplomacy* (1973) 23.

In legal parlance, amnesty is therefore a sovereign act of forgiveness or general oblivion for past offences, often granted before a trial or conviction by a head of state, an executive or a legislative body, to a large group of persons guilty of specific conduct or crimes. Amnesty is granted, usually in a peace treaty or agreement, on condition that those responsible abandon a cause or hostilities.⁷¹ That is, the granting of amnesty is premised on certain conditions, such as the cessation of military attacks against the government of the day. As the definitions indicate, the effect of amnesty is to eliminate the punitive character of an illegal act directed against the security of a state. Amnesty also has the effect of eliminating either, or both, civil and criminal proceedings against individuals responsible for gross human rights violations committed with the support or tacit approval of state authorities. As a sovereign act, amnesty is usually granted for political crimes committed against the state such as treason⁷², sedition⁷³, rebellion and political uprisings.⁷⁴

⁷¹See Edward Baldwin (ed.), *Bouvier's Law Dictionary and Concise Encyclopedia* (1948) 19. R. S. Vason (ed.), *The Canadian Law Dictionary* (1980) 35, defines it as “an act of pardon by the Sovereign obliterating certain crimes of a class committed up to a specific date”. See also Norman Weisman, “A History and Discussion of Amnesty” 4 *Columbia Human Rights Review* (1972) 529.

⁷²Jonathan Burchell & John Milton, *Principles of Criminal Law* (1997), 672, defines treason as “any overt act unlawfully committed by a person owing allegiance to a state with intent to overthrow, impair, violate, threaten or endanger the existence, independence or security of the state or to overthrow or coerce the government of the state or change the constitutional structure of the state”. The crime of treason also includes actions such as taking up arms to force the government to adopt a different policy, or to replace the structure of the government. See *S v Mayekiso* 1988 (4) SA 739 (W).

⁷³Jonathan Burchell & John Milton, *Principles of Criminal Law* (1997), 683, define sedition as the “unlawful gathering together with a number of people, with the intention of impairing the authority of the state by defying or subverting the authority of its government, but without the intention of overthrowing or coercing the government.” Sedition differs from treason in that treason requires hostile intent to overthrow the government, while sedition requires the gathering of a number of people with the intent to defy or subvert the authority of the state. See *S v Zwane* 1989 (3) SA 253 (W).

⁷⁴A rebellion, and political violence, may be loosely defined as unlawful and intentional acts, by a number of people acting in concert to disturb public peace and security or infringe the rights of others or damage of property. See also Burchell & Milton, *Id.* at 609-613.

Based on the above, there are five defining elements to the concept of amnesty: it is a sovereign act of forgiveness; it is conditional upon fulfilment of certain obligations, such as ending a rebellion or an armed struggle; it is commonly granted to benefit a specific group of persons responsible for political crimes; it has the effect of eliminating the punitive character of an illegal act; and finally, it must be taken up within a certain period after which it is no longer available.

It is important to emphasise that amnesty comes in a variety of forms. The form depends entirely on the way in which the decision to grant amnesty is taken, the perpetrators and the crimes it is intended to indemnify. Hence, in many legal systems the law provides several grounds under which a person may be exempted from punishment. It is in this context that the similar concepts commonly used in the literature that are closely related to amnesty, such as “impunity”, “statute of limitations”, and “pardon”, warrant clarification in this study.

2. 2. Concepts Associated with Amnesty

2.2.1. Amnesty and Impunity

Literally, the term “impunity” means that the government does not investigate crimes committed, and that they are ignored or denied. Impunity is the result of a deliberate attempt by authorities to cover up or ignore certain human rights violations by taking no action against those criminally responsible. Impunity may take different forms depending on the circumstances of each case. Roberto Garreton⁷⁵ identifies four types of impunity, namely, legal, political, moral and historical.

⁷⁵ Roberto Garreton, “The Transition Process to Democracy in Latin America: An Analysis from the Perspective of Human Rights,” Paper Presented at a Conference in Celebration of a Decade of Democracy

Legal impunity occurs when legal means are used to ignore or deny victims of human rights violations justice through amnesty laws. Legal impunity further manifests itself when crimes committed are reserved for military courts, or national security laws are used to prevent future investigations or the prosecution of those responsible.

Political impunity occurs when those who were once dictators and assassins are legally elected as presidents, ministers, or congressmen after leaving office.

Moral impunity arises when, despite the crimes committed, the perpetrator justifies his actions on the basis that they were done to “save the county”, or “to protect certain values.” The perpetrator does not feel any remorse for his actions, or fear that he will one day be prosecuted and judged for what he has done.

Lastly, *historical impunity* takes place when the official lies of the past and ongoing years of oppression are presented as the truth, and the *true* history is presented as “a confrontation or as an internal struggle within the party.”⁷⁶

The Post-Second World War period offers a compelling illustration of how impunity manifests itself. After the end of the War, France ignored the collaboration of the Vichy regime and its participation in the Holocaust, and presented itself as a society which had opposed and fought against the Nazi government. It was only in the 1990s that trials of high-ranking officials of the Vichy regime put an end to this anomaly. Impunity is also evident when “show trials” are conducted, often by military courts, which result in

in South Africa, Durban, 22-25 January 2004 (on file) 4 -5.

⁷⁶*Id.* at p. 6.

punishment that is disproportionate to the gravity of the offence.⁷⁷ Another variant of impunity is the immunity which provides protection against prosecution for heads of state developed in international customary law.⁷⁸ This immunity prevents the application of remedies for victims of human rights violations.

The relationship between impunity and amnesty laws is to be found in the fact that in many cases amnesty laws serve as the source of impunity, especially where reconciliation is officially imposed on victims of gross human rights violations by the political elite. This is why the fight against impunity is never-ending. The fight does not end with holding those responsible criminally liable or in seeking the truth through truth commissions, but continues through activities of non-governmental organisations, artistic organisations and academic institutions to remind present and future generations of past atrocities in the hope of preventing similar actions in future and to nurture respect for human rights. The World Conference on Racism, Racial Discrimination, Xenophobia and Intolerance reminded us “we should never forget the Holocaust.”

2.2.2. Amnesty and Statute of Limitations

Another concept which may be associated with amnesty is the doctrine of the statute of limitations, which means that if investigations or prosecutions are not undertaken within a prescribed period, subsequent criminal or civil proceedings will be nullified on the basis that the timeframe within which such action should have been brought, has expired. However, it must be noted that serious violations of human rights and international humanitarian law such as war crimes, genocide and crimes against

⁷⁷ See, for example, Amnesty International, *“Disappearances” and Political Killings: Human Rights Crisis of the 1990’s* (1994) 158.

⁷⁸ See, for example, the ICJ’s decision in the *Democratic Republic of the Congo v Belgium* (“*International Arrest Warrant Case*”), 14 February 2002, 41 *International Legal Materials* (2004) 532.

humanity are not subject to a statute of limitations.⁷⁹ This means that those responsible for such offences must be prosecuted and held accountable irrespective of when such offences were committed.

2.2. 3. Amnesty and Pardon

A pardon is a prerogative act by the chief executive officer of a state, which involves the remitting, or forgiving, of a crime granted *ex gratia*. It is an act of forgiveness generally following on a criminal prosecution and may be absolute, unconditional or conditional.⁸⁰

A pardon is absolute when it frees the criminal without any condition whatsoever. It is conditional when its effectiveness depends on the fulfilment of certain criteria by the offender, such as age or gender. It is common practice in democratic countries for a head of state to exercise his or her powers to pardon prisoners, for example, on humanitarian grounds such as age, gender or terminal illness.

A pardon is usually granted to individuals any time after conviction or sentence. It serves a number of purposes, namely, to allow the accused to make a fresh beginning, because he or she has refrained from entanglement with the law and, thus, deserves an opportunity to start afresh; to correct miscarriages of justice; and to mitigate the harshness of a sentence.⁸¹ After 1996, the Advisory Legal Services Directorate of the Department of Justice and Constitutional Development of the Republic of South Africa,

⁷⁹ Article 29 of the Rome Statute provides that “[t]he crimes within the jurisdiction of the Court shall not be subject to any statutes of limitations.”

⁸⁰ See *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC). Goldstone J defined a pardon as “an act of grace, proceeding from the power entrusted with the executive of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed...”. Cf. Patrick Cowlshaw, “The Conditional Presidential Pardon” 28 *Stanford Law Review* (1975) 149.

⁸¹ Leslie Sebba, “Proceedings of the Symposium on Amnesty in Israel”, organized by the Institute of Criminology, The Hebrew University of Jerusalem, Faculty of Law, Jerusalem, 13-14 May, 1968, pp.vi-x (on file with the author).

based on past experiences with the granting of pardon by the President, developed general policy guidelines for applications for pardon in terms of section 84(2) of the 1996 Constitution of South Africa to clear criminal records.⁸² The policy document states that the consideration of applications for pardon must take three factors into account, namely, age of the offender at the time the crime was committed; the period which has lapsed since a conviction;⁸³ and finally, whether the applicant is of the opinion that he or she was not guilty of the offence. The policy document further states that a person may apply for pardon to clear his or her criminal record on a number of grounds, namely, to start a career in the public service, to obtain a firearm licence, to become a police officer in the South African Police Service, to obtain a professional driving permit, for emigration purposes, or to enable the applicant to register as a security officer.⁸⁴ This is because in all the cases mentioned above it is essential that the applicant clear his or her criminal record because the relevant laws require that a person cannot be granted certain rights and privileges if s/he has previous convictions.

It is common practice in many countries for the granting of pardons to coincide with important social events: the adoption of a new constitution; the birth of a new dispensation; and so forth.⁸⁵ Perhaps the main distinction between amnesty and pardon

⁸² Section 84(2)(j) of the 1996 Constitution provides that the President is responsible for pardoning or relieving offenders and remitting any fines, penalties or forfeitures. See the draft policy document of the Department of Justice and Constitutional Development, *Applications for Pardon in Terms of Section 84(2) (J) of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996), to Clear Criminal Records*, undated (on file with the author).

⁸³ Section 271A of the Criminal Procedure Act 51 of 1977 (as amended) provides that certain minor offences fall away as previous convictions after the expiry of a period of 10 years after conviction. If a conviction falls into that category, the South African Police Service Criminal Record Department in Pretoria is responsible for expunging such criminal record from that person's official criminal record (SAP 69). An offender with serious criminal convictions must apply in terms of section 84(2)(j) of the Constitution to have his or her criminal record expunged.

⁸⁴ *Ibid.*

⁸⁵ In February 2004, for example, the South African Council of Churches and the Inspecting Judge for Prisons, Judge Fagan, proposed a general pardon to mark the ten year celebration of South Africa's democracy. Similarly, the Gender Issues Directorate of the Department of Justice and Constitutional

is the generality of amnesty, compared to the individuality of pardon. A pardon is a matter of individual consideration, while amnesty is one of public interest. Another difference between the two is that pardon follows a conviction, while amnesty does not. However, this supposedly important distinction is sometimes blurred by another expression, “general pardon”, which is similar to amnesty. In practice, most amnesties are granted or approved by the legislature, while pardons fall to the discretion of the head of state or government.

Of particular importance is the fact that amnesty is intended to deal with a specific crisis in the life of a nation or community, often to bring about peace between two or more parties to a conflict. Amnesties can be distinguished from pardons by the fact that they are usually granted to a group of people (unnamed members of a class defined by a particular type of offence which they all committed), such as political detainees, or exiled or insurgent groups fighting the government, and granted on condition that they abandon their cause. The basis for the amnesty is the blanket “forgetting” of possible criminal charges against alleged criminals resulting from a change in public circumstances, or where conditions such as a state of war which made acts criminal, no longer exist or have faded in importance.⁸⁶ Between 1917 and 1918, for example, at the close of the First World War, President Warren Harding granted most Americans who opposed the US involvement in the war amnesty. Similarly, during the 1960s and 1970s, many Americans opposed to the Vietnam War fled the country or went into hiding to avoid military service. At the end of the war, former US President, Jimmy Carter,

Development has proposed pardons for battered women convicted of, and sentenced for, murdering their abusive partners/husbands. On the legality of pardons in South Africa see *President of the Republic of South Africa v Hugo* 1997(4) SA 1(CC). The Constitutional Court rejected an argument that the President’s prerogative powers to pardon a certain category of prisoners was not subject to review by the courts.

⁸⁶ Kathleen Moore, *Pardons: Justice, Mercy, and the Public Interest* (1988) 4 – 33.

granted them amnesty on the basis that the conditions that made such acts criminal no longer existed.⁸⁷ Pardon, therefore implies forgiveness, while amnesty indicates reasons for overlooking or forgetting the offence.

The amnesty granted to participants of the military and political confrontation in the Republic of Tajikistan, in June 1997, is one example of how amnesty, unlike pardon, is about the blanket “forgetting” of criminal charges. The Commission on National Reconciliation was responsible for the implementation of the amnesty provided for in the 1996 General Agreement on Establishing Peace and National Accord in Tajikistan, between the government of President Rakhmonov and the leader of the United Tajik Opposition, S.A. Nuri.⁸⁸ The amnesty law empowered the Commission on National Reconciliation:

1. To annul the convictions of those sentenced to imprisonment, regardless of their duration, and the convictions of those sentenced to other punishment who took part in the political and military confrontation from 1992 up to the adoption of the present Amnesty Act.
2. To discontinue all criminal cases under proceeding and investigation and cases not considered by courts, with regard to persons affected by paragraph 1 of the current Act.
3. Criminal charges will not be brought against persons who committed crimes against the State during political and military confrontation.
4.
5. An amnesty erases previous conviction record.⁸⁹

⁸⁷ *Ibid.*

⁸⁸ Paragraph 4 of the Agreement between the President of the Republic of Tajikistan, E. Sh. Rakhmonov, and the leader of the United Tajik Opposition, S.A. Nuri, on the results of the meeting held in Moscow on 23 December 1996 provided that:

There was a need to implement a universal amnesty and reciprocal pardoning of persons who took part in the military and political confrontation from 1992 up to the adoption of the Amnesty Act.

See www.c-r.org/accord/tajik/accord (accessed 15 June 2004).

⁸⁹ Law on Amnesty to the Participants of the Political and Military Confrontation in the Republic of Tajikistan, June 1997. See www.C-r.org/accord/tajik/accord/keytext (accessed 15 June 2004).

A further distinction between pardon and amnesty lies in their practical legal effects. The effects of the two may differ depending on the circumstances.⁹⁰ Unlike pardon, amnesty in most common law jurisdictions is the blanket *forgetfulness* of the offence, which completely obliterates the perpetrator's culpability and criminal record, hence the expression “forgive and forget” or “forgive and forget the whole thing.” In Continental Europe, the amnestied offender is regarded as having a “clean slate”, and the convicted person is treated as innocent. However, in the case of a pardon the accused’s culpability may still stand.

The general rule is that pardon follows on conviction and sentence, but can, in certain instances, precede them. As the US Supreme Court held in *Ex Parte Garland*⁹¹, the pardoning power “...may be exercised at any time after the commission either before legal proceedings are taken, or during or after conviction and judgement.” Similarly, in the *General Security Service Pardon* case,⁹² the Israeli Supreme Court considered petitions relating to the decision of the President of Israel to pardon the Head of the General Security Service (GSS), and three of his assistants, in respect of all the offences attributed to them in connection with the incident known as “Bus No.300”. The pardons were granted by the President, acting in terms of section 11(b) of the Basic Law, which empowered him “to pardon offenders and to lighten penalties by the reduction or commutation thereof.”

⁹⁰ Lawrence Freeman, “An Historical Justification and Legal Basis for Amnesty Today” 515 *Law & Social Order* (1971) 523 -524.

⁹¹ 71 U.S. (4 Wall) 333 (1866) at 380.

⁹² Translated by Julius Kopelowitz & Asher Felix Landau, in *Selected Judgements of the Supreme Court of Israel*, vol. VI (1986) 1 *et seq.*

The main issue raised in the petitions was whether the President had the power to pardon persons before conviction. The court held that the pardoning power involves a conflict between two important interests, namely, equality before the law, and the protection of the security of the state. The President had to balance the two when making his determination whether to pardon the Head of the GSS and his assistants. The majority of the court interpreted section 11(b) as empowering the President to pardon offenders before and after conviction, given the conflicting interests he had to weigh up when making his decision. However, Judge Barrak dissented, holding that section 11(b) should not be interpreted to mean that Presidential powers are paramount over those of the legislature and the judiciary, thus giving the President broad and unfettered powers over other branches of government. According to Barrak, such powers are residual, and can only be exercised after other authorities namely, the police and the courts, have exhausted their powers, that is, after a proper investigation has been conducted and the accused has been charged and convicted by the courts. He accordingly held that the pardons granted were void and of no effect.

The legal consequences of a pardon and amnesty vary from one country to another, and sometimes the distinction is technical rather than substantive. The French Civil Code, for instance, makes a distinction between *grace amnistiante* and *amnistie judicare*. *Grace amnistiante* is granted to a single person or to a few persons, following punishment and a jail sentence, and *amnistie judicare* is granted to a group of persons without a trial or a conviction (amnesty).

Unlike amnesty, the effects of a pardon are unclear in some jurisdictions. In England, a full pardon clears the person of all wrongdoing, and he may take legal action for

defamation against anyone who thereafter refers to him as a convicted criminal.⁹³ In the United States of America, the matter is not so clear.⁹⁴ In 1974, the incumbent President Gerald Ford granted full, free and absolute pardon to former ex-President Richard Nixon in the wake of the Watergate scandal and Nixon's resignation, for "all offenses against the United States" committed during his term as President of the United States.⁹⁵ The pardon closed the door on any future prosecution of Nixon for any crime committed during his term as President.⁹⁶ Nixon's pardon stirred up some debate and controversy.⁹⁷ It was argued that Ford's action was unfair and, possibly, unconstitutional. Heavy reliance was placed on the US Supreme Court decision in *Ex Parte Garland*.⁹⁸ In this case Garland had been pardoned for his participation in the 1865 rebellion of the American Civil War of Independence. The pardon was granted to Confederate officials and soldiers after the Civil War. When he sought admission to practise law he was required to take an oath that he had not participated in the rebellion. Since he could not take the oath, he petitioned the US Supreme Court to be allowed to pursue his practice without taking the oath. The US Supreme Court held that the statute was unconstitutional because it imposed punishment for acts which were not punishable, and

⁹³ Lawrence Freeman, "An Historical Justification and Legal Basis for Amnesty Today" 515 *Law & Social Order* (1971) 523 -524.

⁹⁴ Mark Zima, "The Law of Pardon" 75 *Annual Survey of American Law* (1974) 179.

⁹⁵ The US Constitution Art II (1) provides the President with the "Power to grant reprieves and Pardons for Offences against the United States except in Cases of Impeachment." See Leonard Boudin, "The Presidential Pardons of James R Hoffa and Richard M. Nixon: Have the Limitations on the Pardon Power been Exceeded?" 48 *University of Colorado Law Review* (1976) 1.

⁹⁶ Brian Kolt, "Pardon Me? The Constitutional Case against Presidential Self-Pardons" 106 *Yale Law Journal* (1996) 779.

⁹⁷ Regarding the presidential pardon debate in the United States. See, for example, William Duker, "The President's Power to Pardon: A Constitutional History" 18 *William & Mary Law Review* (1977) 475; Christopher Smith & Scott Johnson, "Presidential Pardons and Accountability in the Executive Branch" 35 *Wayne Law Review* (1989) 1113; Janice Brown, "The Quality of Mercy" 40 *UCLA Law Review* (1992) 327; Richard Saliterman, "Reflections of the Presidential Clemency Power" 38 *Oklahoma Law Review* (1985) 257.

⁹⁸ 71 U.S. (4 Wall) 333 (1866).

that Congress could not impose a punishment for offences the President had pardoned.⁹⁹

Constitutions of most countries around the world contain provisions enabling the president or head of state, whichever the case may be, to grant pardon under certain circumstances.¹⁰⁰ The Constitution of the Russian Federation of 12 December 1993 is one exceptional case, which, unlike most constitutions, clearly spells out the powers and authority for the granting of amnesty and pardon. As Russia is a federal state with powers shared between federal and state authorities, issues of pardon and amnesty fall exclusively within the federal jurisdiction.¹⁰¹ The President of the Russian Federation has the power to grant pardon to a specific person.¹⁰² Everyone sentenced for a crime has a right to plea for pardon.¹⁰³ The procedure followed is that the application for pardon is sent to the Presidential Office, Department for Issues of Pardon, which then does the technical work and prepares draft acts of pardon or refuses pardon. Thereafter, the special Commission, which is an advisory body consisting of 17 well-known writers, lawyers, priests and doctors, examines the drafts prepared by the Department and advises the President accordingly. The President has the right to agree or disagree with the Commission's opinion. The state *Duma*, the lower house of the Russian Parliament, is responsible for granting amnesty. The state *Duma* passes acts of amnesty by a majority vote of all its members. Amnesty is granted to an unrestricted group of persons such as women, men over 60 years of age, persons sentenced to imprisonment for a

⁹⁹ *Ibid.*, at pp. 377-378.

¹⁰⁰ For example, article 60(2) of the Basic Law of the Federal Republic of Germany of 1949; article 72 of the Constitution of India of 1950, section 32(3) (d) of the Constitution of the Republic of Namibia of 1990 and section 84(2) (j) of the Constitution of South Africa Act 108 of 1996. *Cf. In Re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 (10) BCLR 1253(CC), para. 114 at 116 (“The power of the South African head of state to pardon was originally derived from royal prerogatives...”).

¹⁰¹ Article 71(O) of the Constitution of the Russian Federation of 12 December 1993.

¹⁰² Article 89(W) of the Constitution of the Russian Federation of 1993.

¹⁰³ Article 50 (3) of the Constitution of the Russian Federation of 1993.

period of up to 5 years.¹⁰⁴ The amnesty excludes certain categories of persons such as persons responsible for serious crimes (e.g., war crimes).¹⁰⁵ It has the effect of absolving the person who committed a crime from criminal liability, and those sentenced shall be absolved of previous convictions. As a general rule, amnesty is applicable to those persons who had committed crimes before the amnesty act entered into force. In Russia, amnesty has been granted in connection with significant social events.¹⁰⁶

2.2. 4. A Working Definition of Amnesty

The purpose of differentiating between amnesty and other related concepts is to avoid confusion between amnesty, as understood in this study, and the other related concepts referred to earlier. It is apparent, thus far, that although there is no uniform practice by states to free offenders for whatever reasons they may deem fit, amnesty has definitive elements, which distinguish it from the related concepts discussed above. In this study, for purposes of a working definition, amnesty is defined as:

A sovereign act of forgiveness, exemption, or general oblivion, or a discharge from criminal prosecution, or any other form of punishment for past offences associated with harmful acts committed for political purposes by state and non-state agents granted by a head of state, a legislative body or a body established in terms of legislation, to a group of identified persons available for a fixed period of time, which may, or may not, be predicated upon the fulfilment of certain conditions.

Having discussed the meaning and definitive elements of amnesty and associated concepts, we now turn to the forms of amnesty. At least six forms of amnesty are identified: (i) Amnesty for political offences; (ii) Amnesty for the return of exiles; (iii)

¹⁰⁴ Article 84(1) of the Criminal Code of the Russian Federation.

¹⁰⁵ *Ibid*.

¹⁰⁶ For example, the adoption of the new Constitution of Russia in February 1994.

Amnesty as a component of the pre-transitional negotiation process; (iv) Amnesty for the neutralisation, demilitarisation, disarmament and reintegration of armed opposition forces; (iv) Amnesty for military related offences and, finally, (iv) self-assumed or auto-amnesties.

2. 3. Typology of Amnesty Laws

Based on the practice of states, and the four Geneva Conventions of 12 August 1949, these forms of amnesty may be broadly grouped into two categories.

Firstly, amnesties provided in international peace treaties in the aftermath of an international armed conflict. In cases of inter-state wars, belligerents captured from either side were automatically entitled to amnesty as prisoners of war and to repatriation at the end of the war.¹⁰⁷

With the relative decline in inter-state conflicts, this form of amnesty has gradually disappeared to be replaced by amnesties granted by domestic political actors in the aftermath of a civil war, or in a state in which democracy is threatened.¹⁰⁸ Unlike international wars, amnesty in the aftermath of a civil war is essential, since the end of an internal conflict does not guarantee the non-prosecution of those who fought against the state.¹⁰⁹ This form of amnesty became popular after the Second World War with the increase in intra-state conflicts and remains common in article 6(5) of Protocol II to the four Geneva Conventions of 12 August 1949, which provides that on the termination of hostilities, the warring parties may grant the broadest possible amnesty as part of the

¹⁰⁷ Articles 44 & 75 of Protocol I Relating to the Protection of Victims of International Armed Conflicts and article 4 of the Third Geneva Convention Relative to the Treatment of Prisoners of War.

¹⁰⁸ *Ibid.*

¹⁰⁹ Article 6(5) of Protocol II Relating to the Protection of Victims of Non-International Armed Conflicts.

cessation of hostilities. The only difference between the two is that, in the case of international conflicts, amnesty was automatic, and in internal conflicts the government has the prerogative whether to grant amnesty for acts which threaten the security of the state, i.e., government, people and territorial integrity.

A number of municipal courts have interpreted this provision. In 1995, for example, the Columbian Constitutional Court reviewed Protocol II and Law 171 of 6 December 1994, and ruled that the Protocol was constitutional and therefore applicable to the conflict in Colombia.¹¹⁰ The decision to grant amnesty is often *political* rather than *legal*, hence, the categorisation made here is not conclusive. Amnesties may further be sub-categorised as follows:

2.3.1. Amnesty for Political Offences

The granting of amnesty for political offences is a common practice in many jurisdictions. These amnesties are granted only for politically motivated offences, such as treason committed during internal strife.¹¹¹ Classic examples of amnesties granted for political offences include the El Salvadorian peace agreement of 1995, concluded between the government and the FDR-FMLN, which provided for “a general and unconditional amnesty for all those who have participated directly or indirectly in offences related to the situation of political violence,”¹¹² and, the Presidential Amnesty Decree of 19 February 2000, passed by the late President Laurent Kabila of the Democratic Republic of the Congo (DRC). The amnesty decree was intended to benefit

¹¹⁰ Case No. 176, Constitutional Conformity of Protocol II, paras. 41-42, reprinted in Marco Sassoli & Antoine Bouvier, *How Does Law Protect in War?* (1999) 1357.

¹¹¹ Alfred-Maurice De Zayas, “Amnesty Clause” in Rudolf Bernhardt (ed.), *Encyclopaedia of Public International Law*, vol. 1, (1992) 148.

¹¹² *The United Nations and El Salvador 1990-1995*, vol. IV (1995).

victims of arbitrary arrests and illegal detentions. The amnesty process was to be administered by an *ad hoc* Commission headed by the Minister of Justice established to ensure the application of the Presidential Decree on Amnesty.¹¹³

On 19 May 2000, armed supremacists, led by businessman George Speight, took Prime Minister Mahendra Chaudhry of Fiji Islands and his Cabinet hostage. Following a *coup d'état*, the country was plagued by unrest during which Indo-Fijians were attacked by *coup* supporters. Ten days later, the army took over the government and declared martial law. On 13 July 2000, under the Muanikau Accord, the hostages, including Prime Minister Chaudhry, were released after 56 days in captivity. The Muanikau Accord provided for amnesty for Speight and his followers for committing the crime of treason associated with the hostage-taking of 19 May 2000.¹¹⁴ The amnesty provision was given effect as the Immunity Decree 2000, of 13 July 2000. The Immunity Decree provided, in part, that:

(1)...George Speight the leader of the Taukei Civilian Group, and members of his Group who took part in the unlawful takeover of the Government democratically elected under the 1997 Constitution on the 19th day of May, 2000 and the subsequent holding of the hostages until the 13th day of July 2000 shall be immune from criminal prosecution under the Penal Code or the breach of any law of Fiji and civil liability in respect of any damage or injury to property or person connected with the unlawful seizure of Government powers, the unlawful detention of certain members of the House of Representatives and any other person and no court shall entertain any action or proceeding or make any decision or order, or grant any remedy or relief in any proceedings instituted against George Speight or any member of his Group.

(2) Subsection (1) also applies to any other person who acted under the directions, orders or instructions of George Speight or any member of the Taukei Civilian Government as a result of the unlawful seizure of government powers and unlawful detention of the Prime Minister and certain Cabinet Ministers and Members of the House of Representatives.

(3) Subject to section (4), this Decree does not extend to any other person who committed an offence under any law within and outside the Parliament Complex between the 19th day

¹¹³ See *Second Report of the Secretary-General on the United Nations Organisation Mission in the Democratic Republic of the Congo*, UN Doc. S/2000/330, 18 April 2000, para 57.

¹¹⁴ Article P (E) of the Muanikau Accord for the Release of Hostages Held at the Parliament Complex Veiuto, 9 July 2000. [www.usip.org/library/peace agreements](http://www.usip.org/library/peace%20agreements) (accessed 13 June 2004).

of May 2000 and the 13th day of July 2000 in respect of any act done without the directions, orders or instructions of George Speight or any member of the Taukei Civilian Government.

(4) Any person who commits a political offence within the meaning of this Decree shall be immune from criminal prosecutions under the Penal Code or breach of any law of Fiji.

.....

Despite the amnesty, Speight and his group were arrested and charged with treason on 26 July 2000.¹¹⁵ It would seem that the amnesty was merely a ruse.

2.3.2. Amnesty for the Returning Exiles

Amnesty may be granted to lure political exiles or refugees back as part of a political settlement. These political refugees are often guilty of legitimate opposition to the policy of the government. Unless they return, the amnesty law dealing with exiles effectively becomes redundant and irrelevant. This is why, in certain legislation, a provision is made that those who do not return within a period determined by law will forfeit the amnesty. In some instances the amnesty requires that those returning must apply in writing, and may also provide for a category of people excluded from the benefit of the amnesty law.¹¹⁶

During the run-up to the independence of Namibia in 1990, South Africa's last Administrator General in Namibia, Louis Pienaar, issued a pre-independence Amnesty Proclamation on 6 June 1989.¹¹⁷ The Proclamation provided that:

...no criminal proceedings may be instituted or continued in any court for any crime committed both in Namibia and elsewhere before June 7, 1989 by any person either born in Namibia or born to Namibian parents and who at the time of the proclamation did not

¹¹⁵ See *Chandrika Prasad v the Republic of Fiji & Attorney General of Fiji* [2001] New Zealand Administrative Reports 21. The decision is also reprinted in John Hatchard & Tunde Ogoweto, *Tackling the Unconstitutional Overthrow of Democracies: Emerging Trends in the Commonwealth* (2003) 50–137.

¹¹⁶ See *Joinet Progress Report on the Question of Impunity of Perpetrators of Human Rights Violations Pursuant to sub-Commission resolution 1992/23 E/CN.4/sub.2/1993/6*; Cf. Louis Joinet *The Role of Amnesty Laws in the Safeguarding and Promotion of Human Rights* E/CN.4/sub.2/1985/16/rev.1.

¹¹⁷ Amnesty Proclamation AG 13, 6 June 1989.

live in Namibia.

The Proclamation was intended to facilitate the return of exiled Namibians to the country before the 1989 independence elections, without fear that they might be prosecuted for crimes they may have committed in Namibia, or elsewhere, before the cut-off date of 7 June 1989.

Another recent example of amnesty granted for the return of exiles is the temporary immunity from legal proceedings for political exiles granted as part of the Arusha Peace and Reconciliation Agreement for Burundi signed in August 2000.¹¹⁸ In order to facilitate this process in August 2003, the transitional government of Burundi and the Movement of the National Council for the Defence of Democracy (CNDD-FDD) signed an Agreement for Granting Temporary Immunity for Armed Conflict Related Crimes in Burundi.¹¹⁹ The Agreement granted amnesty to all members of armed conflict groups, movements and political exiles abroad, who wished to return to Burundi, for armed conflict related crimes committed between 1 July 1962 and 21st October 1993, with the exception of war crimes, crimes against humanity and genocide.¹²⁰ The amnesty is valid for only two years.¹²¹

2.3.3. Amnesty as Component of the Pre-Transitional Negotiation Process

The transition from authoritarian to democratic rule often gives rise to problems when the old regime strikes a deal with the new incumbent not to prosecute those responsible

¹¹⁸ See United States Institute of Peace Library, Peace Agreements Digital Collection (Burundi), www.usip.org/library/pa_burundi (accessed 8 January 2004).

¹¹⁹ Agreement for Granting Temporary Immunity for Armed Conflict Related Crimes in Burundi between the Transitional Government of Burundi and the Movement National Council for the Defense of Democracy - Forces (CNDD -FDD), signed 9 August 2003, Pretoria, South Africa. See Appendix B of this study.

¹²⁰ *Ibid.*, articles 1 & 2 of the Agreement.

¹²¹ *Ibid.*, article 10 of the Agreement.

for gross human rights violations after the consolidation of democracy. This type of amnesty is characterised by a preliminary negotiation process and its main objective is to benefit both sides of the warring parties and promote national reconciliation.

In Uruguay, after the return to civilian rule, an agreement was reached by passing an amnesty law which provided that members of the military *junta* responsible for human rights violations would not be prosecuted.¹²² In South Africa, in 1995, amnesty was the price for peaceful transition to democratic rule.¹²³ However, the amnesty granted in South Africa differs from those granted by certain Latin American countries in that it was not automatic, but conditional upon an application for amnesty. Applicants seeking amnesty had to satisfy subjective criteria (motive of the perpetrator), objective elements (i.e., context, nature and intention of the act(s) and the proportionality test (i.e., whether the objective of the act justified its severity) before being granted amnesty.¹²⁴ The overall purpose of the amnesty was to seek national reconciliation, durable peace and stability after the transitional period.

2.3.4. Amnesty for the Neutralisation, Demilitarisation, Disarmament and Reintegration of Armed Opposition Groups

The purpose of this form of amnesty is to reduce socio-political tensions through persuasion and its objective is to neutralise, demilitarise, disarm, and reintegrate armed opposition groups into society as part of the national armed forces. In 1982, for example, the Guatemalan government passed a law in which amnesty was granted to guerrilla

¹²² Neil Kritz, (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes: Country Studies*, vol. II, (Country Studies) (1995) 383-4.

¹²³ See, generally, the Promotion of National Unity and Reconciliation Act 34 of 1995 (as amended) and Constitution of the Republic of South Africa Act 108 of 1996 (Schedule 6, section 22).

¹²⁴ Section 20(2) of the Promotion of National Unity and Reconciliation Act 35 of 1995.

movements on condition that they surrender to the government, lay down arms, and make sworn statements that they would no longer wage war against the government.¹²⁵ Similarly, in 1984, Poland enacted a law lifting martial law, which resulted in many prisoners benefiting from the amnesty. The beneficiaries of the amnesty were those who were prepared to present themselves to the authorities and denounce their anti-government acts within three months after the passing of the law. The law also provided that in cases of recidivism, the beneficiaries would forfeit the benefit of the law.¹²⁶

In 1994, the National Assembly of Cambodia adopted a law which granted amnesty to members of the Khmer Rouge.¹²⁷ Within a period of six months of the enactment senior members of the Khmer Rouge, such as Nuon Chea and Khieu Sampan, defected.¹²⁸

Similarly, in 1991, Algeria experienced civil unrest between government forces and the banned Islamic movement, the *Front Islamique du Salut* (FIS). In April 1999, Abdelaziz Bouteflika was appointed President of Algeria. He immediately passed the Civil Concord Law which granted a limited amnesty to perpetrators of gross human rights violations on condition that they surrender and hand over their weapons to the

¹²⁵ See *Memory of Silence: Report of the Commission for Historical Clarification* (1999).

¹²⁶ Joint Report, *supra*.

¹²⁷ Law of 7 July 1994, 2nd Session of the Legislature of the National Assembly (author's translation). Article 5 provides:

This law is suspended for six months, pending that they submit themselves to the Government of the Kingdom of Cambodia without regard to the infraction committed.

Article 7 similarly provides:

The King can reduce or pardon punishment in accordance with the power of the King enshrined in Article 27 of the Cambodian Constitution.

¹²⁸ Thomas Hammarberg, "Efforts to Establish a Tribunal against the Khmer Rouge Leaders: Discussions Between the Cambodian Government and the UN," Paper presented at a Seminar organised by the Swedish Institute of International Affairs & Swedish Committee for Vietnam, Stockholm, 29 May 2001 (on file with the author).

government within a specified period. The purpose of the amnesty law was to bring the country's turmoil to an end.¹²⁹ Also, in May 2001, after three months insurgency by the ethnic Albanian minority, the President of Macedonia, Boris Trajkovski, offered amnesty to the rebel group on condition that they lay down their arms.¹³⁰ Similarly, in December 1999, the governments of Sudan and Uganda signed a peace agreement with the assistance of former US President, Jimmy Carter and the former President of Kenya, Daniel Arab Moi, in terms of which the parties agreed not to harbour, sponsor or give military or logistical support to any rebel groups, opposition groups, or hostile groups from each other's territories. In order to facilitate this process, the parties agreed *inter alia*, to "...offer amnesty and reintegration assistance to all former combatants who renounce the use of force."¹³¹

Angola is a recent example of an amnesty granted as part of the disarmament, demobilisation and repatriation (DDR) of armed opposition groups. In November 1994, UNITA and the MPLA government of Angola signed the Lusaka Cease-fire Agreement, which promised to grant amnesty for crimes committed during the armed conflict.¹³² Subsequently, on 4 April 2002, UNITA and the MPLA forces signed a Memorandum of Understanding (MoU) for the Cessation of Hostilities and the Resolution of the

¹²⁹ See Loisir la Concorde Civile available at www.algeria-watch.de/infomap/infom/concorde1.htm (accessed 8 January 2004).

¹³⁰ "Macedonia Offers Rebels Amnesty" *International Herald Tribune*, June 2-3, 2001, p. 9.

¹³¹ Article 10 of the Agreement between the Governments of the Sudan and Uganda, 8 December 1999, www.usip.org/library/peace_agreements (accessed 14 June 2004).

¹³² See Lusaka Protocol, Lusaka, Zambia, 15 November 1994. Annex 6, Agenda Item II.4 headed "National Reconciliation", UN Doc.S/1994/1441, 22 December 1994. Article 5 of the Protocol provides that:

In the spirit of National Reconciliation, all Angolans should forgive and forget the offenses resulting from the Angolan conflict and face the future with tolerance and confidence. Furthermore, the competent institutions will grant an amnesty, in accordance with Article 88(h) of the Constitutional Law, for illegal acts committed by anyone prior to the signing of the Lusaka Protocol, in the context of the current conflict.

Outstanding Military Issues Under the Lusaka Protocol.¹³³ The MoU, which was agreed between the military leaders of the Angolan Armed Forces (FAA) and UNITA, put to rest the protracted civil war in Angola. The MoU did not represent a new peace accord, but was intended to complete the Lusaka Peace Process, which remained the legitimate framework for peace in Angola. The MoU replaced Annexes 3 (military issues) and 4 (the police) of the Lusaka Protocol, by the regulation and updating of the military components that would govern the disarmament, demobilisation and reintegration of UNITA rebels and the creation of a single, integrated army for Angola.

Chapter II, Article 21(1) of the MoU provides as follows:

The Government guarantees, in the interest of peace and national reconciliation, the approval and publication, by the competent organs and institutions of the State of the Republic of Angola, of an Amnesty Law for all crimes committed within the framework of the armed conflict between the UNITA military forces and the Government.

In Angola there have been six separate amnesties since the beginning of the conflict in an attempt to lure UNITA to stop the carnage that has so ravaged Angola's ordinary civilians, including thousands of vulnerable women and children.

In the Democratic Republic of the Congo, amnesty was also granted as part of the demilitarisation, disarmament and reintegration process in 2001.¹³⁴ Article 8 of the Cease-fire Agreement in the DRC provided that:

...[the granting] of amnesty to the rank and file of Armed Groups who are not suspected "genocidaires" will be a much needed incentive to surrender. Amnesty laws should be adhered to by the amnesty granting countries. Monitoring Teams will be required to check on abuse.

¹³³ See Memorandum of Understanding, Addendum to the Lusaka Protocol for the Cessation of Hostilities and the Resolution of the Outstanding Military Issues under the Lusaka Protocol, April 2002 (unofficial translation of the Portuguese version).

¹³⁴ Agreement for a Ceasefire in the Democratic Republic of Congo - Joint Military Commission, Annex III of the *Report of the Security Council Mission to the Great Lakes Region*, 15-26 May 2001, UN Doc

Similar amnesties have been granted in the Philippines (1990)¹³⁵ and Papua New Guinea (1995)¹³⁶.

2.3.5. Amnesty for Military Related Offences

By its nature, military training is based on discipline, which involves reciprocal trust between the commander and the soldier. It is important for the commander to know and trust the ability of his subordinates to obey orders. In return the troops must have confidence in the judgement of the commander to make good decisions. A breach of this disciplinary code of conduct is punished accordingly.¹³⁷

Nevertheless, amnesty is often granted for some of the breaches of military laws. Soon after the disintegration of the former Socialist Federal Republic of Yugoslavia in

S/2001/521/Add.1, 30 May 2001.

¹³⁵ Article 4 of the Six Paths to Peace National Unification and Commission Agreement between Maro National Liberation Front and the Government of the Republic of Phillipines provides:

4. Establishment of programs for honorable reconciliation and reintegration into mainstream society

This includes amnesty to respond to concerns for legal status and security, and a program of community-based economic assistance for former rebels. The proposed amnesty program presents twin measures, one for rebels from all armed groups; the other, applicable to agents of the state charged with specific crimes in the course of counter-insurgency operations.

¹³⁶ For example, the Waigani Communique issued by the Prime Minister of Papua New Guinea and the Premier of Bougainville Transitional Government, Theodore Miring, of 18 May 1995 provided as follows:

Amnesty (Pardon) for Surrendered Area

1. That the National Government will grant from 24h00 on 18 May 1995, within the framework of the laws of Papua New Guinea, and as part of the overall settlement of the Bougainville crises, amnesty to various members of illegal and criminal forces, groups and individuals.
2. This amnesty from prosecution will commence from October 1988 to 24: 00hrs of the date of the signing of this communiqué.
3. The National Government also grants as of 24: 00hrs of 18 May 1995, amnesty for the surrender and destruction of all firearms in possession of these illegal, criminal offences, groups and individuals up to and including a period of fourteen (14) days.

¹³⁷ *Minister of Defence v Potsane & Another; Legal Solders (Pty) Ltd & Others v Minister of Defence & Others* 2001 (11) BCLR 1137 (CC). Cf. Mark Osiel, *Obeying Orders: Atrocity, Military Discipline and the Law of War* (1999) 26.

1991,¹³⁸ the Republic of Serbia, together with its old ally, Montenegro, formed the Federal Republic of Yugoslavia (FRY) as successor to the earlier Yugoslav Federation (SFRY). In March 2001, the FRY passed the Federal Amnesty Act.¹³⁹ The aim of the amnesty law was to benefit persons who had participated in the armed rebellion, which led to the fall of President Slobodan Milosovic. The amnesty included provisions for failure to respond to an order, for failure to report for military service, and for avoidance of military service and desertion from the Army of Yugoslavia.¹⁴⁰ Similarly in March 1997, the Russian State *Duma* passed a “declaration of amnesty with respect to persons who committed socially dangerous acts in connection with the armed conflict in the Chechen Republic” between December 1994 and 31 December 1996. The acts covered by the amnesty included evasion of regular military duty; unwarranted absence and unwarranted abandonment of a military unit or duty station; desertion; evasion of military service by self-inflicted maiming or by other means.¹⁴¹ A number of crimes such as spying, terrorism and intentional homicide were expressly excluded. Likewise, the amnesty provision in the Sudan Peace Agreement of 21 April 1997 covered offences such as mutiny and desertion.¹⁴²

2.3.6. Self Assumed/Auto-Amnesty

The granting of absolute or unrestricted amnesty occurs when the outgoing political elite unilaterally award themselves, or those close to them, amnesty *before* they leave office. In most cases such amnesty laws are a source of impunity and, as such, are used to

¹³⁸ The former Federation consisted of the six independent Socialist Republics of Serbia, Slovenia, Macedonia, Bosnia-Herzegovina, Montenegro, Croatia and two autonomous provinces Kosovo and Vojvodina.

¹³⁹ Federal Amnesty Act, 2 March 2001, Sluzbeni list SRJ, No. 9/2001.

¹⁴⁰ Article 1 of the Federal Amnesty Act.

¹⁴¹ Rossiyskaya Gazeta of 15 March 1997.

¹⁴² Article 8 (b) & (c) of the General Amnesty Proclamation Order 997 (Annex 2) of the Sudan Peace Agreement of 21 April 1997 reprinted in 11 *African Journal of International and Comparative Law*

camouflage human rights abuses. Self-assumed amnesty is an example of a false amnesty, not only because it is one-sided, but because it is illegitimate and deliberately undermines the rule of law and existing constitutional norms and standards. Self-assumed amnesty was common in many Latin American countries in the late 1980s. In 1983¹⁴³ and 1987¹⁴⁴, for example, the Argentinian military *junta* passed the so-called “pacification laws” to obviate possibilities of criminal or civil proceedings against those responsible for gross human rights violations. The Parliament of Argentina overturned the amnesty in November 2003.¹⁴⁵

Another example of self-assumed amnesty is the amnesty granted by the ZANU-PF Government of Zimbabwe after the 2000 election to those responsible for violence against the members of opposition parties. During the run-up to the June 2000 parliamentary elections, President Robert Mugabe granted amnesty to anyone who might have committed human rights violations in that period.¹⁴⁶ Politically motivated offences covered by the amnesty law included theft, possession of arms, incitement, fraud or dishonesty, murder, robbery, and being an accessory after the fact to any of the offences mentioned.¹⁴⁷ However, these amnesty laws have been severely criticised by the Zimbabwean Human Rights NGO Forum¹⁴⁸ and Amnesty International¹⁴⁹ for

(1999) 806.

¹⁴³ Law 23, 492 (Full Stop Law), Buenos Aires, 23 December 1986, *Official Bulletin*, 29 December 1986 (Argentina).

¹⁴⁴ Law 23, 521 (Law of Due Obedience), Buenos Aires, 4 June 1987, *Official Bulletin*, 9 June 1987 (Argentina).

¹⁴⁵ Law 25, 779 (Declaraton of Nullity of the Law of Due Obedience and Full Stop Law), Buenos Aires, Argentina, 1 August 2003, *Official Bulletin*, 3 September 2003.

¹⁴⁶ Clemency Order No. 1 of 2000, General Amnesty for Politically-Motivated Crimes, General Notice 457A of 2000.

¹⁴⁷ Section 4 (ii) of the Clemency Order No. 1 of 2000.

¹⁴⁸ *Who was Responsible? Alleged Perpetrators and their Crimes during the 2000 Parliamentary Election*

promoting a culture of impunity.

2.4. The Characterisation of Gross and Systematic Human Rights Violations

Before discussing what characterises gross and systematic human rights violations it is perhaps important to demonstrate the link between amnesty and human rights violations. As the definition of amnesty has shown, the latter originated as a sovereign power geared towards the protection of the security of the state.¹⁵⁰ The Westphalian concept of state sovereignty, which came to be associated with the absolute right of a political power over its territory and subjects, and the reciprocal duty of non-interference in the internal affairs of other states, diminished in the aftermath of the First World War.¹⁵¹ At the end of the Second World War, the role of the individual as an important international actor became an increasingly important aspect of international relations. This resulted primarily from the fact that the number of civilians killed in wars increased tremendously. Today, it is estimated that in conflict situations only one soldier is killed for every twenty civilians.¹⁵² This dramatic shift led to the adoption of various human rights instruments and, later, the creation of supervisory human rights treaty bodies to set norms and standards which effectively sought to limit the absolute powers of governments over their citizens. A number of these international and regional human

Period, Report by the Zimbabwe Human Rights NGO Forum, July 2001.

¹⁴⁹ “Amnesty International Condemns Zimbabwe Amnesty,” *Reuters News Service*, 11 October 2000.

¹⁵⁰ The concept of state sovereignty goes back to antiquity and it is steeped in the thinking of early Greek philosophers such as Aristotle, who saw sovereignty as the embodiment of Greek constitutional order. After the collapse of the Greek democracy, sovereignty found expression in the Middle Ages through the feudal system in which the feudal barons asserted their hegemony over their subjects. Later, the struggle for dominance began between absolute Kings and the Pope. It was these struggles which culminated into the birth of the nation state, marked by the signing of the 1648 Westphalia Peace Treaty. See Ian Brownlie, *Principles of Public International Law* (1992) 287.

¹⁵¹ These principles are reflected in article 2(7) of the UN Charter and article II of the erstwhile 1963 OAU Charter.

¹⁵² Interview with Richard Goldstone 13 *Global Dialogue* (1998) 23.

rights instruments granted the individual the right of access to international and regional forums. Under the UN Economic and Social Council (ECOSOC) Resolution 1503-(XLVIII) procedure, for example, a victim of human rights violations may bring a complaint against his home state once all local remedies have been exhausted.

Where the crimes committed are of such a nature as to “shock the conscience of mankind,” these violations cease to be an “internal affair” as contemplated in article 2(7) of the UN Charter.¹⁵³ One of the unprecedented features of the African Union is that its founding statute, the Constitutive Act, limits sovereignty by allowing intervention by the Union when there is large-scale suffering of the civilian population as a result of genocide, war crimes and crimes against humanity.¹⁵⁴ In such circumstances, the protection of the individual is no longer the exclusive domain of the individual state but the concern of the African Union and the “international community as a whole.”¹⁵⁵ As a result state sovereignty is relative, or rather, of a limited nature. There is, therefore, a gradual move towards “legitimate international responsibility to protect”¹⁵⁶ and hence

¹⁵³ Kofi Annan, *The Question of Intervention* (1999) 17, states that “no government has the right to hide behind national sovereignty in order to violate the human rights or fundamental freedoms of its peoples.”

¹⁵⁴ Articles 4 (h) & 4 (j) of the Act.

¹⁵⁵ Article 53 of the Vienna Convention on the Law of Treaties (1969).

¹⁵⁶ See *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (ICISS), December (2001). The Commission was established in September 2000 by the Canadian Government to look at all forms of international intervention and their relationship to the sovereignty of nations. According to the ICISS, intervention could take three forms (without consent of a target state): (i) political, economic or other sanctions. However, international opinion favored ‘smart or targeted’ sanctions because they tend to hurt the civilians more than the political elite; (ii) international criminal prosecution as it helps to deter war criminals, reconciling parties to the conflict, and individualizes criminal responsibility as opposed to the collect guilt of the entire population for crimes committed by individuals; (iii) military intervention for humanitarian ends. The ICISS further developed a ‘just cause’ threshold test for humanitarian intervention, (a) large-scale loss of human life, i.e. genocide, which is the direct consequence of state action, failed state, or inability to act; (b) large-scale ‘ethnic cleansing’ whether by killing, forced expulsion, acts of terror or rape. There is a growing body of literature on this subject. See, for example, Elizabeth Sidiropoulos (ed.), *A Continent Apart: Kosovo, Africa and Humanitarian Intervention* (2001); Alexander Mosley & Richard Newmann (eds.), *Human Rights and Military Intervention* (2002).

the use of expressions such as “humanitarian intervention” and “human security”¹⁵⁷ which suggest that states are no longer free to violate the rights of their citizens, often under the pretext that it is an internal matter which precludes interference by other states. Therefore, human rights instruments oblige signatory states to ensure and respect certain minimum norms and standards and presuppose that amnesty may not be granted for acts that fall below the threshold set by those respective instruments.

In that context, the adjective “gross” means “serious”, “flagrant (*flagrante*)”¹⁵⁸ or “out of proportion,” and, therefore, the violation cannot be excused.¹⁵⁹ Other synonyms used to describe “serious” or “grave” violations, include “critical”, “heinous”, “unmitigated”, “terrible offences”, “atrocious”, “aggravated”, “deplorable”, “outrageous”, “massive”, “shameful,” and so on.¹⁶⁰ However, a distinction should be made between two types of violation, namely, “simple” and “serious” violations of human rights and fundamental freedoms. Although the term “simple” violations of human rights and fundamental freedoms does not mean punishment is unnecessary, “serious” denotes that violations are systematic or substantial in nature, that is, they occur in a particular pattern, one usually perpetrated by a sovereign state, and warrant a lawful criminal action.

According to Cecelia Quiroga, the determinants of gross and systematic violations of human rights include (i) *quantity* - violations must be massive; (ii) *time* - there must be

¹⁵⁷ See Commission on Global Governance, *Our Global Neighbourhood* (1995) 90 (the Commission coined the phrase ‘human security’ which it defined as “freedom from fear”). Cf. Report of the International Commission on Human Security, *Human Security Now*, May, (2003).

¹⁵⁸ *Larousse* (1995) 13.

¹⁵⁹ *Black's Law Dictionary* (1999) 32.

¹⁶⁰ Celia Quiroga, *The Battle of Human Rights: Gross, Systematic Violations and the Inter-American System* (1998) Chapters 1&2; JM Zuidwijk, *Petitioning the United Nations: A Study in Human Rights* (1982) 30; Theo Van Boven *et al.* (ed.), *Seminar on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, Maastricht, 11-15 March (1992).

a consistent pattern of violations perpetrated over a period of time; (iii) *quality* - which must include factors such as the type of rights violated and the character of the violations; and (iv) *planning* - violations must be an integral part of the political order, be it state policy or by non-state actors.¹⁶¹ She thus defines gross and systematic violations of human rights as:

...those violations, instrumental to the achievement of governmental policies, perpetrated in such a quantity and in such a manner as to create a situation in which the rights to life, to personal integrity or to personal liberty of the population as a whole or of one or more sectors of the population of a country are continuously infringed or threatened.¹⁶²

Therefore, a state violates international law if it condones, ignores, or as a matter of policy, encourages violations of human rights by private or state agents.

At the level of the United Nations, the expression “gross violations of human rights” was first used in 1967 in the Economic and Social Council (ECOSOC) Resolution 1235 (XLII) to enable the Commission on Human Rights and the Sub-Commission on the Prevention of Discrimination and Protection of Minorities to investigate complaints of human rights violations. The UN General Assembly regarded South Africa's apartheid policy, and the discriminatory practices carried out in Southern Rhodesia by Ian Smith's government, as gross and systematic violations of human rights. Subsequently, ECOSOC Resolution 1503 (XLVIII) of 27 May 1970, established a procedure to deal with complaints described in ECOSOC Resolution 1235 (XLII) as “consistent patterns of gross and reliably attested violations of human rights and fundamental freedoms.” The resolution implies that the violations should form a pattern, or series of repetitive

¹⁶¹ Cecilia Quiroga, *The Battle of Human Rights: Gross, Systematic Violations and the Inter-American System* (1988) 11-16; Wolfgang Heinz & Hugo Fruhling, *Determinants of Gross Human Rights Violations by State and State-Sponsored Actors in Brazil, Uruguay, Chile, and Argentina 1960-1990* (1993).

¹⁶² Cecilia Quiroga, *The Battle of Human Rights: Gross, Systematic Violations and the Inter-American System* (1988) 16.

unlawful acts, in order to engage the attention of the Sub-Commission.

The Four Geneva Conventions of 12 August 1949 make a distinction between breaches to which contracting parties must put an end, and “grave breaches”, which place an obligation on states to enact legislation to effect penal sanctions.¹⁶³ Article 85 of the 1977 Additional Protocol to the Geneva Conventions provides that “without prejudice to the application of the Conventions and of this Protocol, grave breaches of these instruments shall be regarded as war crimes.”¹⁶⁴ Therefore, the notion of “systematic and gross violations of human rights” presupposes a hierarchy of violations which are of a severe nature and thus require a response in the form of punishment.¹⁶⁵

2.4.1. Elements of Gross and Systematic Human Rights Violations

The definitive elements of “systematic and gross violations of human rights” are the following: (i) systematic, that is, violations do not occur in isolation, but rather as part of state policy; (ii) institutional, as they implicate all or most of the structures of the state such as the executive, legislature and security sector (police, armed forces, intelligence, courts and prison systems); and finally, (iii) the violations are massive, because they do not involve isolated victims, but many, including those who died, disappeared, were tortured, exiled, arbitrarily imprisoned, and so on. These violations include crimes such as genocide, war crimes, and crimes against humanity as codified in the ICC Statute.

¹⁶³ Articles 49 -52 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Convention) articles 50-53 of the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Convention); Articles 129-131 of the Geneva Convention Relative to the Treatment of Prisoners of War (Third Convention); articles 146 -149 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Convention).

¹⁶⁴ Protocol I, article 85, para. 5.

¹⁶⁵ See *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, UN Doc. E/CN.4/Sub.2/1993/8.

Other serious violations may include damage to the environment and terrorism.¹⁶⁶ The ICC, as stated in the Preamble to the statute, will have “jurisdiction over the *most serious crimes of concern* to the international community as a whole.”¹⁶⁷ Similarly, the Constitutive Act of the African Union uses the expression “grave circumstances” to describe war crimes, genocide and crimes against humanity as a criteria to be used by the African Union (AU) to intervene in a member state pursuant to a decision of the Assembly of States of the AU.¹⁶⁸

When the Universal Declaration on Human Rights was adopted in 1948, human rights and humanitarian law were treated as two distinct regimes. This changed after the 1968 Tehran International Conference on Human Rights.¹⁶⁹ The “merger” was largely influenced by the growing development of international criminal law and the criminalization of grave breaches of human rights. It will be useful for the sake of clarity to make a brief distinction between humanitarian law and human rights law as the two are often used interchangeably in the literature.

2. 5. Bridging the Gap Between Human Rights and Humanitarian Law

In this study, the term “international law” is employed to mean that branch of public international law, known as humanitarian law (HL), designed to limit the use of violence by belligerents, while sparing those who do not, or are no longer, participating in

¹⁶⁶ Jorge Dominguez, Nigel Rodney & Richard Falk, *Enhancing Global Human Rights* (1979) 215-256.

¹⁶⁷ Emphasis added.

¹⁶⁸ Article 4 (h) of the Constitutive Act of the African Union adopted in Lomè, Togo, 11 July 2000.

¹⁶⁹ Resolution XXIII “Human Rights in Armed Conflicts” adopted by the International Conference on Human Rights, Tehran, Iran, 12 May 1968.

hostilities.¹⁷⁰ Humanitarian law, which dates back to the codification efforts of the late 19th and 20th centuries, is one of the oldest branches of public international law. The main thrust of the 1907 Hague Conventions (“the Hague Laws”) is to regulate the conduct of combatants in armed conflicts. The four Geneva Conventions of 12 August 1949 (“the Geneva Laws”) are aimed at restraining the conduct of belligerents by protecting those who have ceased to participate in hostilities, have surrendered, or have at no stage participated in hostilities.

Unlike HL, human rights law developed from the need to protect the individual from the abuses of state power. Historically, from the English Revolution of 1688, from the French Declaration of the Rights of Man and of the Citizens of 1789, and from the American Constitution of 1776 emerged the idea of human rights as a means to control state absolutism. HL originates from the practice of military personnel, such as military manuals, land warfare manuals, air warfare manuals and naval warfare manuals, whereas human rights developed from domestic tensions between states and their citizens. HL developed from military necessity, while human rights developed with humanity as its centre. There is no reciprocity in human rights while reciprocity is at the core of HL – all parties are obliged to protect civilians and prisoners of war (POW). Human rights law also allows for derogation and limitations, e.g., freedom of speech, while HL is not bound by derogations and limitations.¹⁷¹ While human rights law is applicable in times of peace and war, humanitarian law is aimed at regulating the

¹⁷⁰ *Ibid.*, at p. 67.

¹⁷¹ For example, article 4(1) of the 1966 International Covenant on Civil and Political Rights provides:

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligation under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law... .

conduct of parties during war. HL imposes obligations on states and non-state actors, while human rights are enforceable only against the state and create negative and positive obligations to ensure the enjoyment of these human rights.¹⁷²

Another important distinction between human rights and humanitarian law regimes lies in treaty obligations. Generally, human rights treaties do not impose an obligation to punish those responsible for human rights violations and, instead, require states to “respect and ensure,” or to provide “effective remedies” under their municipal law. The 1966 International Covenant on Civil and Political Rights, for example, provides that each party to the Covenant “...undertakes to *respect and to ensure*” the protection of civil and political rights.¹⁷³ It further provides that state parties must ensure that:

...any person whose rights and freedoms ...are violated shall have an *effective remedy* notwithstanding that the violation has been committed by persons acting in an official capacity.¹⁷⁴

Under humanitarian law states are under an explicit obligation to prosecute individuals responsible for grave breaches (war crimes, genocide and crimes against humanity).¹⁷⁵ These crimes are considered part of customary international law and are thus binding on all states irrespective of whether they are party to the convention or not. The crime of genocide, codified in the 1948 Genocide Convention, expressly obliges states in a territory in which such crimes are committed to prosecute those responsible.¹⁷⁶

¹⁷² On the distinction between humanitarian law and human rights law, see, for example, Louise Doswald-Beck & Sylvain Vite, “International Humanitarian Law and Human Rights Law” 293 *International Review of the Red Cross* (1993) 94; Mary Griffin, “Ending Impunity of Perpetrators of Human Rights Atrocities: A Major Challenge for International Law in the 21st Century” 838 *International Review of the Red Cross* (2000) 369.

¹⁷³ Article 2(1). Emphasis added.

¹⁷⁴ Article 2(3) (a). Emphasis added.

¹⁷⁵ Article 5 of the 1998 Rome Statute.

¹⁷⁶ Article IV provides that “persons committing genocide...shall be punished whether they are constitutionally elected leaders, public officials or private individuals.”

There are two compelling reasons why humanitarian law is considered to include human rights. Firstly, the two areas of law share the same objective, namely, the protection of human life and human dignity. The classic example is the prohibition of torture under the 1984 Torture Convention that forms part of both human rights and humanitarian law. Secondly, it is generally accepted that it is no longer a requirement to prove the link between crimes against humanity and armed conflict, because such crimes can also be committed in times of peace.¹⁷⁷ The position stated in the 1998 *Analytical Report of the UN Secretary-General Submitted Pursuant to the Commission on Human Rights Resolution 1997/21 on Minimum Standards*¹⁷⁸ is illustrative:

...For too long, these two branches of law have operated in distinct spheres, even though both take as their starting point concern for human dignity. Of course, in some areas there are good reasons to maintain the distinctness – particularly as regards the rules regulating international armed conflicts, or internal armed conflicts of a civil war. But in situations of internal violence – where there is considerable overlap and complementarity – this distinctness can be counter-productive. One must be careful not to muddle existing mandates, or undermine existing rules, but within these constraints there is still considerable scope for building a common framework for protection.

2. 6. Conclusion

The etymological evolution of amnesty shows a lack of consistency in its meaning, scope and application throughout the centuries. The interchangeable usage of terms such as “general pardon”, “impunity,” “pardon,” *etc.*, in treaty law, legislative measures and constitutions blurred the distinction even further. Nevertheless, the legal effects of both amnesty and pardon often help to clarify the distinction. Amnesty, unlike a pardon, obliterates the perpetrators’ culpability and criminal record, hence, the expression “forgive and forget,” but with a pardon the culpability stands.

¹⁷⁷ See *Prosecutor v Dusko Tadic*, Case No. IT -94-1AR72, Appeals Chamber, paras. 96-127.

¹⁷⁸ E/CN.4/87, 5 January 1998, para. 99.

In general, amnesty is aimed at addressing major social or political crises in society such as to resolve an armed conflict, to allow the return of political refugees, or to bring about political transition. The purpose of a pardon is generally to mitigate the harshness of punishment. It may well be argued that the effects are the same when one considers that, in practice, both amnesty and pardon may be granted before a trial or conviction in anticipation of a criminal prosecution. In that sense, both mechanisms are *ad hoc* and situation specific.

In this study, amnesty shall mean a sovereign act of forgiveness, exemption or general oblivion or a discharge from criminal prosecution or any other form of punishment for past offences associated with harmful acts committed for political purposes by state and non-state actors granted by a head of state, a legislative body, or a body established in terms of legislation, to a group of persons available for a fixed period of time, which may or may not be predicated upon the fulfilment of certain conditions.

The problem with the practice of granting amnesty is that it is often in direct conflict with criminal, constitutional and international law norms and standards. Where violations of human rights and humanitarian law cross the threshold of “gross and systematic violations”, international law imposes the duty on states to investigate and prosecute those responsible. The four Geneva Conventions of 12 August 1949 impose a duty on states, irrespective of whether they are party to the convention or not, to prosecute international crimes which constitute grave breaches. International crimes include war crimes, torture, genocide and crimes against humanity, all of which now fall under the jurisdiction of the International Criminal Court. Crimes under the ICC, with the exception of aggression, form part of customary international law. The crime of

aggression will only come under the jurisdiction of the ICC once there is a generally accepted definition of aggression by the Assembly of States. As the gap between non-international and international armed conflict closes, it is now generally accepted that grave breaches may be committed in time of war and in time of peace with the result that human rights and humanitarian law are beginning to merge.¹⁷⁹ This chapter has shown that the development of the concept of amnesty as a prerogative of a sovereign has been limited by the development of the human rights regime after the Second World War. In principle, human rights instruments called for the criminalization of grave breaches of systematic human rights violations and thus limit the power of the sovereign to grant amnesty. The next chapter examines the historical development of amnesty from antiquity to the modern era, and the circumstances which gave rise to its limitation by the regime of human rights.

¹⁷⁹ See *Prosecutor v Dusko Tadic, supra*.

CHAPTER THREE

THE ORIGIN AND HISTORICAL DEVELOPMENT OF AMNESTY FROM ANTIQUITY TO THE MODERN ERA

What crimes have they committed? The Earth has decreed that they were an offense on the land and must be destroyed. And if the clan did not exact punishment for an offense against the great goddess, her Wrath was loosed on all the land and not just the offender. As the elders said, if one finger brought oil it soiled the other.¹⁸⁰

3.1. Introduction

In the previous chapter, we traced the etymological origin of amnesty, this chapter now traces how amnesty has developed through customs and treaties within the major civilisations of the world. The practice of granting amnesty is *sui generis*, and may have different bases such as legislative, constitutional or an executive decree, depending on the circumstances of each case. The objective here is to sketch the historical sources and development of amnesty from antiquity to the modern era. The emergence of amnesty in peace agreements before and since the Westphalia Peace Treaty to the First and Second World Wars, and later during the Cold War era will be discussed and analysed.

3. 2. The Origin of Amnesty in Antiquity

The practice of granting amnesty to belligerents who took part in war is as old as war itself. Just as waging war was the prerogative of the sovereign power, so, too, was the power to grant amnesty. Kings, and subsequently political leaders of sovereign states, had absolute power to wage wars and conclude peace.¹⁸¹ When two warring parties have laid down arms, they need to agree on the terms of the peace process, that is, how peace

¹⁸⁰ Chinua Achebe, *Things Fall Apart* (1969) 35.

¹⁸¹ See Green Hackworth, *Digest of International Law*, vol. VII, Chps. XIX - XXI (1943) 429 *et seq.*

will be restored or maintained. This will often take the form of a treaty of peace,¹⁸² but may include other forms of agreement such as an armistice agreement, implied mutual consent, *de bellatio* (when the other party has been defeated to a point of total disintegration), unilateral declaration, suspension of hostilities, cease-fire and cessation of hostilities by tacit agreement.¹⁸³

Societies in the Near East, in particular the ancient Hebrews, defined their relations in terms of treaties.¹⁸⁴ Hittites concluded treaties dating back as early as 1380 BC.¹⁸⁵ The Assyrian and Aramaic treaties date from 750 BC.¹⁸⁶ This also applies to a large number of treaties of the Greek City States and the Romans which were concluded during the period between 700 BC and 200 BC.¹⁸⁷

A bilateral peace treaty was seen as the basis for peace and harmony. The purpose of a peace treaty was to put an end to war and to bring about a new order.¹⁸⁸ It was a common practice for centuries to have an amnesty provision in peace treaties.¹⁸⁹ Thus, according to Wilhelm Grewe:¹⁹⁰

¹⁸² Emmerick de Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Affairs of Nations and of Sovereigns*, Book IV, vol. 3 (1758) (trans. Charles Fenwick, 1916) 346.

¹⁸³ Yoram Dinstein, *War, Aggression and Self Defence* (1994) Chp.2.

¹⁸⁴ Garrett Macintosh, "Hebrew Bible & Peace" in Ervin Laszlo & Jang Youl Yoo (eds.), *World Encyclopaedia of Peace*, vol. 1 (1986) 287.

¹⁸⁵ Gary Beckman, *Hittite Diplomatic Texts* (1996) 7 *et seq.*

¹⁸⁶ William Crewe (ed.), *Fontes Historiae Iuris Gentium: Sources Relating to the History of the Law of Nations 1380 – 1493 BC*, vol. 1 (1995) 24–35.

¹⁸⁷ *Id.* at p. 37 *et seq.*

¹⁸⁸ Yoram Dinstein, *War, Aggression and Self Defence* (1994) Chp. 2.

¹⁸⁹ Keith Hopwood, "Peace in the Ancient World" in Linus Pauling (ed.), *World Encyclopaedia of Peace*, vol. 2 (1986) 208.

¹⁹⁰ Wilhelm Grewe, "Peace Treaties" in Rudolf Bernhardt (ed.), *Encyclopaedia of Public International Law (EPIL)*, vol. 3, (1997) 938.

The task and function of a peace treaty was to achieve a durable accommodation and reconciliation between former enemies, and oblivion and amnesty for their citizens who perpetuated acts of hostility, violence, offence, injury or damnification (*perpetua oblivio et amnestia*)....

It was therefore necessary for parties to agree to a reciprocal undertaking of “friendship and perpetual peace.”¹⁹¹ Ensuring “perpetual peace” did not mean that parties would never fight again, but rather that they would attempt to resolve the issues which led to war in the first place.¹⁹² A common feature of most peace treaties, cease-fire or truce agreements was the granting of a reciprocal general amnesty to armies from both sides immunising them from any criminal penalties for acts committed during the war.

3.3. The Roots of Amnesty in Biblical Times

The origin of the concept of a general amnesty in ancient Israel, previously known as Canaan, may be traced to the Bible and the writings of the Talmud.¹⁹³ Since no formal system of imprisonment existed, political prisoners and people captured benefited from the grace of the ruler. There are practices in Biblical times, which could plausibly be associated with amnesty. A man who caused the death of another was instructed to move to another city or town, to avoid possible attempts by relatives of the deceased to take revenge.¹⁹⁴ An example is, the story of Cain, who was allowed to settle in another place as a *quid pro quo* to end his punishment.¹⁹⁵ Another example is found in Pharaoh’s decision to annul the decree of death imposed upon his chief butler,¹⁹⁶ and the decision by Merodach, to release his father, Jehoiachin, King of Judah, who had been held

¹⁹¹ *Ibid*.

¹⁹² *Id*, at p.350.

¹⁹³ Although in Hebrew the term “Hanina” is used to denote both a pardon and an amnesty, the only distinction is that the epithet “Klallit”(“general”) is used in the case of amnesty.

¹⁹⁴ Harold Kushner, *To Life! A Celebration of Jewish Being and Thinking* (1992) 41.

¹⁹⁵ *Genesis* 4, v. xvii.

¹⁹⁶ *Genesis* 40, v. xx-xxii.

captive by King Nebuchadnezzar of Babylon for 37 years.¹⁹⁷ The aim was to quell revenge rather than to encourage it. The practices cited above resemble a pardon more than an amnesty because they did not involve a group of persons but individuals, and the act of forgiveness was extended *ex gratia* or following a sentence.

However, there are at least two institutions in ancient Israel, which resemble a general amnesty. First, there was the institution of “Misharum” or “freedom.” In terms of the “Misharum” it was a practice for the new King who succeeded to the throne to declare a year of “Misharum” or “freedom” which included remission of taxes and the release of persons sold as slaves, including prisoners of war. The idea behind the practice of “Misharum” was for the ruler to portray himself as a man of mercy. Other similar or related institutions under Jewish law are the “Shmitah” (sabbatical year), and the “Yovel” (Jubilee year) in terms of which slaves were released.¹⁹⁸ It may be concluded from the above examples that the practice of granting a general amnesty by kings existed in Biblical times, although its rationale seems to have been more theological than legal. The practice in ancient Israel has some elements of amnesty since it was granted *en masse* to a group of persons as a sign of mercy shown by the reigning king.¹⁹⁹

3. 4. The Development of Amnesty in the Hellenic Civilization

3.4.1. War and Peace in the Homeric and Mycenaean Greek Era

As we saw in Chapter Two, the term amnesty finds its origin in the Greek language. It is

¹⁹⁷ *Book of Kings and Jeremiah*, v. xx & xxi.

¹⁹⁸ Leslie Sebba, *Proceedings of the Symposium on Amnesty in Israel*, organised by the Institute of Criminology, Institute of Criminology, No. 13, Faculty of Law, Hebrew University of Jerusalem, 13-14 May 1968 pp. iii-iv.

¹⁹⁹ *Ibid*.

therefore not surprising that the ancient custom of amnesty was deeply entrenched in the Greek civilization and it is appropriate to trace its development in ancient Greece.

Evidence of war and peace in Greek history may be traced in Greek mythology and epic poetry. Homer's classical works, the *Iliad* and the *Odyssey*, contain scattered evidence of war and peace in ancient Greece. The *Iliad*, which details the quarrel between two Greek leaders in the war against the city of Troy, is a collection of poems believed to date from the 8th and 9th centuries BC. The work depicts scenes of warfare, for example, when the smith-god Hephaestus stabs the warrior-hero, Achilles:

There were present Strife, Confusion and the ruinous Death-Spirit, holding a wounded human being, another unwounded one, and dragging with her feet a corpse through the battle.²⁰⁰

When peace was finally achieved in the *Odyssey*²⁰¹ through the intervention of the goddesses of war and of wisdom, Athena, she wished that “both sides may love one another as before, and let them have in their lot peace and much wealth.” At the end of the war, Zeus, the supreme god, said:

...let them make a treaty of peace...in perpetuity, *and let us wipe their minds of the memory of the slaughter of sons and brothers.* Let them be friends as before and let peace and plenty prevail.²⁰²

By “wip[ing] their minds of the memory of the slaughter of sons and brothers,” Zeus seems to be contemplating amnesty for both warring parties. Therefore it is possible that the granting of amnesty was contemplated to those who took part in the war.

Be that as it may, there is little evidence that the archaic and classical Greeks enacted

²⁰⁰ Homer, *The Iliad*, Book XVIII, 478 –607, (trans. Robert Fagles, 1998) (rev. ed.).

²⁰¹ Homer, *Odyssey*, Book XXIV, 485 (trans. E.V. Rieu & Peter Jones, 1991).

²⁰² *Id.*, Book XXIV, 480 - 485.

internationally recognised laws governing warfare or amnesty.²⁰³ However, it is generally believed that the concept of reconciliation, of “completely forgetting the past,” had a firm foundation in the Mycenaean and Homeric eras.²⁰⁴ Some archaeological evidence suggests that the term amnesty was first used on inscriptions at Milito dating from 20 BC.²⁰⁵ A similar inscription was uncovered during an excavation by the French government in 1895 at the site of the Oracle of Delphi.²⁰⁶

It is generally accepted in literary circles that the Homeric poem, the *Iliad* and its sequel, the *Odyssey*, are historical fiction.²⁰⁷ The *Iliad* ends on a conciliatory note with Achilles overcoming his anger by restoring Hector’s body to the Trojans for a decent burial. However, that alone does not explain the evolution of the idea of amnesty or oblivion as it was called during the archaic and classical Greek era. This is because, as John Warry argues:

...[to] expect Homer or any other poet who portrays a past epoch to provide us with history is to misunderstand the nature of literary art...There may often be elements of history in epic comparisons, for the poet has neither the time nor patience to invent his own history. But without the aid of external evidence it is impossible to distinguish history from fiction, even though we are certain that both are present.²⁰⁸

On that basis we cannot therefore, without the support of other credible archaeological and historical sources, determine with certainty the true nature and evolution of the concept of amnesty during the Homeric and Mycenaean eras. However, one may argue that the loose references in Homer’s work link peace treaties to the early development of

²⁰³ Josiah Ober, “Classical Greek Times” in Michael Howard, George Andreopoulos & Mark Shulman (eds.), *The Laws of War: Constraints in the Western World* (1994) 12.

²⁰⁴ *Ibid*

²⁰⁵ See *Encyclopaedia Britannica* (1998) 10.

²⁰⁶ *Ibid*

²⁰⁷ John Warry, *Warfare in the Classical World: An Illustrated Encyclopaedia of Weapons, Warriors and Warfare in the Ancient Civilisations of Greece and Rome* (1980) 10.

²⁰⁸ *Id.*, at p. 23.

the concept of amnesty in Homeric and Mycenaean warfare.

3. 4. 2. Amnesty During the Period of the *Archonship*

During the Archaic Age (about 800 BC) the Greek city-state (*Polis*) became independent and subsequently abolished monarchic rule in favour of a democratic form of government. It was during this period that the judicial system in Athens and other Greek city-states developed through codification and the establishment of substantive legal rules.²⁰⁹ The legislative process was led by the institution known as the *archonship* (magistrates), a judicial body elected annually by all citizens and consisting of panels of four with a mandate to adjudicate civil, religious and homicide cases.

Subsequently, the *archons* became powerful and often abused their powers, oppressed their subordinates, and enjoyed greater privilege than other citizens. This development led to the unpopularity of some of the aristocrats, particularly in Sparta and Athens. There was an attempted *coup d' état* around 650 BC in Athens, which led the legislator Draco to pass oppressive laws in 620 BC in terms of which even minor offences were punishable by death. It was during this period of the legislators that the citizens were able to overthrow autocratic leaders.²¹⁰

In situations of crisis, the *archons* usually granted an amnesty in order to restore the full rights of those who had been disenfranchised or dishonoured. Elemer Bologh²¹¹ has undertaken a thorough study of the development of amnesty laws in ancient Greece, from the early period of Greek civilisation to the collapse of the Macedonian Empire and

²⁰⁹ Elemer Bologh, *Ancient Refugees from the Period of the Tyrants to Alexander the Great* (1943) 28.

²¹⁰ *Ibid.*

²¹¹ *Ibid.*

its defeat by the Romans. In his work he identifies at least five distinct amnesties in ancient Greece.

3. 4. 3. The Solonic Amnesty

During the *archonship* of Solon, believed to have been between 594 - 590 BC, democracy was introduced in Athens after Draco had been overthrown for his autocratic rule. The practice of granting amnesty gained momentum under Solon's *archonship*.²¹² Solon restored the rights of the disenfranchised by passing an amnesty law. The purpose of the amnesty law was to effect reconciliation amongst the Athenians, especially those who had been deprived of their civil rights and liberties during Draco's *archonship*. It was also to woo opponents of the state so as to avoid Athenians offering support to the enemies of the Athenian state.

According to Plutarch (cited by Bologh²¹³) the law provided that:

[A]ll those [who had] been outlawed, before Solon was elected *archon* [were] to be restored to possession of their rights except those condemned by the *Areopagus* (Council of noble aristocrats)...on charges of murder, manslaughter or an attempt set up a tyranny.

In essence, those captured as slaves during tensions between citizens and the aristocrats were granted amnesty.²¹⁴ Similarly, those who fled the city-state were allowed to return and their properties, which had been taken by the aristocrats, were restored.²¹⁵

The law further listed the category of people excluded from the amnesty provision.

²¹² Regarding a discussion on the laws promulgated by Solon see George Taubman, *Parallel Legislations and Comparative Law (The Laws of Ancient Greece)*, vol. 1, (1959) 142 *et seq.*

²¹³ *Id.*, at p. 58.

²¹⁴ *Ibid.*

²¹⁵ *Ibid.*

Those responsible for murder, manslaughter and attempting to set up a tyranny were excluded from the amnesty and were banished from the city.²¹⁶ The rationale for the exclusion was that it was believed that they were responsible for endangering the “political security of the state”.²¹⁷

In his critique Balogh concludes that the Solonic amnesty “marked an epoch and a precedent in Athenian history,” because “...during the turbulent times of his rule as archon, Solon fell back upon the support of all citizens of good will...when the very existence of the state was at stake.”²¹⁸ Solonic amnesty law should also be credited as “epoch-making” not only because it was more of a socio-political than a purely political measure, but also because we notice important developments in this period. Firstly, it was during the archonship of Solon that amnesty, for the first time, is associated with the “security of the state” and it is granted *only* to a certain category of people. Secondly, we notice that “serious” crimes are automatically excluded from amnesty. Lastly, we also notice in this period the early development of amnesty for the return of exiles.

3. 4. 4. The Persian and Peloponnesian Wars: 490 - 421 BC

As indicated earlier, the Solonic amnesty was epoch-making because it influenced the development of amnesty even after the end of Solon’s *archonship*. This was evident at the end of the Persian wars (490 - 481 BC) in which the Persians attacked Athens, and the Peloponnesian wars in which Athens was attacked by Sparta (431-421 BC).²¹⁹ During the Peloponnesian wars, the Athenians who co-operated with the Spartans were

²¹⁶ *Ibid*

²¹⁷ *Ibid*

²¹⁸ *Id.*, at p. 59.

²¹⁹ *Id.*, at p. 60.

granted amnesty for acts committed during the war.²²⁰ Like the Solonic amnesty law, those who committed serious crimes associated with the security of the state were prosecuted, including Socrates,²²¹ but in a covert way, to take revenge for what the Athenian state perceived to be his anti-democratic politics. The amnesty granted in this period was simply an extension of Solon's amnesty law and this shows the precedent set by Solon during his *archonship*.

3. 4.5. The Battle of Aegospotami: 405 BC

The influence of the Solonic amnesty was similarly felt during the battle of *Aegospotami* (405 BC)²²² between the Athenians and the Spartans. In this period a different reason underpinned the granting of amnesty, namely that during the war the Athenian ships were destroyed, the city was under siege, and the *demos* adopted a resolution to restore the civil rights of the Athenians.²²³ This was done in the hope of ensuring civil unity and to strengthen Athens's force to protect the besieged city.²²⁴ Another related reason was that reinstating the rights and privileges would help the Athenian state to recover money owed by the exiles. Other than this element, those responsible for murder, manslaughter or tyranny remained excluded. It was only after the fall of Athens that those previously excluded for murder, manslaughter and attempted tyranny were allowed back. This was based on a peace agreement of 404 BC, which the Spartans forced on the Athenians. Immediately after the oligarchs had their rights restored, they

²²⁰ *Ibid*.

²²¹ It is the court of the *Archon* which tried Socrates for alleged impiety and corrupting the minds of the youth and sentenced him to death. Mellitus accused Socrates at his trial of inventing new Gods. See generally *Euthyphro* in Plato, *The Last Days of Socrates* (trans. Hugh Tredennick & Harold Tarrant) (1993).

²²² William Merrill, Herbert Nutting & James Allen (eds.), *Classical Philology*, vol. 6 (1971) 27.

²²³ Bologh, at p. 60.

²²⁴ Bologh, at p. 59.

overthrew the democracy in Athens and adopted policies similar to those in Sparta. As a result, the democratically elected leaders and those supporting them went into exile.²²⁵

The experiences of the Athenians following their defeat in the battle of Aegospotami influenced them to grant a modified amnesty after the Battle of *Chaeronea* of 338 BC.²²⁶

3.4. 6. Amnesty and the Reconciliation Agreement of 403/402 BC

The amnesty of 403/402 BC is the most famous of all amnesties granted for “civil” war crimes in ancient Athens. General Thrasybulus granted it to the supporters of Triankintas after the democratic revolution of 403 BC.²²⁷ Following the overthrow of the *archonship* by the people of Athens, a Committee of Thirty was elected and ruled Athens in 404 BC. The Committee allowed no challenge to its rule and as a result many Athenians went into exile in other city-states such as Thebes and Sparta. One of the opponents of the Committee of Thirty, General Thrasybulus, organised a force against the Thirty Tyrants.²²⁸ A second committee was appointed, known as the Committee of Ten. This Committee, like its predecessor, was corrupt, which resulted in further dissatisfaction amongst the Athenians. After the restoration of democracy in 403 BC, a truce was reached in which it was agreed that amnesty should be granted to members of both Committees as well as those who went into exile during their rule.

According to the study by Loening,²²⁹ this amnesty was part of the Reconciliation Agreement of 403/402 BC between the oligarchic city party and the exiled democrats

²²⁵ *Id* at p. 60.

²²⁶ *Id* at p. 64.

²²⁷ *Ibid.*

²²⁸ See Nicholas Canomis, “Lycurgus C Leocr, SS 124-127, The Decree of Demophantus and the Law of Eucrates” *Hellenika* (1958-1959) 7.

²²⁹ For more on the 403BC amnesty law, see Thomas Loening, *The Reconciliation Agreement of 403/402 BC*, Stuttgart (1987); Nick Loraux, *La cite divisee: I' oubli dans la memoire d'Athens*, Paris (1997).

under the leadership of General Thrasybulus. The status of the Reconciliation Agreement according to Dorjahn was “nothing more than an agreement between political parties.”²³⁰ The act of amnesty was described in the agreement by such expressions as “forgetting past wrongs” or “passing an act of amnesty” which meant an act of political forgiveness between the two parties.²³¹

The amnesty not only provided for reconciliation amongst the parties and individuals, but also for the return of stolen and looted possessions. Properties which had been confiscated were returned to their owners, and those acquired through despotism were confiscated. The amnesty meant that those who returned from exile could not be prosecuted and lawsuits for damages were prohibited except against members of the Committee of Thirty and the Committee of Ten.

The significance of the amnesties of 403/402 BC was that they brought about harmony amongst the people of Athens torn apart by wars with their neighbours, and assisted peace after a revolution or counter-revolution.²³² Compared with previous amnesty laws, the innovative aspect of this amnesty process was that it was linked to the return to their rightful owners of properties confiscated by the oligarchy. The return of properties to their rightful owners represents a form of compensation. This was to avoid division between the factions. We notice here the true recognition of amnesty for political offences rather than amnesty granted as a result of duress by another political power. Finally, in order to avoid, revolutions and counter-revolutions, a list of those who had

²³⁰ Elemer Bologh, *supra* at p. 69.

²³¹ Alfred Dorjahn, *Political Forgiveness in Old Athens: The Amnesty of 403 BC* (1946) 1-6.

²³² Gertrude Smith, “The Prytaneum in the Athenian Amnesty Law” XVI *Classical Philology* (1921)345; Bologh, *supra*, at pp. 61-63.

been cavalrymen under the Thirty was compiled in order to disband the cavalry. The aim was to dissolve any organised body which could threaten the stability of the new democratic order.²³³ This appears more like amnesty for the demobilisations and demilitarisation of armed opposition groups of modern practice as identified in Chapter Two.

3.4.7. The Amnesty of Alexander the Great

Amnesty continued to be practised during the reign of Alexander the Great, and after his death in 323 BC. The Macedonian Empire became famous after Alexander's conquest of the Persian Empire and his expansion of the horizons of the empire as far as Asia. The practice of granting amnesty to political refugees is one aspect which made the Macedonian King popular within and beyond the borders of ancient Greece. During the Olympic Games, Alexander the Great would instruct his kinsmen to issue a royal decree to all Greek exiles to return home and to regain the possessions they owned before they were banished.²³⁴ The amnesty included exiles and criminals and was conditional upon future good behaviour. The strategy was to win support in Greek city-states, so that in the event of war or revolution the King could muster immediate support from his subjects and warriors. The time during which the amnesties were granted had to be a suitable one, hence they were often offered during the Olympic festivals. Often the Greeks met these announcements with great enthusiasm and approval. In the end, the King was seen as a protector of the poor and the powerless.²³⁵ The strategy seems to have worked well, because it became easy to crush anti-Macedonian sentiment. Even during the reign of Phillip II, successor to Alexander the Great, the custom was

²³³ Thomas Loening, *supra* at p. 118.

²³⁴ Bologh, *supra* at p. 67.

²³⁵ Bologh, *supra* at p. 68.

continued.²³⁶

3. 4. 8. Conclusion on the Evolution of Athenian Amnesties

From an analysis of Athenian amnesty laws, it is clear that they differed in nature, purpose and scope. As Bologh puts it: "...it is thus impossible to deduce from the Athenian amnesties a general system."²³⁷ This problem is further compounded by the fact that according to those who have studied the amnesties discussed above, no ancient authority like Socrates, Isocrates and Xenophon, gives a complete account of the provisions of the amnesty laws. The content of these amnesties are reconstructed from the speeches of ancient authorities and at times these contradict each other.²³⁸

One of the features common to all the amnesties is that they were granted either in times of political crisis, or during the Olympic games, with the sole purpose of bringing about civic peace and harmony amongst the citizens of the city-state. All the amnesties granted during the *archonship* period, particularly that of Solon, were aimed at restoring the civil rights of those citizens who had collaborated with the enemies of the Athenian state. Compensation is another important characteristic of the Athenian amnesty laws, its purpose being to ensure reconciliation amongst the parties by returning properties to their rightful owners. It was a rudimentary form of compensation as monetary equivalent thereof did not seem to be possible.²³⁹

²³⁶ Bologh, *supra* at p. 81.

²³⁷ Bologh, *supra* at p. 65.

²³⁸ Thomas Loening, *supra* at p. 30.

²³⁹ Bologh, *supra* at pp. 65 - 66.

The conclusion to be drawn from an analysis of the evolution of Athenian amnesty laws is that during the archaic and classical times, the Greeks used amnesty when the security of the state was in danger, and legal action would gravely threaten public order if those who went into exile, or collaborated with the enemy, were punished. In that sense, amnesty was a familiar concept in several Greek city-states, especially Sparta and Athens. It was granted collectively to a group of persons who were involved in a rebellion against the state, such as the amnesty of 403/402 BC. Often the main purpose was to maintain public order and peace with other neighbouring Greek city-states. The effects of amnesty were that the state relinquished its authority to impose a penal sanction. The frequency with which amnesty was granted in the aftermath of conflict between Greek city-states, particularly in Sparta and Athens, clearly indicates that amnesty had almost developed into an established practice.

Finally, the distinction between amnesties in Greece and other amnesties (such as slave-related amnesties in ancient Israel) is that they served to restore the social status of exiled or outlawed persons. However, in certain circumstances there might not have been any crimes that required amnesty; the person had simply fallen foul of the despotic authority. Let us now compare the development of the Athenian amnesty with other civilisations, namely, the Chinese and the African.

3. 5. The Development of Amnesty in Other Ancient Civilizations

3. 5. 1. Amnesty in the Chinese Civilization

One of the key features of the Chinese criminal justice system was the development of amnesty.²⁴⁰ According to Brian McKnight,²⁴¹ amnesty (*She*) was considered an act of

²⁴⁰ Anthony Hulsewe, *Remnants of Han Law* (1955), vol. 1, 225 – 250.

²⁴¹ Brian McKnight, *The Quality of Mercy: Amnesties and Traditional Chinese Justice* (1981) 1 *et seq.*

grace (*Ta-She*) vested in a sovereign ruler and granted for different purposes. Amnesties granted during the Han era, for example, often followed a sacrifice, the appearance of omens, eclipses and so on.²⁴² Although the practice had religious overtones, it was not followed strictly, that is, not all Han rulers granted amnesty after an eclipse and no strict criteria existed to determine when the amnesty would be granted. By and large, national celebrations and astrological phenomena played a major role in the decision to grant amnesty during the Han era, which explains the frequent amnesties granted during this period. The emperors believed that a national phenomenon like an eclipse was a sign of an imbalance in the people, and that amnesty could restore this imbalance by correcting the conduct of people and purifying them. Hence the Chinese idiom that “the emperor is not only the father of the nation... but their mother as well, nurturing and kind.”²⁴³ Therefore, amnesties were designed to allow a society to renew itself. As Brian McKnight²⁴⁴ puts it:

By issuing an amnesty at the beginning of his reign, a ruler was declaring his ability to wipe the slate clean and to restore order. He was reassuring potential enemies within his state that their previous acts were forgiven if not forgotten.

After the fall of the Han Empire, the basic character of the administration of justice, including the granting of amnesty, continued. Even during the time of Confucius (551 – 479 BC) a strict and rigid form of justice was not followed. In fact, Confucius believed that amnesty was an integral element of building a society in which punishment would no longer be necessary.²⁴⁵

²⁴² Brian McKnight, *id* at p. 16.

²⁴³ Brian McKnight, *id* at p. 16.

²⁴⁴ Brian McKnight, *id* at p. 4 (footnote omitted).

²⁴⁵ Inazo Nitobe, *Bushido: The Soul of Japan: An Exposition of Japanese Thought* (2000). Confucius is reported to have said “never has there been a case of a sovereign loving benevolence, and the people not loving righteousness” at 37. The benevolence shown through acts of mercy were necessary in order to mitigate the despotism of the feudal state.

In Medieval China (220- 907AD), murderers were granted amnesty on condition that they were not allowed to stay in the place where they had committed the crime. It was feared that relatives and friends of the victims might be tempted to take revenge. In order to forestall such vengeance, the killer was moved from the area where the offence had been committed.²⁴⁶ The amnesty in this period shows some striking similarities with the practices in Biblical times where the offender was instructed to move to another city in order to avoid possible revenge by members of the deceased's family. As indicated in the assessment of amnesty during Biblical times, the practice of granting amnesty in Medieval China resembles a pardon more than an amnesty, as defined in Chapter Two of this study.

In essence, the system of amnesty in Chinese civilisation had two aspects, namely, political and religious.²⁴⁷ Politically, it reflected the benevolence of the reigning ruler as the father and mother of the people. Like the amnesty granted by Alexander the Great, in almost all the successive Chinese dynasties, there was a profound belief that if the ruler is forgiving so will his subordinates be forgiving. Similar to the amnesty granted by Alexander the Great, the Chinese ruler stood *in loco parentis* to his people, because of his power to punish and forgive their misdeeds for whatever reason he deemed relevant and appropriate.

Secondly, in terms of its religious aspect, the Chinese amnesty differed from the Athenian amnesty in at least one fundamental characteristic, namely, that it entailed a restoration of harmony with nature. This perhaps explains why amnesty was granted after an eclipse or an earthquake.

²⁴⁶ Brian McKnight, *supra*, at p. 60.

3. 5. 2. Amnesty in African Civilization

As indicated at the beginning of this chapter, for centuries the aim and objectives of a peace treaty were to achieve reconciliation and this included the granting of amnesty for acts of violence on both sides of the conflict. This concept was not foreign to African societies in pre-colonial Africa. A peace treaty at the end of the Hittite-Egyptian war (1280 –1270 BC) between the Egyptian Pharaoh of the XIXth Dynasty, Rameses II, and the Hittite King, Hattusilis III provides that:

...in good peace and in good brotherhood. The children of the Great Prince of Hatti are in brotherhood and peace with the children of the children of Rameses Meri-Amon, the great ruler of Egypt, for they are in our situation of brotherhood and our situation of peace. The land of Egypt, with the land of Hatti [shall be] at peace and in brotherhood like unto us forever.²⁴⁸

It is also believed that at the end of the war Hattusilis gave his daughter to Rameses II, most probably as a sign of reconciliation.²⁴⁹ It cannot be asserted with certainty that the above passage refers to the early genesis of “amnesty” in ancient peace treaties. At the same time, it does not disprove such a possibility.²⁵⁰ Even though the word “amnesty” is not used in the peace treaty, it may perhaps be inferred from the repeated use of expressions such “brotherhood” and “peace forever.”²⁵¹ As Crewe²⁵² has stated in his

²⁴⁷ Brian McKnight *id.*, at p. 126; Anthony Hulsewe, *supra* at p. 250.

²⁴⁸ Paragraph 6 of the Peace and Alliance Treaty between the Hittite King Hattusilis III and the Egyptian King Rameses II (1280 –1270 BC) reproduced in Wilhelm Crewe (ed.), *Fontes Historiae Iuris Gentium: Sources Relating to the History of the Law of Nations, 1380 – 1493 BC*, vol. 1 (1995) 18 –20.

²⁴⁹ Cheikh Anta Diop, *Civilisation or Barbarism ? An Authentic Anthropology* (1989) 98.

²⁵⁰ Mathew Metthew Melke & Richard Weigel, *Peace in the Ancient World* (1981) 9 (“One great problem in the study of the Ancient World is caused by gaps in information...The absence of data could indicate a probability of peace, since the presence of war would likely be noted by someone or other. But in the Ancient World, where we rely on ambivalent inscriptions and chancepreservations, this is less likely to be so, especially if the losers are the record keepers. For instance, the Exodus of Moses is not to be found anywhere in Egyptian annals...”) .

²⁵¹ See David Lorton, *The Juridical Terminology of International Relations in Egyptian Texts through Dynasty XVIII* (1974) 116-118; Jessie Buckland, *Kant's Perpetual Peace: A Philosophical Proposal* (1927).

²⁵² Wilhelm Crewe, “Peace Treaties” in Rudolf Bernardt (ed.), *Encyclopedia of Public International Law*

study of ancient peace treaties, they were not only meant to end hostilities but also provide for *perpetua oblivio et amnestia*.

Diallo²⁵³ has also attested to the existence of peace treaties at the end of hostilities in pre-colonial African societies, for instance:

In Kenya, when a peace treaty had been made, the parties swore an oath to keep it. The ceremony was performed at a crossroads: a dog was killed and cut in two, to signify the solemn conclusion of the treaty, and the curse of the gods was called down on anyone violating it.²⁵⁴

Similarly, Schapera²⁵⁵ in his study of the customs and traditions of the Khoisan peoples of Southern Africa, has observed that at the end of hostilities the defeated group would send a messenger to negotiate a peace agreement and make any necessary concessions:

...the two sides came together at their boundary, and after they had agreed upon terms an ox was slaughtered with spears, and the corpse left [as] a prey to wild animals. They then expressed the wish that whoever might break the compact would come to all possible harm, the fate implied being that he might be pierced through just like the ox, and became the food of vultures and hyenas...

The Amharas and Tigreans, two of the ethnic groups of Ethiopia who share the *Ge'ez* civilisation, have a symbolic way to resolve disputes. At the end of intense negotiations a wrongdoer would carry a huge stone on his back and request the victim to forgive him. The victim would then pick up the stone and throw it to the ground to mark peace between them.²⁵⁶

It is against this background of peacemaking and forgiveness that amnesty in pre-

(1992) 938.

²⁵³ Yolande Diallo, *African Traditions and Humanitarian Law*, ICRC (1978) 1. Cf. Emmanuel Bello, *African Customary Humanitarian Law*, ICRC, (1980) 1 *et seq.*

²⁵⁴ Yolande Diallo, *id* at p. 12.

²⁵⁵ Isaac Schapera, *The Khoisan Peoples of South Africa: Bushmen and Hottentots* (1930) 352.

²⁵⁶ Teshale Tibedu, *The Making of Modern Ethiopia 1886 – 1974* (1995) Chp. 1 *et seq.*

colonial African societies should be understood, and within the context of the world-view of the African justice system, which in essence aims to achieve three objectives, namely, rehabilitation of the offender, reconciliation of the parties, and reparations for the victim of crime. As a general rule, instead of focusing on crime as an “act against the state”, the African justice system defines crime as an act against the victim and the community in which both the victim and the offender live. Crime is therefore seen as an injury which violates not only the dignity of the victim, but also the balance of the community in which he or she lives.²⁵⁷ Therefore, the granting of any amnesty is always linked to compensation for the victim(s) of crime.

Since the African criminal justice system emphasises group solidarity, amnesty was not seen in individual terms but rather in collective terms, that is, as part of the reconciliation process expressed in a rich heritage of metaphors of relationship, aphorisms, omens, and symbolic rituals of reconciliation and peace. The 1993 Arusha Peace and Reconciliation Agreement for Burundi, allowed the transitional National Assembly to pass a law or laws, on the one hand, to provide a framework for the granting of amnesty for political crimes consistent with international law,²⁵⁸ while on the other hand it emphasised values of solidarity, forgiveness, mutual tolerance, respect for others and for oneself (*Ubupfasoni*) and *Ubuntu* (humanism and character). It is in this context that some African societies prohibited the imposition of the death penalty for serious crimes such as murder.²⁵⁹ Generally, a person who commits murder was exiled

²⁵⁷ See *S v Makwanyane & Another* 1995 (6) BCLR 665 (CC) paras. 300 - 308 (*per* Mokgoro J) & paras. 345 - 392 (*per* Sachs J).

²⁵⁸ Article 8(1) (b) of the Arusha Peace Accord of 1993.

²⁵⁹ For example, amongst the Zulus and Basotho people in South Africa. For more detailed discussion on this issue see *Sv Makwanyane* 1995 (6) BCLR (CC) paras. 345 - 392 (*per* Sachs J).

to another village and could only return to his community once the village elders were satisfied that he or she had been rehabilitated and had paid compensation to the bereaved family.²⁶⁰ The practice resembles a pardon more than an amnesty as it was granted to individuals by the king or chief, and did not involve a group of identified persons.

However, depending on the circumstances of each case, where such practices involve a group of identified persons it may be characterised as amnesty. For instance, in the case of Mozambique, Priscilla Heyner²⁶¹ has observed that where the government granted amnesty to all those involved in the conflict, individuals known in their communities to have committed atrocities during the war consulted traditional healers to “cleanse” themselves of their crimes so that they could be accepted back into their communities.

In the case of rituals, the process focuses on admission of guilt, making an apology, asking for forgiveness, giving compensation and being reconciled in a ceremony that evokes the presence of God, the spirits and the ancestors. Payment is not seen as punishment, but is made in due recognition of the relative’s sorrow. Amongst the Chagga of Tanzania, for example, public wrongs are seen as a potential threat to the stability of the society and the payment of compensation and a public apology in the presence of the chief and elders ensures that peace prevails in the community. The offender is asked to pay compensation, usually a head of cattle, depending on the nature of the crime committed, in order to strengthen the reconciliation. Finally, “milk, which is seen as a symbol of holiness, is poured on the ground as a sign of praying for peace

²⁶⁰ For example, in Chinua Achebe’s book, *Things Fall Apart*, the main character, Okonko was exiled from his village Umuofia to Mbumo after committing manslaughter.

²⁶¹ Priscilla Heyner, *Unspeakable Truths: Confronting State Terror* (2001)175.

from ancestors of both sides.’²⁶²

There are indeed some striking similarities between the practice of amnesty in pre-colonial African societies and other ancient civilisations. In both the Chinese and African civilisations natural phenomena such as the eclipse of the moon played an important part in the decision to grant amnesty. Like the Athenian amnesty of 403/402 BC, which linked the granting of amnesty to compensation, so too is compensation an important constituent element of the African justice system. Finally, it is important to note that a distinction was drawn between amnesty and pardon in pre-colonial African societies as discussed in Chapter Two of this study. As in Biblical times, when those responsible for serious offences were exiled, the same practice was observed in most pre-colonial African societies. Rituals observed in the aftermath of war not only represent, but also demonstrate, the existence of amnesty in African societies.

3. 6. The Development of Amnesty Through the Writings of Qualified Scholars of International Law

Classical scholars of international law have written about war and its consequences, including the status of amnesty in peace treaties.²⁶³ Most, if not all, of the sources referred to here were written at a time when inter-state conflicts were a common phenomenon. The Dutch lawyer, Hugo Grotius (1583-1645), often regarded as the father of modern international law, discussed the role of amnesty in international peace treaties in his classic work *De Jure Belli ac Pacis* published in 1625.²⁶⁴ The book was written at

²⁶² Amani Aimtoga, “Conflict Resolution and Reconciliation among the Chagga of Tanzania” in *Final Report of the All Africa Conference on African Principles of Conflict Resolution and Reconciliation*, November 8-12 (1999) 59 at p. 64.

²⁶³ See generally Benjamin Ferencz, *Enforcing International Law: A Way to World Peace*, vol. 1 (1983).

²⁶⁴ Hugo Grotius, *The Law of War and Peace (De Jure Belli ac Pacis)*, translated by Louise Loomis (1949); Cf. Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order*

the time of the Thirty Years War, which culminated in the Westphalia Peace Treaty of 1648. Grotius was outraged by the cruelty of war at that time. His book was rooted in the Christian ideas of justice and natural law. He wrote that peace agreements to end war were the responsibility of those waging war, and that compromises help to end war.²⁶⁵ Peace agreements, according to Grotius, can either be tacit or explicit. Amnesty, he argued, was an integral part of a peace agreement. According to Grotius, penalties:

...ought to be relinquished, for fear that peace may not be peaceful enough, if it leaves standing the old reasons of war. Accordingly, even wrongs not previously known about will come under the rule of being left unpunished...²⁶⁶.

Grotius argued that compensation was more important than punishment for war related offences. Those who surrender do so in good faith and under the belief that the victor will grant them amnesty for all offences committed during the war. He argued that punishment could be mitigated by the law of love and the “theory of pardon” by which the severity of the crime is mitigated.²⁶⁷ Grotius believed that pardon/amnesty was the result of the virtue of human generosity and its essence was forgiveness. According to him, pardon/amnesty could take different forms such as refraining from prosecution, mitigating or imposing no penalty at all, and the official reduction of the sentence or termination of imprisonment after the sentence had commenced. Although Grotius regarded all crimes as intrinsically evil and deserving of punishment, the discretion to punish depends on the purpose served by each punishment. The criteria governing the decision to punish are whether (i) punishment seeks to achieve a valid purpose; (ii) the purpose of punishment could be achieved by other means; and (iii) the off-setting elements, that is, situations specific to the crime that warrant mercy for the criminal, for

from *Grotius to Kant* (1999).

²⁶⁵*Id.*, Book Three, Chp. XX.

²⁶⁶*Id.*, at p. 405.

²⁶⁷ It does not seem that Grotius made a distinction between amnesty and pardon.

example, if the criminal has done something commendable or promises to be a law abiding citizen.

Grotius's theory of pardon/amnesty is still relevant today. In determining whether amnesty should be granted to those responsible for atrocities in the aftermath of war, it is important to ascertain whether their punishment would serve any purpose. If the punishment of the most culpable leaders would end the culture of impunity, the less important perpetrators need not be punished. The punishment could be served by other means such as lustration (exclusion from public life) which will serve as a mitigating factor.²⁶⁸

Cesare Beccaria (1738-1794) argued that the power to grant pardon and amnesty was “an attribute of a sovereign power.” He argued that where the administration of justice functioned well, that is, during times of peace, it was not necessary to grant pardon or amnesty. He attributed the power to grant amnesty to the magnanimity of the sovereign. He warned against frequent granting of amnesty and pardon as this could “show men that crimes can be pardoned and that punishment is not their inevitable consequence, which encourages the illusion of impunity”.²⁶⁹

Like Cesare Beccaria, the Swiss international lawyer Emmerich de Vattel, maintained that amnesty was a direct consequence of war and peace and was often embodied in a peace treaty.²⁷⁰ According to De Vattel, amnesty is the first principle of a peace treaty.

²⁶⁸ Onuma Yasuaki (ed.), *A Normative Approach to War: Peace, War, and Justice in Hugo Grotius* (1993) 229-230.

²⁶⁹ Cesare Beccaria, *On Crimes and Punishment and Other Writings* (1995) (ed.), Richard Bellary (trans. Richard Davies), Chp. 46, pp.111-112.

²⁷⁰ Emmerich de Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Affairs of*

Amnesty according to him is implied even if it has not been included. He wrote:

An amnesty is a complete forgetfulness of the past; and as the treaty of peace is meant to put an end to every subject of discord, the amnesty should constitute its first article. Accordingly, such is the common practice at the present day. But though the treaty should make mention of it, the amnesty is necessarily included in it from the very nature of the agreement.²⁷¹

The purpose of an amnesty clause in a peace treaty is to forgive all injuries incurred during the war, and to ensure that no action will be taken against either of the parties unless it has been clearly stipulated in the peace treaty. Any acts committed by either side are considered never to have happened.²⁷²

Another distinguished scholar of international law in his time, Samuel von Pufendorf (c. 1632)²⁷³ in his work *De Officio Hominis Et Civis Juxta Legem Naturalem Libri Duo*, argued that the power to wage war belongs to the sovereign, who wages war on behalf of his subjects. A sovereign should have a just cause for waging war because of its disastrous consequences. Equally, the sovereign has the power to declare peace or a truce. A peace agreement, according to Pufendorf, results in perpetual peace, which extinguishes all offences committed by the warring parties on both sides. However, for such a peace treaty to be valid it has to be ratified by all parties, and must include the terms and conditions for the restoration of friendship and perpetual peace and tranquillity. The condition of such peace must always include perpetual oblivion for crimes committed during the war up until the peace treaty has been signed.²⁷⁴

Nations and of Sovereigns (Book IV), vol. 3, (1758)(trans. Charles Fenwick, 1916) 351.

²⁷¹ *Ibid*

²⁷² *Ibid*

²⁷³ Samuel von Pufendorf, *De Officio Hominis et Civis Juxta Legem Naturalem Libri Duo* (1982), vol. 2, (ed.) James Brown Scott, *The Classics of International Law* (1927), (trans. Frank Moore), Chp. XVI, 154-155.

²⁷⁴ *Id.*, at p. 141 *et seq.*

Jean Bodin, like other international lawyers, agreed that the power to proclaim “the law of forgetfulness for ending civil wars” is the “first mark of sovereignty.”²⁷⁵ He cites two examples of such laws of forgiveness aimed at ending a war. Firstly, the law passed by General Thrasybulus after overthrowing the Thirty Tyrants and forcing them out of Athens, which proclaimed the law of forgiveness. This law contained a provision that all injuries and losses incurred as a result of the civil war be forgotten.²⁷⁶

Secondly, during the Roman empire, the King and Prince had the power to pardon villains for wars and other offences against the general public, but could not pardon violations of the laws of God which were regarded as falling beyond the power of the sovereign.²⁷⁷ The most sacred of all pardons or graces that a sovereign could give, was for offences committed against him or his throne. Under such circumstances, according to Bodin, it was possible for the sovereign to abuse his powers, for example, where the sovereign refused to exercise his prerogative of granting amnesty as a revenge for injuries sustained.²⁷⁸

3.7. The Relationship between Amnesty and State Sovereignty: The Development of Amnesty in Peace Treaties from Westphalia to Evian

The treaty of Westphalia concluded in 1648 brought an end to the leading role of the Holy Roman Empire and the emperor in Europe. The Westphalia Peace Treaty ended the

²⁷⁵ Kenneth McRae (ed.), Jean Bodin, *The Six Bookes of a Commonweale* (1606) (Book I, 1962) 110 &171.

²⁷⁶ See discussion above on the developments of amnesty in the Hellenic civilisation during the period of the *Archonship*.

²⁷⁷ Kenneth McRae, *supra*, at p. 174.

²⁷⁸ *Id.*, at p. 175.

Thirty Years War, which began as a struggle between Catholic and Protestant states within the Holy Roman Empire. In October 1648, after thirty years of war and nearly four years of negotiations, the Peace Treaty of Westphalia was concluded by two peace treaties: one between the Holy Roman Emperor and France, in Münster, and one between the Holy Roman Emperor and Sweden, in Osnabrück.²⁷⁹ Amongst others, the treaty reduced the Papacy to a second-class international actor, guaranteed the protection of religious minorities, and pleaded for religious tolerance between Catholics and Protestants.²⁸⁰

From an international law perspective, the Treaty of Westphalia marked the advent of the modern nation state.²⁸¹ The sovereignty of the former member territories of the empire was established. The Swiss Confederation and the Republic of the United Netherlands were recognised as independent states, and the other remaining members of the alliances obtained the right to conclude treaties with foreign powers. This new principle of the sovereign equality of states was evident, for example, in the 1713 Anglo-Spanish Peace Treaty which ended the war of the Spanish succession. The treaty, *inter alia*, provided for the “equal balance of power” as “the best and most solid foundation of mutual friendship, and of a concord which will be lasting on all sides.”²⁸²

The significant element of this “equal balance of power” was that states had the power

²⁷⁹ Reprinted in Fred Israel, *Major Peace Treaties of Modern History 1648-1967*, vol.1 (1967) 9. See also *A General Collection of Treaties, Declarations of War, Manifestos, and other Publick Papers, Relating to Peace and War*, vol. 1, (1967) 4.

²⁸⁰ Leo Gross, “The Peace of Westphalia 1648-1948” in Charlotte Ku & Paul Diehl (eds.), *International Law: Classic and Contemporary Readings* (1998) 55.

²⁸¹ Alfred-Maurice de Zayas, “ Westphalia Peace of 1648” *Encyclopedia of Public International Law*, vol. 4 (2000) 1465.

²⁸² Article 2 of the 1713 Anglo-Spanish Peace Treaty reprinted in William Crewe (ed.), *Fontes Historiae Iuris Gentium: Sources Relating to the History of the Law of Nations*, vol. 2 (1995) 240.

to grant reciprocal amnesty for acts committed in the war between sovereign states. In most cases the amnesty provision usually appeared amongst the first provisions of the peace treaty. Article II of the Treaty of Osnabrück, headed Amnesty Clause, provided:

That there shall be on both sides *a perpetual Oblivion and Amnesty* of all that has been done since the beginning of these Troubles, in what Place or in what Manner for whatever Hostilities may have been exercised by the one or the other Party; neither for any of those things, nor upon any other Account of Hostility or Enmity, Vexation or Hindrance shall be exercised or suffered, or caused to be exercised, either as to Persons, Condition, Goods or Security, either by one self or by other, in private or openly, directly or indirectly, under form of Right or Law, or by open Deed, either within, or in any Place whatsoever without the Empire, notwithstanding all former Compacts to the contrary; but that all Injuries, Violence, Hostilities and Damages, and all Expenses that either side has been obliged to be at, as well before as during the War, and all Libels by Words or Writing shall be entirely forgotten, without any regard to Persons or Things; for that whatever might be demanded or presented by one against another upon this account, shall be buried in perpetual Oblivion.²⁸³

The amnesty provision excluded compensation for losses incurred during the war by all parties which participated in the Thirty Years War.²⁸⁴ With time, the practice of granting amnesty came to be understood as excluding the right to claim compensation for losses during the war. For instance, Article III on general amnesty of the 1654 Anglo-Dutch Treaty of Peace and Union stated:

Also, that all offences, injuries, charges, and damages, that either party has sustained from the other since the 18/28 day of May, 1652, shall be blotted out and forgotten, in such a manner as that neither of the said parties shall trouble the other on account of any such damages, offences, injury or losses.²⁸⁵

Similarly, the 1714 Treaty between the Emperor of Germany and France provided that:

On each side there shall be a perpetual pardon and amnesty for all that has been done since the beginning of the war, in all manners and in all places that the Hostilities took place ...all wrongs committed by either side in words, acts of hostilities and destruction, and expenses incurred, without taking into account persons, or property, are completely annulled, so that all demands and claims in these matters shall be forgotten.²⁸⁶

²⁸³ Emphasis added.

²⁸⁴ Articles XV – XVI.

²⁸⁵ 1654 Anglo-Dutch Treaty of Peace and Union reprinted in William Crewe (ed.), *Fontes Historiae Iuris Gentium*, vol. 2 (1995) 423.

²⁸⁶ Article II of the 1714 Peace Treaty between the Emperor and France, reprinted in William Crewe, (ed.), *Fontes Historiae Iuris Gentium*, vol. 2 (1995) 240.

During the sixteenth and seventeenth centuries amnesty clauses continued to appear in peace treaties, for example, the Pyrenean Treaty of Peace between the Crowns of France and Spain (1659)²⁸⁷; Polono-Swedish Peace Treaty (1660)²⁸⁸; the Treaty of Ryswick between King William III of Great Britain, the Christian King Louis XIV and the King of France of September 1697²⁸⁹; Russo-Swedish Peace Treaty (1721)²⁹⁰; 1670 Treaty of Peace and Amity on the recognition of British sovereign rights over possessions in the West Indies or any other part of America²⁹¹; Nijmegen Peace Treaty of August 1678

²⁸⁷ *A General Collection of Treaties, Manifestos, and other Publick Papers, Relating to Peace and War* vol. 4 (1967) 39. Article IV provides:

All occasions of Enmity or misunderstanding, shall remain extinguished and for ever abolished, and whatsoever hath been done or hath happened, upon occasion of the present Wars or during the same, shall be put into perpetual Oblivion... .

²⁸⁸ Reprinted in William Crewe (ed.), vol. 2, *supra* at 310. Article II provides:

There shall be perpetual oblivion and Amnesty of all those things which have been committed by any of the covenanting powers whomsoever in what Place, and in what manner forever, for that neighbour of the parties shall hereafter on that or any other account or pretext, commit any Hostility or Act of enmity against any one of the other parties, in Form of law, or by violence, nor cause it to be done by his own or other's subjects.

²⁸⁹ *A Collection of all the Treaties of Peace, Alliance, and Commerce Between Great Britain and other Powers from the Revolution in 1688, to the Present Time*, vol. I (1688-1727) 13. Reprinted in Alfred Israel, *Major Peace Treaties of Modern History* vol. 1, (1967) p. 153. Cf. *A Collection of All the Treaties of Peace, Alliance and Commerce Between Great Britain and Other Powers 1688 - 1727*, vol.1 (1967) 13.

Article II of the treaty provides as follows:

There shall be a General Amnesty and Oblivion of all that hath been done on either part upon the account of the last War, whether for those, who being subject of France... .

Article III also provided that:

...all offences, injuries, damages which the said King of Great Britain and his subjects, or the said Most Christian King and his subjects have suffered from each other during this war, shall be forgotten... .

²⁹⁰ Reprinted in William Crewe (ed.), vol. 2, *supra* at 326. Article II of the treaty stated:

Furthermore, there shall be mutual and general amnesty in view of all hostilities committed during the war.

²⁹¹ Article VII (Oblivion and Amnesty) reprinted in William Crewe (ed.), vol. 2, *supra* at p. 473.

between France and the Netherlands²⁹²; Utrecht Peace Treaty of July 1713 between Britain and Ireland and Prince Louis XIV of France²⁹³; Paris Peace Treaty of 1763 between France, Spain, England and Portugal at the end of the Seven Years War²⁹⁴; Treaty of Rastadt between the Holy Roman Empire and the King of France of March 1774²⁹⁵; Treaty of Peace and Territorial Limits of 1777²⁹⁶; Treaty of Aix la Chapelle between the Kings of Great Britain, France, Spain and Sorolinia, the Queen of Hungary, the Duke of Modena, the Republic of Genoa and the United Provinces of October 1748²⁹⁷; and the Peace Treaty between France and Spain of September 1678.²⁹⁸

At the end of the Napoleonic Wars, France and the Allied Powers agreed to redraw the borders of Europe (e.g., Saxony and other German states). The neutrality of the Swiss Federation was also agreed upon during the Vienna Congress of 1814. However, individual peace agreements were signed with France which did not form part of the

²⁹² Article 2, *C. T.S.* vol. 14 at p. 365.

²⁹³ Article 2, *C. T.S.* vol. 27 at p. 475.

²⁹⁴ Cited by Fania Domb, "Treatment of War Crimes in Peace Settlements: Prosecution or Amnesty?" in Yoram Dinstein (ed.), *War Crimes in International Law* (1996) 307.

²⁹⁵ Reprinted in Fred Israel, *Major Peace Treaties of Modern History* vol. 1, (1967), p.180. Article XXIII of the treaty provides:

There shall be on either side a reciprocal pardon for all wrongs, hurts and offences committed in word and deed or in any manner whatsoever, during the course of the War, by the subjects of the Spanish Low Countries and of the places and lands ceded or restituted and no investigations of any sort shall be introduced.

²⁹⁶ Reprinted in William Crewe (ed.), *supra* at p. 489. Article 1 (peace, amnesty and confirmation of preceding treaties).

²⁹⁷ Fred Israel, *Major Peace Treaties of Modern History* vol.1, (1967) 271. Article II provides:

There shall be a general oblivion of whatever may have been done or committed during the war, now ended... .

²⁹⁸ Fred Israel, *Major Peace Treaties of Modern History 1648-1967*, vol.1, (1967) 133. Article III provides:

All that has been done during the war, shall be buried in perpetual oblivion.

Vienna Congress. The Definitive Treaty of Peace and Amity between Great Britain, Portugal, Prussia, Russia and Sweden, France and Austria (May 1814) incorporated an amnesty clause.²⁹⁹ Similarly, other treaties thereafter like the 1866 Prague Peace Treaty between Austria and Prussia to end the Holstein conflict³⁰⁰, and the 1879 Treaty of Constantinople between Russia and the Ottoman Empire included provisions on amnesty.³⁰¹

3.7.1. Amnesty in Treaties Signed between the Indian Tribes and the Government of the United States of America

A number of treaties concluded between the Government of the United States and the Indian tribes show that amnesty was granted at the end of hostilities. At least two of these treaties contained provisions that granted amnesty for acts committed during the various conflicts between the USA Government and the Indians. Firstly, the peace treaty of 1843 provided that:

Revenge shall not be cherished, nor retaliation practiced, for offenses committed by individuals.³⁰²

Secondly, on 14 June 1866, the Government of the United States and the Creeks Nation signed a peace treaty which, amongst others, purported to reinstate the relationship

²⁹⁹ *C.T. S.*, vol. 63. Article XVI provides:

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

³⁰⁰ *C. T. S.* vol. 133, at p. 477.

³⁰¹ *C. T.S.* vol. 154, at p. 477.

³⁰² Compact between the Several Tribes of Indians – 1843 reprinted in *The American Indian Treaties Series*, Institute for the Development of Indian Law, Washington, D.C., vol. 1, (1962) 1.

between the two parties by granting amnesty.³⁰³ Article 1 of the treaty explicitly provided for the granting of amnesty excluding claims for reparations that:

There shall be perpetual peace and friendship between the parties to this treaty, and the Creeks bind themselves to remain firm allies and friends of the United States, and never to take up arms against the United States, but always faithfully to aid in putting down its enemies. They also agree to remain at peace with all other Indian tribes, and, in return, the United States guarantees them quiet possession of their country, and protection against hostilities on the part of other tribes. In the event of hostilities, the United States agree that the tribe commencing and prosecuting the same, as far as may be practicable, will make just reparation therefor. To ensure this protection... *A general amnesty of all past offenses against the laws of the United States, committed by any member of the Creek Nation, is hereby declared. And the Creek, anxious for the restoration of kind and friendly feelings among themselves, do hereby declare an amnesty for all past offenses against their government, and no Indian shall be proscribed or any act of forfeiture or confiscation passed against those who have remained friendly to, or taken up arms against, the United States, but they shall enjoy equal privileges with other members of the said tribe, and all laws heretofore passed inconsistent herewith are hereby declared inoperative.*³⁰⁴

Amnesties continued to be granted at the end of rebellions and during the American War of Independence. In the 1794 Treaty of Amity, Commerce and Navigation between Great Britain and the United States, not only was amnesty granted, but the American Government also agreed that the loyalists to the British government could claim either the restitution of their property or compensation for their property and communal losses.³⁰⁵ However, the subsequent deterioration of the political relationship between the two countries resulted in the United States failing to honour its obligation to pay compensation to loyalists.

In 1795, President George Washington granted amnesty to Pennsylvanian residents who participated in an uprising called the Whiskey Rebellion. During the American Civil War (1861-1865), President Abraham Lincoln granted amnesty to Confederates who

³⁰³ Treaty with the Creeks, 14 June 1866. Reprinted in Francis Prutcha (ed.), *Documents of United States Indian Policy* (2000) 98 -99.

³⁰⁴ Emphasis added.

³⁰⁵ Article 2 (amnesty) & articles VI– X (compensation).

supported the Union during the civil war. Lincoln's successor also issued several conditional amnesties,³⁰⁶ for example, on 17 July 1862, the USA Congress passed a proclamation authorising President Andrew Johnson:

...to extend to persons who may have participated in the existing rebellion in any State or part thereof, pardon and amnesty with such exceptions and at such time and such conditions as he may deem expedient for the public welfare.³⁰⁷

As indicated earlier, the practice of granting amnesty at the end of conflicts as developed in peace treaties since the Westphalian era, continued during the period of colonialism as illustrated by the American Government and the Indians. However, the practice of linking the granting of amnesty to compensation was not consistently followed by the parties.

3.7.2. The Anglo-Boer War (1899-1902)

Towards the end of the nineteenth century a civil war broke out in southern Africa, between the Afrikaners of the two Boer Republics of the Orange Free State and the South African Republic (Transvaal), and the British. The Anglo- Boer War began on 11 October 1899 and ended in May 1902. It is estimated that more than 20 000 Blacks and Afrikaner women and children³⁰⁸ were herded into British concentration camps. It has been estimated that about 2 600 prisoners of war were deported to St Helena, Bermuda, Ceylon and India.³⁰⁹ Some thirty-two Boer rebels were prosecuted for treason and

³⁰⁶ Doris Jonathan, *Pardon and Amnesty under Lincoln: The Restoration of Confederates to their Rights and Privileges, 1861 -1898* (1977) 221.

³⁰⁷ Section 13, Act to Suppress Insurrection, to Punish Treason and Rebellion, to Seize and Confiscate Property of Rebels, and for other Purposes, 17 July 1862 reprinted in George Sanger (ed.), *Statutes at Large, Treaties, Proclamations of the United States of America*, vol. XIV, December 1865, p. 377.

³⁰⁸ See generally John Camaroff, Solomon Molema & Andrew Reed (eds.), *The Diary of Sol T. Plaatjie* (1999).

³⁰⁹ Regarding an account of the Anglo-Boer War, see LS Emery (ed.), *The Times History of the War in South Africa*, vol. V (1907); SB Spies, *Methods of Supremacy in South Africa: 1899 - 1907* (1969); Thomas Pakenham, *The Boer War* (1979); JD Kestell & Van Velden, *The Peace Negotiations Between Boer and Briton in South Africa* (1912); Eric Itzkin, "Handicraft by Boer Prisoners of War" in *The Anglo-*

executed.³¹⁰ Ironically, at the time when these atrocities were being committed, the British Government was a major role-player in the first codification of the laws and customs of war which lead to the adoption of the 1899 and 1907 Hague Conventions on the Laws and Customs of War on Land.³¹¹ British forces were also familiar with the 1880 *Oxford Manual of the Laws and Customs of War*, which formed the basis of the Hague Conventions.³¹² In September 1900, two years before the end of the war, Britain ratified the Hague Conventions.³¹³

During the war, British forces not only refused to recognise Boer rebels as prisoners of war, but the British Government also refused to grant the Boer rebels amnesty as part of a brokered peace agreement.³¹⁴ Negotiations between the leaders of the Boer republics and British representatives became a difficult process. Before the war formally ended in 1902, negotiations for a peace deal were spearheaded by two representatives of the British government, General Lord Kitchener, Commander-in-Chief of the British forces, and the High Commissioner, Lord Milner. The two representatives met with leaders of the Boer Republics, Generals Louis Botha, De Wet and Steyn who requested immunity in order to attend the Middleberg meeting scheduled for 28 February 1901.³¹⁵ Lord

Boer War, Commemorative Lectures at Rand Afrikaans University, 1999, RAU (1999) 131.

³¹⁰ John Dugard, "The Treatment of Rebels in Conflicts of a Disputed Character: The Anglo-Boer War and the ANC-Boer War Compared" in Astrid Delissen & Gerard Tanja (eds.), *Humanitarian Law of Armed Conflict Challenges: Essays in the Honour of Frits Kalshoven* (1991) 447; Neil Boister & Richard Burchill, "The International Legal Definition of the South African Armed Conflict in South African Courts: War of National Liberation, Civil War, or War at All?" 45/3 *Netherlands International Law Review* (1998) 348.

³¹¹ Reprinted in Adam Roberts & Richard Guelff (eds.), *Documents on the Laws of War* (2000) 67.

³¹² AWG Raath & HA Strydom, "The Hague Conventions and the Anglo-Boer War" 24 *South African Yearbook of International Law* (1999)149.

³¹³ *Id.*, at p. 155.

³¹⁴ John Dugard, *International Law: A South African Perspective* (2000) 15.

³¹⁵ Leslie Emery (ed.), *The Times History of War in South Africa 1899-1902*, vol. v (1907) 183.

Kitchener and Louis Botha met between February and March 1901. Afterwards Kitchener briefed Milner. In a letter Kitchener stated that:

...His Majesty's Government is prepared at once to grant an amnesty in the Transvaal and Orange River Colony for all bona fide acts of war committed during the recent hostilities: as well as to move the governments of Cape Colony and Natal to take similar action, but qualified by the disenfranchisement of any British subjects implicated in the recent war. All prisoners of war in St. Helena, Ceylon or elsewhere will, on the completion of the surrender, be brought to their country.³¹⁶

The colonies of Natal and the Cape of Good Hope could not agree on the terms of the peace agreement. One controversial issue involved the granting of amnesty to the Boer rebels. Milner supported by Chamberlain (unlike Kitchener), refused to give amnesty to colonial rebels even if disenfranchised, arguing that the British cabinet in London would not approve such a deal. Lord Kitchener met the Boer representative Botha in Middleburg and presented him with ten points of the peace deal, which included:

- (a) *Bona fide* amnesty to colonial rebels for acts of war,
- (b) Prisoners of war to be brought home,
- (c) Farmers to be compensated for houses lost during the war,
- (d) No war indemnity for farmers,
- (e) No equality between whites and coloureds especially in the Cape Colony.³¹⁷

The question of amnesty for Boer rebels presented serious difficulties for the colonial administrators. Lord Kitchener was prepared to grant amnesty, subject to disenfranchisement of collaborators against British forces. Although the British Cabinet approved the peace plan, they objected to the granting of amnesty to the Boers whom they considered to be rebels who deserved punishment. Lord Kitchener was rebuked by the British Government for his proposal. The Middleburg peace talks collapsed, so Kitchener continued with the war, and Milner refused amnesty to colonial rebels. On 16 March 1901 General Botha turned down the terms of the Middleburg peace proposal on

³¹⁶ *Id.*, at p. 185.

³¹⁷ *Id.*, at p. 186 -187.

the basis that the British Cabinet had refused to grant amnesty to colonial rebels in the Boer republics.³¹⁸ Kitchener was disappointed about these developments and later wrote in his diary:

I did all in my power to urge Milner to change his views...on amnesty or King's pardon for the two or three hundred rebels in question (carrying with it disenfranchisement which Botha willingly accepted) would be extremely popular amongst the majority of the British and Dutch in South Africa; but there [is] no doubt a small section in both Colonies who were opposed to conciliatory measures being taken to end the war, and I fear their influence is paramount; they want extermination, and I suppose will get it... Milner's views may be strictly just but they are to my mind vindictive, and I do not know of a case in history when, under similar circumstances, an amnesty has not been granted.³¹⁹

On 14 April 1902, the Boer delegates met Milner again and presented him with a peace plan for a “perpetual treaty of friendship and peace” in order to settle all areas of disagreement with the British. The proposal by the Boer delegates rejected the annexation of the Boer Republics by the British. All points were acceptable to the Boer delegates except Britain’s adamant refusal to revisit the question of amnesty.³²⁰ The Boer delegates were concerned that, without amnesty, the leaders of the Commandos might decide to wage war. The amnesty issue remained the only obstacle to finalising the agreement. In an effort to expedite the peace talks and to reach an agreement on both sides, delegates from the South African Republic and the Orange Free State met in Vereeniging on 15 May 1902. A compromise was reached between the British and the Boer republics in terms of which the burgers in the Boer republics would recognise Britain as a “lawful sovereign”. It was finally agreed that amnesty for colonial rebels would be granted with the Cape rebels exempted from imprisonment.³²¹

³¹⁸ Thomas Pakenham, *The Boer War* (1998) 499.

³¹⁹ *Id.*, at p. 500 (footnote omitted).

³²⁰ *Id.*, p. 552.

³²¹ *Id.*, p. 563 (footnote omitted).

On 31 May 1902, a peace treaty was signed between the British and the Boers in Vereeniging, known as the Vereeniging Peace Treaty.³²² The treaty provided for the recognition by the burghers of Britain's lawful sovereignty over the territory of the erstwhile Boer republics.³²³ Prisoners of war had to accept the sovereignty of King Edward VII and burghers were not deprived of their liberty or property.³²⁴ A partial, one-sided amnesty was granted to burghers in the Boer Republics. Article IV provided as follows:

No proceedings, civil or criminal, will be taken against any of the burghers so surrendering or so returning for any acts in connection with the prosecution of the war. The benefit of this clause will not extend to certain acts contrary to the usage of war which have been notified by the Commander-in-Chief to the Boer Generals, and which shall be tried by court-martial immediately after the close of hostilities.

Similarly, in Natal, a British Colony, amnesty was granted by the Governor of Natal, Henry McCallum, who passed a proclamation with his Majesty's grace to pardon war prisoners in the then South African Republic and the Orange Free State.³²⁵ The amnesty granted at the end of the Anglo-Boer War was one-sided since it did not cover war crimes committed by the British forces.

The conclusion to be drawn from the above is that we notice some similarity between the amnesty provided for in treaties between the Indians and the American Government, and between the Boers and the English, that is, the continuation of the practice of amnesty even in the colonial period. Furthermore, the parties, particularly the colonialists, granted amnesty but refused to pay compensation to the victims of the

³²² Agreement between Great Britain and the Orange Free State and the South African Republic as to Terms of Surrender of the Boer Forces in the Field (Vereeniging Peace Treaty) reprinted in *C.T.S.* vol. 191, p. 233.

³²³ Article I.

³²⁴ Article III.

³²⁵ Reprinted in David Throup (ed.), *British Documents on Foreign Affairs: Reports and Papers from the*

conflict.

3. 8. The Decline of Amnesty During the Post-First World War and Post-Second World War Periods

After the end of the First World War, the Peace Treaty of Versailles of 28 June 1919, demanded the punishment of Germany which had violated the laws and customs of war.³²⁶ Two practices developed during this period, namely, the demand for the prosecution of war criminals, and a general amnesty for members of the Allied powers and the populations of territories occupied by the Central Powers. The practice of a general amnesty for members of the Allied powers and populations under occupation was common in most peace treaties between the Allied and Central powers. For example, Article 16 of the peace treaty between the Allied powers and Italy of February 1947 provided that:

Italy shall not prosecute or molest Italian nationals, including members of the armed forces solely on the ground that during the period from June 10, 1940, to the coming into force of the present Treaty, they expressed sympathy with or took action in support of the cause of the Allied and associated powers.

After the Armenian genocide in 1915, the Allied Powers (Britain, the United States of America and France) attempted to prosecute perpetrators in Turkey by applying principles of international law. The Peace Treaty of Sevres, signed on 10 August 1920, made provision for the prosecution of the perpetrators of the Armenian genocide.³²⁷

Foreign Office Confidential Print, Part 1, Series G Africa, 1885-1914. See Appendix A of this study.

³²⁶ Treaty of Peace between the British Empire, France, Italy, Japan and the United States (The Principal Allied and Associated Powers) and Belgium, Bolivia, Brazil, China, Cuba, Czechoslovakia, Ecuador, Greece, Guatemala, Haiti, The Hedjaz, Honduras, Liberia, Nicaragua, Panama, Peru, Poland, Portugal, Romania, The Serb-Croat-Slovene State, Siam and Uruguay and Germany, *Consolidated Treaty Series*, vol. 225 (1919) 188.

³²⁷ Article 226 of the Treaty of Peace Between the Allied Powers and Turkey provided:

The Turkish government recognises the right of the Allied Powers to bring before military tribunals

Unfortunately, the Sevres Treaty was replaced by the 1923 Treaty of Lausanne between Greece and Turkey which contained a “Declaration of Amnesty” for all offences committed between 1 August 1914 and 20 November 1922.³²⁸ Article II provided that:

Full and complete amnesty shall be respectively granted by the Turkish government and by the Greek government for all crimes or offences committed during the same period which were evidently connected with the political events which have taken place during that period.

Thus, the Lausanne Peace Treaty effectively nullified the Sevres Peace Treaty and with it the possibility of ever holding the Turks accountable for the genocide of the Armenian people.³²⁹ The Armenian genocide became the “forgotten genocide” of the twentieth century.³³⁰ Another important development during the post First-World War era was the continued demand for compensation for victims of gross human rights violations. The Lausanne Peace Treaty, for example, provided for compensation to victims of war, but this was never honoured by Turkey.³³¹

persons accused of having committed acts in violation of the laws and customs of war. Such persons shall, if found guilty, be sentenced to punishment laid down by law. This provision will apply notwithstanding any proceedings or prosecutions before a tribunal in Turkey or in the territory of her allies...

reprinted in 15 *American Journal of International Law* (1921) 179. In the Treaty between the Allied and Associated Powers and Hungary of 4 June 1920 similar provisions regarding the punishment of perpetrators of war crimes were made. Article 157 of the Treaty provided in part that:

The Hungarian government recognises the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. Such persons shall if found guilty, be sentenced to punishments laid down by law. This provision shall apply notwithstanding any proceedings or prosecutions before a tribunal in Hungary or in the territory of her allies... .

³²⁸ Agreement Between Greece and Turkey Respecting the Reciprocal Restitution of Interned Civilians and Exchange of Prisoners of War (Lausanne Peace Treaty) *Major Peace Treaties*, vol. IV (1923) 2301. See also *United Nations War Crimes Commission* E/CN.4/W.20/28 May 1948.

³²⁹ *Ibid*.

³³⁰ Antonio Cassese, “Reflections on International Criminal Justice” 61 *The Modern Law Review* (1996) 1 at 2.

³³¹ Articles 65 – 72.

At the end of the Second World War, the Nuremberg and Tokyo Tribunals were set up to prosecute Nazi and Japanese war criminals for crimes of aggression, genocide and the violation of the laws and customs of war. Following the Conference on Jewish Material Claims against the Federal Republic of Germany by the State of Israel, Germany agreed to pay compensation to Holocaust victims or their next of kin.³³² The only exception in the post-Second World War era was the reciprocal amnesty for belligerents of war granted by the March 1962 Evian-Les Boinis Accord between the Government of France and the Algerian National Liberation Front (FNL). The peace treaty officially ended 130 years of French rule in Algeria. However, no compensation was paid.³³³

3.9. Amnesty as a Tool for Peacemaking During and After the Cold War

During the Cold War era impunity was the norm. In Latin America, Asia, Europe, Africa and the Middle East, peace agreements (with few exceptions) included a provision on amnesty for gross human rights and international humanitarian law violations.³³⁴ The general practice of states was to ignore past atrocities, especially during the late 1970s and 1980s. Despite large-scale human rights violations in Portugal after the fall of the Caetano regime (*Estado Novo*), and in Spain in 1974 when General Franco (1975-1977)

³³² Agreement Between the Federal Republic of Germany and the State of Israel, *Bundesgesetzblatt*, II, Bonn, 21 March 1953, pp. 37 *seq.* (hereinafter the 1952 Luxembourg Agreement).

³³³ Reprinted in the *United Nations Treaty Series*, vol. 7395 (1964) 28. Article K provided that:

Amnesty will be proclaimed immediately. Detained people will be released.

Article II provided that:

No one shall be subject to police or judicial measures, to summary punishment or to any discrimination, on account of:

-Opinions expressed at the time of events, which occurred in Algeria before the date of the vote on self-determination.

-Acts committed at the time before the date of proclamation of the cease-fire.

³³⁴ For example, paras. 13 –15 of the 1974 Bangladesh-India-Pakistan: Agreement on the Repatriation of Prisoners of War and Civilian Internees, reprinted in 135 *International Legal Materials* (1974) 501; Article (K) of the 1962 Evans Peace Accord between the government of France and the Algerian National Liberation Front, reprinted *United Nations Treaty Series*, vol. 7395 (1964) 28.

was defeated, no one was held accountable. In Spain, the parliamentary regime introduced in 1976 issued amnesty to those responsible for the human rights violations of July 1976 to October 1976.³³⁵ The only exception during this period was Greece, which conducted trials and prosecuted members of the *junta* who ruled the country.³³⁶

During the 1980s impunity continued unabated, especially in Latin America. Argentina conducted trials against the top generals of the military *junta*, but subsequent trials were stopped following protests from the military.³³⁷ After the restoration of democracy in Chile, the new government of President Raul Alfonsin decided to honour the amnesty promulgated by General Augusto Pinochet in 1978.³³⁸ In Uruguay, after the return to civilian rule, an agreement was reached by passing an amnesty law which provided that members of the military *junta* responsible for human rights violations would not be prosecuted.³³⁹ In Brazil, the military *junta* negotiated a pact with the new government that there would be no official inquiry into allegations of human rights abuses during military rule.³⁴⁰ In El Salvador³⁴¹ and Guatemala,³⁴² the peace accord brokered by the UN ended the civil war and provided for truth commissions sponsored by the United

³³⁵ Paloma Aguilar, "Collective Memory of the Spanish Civil War: The Case of the Political Amnesty in the Spanish Transition to Democracy" Working Paper, December 1996 (on file).

³³⁶ See generally Neil Kritz (ed.), *Transitional Justice*, vol. 3, (Country Studies) (1995).

³³⁷ Roberto Garretón, "The Transition Processes to Democracy in Latin America: An Analysis from the Perspective of Human Rights" Paper Presented at Conference in Celebration of a Decade of Democracy in South Africa, Durban, 22-25 January 2004 (on file).

³³⁸ Amnesty Decree Law 2.191 of 1978. See also the *Report of the Chilean National Commission on Truth and Reconciliation* ("Rettig Report"), United States Institute of Peace Library Collection, available at www.usip.org/library/truth.htm (accessed 2 February 2004).

³³⁹ *The Commission for the Investigation of the Situation of the Disappeared and Related Events* (1985), Reprinted in Neil Kritz (ed.) *Transitional Justice*, vol. III (1995).

³⁴⁰ Neil Kritz (ed.), *Transitional Justice*, vol. 3, (Country Studies) (1995) 196.

³⁴¹ *From Madness to Hope: The 12-Year War in El-Salvador: Report of the Commission on the Truth for El Salvador*, UN Report, United Nations (1993).

³⁴² *Memory of Silence: Report of the Commission for Historical Clarification* (1999).

Nations.

In Asia, with the protracted armed conflict over the disputed province of Kashmir between the governments of Bangladesh, Pakistan and India, a tripartite agreement was reached in April 1974. Parties agreed to exchange prisoners of war. The agreement also appealed to the people of Bangladesh “...to forgive and forget the mistakes of the past...[and] not to proceed with the trials as an act of clemency.”³⁴³

Most Eastern European and former Soviet states likewise chose not to pursue those associated with previous repressive regimes.³⁴⁴ Czechoslovakia opted for lustration by purging from office those associated with the prior regime.³⁴⁵ After the fall of the Berlin Wall, a unified Germany had to come to terms with the past (*Vergangenheitsbewältigung*) which included putting on trial and convicting former East German border guards and the political leadership responsible for nearly 600 deaths at the inter-German border.³⁴⁶

The Dayton Peace Agreement for Bosnia-Herzegovina, which was negotiated, after more than three years of war and genocide in Bosnia-Herzegovina, at a United State Air Base in Dayton, Ohio and signed in Paris on 14 December 1995, provided for amnesty and reparations for victims of the war. Article VI of the General Framework Agreement for Peace provided that:

³⁴³ *Bangladesh-India-Pakistan: Agreement on the Repatriation of Prisoners of War and Civilian Internees*, 9 April (1974) 74 *International Legal Materials* (1974) 501-505 paras. 13 & 15.

³⁴⁴ Neil Kritz (ed.), *Transitional Justice*, vol. I (General Issues), (1995) 142.

³⁴⁵ *Ibid*.

³⁴⁶ Manfred Gabriel, “Coming to Terms with the East German Border Guards Cases” 38 *Columbia Journal of Transnational Law* (1999) 375.

Any returning refugees or displaced person charged with a crime, other than serious violations of international humanitarian law...or a common crime to the conflict, shall upon their return be granted amnesty.³⁴⁷

Article II of Annex 6, established a Commission on Human Rights consisting of the Ombudsman for Bosnia-Herzegovina and the Human Rights Chamber. In terms of article XI of Annex 6 the Chamber had the competence to order reparations:

Following the conclusion of the proceeding, the Chamber shall promptly issue a decision, which shall address:

- a) whether the facts found indicate a breach by the Party concerned of its obligations under this agreement; and if so
- b) what steps shall be taken by the Party to remedy such breach, including orders to cease and desist, monetary relief (including pecuniary and non-pecuniary injuries), and provisional measures.

After the 1948 war between Israel and the Arab states, a series of Rhodes Armistice Agreements were signed between Israel and the Arab states. One such example, is the Israel-Lebanon Armistice Agreement of 23 March 1949, which *inter alia* provided that prisoners of war, including those awaiting prosecution or sentence, would be exchanged.³⁴⁸ However, the United Nations General Assembly called on Israel to compensate Palestinian refugees for damage or loss of property during the 1948 war of independence.³⁴⁹ Again, after the 1967 Six Day War the Knesset (Israeli parliament) passed a general amnesty law.³⁵⁰ The law provided, amongst other things, that persons who had committed a criminal offence before June 1967, or had been sentenced, were to be released when the new law came into operation. However, it excluded, for example,

³⁴⁷ General Agreement for Peace in Bosnia and Herzegovina, 14 December 1995, 75 *International Legal Materials* 75 (1996) 118.

³⁴⁸ Article VI (2) of the Armistice Agreement.

³⁴⁹ UN GA Res. 194 (III), 11 December 1948.

³⁵⁰ Leslie Sebba, *Proceedings of the Symposium on Amnesty in Israel*, organised by the Institute of Criminology, Institute of Criminology Paper no. 13, Faculty of Law, Hebrew University of Jerusalem, 13-14 May 1968, *supra* at pp. x-xv.

those sentenced to life imprisonment or charged with genocide or collaborating with the Nazis.³⁵¹ Similarly, in 1978, during negotiations between the Israelis and the Palestinians which lead to the signing of the Camp David Accords, the then Minister of Foreign Affairs of Egypt, Boutros-Boutros Ghali, proposed to the United States Secretary of State, the possibility of “granting amnesty to Palestinian political prisoners.”³⁵²

In Africa, at the end of the Biafran War in Nigeria between the Nigerian government and the Ibbo rebel group, there were no prosecutions of those who participated in the rebellion. Instead, a declaration of “no victor, no vanquished” was issued which amounted to an amnesty as no one was held responsible. This was provided for in a negotiated agreement and was enacted in the law of 14 January 1970.³⁵³ The Government of President Obasanjo, although having appointed a commission of inquiry to investigate human rights violations between 1994 and 1999, has indicated that it will not pay compensation to the victims of previous dictatorial regimes, including victims of the Biafra war.

In Zimbabwe, after the demise of Ian Smith’s minority government through a protracted liberation struggle (*Chimurenga*), Zimbabwe became independent in 1980.³⁵⁴ The new government of President Robert Mugabe granted amnesty for acts committed prior to 21

³⁵¹ Passed by the Knesset (Israel Parliament) on the 4th Tammaz, 5727 (12th July 1967) and published in *Sefer Ha-Chukkim* No. 502 of the 6th Tammuz, 5727 (14th July, 1967).

³⁵² See Edward Lawson (ed.), *Encyclopaedia of Human Rights* (1995) 61.

³⁵³ Neil Kritz, *Transitional Justice*, vol. I (General Issues), (1995) 189.

³⁵⁴ Before independence the government of Ian Smith passed Amnesty Ordinance 3 of 1979 which prevented the institution or continuation of civil or criminal legal proceedings in respect of specific acts within the country or elsewhere related to the Unilateral Declaration of Independence in November 1965, the efforts of various organisations to resist the regime after the Unilateral Declaration of Independence, and measures taken to suppress such resistance.

March 1980 in good faith to resist independence under majority rule.³⁵⁵ Another Act was passed to provide for compensation in respect of injuries or death of Zimbabwean citizens caused directly or indirectly by the armed conflict between Zimbabwe and her neighbouring countries between 23 December 1972 and 29 February 1980.³⁵⁶ After President Robert Mugabe came to power an internal war ensued in the Matebeleland region and it is estimated that nearly 1 000 people were killed by government forces for being against the Zimbabwean government and no compensation was paid to the victims of the war.³⁵⁷

In Uganda, President Museveni appointed a commission of inquiry after the Idi Amin era, which recommended compensation of Ugandan Indians/Asians.³⁵⁸ Instead, President Museveni, granted amnesty to rebels who committed atrocities against the civilian population in the North-East of Uganda between the years of 1962 and 1986.³⁵⁹ Likewise, at the end of the civil war in Mozambique, the newly appointed National Assembly passed an amnesty law on 14 October 1992.³⁶⁰ The amnesty law provides as follows:

Within the principle of national reconciliation, and harmonisation of the lives of the Mozambican people and in terms of subheading I of paragraph 2 of article 135 of the Constitution³⁶¹, the National Assembly determines:

³⁵⁵ Amnesty (General Pardon) Ordinance 12 of 1980.

³⁵⁶ War Victims Compensation Act 22 of 1980.

³⁵⁷ See *Report on the 1980s Disturbances in Matebeleland and the Midlands*, Catholic Commission for Justice and Peace in Zimbabwe, March 1997.

³⁵⁸ *Report of the Commission of Inquiry into Violations of Human Rights: Findings, Conclusions and Recommendations* (1962 – 1986), October, 1994, p. 625.

³⁵⁹ *Ibid*.

³⁶⁰ Law no. 16/92 of 14 October 1992, *Dairy of the Republic*, 1 Series, No. 42 (author's own translation).

³⁶¹ Article 135 of the Constitution provides as follows:

1. The Assembly of the Republic shall have power to legislate on basic questions of the country's domestic and foreign policy.

Article 1: that amnesty be granted for crimes committed against the security of the people [...] and the popular state [...].

Article 2: that amnesty be granted for crimes against the people as per the common penal law and of which a criminal proceeding has not been initiated until 1 July 1988 are also given amnesty.

Article 3: this law becomes effective at the date of its publication.

After the fall of President Hussein Habre in Chad, the new government instituted a commission of inquiry (1991-1992) to investigate gross human rights violations by the Habre regime. The Commission reported 4 000 cases of murder, torture, and disappearance. Unfortunately, no actions were taken against those allegedly responsible for these actions.³⁶²

The only exception during the 1990s was Ethiopia, after the fall of Colonel Mengistu Mariam, who was charged with genocide and crimes against humanity by the newly appointed Special Prosecutor's Office (SPO) established by the new government in 1992.³⁶³

3. 10. Conclusion

This chapter has shown that from the development of Athenian democracy to the modern state, amnesty has always been an integral part of peace agreements in the aftermath of civil or international armed conflicts. Later, amnesty was linked to the return of property to those who supported the ousted oligarchs in Athens. We saw the

2. In particular, the Assembly of the Republic shall have power:

.....

- (I) Grant amnesties and pardons

³⁶² *The Commission of Inquiry into the Crimes and Misappropriations Committed by Ex-President Habre, His Accomplices and/or Accessories* (1992), Reprinted in Neil Kritz (ed.), *Transitional Justice* vol. III (1995).

³⁶³ Proclamation no. 22/1992 – Proclamation to provide for the establishment of the Special Prosecutor's

early development of human rights through the restoration of the rights of Athenians whose rights had been violated in war by the return of their property. This link continued in international peace agreements, such as the 1648 Peace Treaty of Westphalia, which not only provided for amnesty, but also for compensation to victims of the Thirty Days War.

Unfortunately, the practice of linking amnesty to compensation has not always been consistent or honoured by the parties. However, for many centuries the practice of granting reciprocal amnesties at the end of a war between two sovereign states, forbidding the prosecution of members of the armed forces and their respective subjects for offences committed during the conflict, became an established practice to a point where even if amnesty was not provided for in a peace treaty, it was implied.

With an increase in intra-state conflicts it became necessary to make explicit provision for amnesty, since the end of a civil war is not a guarantee of non-prosecution. At the end of the First World War, the practice of granting amnesty waned with the call to prosecute the German Emperor, Wilhelm II, in the Versailles Peace Treaty of 1919. However, amnesty was granted to those who supported the Allied Powers during the war. During this period, the granting of amnesty was again linked to compensation in the 1923 Lausanne Peace Treaty between Turkey and Greece. However, the terms of the peace treaty were never implemented by the parties.

Although the end of the Second World War was followed by the prosecution of Nazi and Japanese war criminals, amnesty did not disappear completely from the scene, for example, amnesty was granted at the end of the 1962 Algerian war of independence.

Since 1948, with the adoption of the UN Charter and other international human rights treaties, amnesty has gradually been constrained by the obligation to prosecute perpetrators of gross human rights violations and to pay compensation, as was evident in the 1952 Luxembourg Agreement between the Federal Republic of Germany and the State of Israel in terms of which Germany agreed to pay compensation to Holocaust victims or to their next of kin. The changing nature of armed conflicts during the Cold War, with no victors and no vanquished, had the *effect* of an amnesty as no one was held responsible and no compensation was offered to victims of human rights violations. Given the changing nature of contemporary armed conflict during and after the end of the Cold War, in the next chapter we will evaluate arguments on the efficacy of amnesty as a tool for peace and national reconciliation in transitional democracies.

PART II

THE DUTY TO PROSECUTE GROSS AND SYSTEMATIC HUMAN RIGHTS VIOLATIONS AND THE STATUS OF AMNESTIES IN INTERNATIONAL LAW

CHAPTER FOUR

RETHINKING THE EFFICACY OF AMNESTY AS A TOOL FOR PEACE AND NATIONAL RECONCILIATION IN TRANSITIONAL DEMOCRACIES: TOWARDS A BALANCED APPROACH MODEL

Let's close this book once and for all and never speak about it again, never again, never again.

Ariel Dorfman, *Death and the Maiden*³⁶⁴

4.1. Introduction

Societies emerging from the aftermath of repression, atrocities, armed conflict or state-sponsored violence are confronted with the burden of dealing with this legacy of past human rights abuses. In attempting to come to terms with these abuses, government officials, political leaders and NGOs are likely to consider both punitive and non-punitive accountability mechanisms, and increasingly resort to both. This may include: the prosecution of individual perpetrators; reparations to victims of state-sponsored violence; institutional reform; and the removal of political leaders accused of serious human rights abuses.³⁶⁵

Martin Frankel and Ellen Saideman in their work, *Out of the Shadows of the Night: the*

³⁶⁴ Ariel Dorfman, *Death and the Maiden* (1999) 36.

³⁶⁵ For a comprehensive discussion of these and other related issues see Neil Kritz (ed.), *Transitional Justice: How Emerging Democracies can Reckon with Former Regimes* (1995); Medard Rwelamira & Gerhard Werle (eds.), *Confronting Past Injustices: Approaches to Amnesty, Punishment, Reparation and Restitution in South Africa and Germany* (1996); McAdams Adams, *Transitional Justice and the Rule of Law in New Democracies* (1997); Naomi Roht-Arriaza (ed.), *Impunity and Human Rights in International Law and Practice* (1995); Charles Villa-Vicentio & Wilhelm Verwoerd (eds.), *Looking Back Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa* (2000); Priscilla Heyner, *Unspeakable Truths: Confronting State Terror* (2001).

Struggle for International Human Rights,³⁶⁶ explain in a profound way the complexities of confronting the legacy of past human rights violations in transitional democracies.

They write:

The call to punish human rights criminals can present complex and agonising problems that have no single or simple solution. While the debate over the Nuremberg trials still goes on, that episode - trials of war criminals of a defeated nation - was simplicity itself as compared to the subtle and dangerous issues that can divide a country when it undertakes to punish its own violators.

A nation divided during a repressive regime does not emerge suddenly united when the time of repression has passed. The human rights criminals are fellow citizens, living alongside everyone else, and they may be very powerful and dangerous. If the army and police have been the agencies of terror, the soldiers and the cops aren't going to turn overnight into paragons of respect for human rights. Their numbers and their expert management of deadly weapons remain the significant facts of life... The soldiers and the police may be biding their time, waiting and conspiring to return to power. They may be seeking to keep or win sympathisers in the population at large. If they are treated harshly or if the net of punishment is cast too widely - there may be a backlash that plays into their hands. But their victims cannot simply forgive and forget.

These problems are not abstract generalities. They describe tough realities in more than a dozen countries. If, as we hope, more nations are freed from regimes of terror, similar problems will continue to arise. Since the situations vary, the nature of the problems varies from place to place.

There is undoubtedly tension between the emerging international criminal justice system, and non-punitive measures to deal with past gross human rights violations. In most cases, incumbent governments have limited options to deal with past human rights violations: they can either punish those responsible for heinous crimes, or grant them amnesty.³⁶⁷

³⁶⁶ Martin Frankel & Ellen Saideman, *Out of the Shadows of the Night: The Struggle for International Human Rights* (1989) 103-4.

³⁶⁷ For a comprehensive review of the scholarship on this debate see Neil Kritz (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, vols. 1, 2 & 3 (1995); Juan Mendez, "Accountability for Past Abuses" 19 *Human Rights Quarterly* (1997) 2; Aryeh Neier, "What should be done about the Guilty" *New York Review of Books* 1 February 1990; Luc Huyse "Justice After Transition: On the Choices Successor Elites Make in Dealing with the Past" 1 *Law & Social Inquiry* (1995) 20.

4.2. The Interface Between Amnesty and Justice

The relationship between amnesty and peace, justice and national reconciliation, which is the focus of this chapter, not only raises complex philosophical, moral, and legal issues, but also demonstrates the lack of consensus about what constitutes justice in the face of widespread and systematic human rights violations. This chapter attempts to lay a theoretical framework by examining how amnesty interacts with justice to produce reconciliation/social reconstruction and peace in transitional societies.³⁶⁸ The debate on the justice of amnesty shows the dichotomy between the idealist approach and the realist approach³⁶⁹ to the question of amnesty as a tool for peace and national reconciliation in complex political emergencies. Broadly speaking, there are two schools of thought on the justice of amnesty. Firstly, the idealist or hard line approach, regards amnesty as an “easy option” which encourages a culture of impunity. Amnesty is seen largely as a tool used by abusive governments to override the interests of justice.

Secondly, the realist view proceeds from the premise that transition from authoritarian to democratic rule is a complex process, and amnesty is an incentive and a once-off process necessary to consolidate democracy, especially in fragile democracies. The realist camp has argued that judicial absolutism often takes precedence over the interests

³⁶⁸ The notion of justice (generated through punishment) and reconciliation (non-prosecutorial mechanism) are elusive and contested concepts. For the purposes of this analysis, reconciliation here refers to a process by which people who were formerly enemies bury the hatchet in favour of communitarian ideals. Justice is defined as including primarily the prosecution of all those who transgress established rules of law. Peace and national reconciliation are dividends, which motivates prosecution or the granting of amnesty in the aftermath of war in conflict-ridden societies.

³⁶⁹ For purposes of this analysis, the term “idealism” is used literally to mean pursuing ideals which often are not realistic to achieve. Similarly, “realism” is used here to mean accepting situations as they are and dealing with them accordingly, in a way that is realistic in the circumstances prevailing at that time. See *Concise Oxford Dictionary* (1999).

of the local population – what some refer to as “justice over ashes.”³⁷⁰

4.3. Tensions Raised by Amnesty and Justice

The granting of amnesty by a state for serious human rights violations is a contradiction of the rule of law since it excludes accountability.³⁷¹ The doctrine of the rule of law, generically means that the law must be applied equally to everyone without discrimination.³⁷² No one is exempted or is “above the law.” Justice is blind, irrespective of the standing of the person in society or of whether the crimes were committed today or yesterday. Failure to prosecute criminals responsible for the same offence infringes the principle of equal treatment before the law by setting some above the law. The degree of culpability may suggest that those most responsible should be treated harshly, and those with the least responsibility should be treated more leniently.³⁷³

In modern constitutional democracies the rule of law doctrine has come to mean limiting the discretionary powers of the executive; legal certainty; the right to a judicial remedy; and the application of checks and balances.³⁷⁴

The problem with the practice of granting amnesty is that the justice system becomes

³⁷⁰ Emily Schabacker, “Reconciliation or Justice and Ashes: Amnesty Commissions and the Duty to Punish Human Rights Offenses” 12 *New York International Law Review* (1999) 1; James Gibson, “Truth, Justice and Reconciliation: Judging the Fairness of Amnesty in South Africa” 46 *American Journal of Political Science* (2002) 540.

³⁷¹ Ronald Slye, “Justice and Amnesty” in Vila-Vicencio & Wilhelm Verwoerd (eds.), *Looking Back Reaching Forward*, *supra*, at 174 at 178 (arguing that accountability includes a wide variety of methods used for identifying individual and group responsibility, and punishment is but one consequence of individual responsibility for a particular act or acts); Ronald Slye, “The Legitimacy of Amnesties under International Law and General Principles of Anglo-American Law” 43 *Virginia Journal of International Law* (2002) 173.

³⁷² Beinart B., “The Rule of Law” *Acta Juridica* (1962) 99.

³⁷³ On the proponents of the rule of law in contemporary context see for example, Ronald Dworkin, *Law’s Empire* (1990); David Dyzenhaus (ed.), *Recrafting the Rule of Law: The Limits of Legal Order* (1999).

³⁷⁴ Albert Dicey, *Introduction to the Study of the Law of the Constitution*, 10th edition (1965) 183 *seq.*

vulnerable to trade,³⁷⁵ through secret arrangements to exempt criminal offenders from prosecutions.³⁷⁶ Peace agreements, usually crafted under duress with little regard to the interests and rights of victims, lack moral legitimacy. Granting amnesties therefore threatens the foundations of the rule of law.

Deliberately to refrain from prosecuting a known offender is also a violation of the principles of fairness. As a matter of principle, all procedures must be fair, and be perceived as such. All persons are entitled to equal protection before the law and everyone is entitled to a remedy for the wrong committed. The granting of amnesty seems incompatible with all these principles, which are cardinal to a fair criminal justice process. Therefore, the consequences of granting amnesty are that it brings the justice system into disrepute, damages its integrity and as a result the general public lack confidence in the system because it undermines the rule of law. In other words, the justice system is rendered *ineffective* by the amnesty process.

Consequently, by excusing someone from the consequences of unlawful acts committed in the past, the amnesty process negates the fundamental rights of victims.³⁷⁷ Amnesty laws that purport to expunge criminal and civil liability aggravate the victims' loss and deepen their mistrust in the law and its application. The victim effectively gets no protection from the law while the perpetrator receives heightened protection from the law. Ben Chigara,³⁷⁸ argues, for example, that when the South African Constitutional

³⁷⁵ See King John, *Magna Carta 1215*, (section 40 “To no one will we sell, to no one will we refuse or delay right or justice”).

³⁷⁶ John Mackie, *Ethics: Inventing Right and Wrong* (1977) 159-68.

³⁷⁷ Iain Currie & Johan de Waal *et al.* (eds.), *The New Constitutional Law & Administrative Law*, vol. 1 (2002) 310.

³⁷⁸ *Supra*, at 61.

Court in *Azanian People's Organisation (AZAPO) v President of the Republic of South Africa*³⁷⁹, insisted on the need for “*ubuntu* but not ...victimization”, it empowered the agents of the apartheid system and humiliated its victims. He further argues that “[amnesty]...is similar to...condemning the sheep for being the wolf’s victim, while taking all the trouble necessary to cleanse the wolf of any blood stains that resulted from its vicious attack on the sheep.”³⁸⁰ Foregoing prosecution excludes the victims’ right to a remedy and thus violates the *ubi jus, ibi remedium* (where there is a right, there is a remedy and where no remedy exists there is, realistically, no right) principle. In this regard the Constitutional Court in *AZAPO*³⁸¹ held that:

The effect of an amnesty undoubtedly impacts upon very fundamental rights. All persons are entitled to the protection of the law against unlawful invasions of their right to life, their right to respect for and protection of dignity and their right not to be subject to torture of any kind. When those rights are invaded those aggrieved by such invasion have the right to obtain redress in the ordinary courts of law and those guilty of perpetrating such violations are answerable before the courts, both civilly and criminally. An amnesty to the wrongdoer effectively obliterates such rights.

The ideal application of the rule of law by the courts may come into conflict with other institutions and practices exercising economic, social and political power. In transitional democracies the courts are always under pressure for two reasons. Firstly, because victims of gross human rights violations look to the courts for the protection of their rights and the restoration of democracy. Secondly, those seeking social change may see amnesty not necessarily as a violation of the rule of law, because the dictates of public policy are not solely a private matter, but also encompass a general public interest.³⁸²

³⁷⁹ *Supra*, at para. 19.

³⁸⁰ Ben Chigara, *Amnesty in International Law: The Legality under International Law of National Amnesty Laws* (2002) 61.

³⁸¹ *Supra*, para. 9.

³⁸² For example, this argument is made by the Chilean jurist, Eduardo Novoa Monreal, in his book *Law as an Obstacle of Social Change* (1970) 1 *et seq.*

The state acts in the interest of the entire population.³⁸³ It may therefore seek judicial affirmation to confer legitimacy on the “legal” instruments such as an amnesty law used to facilitate change in society.

The doctrine of the rule of law is flexible and has to be balanced against other societal interests and considerations. It is a common practice in many constitutional democracies, for example, for the new government to grant pardons to criminals while taking into account societal interests and values, such as the need for rehabilitation and overcrowding in prisons.³⁸⁴ In that sense, a criminal justice system presupposes that while there are certain fundamental values by which all members of society must abide, such as respect for human life and dignity and non-violence, it is equally important to draw a distinction between those values and other economic and social policy considerations. The criminal justice system is but one vehicle through which such values must be upheld, and where necessary, by forgiving transgressors.

4.4. Traditional Approaches to Reconciliation of Justice and Amnesty

4.4.1. Idealist Approach

Generally, the idealist approach is sceptical of a peace process built upon the injustices of the past. To the idealists such a peace process is unlikely to survive the test of time. The idealist approach rejects amnesty as a by-product of political compromise in transitional societies because although political compromises are an integral part of a democratic order and are not necessarily unworkable, they carry the potential risk of injustice.³⁸⁵ Nothing except aspirations of peace and national reconciliation guarantee

³⁸³ Jeremy Bentham *An Introduction to the Principles of Morals and Legislation* (1970) 143-57.

³⁸⁴ See Chapter One of this study.

³⁸⁵ Samantha Besson, “Four Arguments against Compromising Justice Internally” 23 *Oxford Journal of Legal Studies* (2003) 211.

that a political compromise is sustainable. David Matas,³⁸⁶ for instance, contends that the notion of trading off justice for peace is a political process and is diametrically opposed to human rights ideals, which are based on peace and justice. The first assertion is that reconciliation is a contentious ideal on which to base a policy. As Reed Brody,³⁸⁷ quoting Juan Mandez, states: “reconciliation is a code word for those who wanted nothing done.” The only basis for building a society is through law and procedure. Hence some commentators have remarked that prosecuting German and Japanese war criminals after the Second World War, formed the basis for the reconciliation and economic development subsequently established between these countries and the rest of the world.³⁸⁸

Human rights norms and standards are, by their nature, universal and not susceptible to change depending on the political expediency of the day.³⁸⁹ Within the human rights framework, unlike that of politics, what is right or wrong cannot be decided on the basis of what is politically practical and necessary. Thus, through political expediency, amnesty nullifies the struggle for human rights ideals developed since the Second World War.³⁹⁰ A state which foregoes punishment through the expedient of amnesty, may be perceived as privileging political violence over non-violence within the context of

³⁸⁶ David Matas, “Immunity in Transitional Democracies” 25 *Justice* (2000) 20–21.

³⁸⁷ Reed Brody, “Justice: The First Casualty of Truth?: The Global Movement to end Impunity for Human Rights Abuses faces a Daunting Question” *The Nation Magazine*, 30 April 2001.

³⁸⁸ Kingsley Moghalu, “No Peace Without Justice: The Role of International Criminal/Humanitarian Law in Conflict Settlement and Reconciliation” Paper Presented at an International Conference on *From a Culture of Impunity to a Culture of Accountability*, Organised by the United Nations University and the Netherlands Institute of Human Rights, Utrecht University, Utrecht, 26 – 28 November 2001 (on file with the author); Aleksander Fatic, *Reconciliation via War Crimes Tribunals?* (2000).

³⁸⁹ David Matas, *supra* at p. 20.

³⁹⁰ Dumisa Ntsebeza, “The Struggle for Human Rights: From the UN Declaration of Human Rights to the Present” in Charles Villa-Vicencio & Wilhelm Verwoerd (eds.), *Looking Back Reaching Forward: Reflections on the Truth & Reconciliation Commission of South Africa* (2000) 2.

national and international law. It further sets a dangerous precedent and sends a wrong signal to a society wishing to legitimise the rule of law.

The basis for the idealists' rejection of the amnesty agreement between the state and the offender is that it runs counter to the retributive model of justice.³⁹¹ The justification for penal sanctions advanced by criminal theorists is the prevention of future abuses by deterring potential mass criminals. Impunity perpetuates impunity. Some believe that the genocide of the Armenians by the Turks after the collapse of the Ottoman Empire gave Hitler the nod to embark upon the Holocaust. He is reported to have asked "who still remembers the Armenians?" According to Robert Jackson, former Prosecutor of the Nuremberg and Tokyo Military Tribunals, leaving Hitler and his generals to write their memoirs in peace would have mocked "...the dead and make cynics of the living."³⁹²

The deterrence argument is therefore based on the assumption that political leaders believe that, because the criminal justice system is unable to prosecute them, they will escape scot-free.³⁹³ The fact that the ICTY and ICTR have targeted political and military leaders in Rwanda such as Jean Kambanda,³⁹⁴ the former Prime Minister of Rwanda, and Slobodan Milosovic,³⁹⁵ former President of the Federal Republic of Yugoslavia (Serbia-Montenegro), is a clear message to political leaders that they are individually accountable for gross human rights violations. Punishment therefore inhibits the

³⁹¹ Dan Morkel, "The Justice of Amnesty? Towards a Theory of Retributism in Recovering States" 48 *University of Toronto Law Journal* (1999) 389.

³⁹² Cited by Antonio Cassese, "Reflections on International Criminal Justice" 61 *Modern Law Review* (1996) 1 at p. 2.

³⁹³ Frans Viljoen, "The Role of Law in Post-Traumatized Societies: Addressing Gross Human Rights Violations in Rwanda" 30 *De Jure* (1997) 18.

³⁹⁴ ICTR 97-23-37 reprinted in 141 *International Legal Materials* (1998) 1.

³⁹⁵ *The Prosecutor v Slobodan Milosovic & Others*, Case No. IT-99-37-PT (Second Amended Indictment).

commission of future crimes, and this is preventive in nature. As a result, those responsible for serious crimes like Milosovic and Jean Kambanda, deserve their day in court. They must pay for their sins and this must include depriving them of their freedom. If the offender's freedom has been taken away it is believed that he or she has been held accountable. Retributive justice, or an "eye for an eye", is what they deserve and nothing less.³⁹⁶ It is only through setting a precedent by prosecuting those held criminally responsible that society will send a powerful message to would-be mass murderers. In this context, the courts are seen as the best forum for setting the historical record straight. Despite their inherent weaknesses, criminal trials are not incapable of revealing the truth about past human rights abuses. In the ICTR for example, the former Prime Minister of Rwanda, Jean Kambanda, and the leader of the *Interahamwe*, Omar Serushago, pleaded guilty and confessed to the crimes they had committed. In none of these cases were the pleas of guilt made in exchange for amnesty. Therefore, criminal trials can contribute towards peace and national reconciliation without granting amnesty to mass murders.

Of particular importance is the fact that political leaders often fail to appreciate that amnesties born out of political expediency do not satisfy the victims' desire to bring their tormentors to justice. In 1948, immediately after the Second World War, Allied powers abruptly halted the prosecution of Nazi war criminals. The political reasoning during the early stages of the Cold War was that it was important to win West Germany as an ally of the Allied powers rather than risk losing her to the Soviet Union. Prosecution did end as the British had proposed, but only to start up later in one country

³⁹⁶ Immanuel Kant, *The Philosophy of Law* (trans. John Hastie, 1887) "Even if a society resolved to dissolve itself with the consent of all its members - as might be supposed in the case of a people inhabiting an island resolving to separate and scatter themselves throughout the whole world - the last murderer lying in prison ought to be executed before the resolution was carried out. This ought to be done in order that every one may realize the desert of his deeds..." 198.

after another.³⁹⁷ What is even more interesting is that the call to prosecute Nazi war criminals was initiated by people who had either not been born during the Second World War, or bore no connection to victims of the Holocaust. The trials of Maurice Papon in April 1998 as an accomplice for the alleged detention of French Jews, and Paul Touvier (1992) and Klaus Barbie (1983), director of the Gestapo office in Lyon, which took place under the Vichy regime in France, are cases in point.³⁹⁸

At the heart of this approach is the proposition that to create exceptions by allowing the granting of amnesty laws, or trade offs with justice, results in the selective application of international rules and undermines the enforcement of international justice. Selective application of justice, it is argued, will create an Orwellian situation in which some political leaders responsible for serious human rights violations are more equal than others.³⁹⁹ According to Orentlicher,⁴⁰⁰ a leading proponent of prosecution, "...the law proscribing [international crimes] has commanded a uniquely powerful commitment by the international community, which has resolved emphatically that it will not countenance impunity for massive atrocities against persecuted persons." She further argues that states' international law obligations are not affected by changes of government. If a previous government failed to prosecute, its successor cannot renege by granting amnesty to military leaders under the banner of promoting national reconciliation. The granting of amnesty does not change a state's duty to fulfil its

³⁹⁷ David Matas, *No More: The Battle Against Human Rights Violations* (1994) 106 *et seq.*

³⁹⁸ See Shua Eftekhari, "France and the Algerian War: From a Policy of 'Forgetting' to a Framework for Accountability" 34 *Columbia Human Rights Law Review* (2003) 413 at 428-29.

³⁹⁹ Abdul Lahmin, "Put Charles Taylor on Trial" *This Day*, 26 November 2003, p. 15 (arguing that if Charles Taylor is allowed to escape prosecution, that will undermine the Special Court in Sierra Leone and the African struggle for peace and justice will be eroded.)

⁴⁰⁰ Dianne Orentlicher, "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime" 100 *Yale Law Journal* (1991) 2595.

international obligations under relevant international law treaties. Aryeh Neier⁴⁰¹ likewise strongly favours prosecution because “[w]hen the community of nations shies away from responsibility for bringing to justice the authors of [international crimes], it subverts the rule of law.”

Aryeh Neier⁴⁰² further argues that accountability reduces the possibility of revenge. Once victims realise that no one is being held accountable they might be tempted to take the law into their hands by seeking revenge and thus continue the cycle of violence. Hannah Arendt⁴⁰³ attempts to demonstrate this by citing two historical examples to demonstrate the risk of impunity. Firstly, Shalom Schwartzbard killed Simon Petlyura, of the Ukraine army, who was responsible for killing thousands of victims during the Russian civil war (1917-1920).⁴⁰⁴ Secondly, the case of the Armenian Tindelian who, in Berlin in 1921, shot and killed Talaat Bey, the greatest killer of the Armenians during the 1915 massacre in which a third of the Armenian population in Turkey was wiped out. Both assassins gave themselves up to the police and insisted on being tried. They used their trials to show the world that crimes against their people had gone unpunished. Proceedings in both cases were effectively reduced to “show” trials and attention was on the “heroes” as their people saw them.⁴⁰⁵ Accountability individualises criminal responsibility and avoids the collective guilt residing in a group in society. The prosecuting authority cannot subsequently be accused of administering a victor’s justice

⁴⁰¹ Aryeh Neier, *War Crimes: Brutality, Genocide, Terror, and the Struggle for Justice* (1998) 213.

⁴⁰² *Id.* at p. 228.

⁴⁰³ Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (1963) 243-244.

⁴⁰⁴ Antonio Cassese, “Reflections on International Criminal Justice” 61 *Modern Law Review* (1998) 1 at p. 23.

⁴⁰⁵ On the politicisation of trials see generally Mark Osel, *Mass Atrocity, Collective Memory and the Law* (1997), Martti Koskeniemi, “Between Impunity and Show Trials” 6 *Max-Planck Yearbook of United Nations Law* (2002) 1.

over the vanquished, as was the case with the Nuremberg and Tokyo Military Tribunals.

4.4.2. Realist Approach

George Bizos, a prominent South African trial lawyer, is reported to have remarked that peace and justice are “sisters or at least first cousins.”⁴⁰⁶ Arguably they are at the same time, sworn enemies, given the tension that they often evoke. The realist camp attempts to draw the link between peace and justice, which epitomises the dichotomy between human rights ideals and political necessity, or between law and politics. To them justice is not the only consideration in peacemaking.

The dilemma of balancing the interests of justice and peace was captured by the *Ugandan Commission of Inquiry into Violations of Human Rights* appointed to investigate human rights abuses committed by the Idi Amin regime from the years 1962 to 1986. The Commission observed:

The dilemma arises because on the one hand society and relatives or dependants of the victims of human rights abuse often demand retribution against the offenders, and there is a need to deter potential future perpetrators. *On the other hand it is necessary to promote reconciliation and peace by granting amnesty and rehabilitating those who were implicated in human rights abuses. While in a legalistic approach the answer would be straight forward, politically, the answer may not be that simple. In the end, the decision of what should be done must be a political one.*⁴⁰⁷

The realist model justifies granting amnesty to perpetrators of human rights violations on the basis of the inextricable link which exists between peace and justice, that is, where the price for peace is that mass murderers are spared any punishment, so be it. It

⁴⁰⁶ Cited by Villa-Vicentio, “Why Perpetrators Should not Always be Prosecuted: Where the International Criminal Court and Truth Commissions Meet” 49 *Emory Law Journal* (2000) 204 at 221.

⁴⁰⁷ *Report of the Commission of Inquiry into Violations of Human Rights: Findings, Conclusions and Recommendations* (1962 – 1986), October, 1994, p. 625 (emphasis added).

is important to place the interests and future of society above individual considerations. Therefore, it is necessary, under certain circumstances, to “sacrifice” the pursuit of justice for other social and economic imperatives such as the rebuilding of a new society founded on reconciliation. The most important consideration for the realist approach is the social reconstruction of society.

The realists rely on restorative justice as an alternative to the retributive model of justice. The restorative model of justice is about balancing the rights and interests of victims and perpetrators alike. While accepting the need to deter potential criminals and end a culture of impunity, this model instead recognises that the commission of a crime does not always warrant punishment. The South African TRC in its *Final Report*⁴⁰⁸ acknowledged that restorative justice “...is not so much concerned with punishment as with correcting moral imbalances, restoring broken relationships – with healing, harmony and reconciliation.”

The realists subscribe to the notion that public shaming, by naming those responsible for heinous acts of brutality is in itself a form of punishment.⁴⁰⁹ The fact that many mass murderers during the Second World War suffered from post-traumatic stress disorder is a constant reminder that nothing is a secret forever.⁴¹⁰ This is a recognition that the

⁴⁰⁸ *Truth and Reconciliation Commission of South Africa Report* (1999), vol. 1, para. 36.

⁴⁰⁹ Harold Kushner, *How Good Do We Have to Be? A New Understanding of Guilt and Forgiveness* (1996) at 39– 40 distinguishes guilt and shame as follows:

Guilt...is a judgment we pass on ourselves. It is a voice inside our heads telling us that we did something wrong. Shame is a sense of being judged by someone else. It is visual rather than auditory, not an inner voice but a sense of being exposed, being looked at and judged by someone whose opinions we take seriously...Guilt is the product of an individual conscience. A psychopath, a person without conscience, will do terrible things and not feel guilty. Shame is the product of a community. If we don't care about what other people think of us, we will feel no shame.

⁴¹⁰ Albie Sachs, “His Name was Henry” in Wilmont James & Linda van der Vijver (eds.), *After the TRC: Reflections on Truth and Reconciliation in South Africa* (2000) 94.

world where they once enjoyed complete recognition, unconditional loyalty, blind obedience and submissiveness from those they oppressed and killed, has disappeared before their eyes. They have a new status in society. According to Haclav Havel,⁴¹¹ they are the “fallen angels” in the eyes of their victims, families and the society at large. They no longer have a free pass to anything.

A positive aspect of the South African amnesty process is that it gave perpetrators the opportunity to participate fully in a new political order without fear, guilt or under a cloud of uncertainty.⁴¹² In essence, it helped to put both victims and culprits on the same map. In the words of Justice Mohamed, “...perpetrators become exposed to opportunities to obtain relief from the burden of a guilt or an anxiety that they might [have been] living with for so many years.” It gave perpetrators the opportunity to atone for their guilt.⁴¹³ Through the amnesty process, revelations before the TRC laid to rest on-going denials by apartheid apologists, especially the killings and torture of political detainees which were a source of great shame and embarrassment to white South Africans who willingly or unwillingly supported, or were bystanders, during the apartheid years. However, shame and remorse is unlikely if members of the parties find solace in ignorance and justify their actions on the basis of prevailing political circumstances.

An obvious practical consideration for the realists is that often the sheer number of victims and perpetrators necessitates a political compromise which may include the

⁴¹¹ Address by Haclav Havel, “The Anatomy of Hate” Oslo Conference, 28 August 1990 (on file with the author).

⁴¹² *Azanian People’s Organisation (AZAPO) v President of the Republic of South Africa & Others* 1996 (8) BCLR 1015 (CC), para. 18.

⁴¹³ *Id.*, para. 17.

granting of amnesty. Even if trials are conducted it will be impossible to prosecute the entire group. There will always be those who will escape the net. In post-war Germany, for example, about 85 882 accused persons were brought to trial for their involvement in the Holocaust and only 7000 convictions were secured, even though the German criminal justice system was relatively efficient.⁴¹⁴

Amnesty, it is argued, is a once-off process. In the words of Desmond Tutu⁴¹⁵:

...amnesty is an *ad hoc* arrangement meant for [a]...specific purpose. This is not how justice is to be administered...forever. It is for a limited and definite period and purpose...it is not how business is to be conducted in future.”

Related to this, is the fact that in the aftermath of war, the institutions responsible for protecting human rights such as the courts have either been destroyed or compromised. This was the case in many post conflict societies such as the former Yugoslavia, Rwanda, South Africa, or Cambodia. In such circumstances, choices are limited by political, military and economic conditions. In essence, in a society characterised by institutional mass violence and gross human rights violations, as Alex Boraine⁴¹⁶ argues, “...punishment cannot be the final word if healing and reconciliation are to be achieved, because the human rights violations have taken place within a particular context.” In that way, “...abnormal measures have to be used, because the law on its own cannot be expected to deal with consequences of large-scale massacres, [violence] and the like.”⁴¹⁷ Such “abnormal measures” may include granting amnesty to those who committed atrocities.

⁴¹⁴ Tina Rosenberg, *The Haunted Land: Facing Europe's Ghosts After Communism* (1995) 312.

⁴¹⁵ Desmond Tutu, *No Future Without Forgiveness* (2000) 51.

⁴¹⁶ Alex Boraine, *A Country Unmasked* (2000) 281-282.

⁴¹⁷ *Id.*, at p. 283.

The recent situation in Zimbabwe further helps to explain why the realist approach perceives social reconstruction/political stability as an overriding factor when faced with the dilemma of having to make a choice between the interests of peace and justice. Shortly before President Robert Mugabe's disputed victory, following the 2002 presidential elections, there were media speculations of an "exit strategy" or "regime change" as it is often termed.⁴¹⁸ It was reported that the exit strategy included Mugabe relinquishing power, the formation of a government of national unity, fresh elections and Mugabe's departure into exile with an amnesty for any crimes he might have committed during his 23-year term as President of Zimbabwe. In early 2003, similar media reports resurfaced.⁴¹⁹ It may well be that, political reality demands that given the deteriorating situation in Zimbabwe, the only "exit strategy" is to grant President Mugabe amnesty for alleged crimes he might have committed during his term as President of Zimbabwe. Indeed, as one newspaper reported, the President is apprehensive about the massacres committed in Matebeleland and the Midlands by the Fifth Brigade army unit in the early and mid-Eighties. A report published by the Zimbabwean Catholic Commission for Peace and Justice and the Legal Resources Foundation in March 1997 estimated that between 5000 and 7000 unarmed civilians were massacred.⁴²⁰ President Mugabe has since refused to proffer an apology or compensation to the relatives of the victims.

Indeed, the fears expressed on behalf of President Mugabe appear well-founded. In 2000, several Zimbabwean nationals filed a civil suit in a New York federal court

⁴¹⁸ Dirk Kotze, "Is Amnesty a Viable Solution?" *Mail & Guardian*, vol. 19, no. 8, 21-27 February, (2003) p. 23.

⁴¹⁹ Ranjeni Munusany, "Mugabe Ready to Quit" *Sunday Times*, 27 April 2003, p.1.

⁴²⁰ See generally, *Report on the Disturbances in Matebeleland and the Midlands: 1981 – 1988*, March 1997. The report investigates mass murder and human rights violations, which occurred during the conflicts that followed President Robert Mugabe's rise to power. The Commission's report is based on the evidence of more than 1000 testimonies and witnesses.

against President Mugabe and his Foreign Minister, Stan Mudenge, for alleged murder, torture and other acts of violence under orders from President Mugabe.⁴²¹ Court papers were served on President Mugabe and his Minister of Foreign Affairs in New York when they were visiting the United Nations.⁴²²

In similar vein, the realists would accept the approach adopted in the peace agreement to end the 14 year conflict in Liberia reached between the government and the rebel forces in Accra, Ghana in August 2003.⁴²³ Despite the fact that the former Liberian President, Charles Taylor, has been indicted by the Special Court for Sierra Leone for war crimes, crimes against humanity, and other serious violations of international humanitarian law, the Accra Accord calls for the creation a truth and reconciliation commission to address issues of impunity.⁴²⁴ The Accord provides that:

The NTGL [National Transitional Government of Liberia] shall give consideration to a recommendation for a general amnesty to all persons and parties engaged or involved in military activities during the Liberian civil conflict that is the subject of this agreement.⁴²⁵

The amnesty process is backed by the leader of the transitional government in Liberia, Gyude Bryant, who supports the granting of a general amnesty to all, including Charles Taylor⁴²⁶. It is feared that threats of prosecution might undermine the disarmament and

⁴²¹The case is reported in 95 *American Journal of International Law* (2001) 874-6.

⁴²²Jillian Reilly, "Let Them Pursue at Least Symbolic Justice" *Washington Post*, 18 February 2001, B5.

⁴²³Comprehensive Peace Agreement between the Government of Liberia and the Liberians United for Revolution and Democracy (LURD) and the Movement for Democracy in Liberia (MODEL) and Political Parties, Accra, 18th August 2003 ("Accra Accord"). See <http://www.usip.org/library> (United Institute of Peace).

⁴²⁴Article XIII of the Accra Accord.

⁴²⁵Article XXXIV of the Accra Accord.

⁴²⁶Kwaku Sakyi-Addo, "Liberia's Chief Wants Amnesty not Trials" *Sydney Morning Herald*, 23 August 2003. On the contrary the idealists may argue that the amnesty encourages a culture of impunity because it had earlier been granted in the Cotonou Agreement, but still the war continued in Liberia. Section 9, article 19 of the Agreement between the Interim Government of National Unity (IGNU) and the United Liberation Movement of of Liberia for Democracy (ULMLD) ("Cotonou Agreement"), July 1993

demilitarisation process of Taylor's forces and further derail the Liberian peace process.⁴²⁷

The realists further rely on the political question doctrine, in terms of which the granting of amnesty is seen as an entirely political act over which the courts have no jurisdiction. The US Supreme Court in *Baker v Carr*⁴²⁸ developed the political question doctrine. In *Baker* the court reasoned that the political question doctrine dictates that matters, especially those that require the nation to speak with one voice, are better left to the discretion of the executive. It continued to formulate factors which could determine when the doctrine was applicable. These were (i) when it is impossible for the courts which are dealing with the issue not to make a non-judicial policy determination; (ii) when there is potential for disrespect to be shown to the other branches of government; and (iii) when the decision by the courts may potentially embarrass the government.⁴²⁹ In *In re Nazi Era Cases*⁴³⁰ the court used the political question doctrine to dismiss the lawsuit brought against private companies for their alleged involvement in forced labour. The actions were instituted immediately following an agreement between the United States, France, Germany and Austria in July 2000 to resolve litigation pending in

provides that:

The Parties hereby agree that upon the execution of this Agreement there shall be a general amnesty granted to all persons and parties involved in the Liberian civil conflict in the cause of actual combat engagements. Accordingly, acts committed by the parties of any of the parties in the cause of actual combat are hereby granted amnesty. Similarly, the parties agree that business transactions largely conducted by any of the Parties hereto with private business institutions in accordance with the laws of Liberia shall ... be covered by the amnesty herein granted.

⁴²⁷ Chidi Odinkalu, "The Indictment of Charles Taylor" *Inside Africa Bimonthly Newsletter*, June 2003, p.1.

⁴²⁸ 369 US 186 (1962) 217.

⁴²⁹ *Id.*, at p. 217.

⁴³⁰ 129 F. Supp. 2d (2001) 370.

the US courts arising out of the Second World War and the Holocaust.⁴³¹ The court used the *Baker* test and accordingly held that the matter would better be resolved through government negotiations, and a determination by the courts would constitute lack of the respect due to the other branches of the government and would further embarrass the government of the United States.⁴³²

On the other hand, critics have argued that the political question doctrine undermines the rule of law and the powers of the judges independently to review decisions of the legislature and the executive.⁴³³

The Constitutional Courts of El Salvador and Peru have invoked the political question doctrine to justify the amnesty process in those countries.⁴³⁴ The Constitutional Court of El Salvador held that the power to grant amnesty is the consequence of a political act and was consistent with the constitution because the legislature had enacted the law through the sovereign power granted in terms of the constitution. Similarly, the Peruvian Supreme Court affirmed the decision of the Superior Court in the *Salazar Monroe* case,⁴³⁵ where it was decided that it was necessary and justifiable for the legislature to enact laws that would bring about peaceful social, economic and political harmony. The court held that judges are obliged to respect the doctrine of separation of powers and are

⁴³¹ This agreement is fully analysed by Ingrid Wuerth, “The Dangers of Deference: International Settlement by the President” 44 *Harvard International Law Journal* (2003) 1.

⁴³² *Supra*, at 382.

⁴³³ For scholarly discussions on the political question doctrine see Thomas Franck, “Political Question Doctrine/Judicial Answers: Does the Rule of Law Apply to Foreign Affairs?” 135 *California Law Review* (1992) 113; Louis Henkin, “Is there a ‘Political Question Doctrine’?” 297 *Yale Law Journal* (1976) 597 arguing that the political question doctrine is form of deference; Rachel Barkow, “More Supreme than Courts?: The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy” 102 *Columbia Law Review* (2002) 237.

⁴³⁴ *El Salvador Decision* cited by Naomi Roht-Arriaza & Lauren Gibson, “The Developing Jurisprudence on Amnesty” 20 *Human Rights Quarterly* (1998) 843 at 870 - 871.

precluded from questioning decisions of the legislature which are of a political nature. The court further stated that international law enjoyed a status inferior to that of municipal laws. The Honduran Supreme Court⁴³⁶ and the Guatamalan Constitutional Court⁴³⁷ have equally emphasised the primacy of national interests and sovereignty over international law principles.

In the *AZAPO* case,⁴³⁸ the South African Constitutional Court held *inter alia* that the choice of whether to grant amnesty for atrocities committed during the apartheid period rested with a democratically elected parliament. According to the court the choice faced by those negotiating a new democratic order was to reject the amnesty option on “the grounds that it was irrational,” or to favour the path of reconstruction of a new society.⁴³⁹ The court emphasised that despite the “untold sufferings and injustices” of the apartheid system it was important to “develop constitutional democracy and prevent a repetition of [future human rights] [...] abuses”.⁴⁴⁰ In essence, it was important for the court to show deference to the wisdom of the democratically elected legislature in enacting the amnesty law.

A common factor in all the cases reviewed above in which amnesty was challenged, is that national courts hearing the cases have ruled that the political realities of the time dictated that it was in the national interests of those countries to grant amnesty for purposes of peace and national reconstruction of a new society.

⁴³⁵ *Salazar Monroe* case, *id.*, at 878-79.

⁴³⁶ See *Hernandez Santos*, Case No. 60-96, 13 January 1996 cited *ibid* at 881.

⁴³⁷ *Id.*, at p. 882.

⁴³⁸ *Supra*, at para. 24.

⁴³⁹ *Id.*, paras. 44-45.

⁴⁴⁰ *Id.*, para. 46.

Finally, the threat of prosecution and the refusal to consider amnesty as an option for serious human rights violations for political leaders may have other unintended negative effects. It is possible that a political leader may cling to power fearing that if s/he steps down s/he might face a fate similar to other leaders accused of gross human rights violations, such as that of General Pinochet, Hussein Habre and Mengistu Heille Merium. It is reasonable that a political leader, who co-operated in establishing a peaceful transfer to democratic rule, should be rewarded or acknowledged by considering amnesty for his acts, not because he deserves the reward, but because it is necessary to expedite political transformation. Failure to reward dictators for stepping down in response to democratic pressure, may prolong the conflict and result in civilian casualties as is the case with Zimbabwe.

Political decisions to reward or exempt political leaders from prosecution are not new. The International Military Tribunal for the Far East responsible for prosecuting Japanese war criminals did not prosecute Emperor Hirohito. This was a deliberate decision by the Allied Powers, who believed that the emperor would play an important role in the reconstruction of a postwar Japan. This decision was made despite the acts of Japanese war criminals in countries such as South Korea.⁴⁴¹ In the case of the former Yugoslavia, some have suggested that perhaps if Milosovic had been granted or promised amnesty, casualties could have been limited and that without the promise of amnesty, the transition in South Africa might not have materialised.⁴⁴²

⁴⁴¹ See generally Herbert Bix, *Hirohito and the Making of Modern Japan* (2001).

⁴⁴² Richard Goldstone, *For Humanity: Reflections of a War Crimes Investigator* (2000) 59.

4.5. Re-assessment of the Idealist and Realist Approaches to Amnesty and Justice

4.5.1. The Changing Nature of Contemporary Armed Conflicts

A common denominator of contemporary armed conflicts around the world is that often there are no “victors and vanquished” as in South Africa and Mozambique.⁴⁴³ It is under these complex circumstances that it is often impractical to imagine that those fighting will abandon their cause without incentives, or guarantees of freedom from prosecution. In such a situation a political compromise would require granting amnesty to members of the warring factions. The Lusaka Cease-fire Agreement of 10 July 1999, for example, provided that with the exception of *genocidaires*, amnesty could be granted, even for gross human rights violations, if necessary, to ensure peace in the Democratic Republic of the Congo.⁴⁴⁴ The granting of amnesty was seen as a tool to diffuse possible escalation of the conflict, because security was a concern during a disarmament, demobilisation and reintegration of the armed forces. The same applies to Burundi, Angola and Sudan where amnesty has been granted for serious human rights violations.

At the same time these realities must be weighed against diminishing the relevance and significance of international law obligations assumed by states in international human rights instruments.

⁴⁴³ In 1992 the Mozambican parliament passed a general amnesty for “crimes against the state” after the signing of the peace accord with RENAMO. For more details on these developments see Priscilla Heyner, *Unspeakable Truths: Confronting State Terror* (2001) 187 *et seq.*

⁴⁴⁴ See Chapter 9, article 22 of the Lusaka Ceasefire Agreement. Again, in the Pretoria Agreement of 17 December 2002, the DRC President has the power to grant amnesty for politically motivated crimes except for war crimes, genocide and crimes against humanity. President Kabila passed the law on 15 April 2003. However, at the time of writing the law still had to be approved by the transitional government. See also Ketumile Masire, “The Lusaka Cease-fire Agreement: Prospects for Peace in the DRC” 10 *African Security Review* (2001) 89.

4. 5. 2. Restorative Justice as an Expression of Political Elitism

Restorative justice is not without dangers. Those who want to maintain the *status quo* may cynically use restorative justice and reconciliation as smokescreens to avoid reparations to victims. The outcomes of national reconciliation are relative and often difficult to measure. Believing in the virtues of restorative justice does not mean believing in the validity of amnesty. Restorative justice is based on Judeo-Christian model of forgiveness, that one must love one's neighbours by extending mercy and forgiveness to them.⁴⁴⁵ Christianity emphasises the need to forgive enemies and confess one's sins. Forgiveness is essentially a private matter, a person-to-person thing, not a public catharsis as the TRC and politicians would have us believe. It is largely dependent on the willingness of the other party to reconcile.⁴⁴⁶

Before reconciliation can materialise, the parties must agree on certain basic principles. It would, for example, be futile to seek reconciliation with someone who claims that s/he was within his/her rights when s/he violated the victim's rights and that his/her actions

⁴⁴⁵ Methew 5: 38-48.

⁴⁴⁶ Ibbo Mandaza, "Reconciliation and Social Justice in Southern Africa: The Zimbabwean Experience" in Malekgapura Makgoba (ed.), *African Renaissance: The New Struggle* (1999) 79 writes that South Africa, Zimbabwe and Namibia, which share a common history of colonialism and racial discrimination, are overtly or covertly trapped in the illusion of reconciliation. This trapping has, according to Ibbo, resulted in the majority of the oppressed feeling "cheated by the reconciliation exercise." This is because reconciliation serves the small Black elite which "...inherits state power without the fulfilment of social justice to the majority" in order to "[facilitate] the necessary compromise between rulers of yesterday and the in takers of state power within the context of incomplete decolonisation. For this reason, reconciliation is neither durable nor sustainable" (at 99). It is rare for African leaders to demand the Augusto Pinochet style of social justice against colonial masters responsible for systematic human rights violations like the unrepentant Ian Smith and P.W. Botha. Likewise, former President Nelson Mandela and now President Thabo Mbeki have both opposed the lawsuit by victims of apartheid against South African corporations for supporting apartheid. Hence Ali Muzrui, "White Power and Africa's Short Memory of Hate" has questioned the link being made between amnesty and African values, such as the notion of *ubuntu* in South Africa. He argues that *ubuntu* may be the genesis of Africa's "short memory of hate." According to Mazrui, the concept of what he refers to as "ancestral amnesty" in recent times is the result of cultural and historical relativism, that is, its acceptability depends largely on the values between societies and historical epochs. Hence, according to Muzrui "the sins of the powerful acquire some of the prestige of power." The argument made by Mazrui confirms the proposition made earlier that the role of amnesty as a catalyst for change depends on the power relations between the parties, the influence of third parties, and the nature of the peace agreement.

were to protect “certain values” or “national security interests” and thus fall outside of what constitutes criminal conduct.⁴⁴⁷ Again, we can forgive harm done to us, but it is not within our power to forgive crimes committed against others. A more forceful argument is made by David Matas:⁴⁴⁸

...forgiving a murderer victimizes the dead person twice over. First his life is desecrated. By denying the dead justice, we make their deaths meaningless. We impose a posthumous cruelty on them....By saying we shall do nothing about their deaths, we instead degrade the memory of their victimization.

It is therefore important to guard against the notion of national reconciliation being used by political elites to discourage the demands for justice for the victims of mass violence. National reconciliation is about *goals* and *processes* that may take decades or generations.

4. 5. 3. Prosecutions as one Aspect of a Larger Scheme of Possible Interventions

Strict adherence to the letter of the law by the idealists ignores the practical realities which may militate against prosecution such as lack of resources or insufficient information to prosecute. They also ignore the fact that democratic societies are free to choose non-prosecutorial measures to deal with past human rights violations, which may include the trade-off of amnesty for the sake of peace and national reconciliation. Prosecution as a strategy is but one aspect of the larger scheme of possible interventions to foster social transformation.

Although it is true that amnesty is an affront to the fundamental principles of the separation of powers, equality and equal treatment before the law, respect for the rule of

⁴⁴⁷ Stuart Wilson, “The Myth of Restorative Justice: Truth, Reconciliation and the Ethics of Amnesty” 17 *South African Journal on Human Rights* (2001) 531 at 544 –6.

⁴⁴⁸ David Matas, *No More: The Battle against Human Rights Violations* (1994) 107.

law, constitutional supremacy and fair procedure as argued by the idealists, it does not necessarily follow that such an option is likely to institutionalise impunity.⁴⁴⁹ In fact, it would be difficult to prove that impunity increases the likelihood of gross human rights violations. It is equally true that history is full of examples where past human rights violations might have encouraged impunity. The case of Rwanda stands out in this regard. Arguably, because nothing was done about the Hutu genocides of 1963 and 1979, the Hutus committed the 1994 genocide of the Tutsis.⁴⁵⁰ At the same time it must be noted that no attempts have been made to address the legacy of the Hutu genocide by holding those responsible accountable, not to mention considering reparation to victims of the genocide. Even with the establishment of the ICC in The Hague, ICTR in Arusha, and the Special Court in Sierra Leone, killings continue in neighbouring Burundi and the DRC. Threats of prosecution are not sufficient to deter future perpetrators.

While it is correct that prosecution enhances the chances of establishing the rule of law and that no one is beyond the reach of criminal responsibility, one of the shortcomings in the idealist approach is the failure to understand the link between individual criminal responsibility and reconciliation/social reconstruction of a society in transition. It is submitted that such a link may in certain circumstances be more of an aspiration than a reality because reconciliation or the reconstruction of society may not be easy to achieve if the majority's notion of what constitutes justice, truth and reconciliation does not correspond to the truth commission's or the court's authoritative pronouncements on the historical record of the past. It may also be that only a few legal professionals champion

⁴⁴⁹ For example, Chapter 1, headed *Founding Provisions* of the South African Final Constitution Act 108 of 1996 provides that the new South Africa is founded of values human dignity, constitutional democracy, the rule of law and equality (section 1). Section 9 (1) provides that "everyone is equal before the law and has the right to equal protection and the benefit of the law."

⁴⁵⁰ Mahmood Mamdani, *supra* at p. 20 *et seq.*

the court's notion of individual criminal responsibility and not necessarily the entire society affected by the conflict.⁴⁵¹ On that basis, it does not follow that truth commissions or trials will necessarily produce a legitimate and credible historical record of the past. It is possible that records may have been destroyed and witnesses may lie.

4.5.4. Practical Realities Facing a State Emerging from Past Atrocities

The first practical reality confronting a state emerging from past atrocities is the lack of access to information on crimes committed, which makes trials qualitatively unreliable.⁴⁵² The information is subject to the whim of the prosecutor who will decide on the admissibility or otherwise of the information presented before him or her. It is common cause that such information is subject to the strict rules of procedure and evidence and cross-examination. Guilt must be proved beyond a reasonable doubt. These long established traditions of procedural and substantive fairness are not without flaws and limitations. According to Albie Sachs:⁴⁵³

[c]ourts records, ...are notoriously arid as sources of information. Outside the microscopic events under enquiry, you learn little. The social processes and cultural and institutional systems responsible for the violations, remain uninvestigated.

He further stated that:

[c]ourts are concerned with accountability in a narrow individualised sense. They deal essentially with punishment and compensation. Due process of law relates not so much to truth, as to proof. Before you send someone to jail there has to be proof of responsibility in the microscopic sense.⁴⁵⁴

⁴⁵¹ See *Justice, Accountability and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutors*, joint project by the International Human Rights Law Clinic, University of California, Berkeley & Centre for Human Rights, University of Sarajevo, May 2000.

⁴⁵² Boraine, *supra*, at p. 281.

⁴⁵³ Fourth DT Lakdawala Memorial Lecture, Institute of Social Sciences, New Delhi, India, 18 December 1998, p. 13 (on file with the author); Cf. Gerry Johnstone, "Restorative Justice, Shame and Forgiveness" 21 *Liverpool Law Review* (1999) 197.

⁴⁵⁴ *Ibid.*

At least two cases in South Africa, namely those of Dr Wouter Basson and General Magnus Malan, demonstrate not only the weaknesses and inadequacy of criminal prosecutions, but also the risk inherent in prosecuting state-sponsored crimes. In 1996, the former South African Minister of Defence Force, General Magnus Malan and two other senior military officers, were acquitted despite reasonable suspicion that they had a hand in the killing of innocent civilians. Magnus Malan was charged and prosecuted for the 1989 Kwamakutha massacre and was subsequently acquitted due to lack of evidence to link him to the massacre. He subsequently applied for amnesty before the TRC.

The second case is that of Dr Wouter Basson, the infamous Chemical and Biological Warfare expert, who headed the then South African Defence Force (SADF) biological and chemical warfare programme, known as Project Coast. He was widely referred to in the media as “Dr. Death”.⁴⁵⁵ He was initially charged with 229 charges of murder, attempted murder, incitement to murder, theft, fraud, dealing in drugs, and defeating the ends of justice. Also among the charges was the killing of two hundred SWAPO detainees who were poisoned with drugs and allegedly their bodies later dumped from an aircraft.

On 11 April 2002, Judge Hartzenberg delivered his judgement in which he acquitted Basson of all 46 charges.⁴⁵⁶ The acquittal of Basson holds two lessons. First, it vindicates those who believed in the TRC process on the basis that it is impossible to

⁴⁵⁵ Marlene Burger, “In the Dock with Dr. Death” *Mail & Guardian*, April 5 -11, 2002, p. 25.

⁴⁵⁶ Dr Basson was acquitted of certain serious crimes due to the lack of “credible” evidence, charges which, during the course of the trial were dropped because of the amnesty granted by the SWA administration just before the 1990 elections in Namibia. The Basson trial, which began in October 1999, took 300 days, during which 153 state witnesses were called to testify. Key witnesses were brought to South Africa from the United States, Canada and Europe. The transcripts of the trial produced some 30 000 pages. The trial is regarded as one of the most costly trials in South African legal history. See further discussion in Chapter Eight of this work.

convict those like Basson and Malan through the judicial process, especially where evidence has been destroyed. It is not only a costly exercise, but it is often a tall order to mount evidence to prosecute the “big fish” of the previous regime, particularly when they have destroyed records. Moreover, such high profile cases require a lot of preparation and defendants usually have enough resources to seek the services of an experienced defence team. Secondly, it demonstrates that the South African political leadership made a wise decision to choose the route of the TRC.⁴⁵⁷ Wouter Basson has accused the media and other detractors of a witch-hunt.

The second practical consideration is the astronomical costs resulting from prosecutions and trials. Exorbitant costs to litigants are often a significant deterrent for those deciding whether to start or continue litigation, even if they can find a lawyer willing to act on their behalf.⁴⁵⁸ The risk is that such prosecutions may result in acquittals or the withdrawal of indictments if there is insufficient evidence to secure a conviction. This may be an embarrassment to the prosecution authorities and a great disappointment to the victims of gross human rights violations. Even if trials are conducted, it will be impossible to prosecute the entire group. In Rwanda, for example, it is estimated that during the 1994 genocide over 800 000 people were killed in a period of three months. More than 100 000 persons accused of the genocide are in Rwandan prisons awaiting trial under appalling conditions that fall far short of international norms and standards. Some commentators have estimated that it will take Rwanda 137 years to complete the

⁴⁵⁷ See *State v Wouter Basson* 2000 (3) SA 59 (T).

⁴⁵⁸ For example, the apartheid lawsuit against insurance, banks and mining houses for alleged conspiracy, discriminatory labour practices and aiding and abetting the commission of crimes of apartheid is currently being litigated on a contingency based system. See *Lungisiwe Ntsebeza & Others v Citigroup Inc & Others* (Heads of Argument), United States District Court for the Southern District of New York, November 2003 (on file).

trials for *genocidaires*.⁴⁵⁹ This is why Rwanda has, despite the existence of the ICTR and on-going domestic prosecutions of the 1994 *genocidaires*, opted for a community-based justice known as the *Gacaca* Courts (“popular courts”) as an alternative means by which to deal with the accused in Rwandan jails. However, the *Gacaca* Courts will not deal with the planners of the genocide (Category One), but with those who participated in one way or another in the commission of the genocide. In that sense, amnesty, for economic reasons, becomes not only difficult to avoid but almost inevitable. In the same breath, it would have been difficult for the state of Rwanda to pay reparation to an estimated 400 000 victims of genocide. If each of the victims were given a once-off payment of US \$1000 the total reparation would have cost the government of Rwanda US\$ 4 billion.⁴⁶⁰

To a large extent, the cost factor may be used to support an amnesty process in developing countries because, unlike developed countries, the question of resources is an important consideration. Further compounding this problem is that more often than not, developed countries will emphasise first-generation rights (civil and political rights), while developing countries tend to focus on second-generation rights (socio-economic rights).⁴⁶¹

4. 6. Constituent Elements of the Balanced Approach Model

The balanced approach model, which is also termed an integrated model, is preferred because it seeks to promote a harmonious relationship between prosecution and non-

⁴⁵⁹ Charles Villa-Vicencio, “Learning from Rwanda” *Cape Times*, 27 June 2000.

⁴⁶⁰ *Ibid.*

⁴⁶¹ Oloka-Onyango & Deepika Udagana, *The Realization of Economic, Social & Cultural Rights: Globalization and its Impact on the Full Realization of Human Rights*, UN Doc. E/CN.4/sub.2 2000/13 (15 June 2000); Cyrill Gwam, “The Politics of Human Rights: A Case Study of the 57th Session of the Commission on Human Rights” XI *Finnish Yearbook of International Law* (2000) 221.

prosecutorial mechanisms. It also seeks to encourage checks and balances without undermining the *raison d'être* of prosecution and other alternative forms of justice. In short, it advocates a relationship of complementarity between amnesty and the values of justice. The balanced approach model sees the two mechanisms of justice and peace as “cousins” rather than “sworn enemies.” The constituent elements of the balanced approach model are that:

- (i) The amnesty granted as part of a national reconciliation process must be a product of a legitimate and home-grown political process.
- (ii) The amnesty process must be proportional and rationally connected to the peace process. If amnesty is granted for serious human rights violations it must be stringently justified by taking into account the rights of victims to claim reparations and that an effective remedy must be guaranteed as part of a *quid pro quo* mechanism for the granting of amnesty.
- (iii) Prosecution as a policy must only be pursued if it will serve the interests of justice to do so.
- (iv) A state granting a general amnesty must demonstrate a commitment to human rights treaty obligations and the test is objective.

4. 6.1. Amnesty as a Product of a Legitimate and Home-Grown Political Peace Process

If amnesty is an act of a sovereign power as defined in this study, it is necessary that the means used to achieve peace and justice must enjoy credibility and legitimacy in the

eyes of the beneficiaries of the peace process.⁴⁶² Legitimacy of the process is therefore an important constituent element of the balanced approach model.⁴⁶³ In short, a legitimate, democratically elected body must approve the amnesty after it has considered the implications that the granting of amnesty will have on the rule of law and the universally accepted values of a constitutional state. An amnesty process not supported by the will of the people will be seen as illegitimate and risk being challenged.⁴⁶⁴ Equally, it is important to limit the role of the international community, and thus respect the historical and cultural context of the conflict. This is because a home-grown solution has greater prospects of success than an imposed solution because it is the survivors themselves who assume the terms and conditions of the reconciliation process.⁴⁶⁵

4.6.2. Amnesty must be Proportional and Rationally Connected to the Peace Process

One of the defining elements of amnesty is conditionality and for that reason proportionality is essential to balancing the interests of society with those benefiting from amnesty.⁴⁶⁶ Besides, proportionality is an integral part of human rights⁴⁶⁷ and

⁴⁶² See definition of amnesty in Chapter Two of this study.

⁴⁶³ Hendrik van der Merwe, *Pursuing Justice and Peace in South Africa* (1989) 115.

⁴⁶⁴ For example, in August 2003, the Argentinian Congress (Lower House and Senate) unanimously annulled the “Full Stop” and “Due Obedience Law” which gave amnesty to military officers accused of torture and human rights violations during the Dirty War period (1976 – 1983). See Law 25, 779 (Declaration of Nullity of the Law of Due Obedience and the Full Stop Law), Buenos Aires, 21 August 2003. Article 1 provides:

The Laws number 23, 492 and 23, 521 are herewith declared null and void.

Cf. Transitional Justice Newsletter, 31 August 2003.

⁴⁶⁵ David Bloomfield, Teresa Barnes & Luc Huyse (eds.), *Reconciliation after Violent Conflict: A Handbook* (2003) 22 *et seq.*

⁴⁶⁶ See Chapter Two of this study.

⁴⁶⁷ For example, under the UN Charter, one of the requirements of legitimate self-defence (article 51) is proportionality.

humanitarian law instruments.⁴⁶⁸ Proportionality, for the purposes of the balanced approach model, must be understood to mean the minimum measures necessary to achieve the objectives of a new political dispensation. In that sense, even though the “price” to be paid for peace may be a questionable one, it must nevertheless be one necessary to achieve the intended objectives of peace and eventual reconciliation.

The amnesty granted must be weighed against the following factors: nature and gravity of the wrongfulness; availability of resources; rights of victims to an effective remedy and to claim reparations. However, the criteria for the determination of proportionality are not exhaustive, except that those factors taken into account when granting the amnesty must be rational and proportional to the purposes of achieving peace and national reconciliation.

In the case of reparations, the historical development of amnesty, especially in the Hellenic and African civilisations, has shown that when amnesty was granted or reconciliation pursued, reparations, including the return of lost property, were made to victims.⁴⁶⁹ On that basis the rights of victims to an effective remedy and to claim reparations are important criteria in determining proportionality, because they are a *quid pro quo* for the amnesty process. A *quid pro quo* mechanism means that victims should have the right to compel the current and subsequent governments to fulfil their statutory and international law obligations rather than create *hope* for victims that some day they will receive reparations, and fail to provide the promised remedy. Where reparation

⁴⁶⁸In terms of article 51(5) (b) of the 1977 Protocol I to the Geneva Conventions indiscriminate attacks by bombardment expected to cause incidental loss of civilian loss of life should not be excessive in relation to the military advantage anticipated. For more on the principle of proportionality, see Jost Delbruck, “Proportionality” in Rudolf Bernard (ed.), *Encyclopedia of Public International Law*, vol. 3 (1999) 1440.

⁴⁶⁹See Chapter Three of this study.

undertakings have not been fulfilled, prosecution must be vigorously pursued.⁴⁷⁰

Martha Minow⁴⁷¹ argues that the decision whether to grant amnesty or not in the aftermath of atrocities will depend on the political and historical circumstances of each case. Some of the factors include whether the goals of nation-building are likely to succeed, and if the new government was the result of political compromise then amnesty may be considered. She further argues that even though amnesty may constrain responses to serious human rights violations, such constraints may be justified if the political compromise produces genuine democracy. Amnesty will have to stand the proportionality test, that is, it must be necessary to the achievement of political stability. In this sense, the proportionality principle⁴⁷² becomes a relevant criterion in balancing the interests of justice, peace and national reconciliation.

Lastly, there must also be a *rational connection* between the amnesty process and the goals of achieving peace and national reconciliation. In this instance, there would be no reason why amnesty should be granted for acts not associated with the conflict.

4. 6.3. Prosecution shall be Pursued if it is in the Interests of Justice to do so

Given the practical realities that often confront transitional democracies discussed earlier, the second element of the balanced approach model is whether prosecution of *all*

⁴⁷⁰ Terry Bell & Dumisa Ntsebeza, *Unfinished Business: South Africa, Apartheid and Truth* (2003) similarly arguing that where reparations has not been made, prosecution for those granted amnesty must be vigorously pursued.

⁴⁷¹ Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (1998) 133-135.

⁴⁷² Richard Lyster, "Amnesty: The Burden of Victims" in Charles Villa-Vicencio & Wilhelm Verwoerd (eds.), *Looking Back, Reaching Forward* (2000) 184.

or some of those alleged to be responsible for serious violations of human rights will serve the interests of justice. It would certainly not be in the interest of justice if prosecutions were to be pursued for the sake of prosecution, and there is insufficient evidence on which to base prosecution. Without being pre-emptive and exaggerating the outcomes of trials, it is important to be cautious that long trials do not prejudice the interests of justice especially if they are unlikely to offer any tangible results for victims. The same holds true of show trials or where technical judicial processes are used simply to avoid the real issues.

The interests of justice demand that persons accused of serious offences such as war crimes, genocide and crimes against humanity must be prosecuted within a reasonable period of time so that justice is not only done, but is also seen to be done. It is equally important for the entire society to know that the conviction or acquittal of the accused was fair and the result of a legitimate and not a flawed process.

4.6.4. A State Granting a General Amnesty shall demonstrate a Commitment to Fulfil Human Rights and other International Law Obligations

The human rights regime, which began after the Second World War and which led to the decline of amnesty, necessitates that the state granting amnesty must demonstrate a commitment to human rights obligations. The test here is objective, for example, where a state is a party to a particular human rights treaty, necessary steps must be taken after the granting of amnesty to ensure domestic implementation depending on the requirements of that instrument. Reporting obligations and decisions of the relevant treaty monitoring bodies must be respected by the state granting amnesty.⁴⁷³ Other

⁴⁷³ See generally Anne Bayefsky, *The United Nations Human Rights Treaty System: Universalism at the Crossroads* (2001).

objective criteria may include the commitment of the state granting amnesty to strengthen institutional mechanisms to prevent the recurrence of future abuses (e.g. human rights commissions, transformation of the judiciary, and exercising civil control over the security sector, *etc.*)

4.7. Conclusion

In conclusion, the debate on the efficacy of amnesty as a tool for justice reveals the conflict between politics and law. It also shows the lack of common principles, norms and standards on what should constitute justice in the aftermath of violence characterised by gross and systematic human rights violations. At the core of the balanced approach model is a desire to strike a balance between accountability, political transformation and social stability. Trade-offs and choices have to be made between seeking justice for past abuses, often at the risk of political destabilization; political and practical considerations have to be weighed against encouraging cynicism about the rule of law; prevention of future abuses of human rights; and repairing the damage caused to the extent that this is possible.⁴⁷⁴

Although it is true that it would be difficult to prescribe a “one size fits all” model on how to address issues of justice in transitional democracies, the proposed balanced approach attempts to bridge the gap between the idealist and realist approaches.

This chapter has attempted to suggest that a human rights policy framework that purports to advance a balanced approach model must, as a minimum, satisfy one or more

⁴⁷⁴ Jose Zalaquett, “Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints” in *State Crimes – Punishment or Pardon: Papers and Report of the Conference*, Wye Center, Maryland, 4-6 November 1988, at p. 23.

of the following criteria:

- (i) The amnesty process must be linked to the interests of peace and national reconciliation, and such a policy must represent the will of the people for it to be legitimate. A democratically elected body must approve the amnesty process. International considerations should not be allowed to override the national interests of a sovereign state. However, such a determination, although largely political rather than legal, is likely to be influenced by the power relations between the parties, the nature of the peace process, and the influence of third parties;
- (ii) The element of proportionality is important in order to counterbalance amnesty with other considerations, such as reparations for victims of violence;
- (iii) Prosecution should not be pursued if the prospects of success look dim, due to lack of information, if the costs are to be enormous particularly where resources are limited, or, if prosecution is likely to jeopardise the chances of creating a new society;
- (iv) Finally, the government must demonstrate a commitment to respect human rights and other international law obligations.

Finally, how is it possible to balance these interests without jeopardising the ultimate objectives of justice and peace and *vice versa*? The balanced approach model does not see peace and justice as antagonistic. Rather, the two are “sisters or at least cousins” and are therefore not mutually exclusive. It must, in this context, be understood that justice is

“transitional” or “transformational”⁴⁷⁵ in nature. Justice, like peace, is the foundation of any free and democratic society. If there is no justice citizens will lose faith in the authority of the state and resort to self-help. At the same time, justice for the sake of justice is probably doomed to fail. The abolition of amnesty laws on the basis that they are inherently immoral will not end conflicts, but rather a balanced approach seems to be the optimal solution. In terms of the balanced/rational approach amnesty is not a substitute for justice but rather a catalyst to bring about ultimate peace and national reconciliation and through this, eventually an acceptable system of justice. The next chapter examines the extent to which the human rights treaty regime which emerged after the Second World War limited the powers of states to grant amnesty and how the balanced approach model fits into these developments.

⁴⁷⁵ Willie Esterhuysen, “Truth as a Struggle for Transformation: From Apartheid Injustice to Transformational Justice” in Charles Villa-Vicencio & Wilhelm Verwoerd (eds.), *Looking Back, Reaching Forward*, *supra* 144 “transformational justice refers to the notions of justice that drive and also legitimise the process of transition and transformation...” 151.

CHAPTER FIVE
THE DUTY TO PROSECUTE AND THE LIMITATION OF STATE POWERS
TO GRANT AMNESTY IN TREATY LAW AND CUSTOMARY
INTERNATIONAL LAW

5. 1. Introduction

As emerged in Chapter Three, the power of a sovereign state to grant amnesty dates from ancient civilisations and persists to the present day.⁴⁷⁶ For many centuries it was common practice at the end of a war for states to sign peace treaties which granted amnesty to those responsible for war-related offences.⁴⁷⁷ By the First World War, this practice was so established that if a treaty was silent on amnesty, the concept was read into the treaty, that is, amnesty was an implicit part of treaty law and possibly customary international law.

It was only after the end of the First World War that peace treaties with provisions that granted amnesty to those involved in warfare lost favour. On 18 January 1919, the Paris Peace Conference created a Commission on the Responsibility of the Authors of War and the Enforcement of Penalties.⁴⁷⁸ In March 1919, the Commission submitted its report and concluded that Germany and her allies including “Chiefs of State” were responsible for violations of the laws and customs of war. The United States opposed the recommendation based on the argument that heads of state are agents of the people and politically responsible to the people. An agreement was reached in the Versailles Peace

⁴⁷⁶ See Chapter Three of this study.

⁴⁷⁷ See, generally, Andrew Wolpert, *Remembering Defeat: Civil War and Civil Memory in Ancient Athens* (2001).

⁴⁷⁸ Yves Beigbeder, *Judging Leaders: The Slow Erosion of Impunity* (2002) 41.

Treaty of 28 June 1919, in which no provision was made for amnesty, that Germany was obliged to extradite its head of state and others responsible for war crimes.⁴⁷⁹ In this regard the treaty demanded that the German Emperor, Wilhelm II, be tried for war crimes. Article 227 (1) of the Versailles Peace Treaty specifically provided:

1. The Allied and Associated powers publicly arraign William II of Hohenzollern formerly German emperor, for a supreme offence against international morality and sanctity of treaties.

A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defence. It will be composed of five judges, one appointed by each of the following powers: namely, the United States of America, Great Britain, France, Italy and Japan.

In its decision the tribunal will be guided by the highest notions of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality. It will be its duty to impose the punishment, which it considers should be imposed.

The Allied Powers and Associated Powers will address a request to the government of the Netherlands for the surrender to them of the ex-emperor in order that he may be put to trial.

According to Schabas,⁴⁸⁰ the expression in article 227 that the emperor be prosecuted for the “supreme offence against international morality and sanctity of treaties” cannot be reconciled with the principle of legality. This is because in a reply to the German protest over article 227, the Allied powers conceded that the indictment had no “...juridical character as regards its substance, but only in its form. The ex-Emperor is arraigned as a matter of high international policy...”.⁴⁸¹ Article 227 did not use the term “aggression” because at that time it was not considered a violation of international law or subject to prosecution. The provision was aimed at military and civilian leaders who waged war

⁴⁷⁹ Article 225 of the Treaty of Peace between the Principal Allied Powers, Associated Powers and Germany, 28 June 1919, also known as the Versailles Peace Treaty. Reprinted in Clive Parry (ed.), *Consolidated Treaty Series*, vol. 225 (1919).

⁴⁸⁰ William Schabas, “Origins of the Criminalization of Aggression: How Crimes against Peace became the ‘Supreme International Crime’” in Mauro Politi & Giuseppe Nesi (eds.), *The International Criminal Court and the Crime of Aggression* (2004) 17 at p. 21.

⁴⁸¹ *Ibid.*

illegally and violated the “sanctity of treaties.”⁴⁸² As a result, the ex-Emperor was never extradited to Germany from the Netherlands (which remained neutral during the war), and only a handful of German war criminals were prosecuted by German courts in what came to be known as the *Leipzig* trials.⁴⁸³

Another significant element of the Versailles Peace Treaty is that it linked the demand to prosecute Wilhelm II to the obligations of Germany to pay reparations for damages incurred by the victorious powers and their citizens.⁴⁸⁴ Article 231 of the Treaty provided as follows:

The Allied and Associated Governments affirm and Germany accepts the responsibility of Germany and her allies for causing all the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of the war imposed upon them by the aggression of Germany and her allies.

The Inter-Allied Commission, known as the Reparations Commission, was established in order to implement the reparations provisions of the treaty.⁴⁸⁵ The extent of the damages was calculated at some 132 000 million gold marks.⁴⁸⁶ Due to the high inflation rate, Germany was unable to meet her treaty obligations and as a result France occupied the Ruhr area in January 1923.⁴⁸⁷ In terms of article 234 of the Treaty, two reparations committees were established, chaired by two Americans, General Charles Dawes (“Dawes Plan”) and Owen Young (“Young Plan”), to determine Germany’s ability to pay reparations. In 1930, the Dawes Plan was replaced by the Young Plan and

⁴⁸² Quincy Wright, “Changes in the Conception of War” 18 *American Journal of International Law* (1924) 755.

⁴⁸³ See Arthur Wegner, *Kriminelles Unrecht Staatsunrecht und Volkerrecht Wissenschaftlicher* (1925) 1 *et seq.*

⁴⁸⁴ Part VII, Articles 231 – 244 of the Versailles Peace Treaty.

⁴⁸⁵ Article 233 of the Versailles Peace Treaty.

⁴⁸⁶ Article 234 of the Versailles Peace Treaty.

⁴⁸⁷ Helmut Coigng, “Dawes Plan” 1 *Encyclopedia of Public International Law*, vol. 3 (1999) 961.

the latter recommended the establishment of a Bank of International Settlement as a reparations agency to settle Germany's debts to the Allied Powers.⁴⁸⁸

After the Versailles Peace Treaty, only the Treaty of Lausanne of 1923 which replaced the Treaty of Sevres between Greece and Turkey, but which was never ratified, provided for amnesty and reparations for crimes committed by Turkey between 1914 and 1922.⁴⁸⁹

The Versailles Peace Treaty set a precedent for the prosecution of the Nazi leaders at the end of the Second World War, for war crimes and crimes against humanity as was laid down in the 1945 London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Charter).⁴⁹⁰ This was later to be extended by Control Council Law No.10 on the Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity.⁴⁹¹ The Law prohibited the granting of amnesty for war crimes, crimes against peace and crimes against humanity:

In any trial or prosecution for a crime herein referred to, the accused shall not be entitled to the benefits of any statute of limitation in respect to the period from 30 January 1933 to July 1945, nor shall any immunity, pardon or *amnesty* granted under the Nazi regime be admitted as a bar to trial or punishment.⁴⁹²

When Germany was defeated at the end of the Second World War in 1945 no peace treaty was signed with the Allied Powers. This is significant for two reasons. Firstly, because the Allied Powers no longer accepted Germany as an equal sovereign state after

⁴⁸⁸ *Ibid*.

⁴⁸⁹ Lausanne Peace Treaty, *League of Nations Treaty Series*, vol. 28, (1923) 11-13.

⁴⁹⁰ Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, London, August 8, 1945 *UNTS* 82 at 279. Also reprinted in Gerhard Mueller & Edward Wise (eds.), *International Criminal Law* (1965) 227.

⁴⁹¹ *Official Gazette of the Control Council for Germany*, No. 3, Berlin, 31 January 1946.

⁴⁹² Article 5 of Control Council Law No. 10. Emphasis added.

the end of the war. This was a break with historic practice since the Westphalian Peace Treaty of 1648, in which the victor and vanquished were treated equally, and hence the conclusion of a peace treaty with an amnesty provision for both sides at the end of an armed conflict. Secondly, the Allied Powers could not agree amongst themselves on the question of reparations for damages arising from the war.⁴⁹³ The matter was later resolved following the 1946 Inter-Allied Reparations Conference in Paris in which it was agreed to establish an Inter-Allied Reparations Agency and procedure to deal with the question of reparations from Germany.⁴⁹⁴ As Germany's ally during the war, Japan, although not occupied by the Allied Powers, also signed an agreement with the Allied Powers to pay reparations.⁴⁹⁵

In 1953, Germany's external debts was resolved in order to remove obstacles to normal economic relations between the Federal Republic of Germany and other countries.⁴⁹⁶ In the same year, an agreement was signed between the State of Israel and the Federal Republic of Germany in which the latter agreed to pay compensation in the form of "... commodities and services as shall serve the purpose of expanding opportunities for the settlement and rehabilitation of Jewish refugees in Israel...".⁴⁹⁷

Similarly, after the end of the Cold War in 1989, followed by the fall of the Berlin Wall

⁴⁹³ The Soviet Union, for example, lost about 8 million soldiers, and requested coal and steel produced in Germany as a form of compensation.

⁴⁹⁴ Agreement on Reparation from Germany on the Establishment of an Inter-Allied Reparation Agency and on the Restitution of Monetary Gold, 14 January 1945, Paris, 1999 *UNTS* 555 at p. 71.

⁴⁹⁵ 1951 Peace Treaty between Japan and the Allied Powers, 1952 *UNTS* 136 at 45 –164.

⁴⁹⁶ Agreement on German External Debts, London, 27 February 1953, *CTS*, 333, 1953. p. 4

⁴⁹⁷ Article 2 of the Agreement between the Federal Republic of Germany and the State of Israel, *Bundesgesetzblatt*, 21 March 1953, p. 37.

and the unification of East and West Germany, no *formal* peace treaty was signed.⁴⁹⁸ Instead, Germany prosecuted East German border guards and the political leadership responsible for nearly six hundred deaths at the Berlin Wall.⁴⁹⁹ Those who lost property in the former East German Republic were compensated.⁵⁰⁰

It is against this background that the regime of human rights protection which began after the Second World War was born, inspired by the conviction that the massive violations of human rights which took place during the war must be prevented from happening again. In order to achieve this, states assigned themselves the obligation of meeting minimum standards of human rights protection and thus to end the culture of impunity. As state sovereignty remains the source of the prerogative to grant amnesty, it is important to determine the extent to which a state's sovereign powers are recognised or limited by international law through treaty law and custom.⁵⁰¹ In this chapter, the status of amnesties and the duty to prosecute international crimes in international law is

⁴⁹⁸ See Federal Republic of Germany-German Democratic Republic: Treaty on the Establishment of German Unity ("Unification Treaty") 30 *International Legal Materials* 457 (1991); Federal Republic of Germany-German Democratic Republic - France-Union of the Soviet Socialist Republics-United Kingdom-United States: Treaty on the Final Settlement with Respect to Germany 29 *International Legal Materials* 1186 (1990). The treaty granted the reunited Germany sovereignty over her internal and external affairs. One of the main reasons why no formal treaty was signed after the fall of the Berlin Wall was because West Germany had always considered itself the representative of the "old" Federal Republic of Germany.

⁴⁹⁹ In the judgment of the European Court of Human Rights (ECHR), Strasbourg, 22 March 2001, in *Streletz, Kessler & Krenz v Germany & K.H.W.v.Germany*, three German nationals, who were senior officials in the erstwhile German Democratic Republic's (GDR) National People's Army were stationed as border guards on the border of the two German states. They filed an application with the ECHR against a judgment of the German Constitutional Court. After German unification they had been charged and convicted by the German Constitutional court for their participation in the deaths of people who tried to flee the GDR across the intra-German border between 1971 - 1989. They contended that their actions did not constitute offences under the law of the GDR or under international law. They further argued that the conviction was a breach of article 7(1) of the European Convention on Human Rights (no punishment without law). The court unanimously ruled that there was no breach of article 7(1) and that their actions, amongst others, had indeed violated the rules of international law. See Jens Rytter, "No Punishment without Guilt – the Case Concerning German Prosecution of a Former GDR Border Guard" 2 *Netherlands Quarterly of Human Rights* (2003) 39.

⁵⁰⁰ For more developments on compensation for those who lost their property in the former East Democratic Republic of Germany see the recent decision of the European Court of Human Rights, *Jahn & Others v Germany*, Strasbourg, 28 January 2004, 43 *International Legal Materials* (2004) 522.

examined. This has two legs, namely, treaties which specifically allow or prohibit amnesty, and treaties which are silent on amnesty, but which impose duties on a state which are incompatible with the granting of amnesty. In the latter case, an examination of these duties will, if they are found to be binding obligations, exclude by implication the possibility freely to grant amnesty for egregious human rights violations.

5. 2. Amnesty in General International Human Rights Treaties

The first impetus for the protection of human rights at the end of the Second World War was marked by international human rights instruments of historic significance, such as the Universal Declaration of Human Rights (1948)⁵⁰², and the International Convention on the Prevention and Punishment of the Crime of Genocide (1948).⁵⁰³ These developments were later to be followed by other human rights treaties with treaty-monitoring mechanisms.⁵⁰⁴

Through the ratification of human rights treaties, states voluntarily undertake to exercise their sovereign powers within the limits of human rights norms and standards embodied in the treaties.⁵⁰⁵ This is a demonstration of the willingness on the part of the

⁵⁰¹ Article 38(1) of the Statute of the International Court of Justice (ICJ).

⁵⁰² GA Res. 217A (III), U.N Doc. A/810 (1948).

⁵⁰³ 1948 *UNTS* 78 at p. 277.

⁵⁰⁴ The International Convention on the Elimination of All Forms of Racial Discrimination, 1948 *UNTS* 660 at 195; the International Covenant on Civil and Political Rights (1966) GA Res. 220(XXI); the International Covenant on Economic, Social and Cultural Rights (1966) GA Res. 2200 (XXI); the International Convention Against Torture (1984) GA Res. 39/46, Annex, A/39/51 (1984) and the International Convention on the Rights of the Child (1989), A/Res./44/25 (1989).

⁵⁰⁵ Edward Kwakwa, "Internal Conflicts in Africa: Is there a Right of Humanitarian Action?" 1 *African Yearbook of International Law* (1995) states at 21 that "[t]here has been a rapid growth in the number of multilateral treaties which seek to regulate a much more extensive range of issues among States in areas of human rights, politics, economics and other social issues. The European nations are ceding some of their sovereignty to a common European Union; the African States are signing up for the African Charter on Human and Peoples' Rights which subjects their human rights practices to review by an African

international community seriously to confront human rights violations, to set universal standards, to develop international mechanisms for human rights protection and enforcement, and more importantly, to challenge the established notion of national sovereignty. The international human rights instruments discussed here generally recognise that each nation has an obligation to respect the minimum norms and standards of human rights by providing redress for gross human rights violations which includes compensation for victims.⁵⁰⁶

5.2.1. The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) was adopted by the United Nations General Assembly in 1966.⁵⁰⁷ As of January 2004, 152 countries have ratified the ICCPR.⁵⁰⁸ Article 2 of the ICCPR provides that “[each] State Party to the present Covenant undertakes *to respect and to ensure*”⁵⁰⁹ the rights contained in the Covenant, and “...any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed

Commission on Human Rights; and under the Vienna Convention on Diplomatic Relations, States incur responsibility for action within their own territory arising from non-adherence to the principle of diplomatic immunity”. Cf. African Peer Review Mechanism (APRM) of the African Union (AU), which is a voluntary self-monitoring process in which participating AU member states agreed to periodic peer review to ensure compliance with political, economic and corporate governance values, codes and standards contained in the Constitutive Act, AU instruments and the NEPAD documents. See discussion *infra*.

⁵⁰⁶ Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989) Chp. III, 136-245; Naomi-Roht-Arriaza, “State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law” 78 *California Law Review* (1990) 451; Jamie Malamud-Goti, “Transitional Governments in Breach: Why Punish State Criminals?” 12 *Human Rights Quarterly* (1990)1; Jon Van Dyke & Gerald Berkley, “Redressing Human Rights Abuses” 20 *Denver Journal of International Law & Policy* (1992) 243.

⁵⁰⁷ GA Res. 2200 (XXI), 1966 *UNTS* 240 at p. 171.

⁵⁰⁸ UN Multilateral Treaties deposited with the Secretary-General as of January 2004.

⁵⁰⁹ Article 2(1) of the Covenant (emphasis added).

by persons acting in an official capacity.”⁵¹⁰ A right to an “effective remedy” is defined as including competent action by judicial, administrative or legislative authorities, or any other competent authority provided for by the legal system of the member state.⁵¹¹

The obligation of state parties to “respect and ensure” the protection of human rights and “the right to a remedy” have been the subject of much interpretation and discussion, with some arguing that the provisions must be given their plain and ordinary meanings, suggesting that redress is warranted.⁵¹²

The question is whether the phrase “respect and ensure” could be interpreted as imposing a duty on state parties to investigate and prosecute human rights violations under these instruments. The main objective of international human rights instruments is to protect fundamental human rights by striking a balance between state power *vis-à-vis* citizens’ rights. This is done by prohibiting violations of the rights in question and at the same time calling for remedies in cases of violation. The Vienna Declaration on Human Rights and the Programme of Action adopted at the 1993 World Conference on Human Rights, and supported by delegates from 171 countries, condemns not only the continuing disregard of norms and standards of international human rights instruments by member states, but also “the lack of sufficient and effective remedies for the victims.”⁵¹³ The Declaration called on member states to “abrogate legislation leading to

⁵¹⁰ Article 2 (3)(a) of the Covenant.

⁵¹¹ Article 2(3)(b) of the Covenant.

⁵¹² Dinah Shelton, *Remedies in Human Rights Law* (2000) 52 *et seq*; Thomas Buergenthal, “To Respect and to Ensure: State Obligations and Permissible Derogations” in Louis Henkin (ed.), *The International Bill of Rights – The Convention on Civil and Political Rights* (1981) 72; Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (1993) 30-31. Seibert-Fohr, Anja, “The Fight against Impunity under the International Covenant on Civil and Political Rights” 6 *Max-Planck Yearbook of United Nations Law* (2002) 301 at pp. 332-344.

⁵¹³ See *Report of the UN Secretary-General on the World Conference on Human Rights*, A/CONF.157/24 (part I).

impunity for those responsible for grave violations of human rights such as torture and prosecute such violations.”⁵¹⁴

State parties to the ICCPR established the Human Rights Committee as a treaty monitoring body to track the implementation of the Covenant.⁵¹⁵ The Committee receives and consider communications from victims of violations by state parties of the Covenant.⁵¹⁶ In several periodic reports submitted by state parties to the ICCPR in accordance with article 40⁵¹⁷ of the Covenant, the Committee has concluded that amnesties violate article 2(3) (the right to an effective remedy) which includes the right to compensation, and further that amnesties encourage a culture of impunity.

In one of the reports submitted by Paraguay (1982), in terms of article 40 of the Covenant, the Committee was critical of the Expiry Law No. 15, 584, which provided for the expiry of penal actions against those responsible for gross human rights violations in Paraguay.⁵¹⁸ The Expiry Law was passed after the restoration of democracy with a view to bringing about stability in the deeply divided society of Paraguay after so many years of dictatorship and civil war. The law covered only those acts considered to be of a political nature and excluded serious human rights violations such as forced disappearances. Nevertheless, the Committee ruled that the effect of the law was to

⁵¹⁴ *Id.*, para. 60.

⁵¹⁵ Article 28 of the Covenant.

⁵¹⁶ Article 1 of the Optional Protocol to the International Covenant on Civil and Political Rights 1966 *UNTS* 302.

⁵¹⁷ Article 40 in part provides:

The State parties to the Covenant undertake to submit reports on the measures they have adopted to give effect to the rights recognised therein and on progress made in the enjoyment of these rights.

⁵¹⁸ *Observations of the Human Rights Committee – Paraguay*, UN Doc., CCPR A/37/40, 21 July 1982.

exclude the possibility of investigation into past human rights violations and thus prevented Paraguay from discharging its responsibility to provide effective remedies to victims of human rights violations. On that basis, the Committee concluded that, while taking into account the political situation which existed in Paraguay before the restoration of democracy, the Expiry Law encouraged impunity by undermining the democratic order and thus could give rise to future grave human rights violations.⁵¹⁹

Similarly, after reviewing the report submitted by Peru in accordance with article 40, the Committee concluded that the effect of the Peruvian amnesty law was that it violated the right of victims to an effective remedy (article 2 of the Covenant).⁵²⁰ In this respect, the Committee observed as follows:

...the amnesty granted by Decree Law 26, 479 on 14 June 1995 absolves criminal responsibility and, as a consequence, from all forms of accountability, all military, police and civilian agents of the State who are accused, investigated, charged, processed or convicted for common and military crimes for acts occasioned by the “war on terrorism” from May 1980 until June 1995. It also makes it practically impossible for victims of human rights violations to initiate successful legal action for compensation. Such an amnesty prevents appropriate investigation and punishment of perpetrators of past human rights violations, undermines efforts to establish respect for human rights, contributes to an atmosphere of impunity among perpetrators of human rights violations, and constitutes a very serious impediment to efforts undertaken to consolidate democracy and promote respect for human rights and thus violates article 2 of the Covenant. In this connection, the Committee reiterates its view that... this type of amnesty is incompatible with the duty of States to investigate human rights violations, to ensure freedom from such acts within their jurisdiction and that they do not occur in the future.⁵²¹

In October 1995, the Human Rights Committee considered the periodic reports of Haiti and Argentina, which were also submitted pursuant to article 40 of the Covenant. In the case of Haiti, the Committee was of the opinion that the amnesty law agreed upon during the process which led to the return of the elected government of President

⁵¹⁹ *Id.*, paras. 150 – 153.

⁵²⁰ *Preliminary Observations of the Human Rights Committee – Peru*, UN Doc., CCPR/C/79/Add.67, 25 July 1996.

⁵²¹ *Id.*, para. 9.

Aristide in 1993:

... despite the limitation of its scope to political crimes committed in connection with the *coup d' état* or during the past regime, the Amnesty Act might impede investigations into alleged human rights violations, such as summary and extra-judicial executions, disappearances, torture and arbitrary arrests, rape, sexual assaults committed by the armed forces and agents of national security agencies.⁵²²

In a similar vein, the Committee expressed its reservations concerning two amnesty laws passed by Argentina, namely, Act 23, 521 (Due Obedience Law) of 4 June 1987⁵²³, and Act 23, 492 (Full Stop Law) of 12 December 1986,⁵²⁴ which effectively prevented the prosecution of the members of the Argentine armed forces responsible for gross human rights violations committed during the previous military regime.⁵²⁵ The Committee concluded that the two laws denied victims of gross human rights violations an effective remedy and, therefore, violated article 2 of the Covenant:

The Committee is concerned that amnesties and pardons have impeded investigation into allegations of crimes committed by the armed forces and agents of national security services and have been applied even in cases where there exists significant evidence of such gross human rights violations as unlawful disappearances and detention of persons, including children. The Committee expresses concern that pardons and general amnesties may promote an atmosphere of impunity for perpetrators of human rights violations belonging to the security forces. Respect for human rights may be weakened by impunity for perpetrators of human rights violations.⁵²⁶

⁵²² *Comments by the Human Rights Committee – Haiti*, UN Doc, CCPR/C/79, Add. 49, 30 October 1995.

⁵²³ Law of Due Obedience, Buenos Aires, 4 June 1987, *Official Bulletin*, 9 June 1987. Article 1 of the law states:

It is presumed, without accepting evidence to the contrary, that those persons who at the time of the commission of the criminal act had the status of chief officer, subordinate officer and troop personnel of the armed force; as well as security, police and penitentiary forces, are not punishable for the [alleged] crimes...as they have acted in due obedience (to their superior)....

⁵²⁴ Full Stop Law, Buenos Aires, 23 December 1986, *Official Bulletin*, 29 December 1986. Article 1 of the law provides as follows:

Criminal proceedings shall be terminated or shall not be initiated, in regards to those persons who, due to their alleged participation in the crimes...and who is not a fugitive of the law or has been declared in criminal contempt, or who has not been required to appear before a tribunal of law during the period of sixty days following the promulgation of the present law. In the same conditions, all criminal proceedings shall be terminated or shall not be initiated against those persons who have committed crimes in conjunction with the reinstatement of violent forms of political action until December 10, 1983.

⁵²⁵ *Report of the Human Rights Committee*, GA, 50th Session, Supp. No. 40, (A/50/40), , 30 October 1995.

⁵²⁶ *Id.*, para. 152.

In August 2003, the Argentine Parliament voted unanimously in favour of the motion to annul the two laws with retrospective effect. In January 2004, the National Court of Appeal for Federal Criminal and Correctional Cases ruled that two cases should be reopened which had previously been blocked under the 1978 amnesty laws on the basis that the latter violated Argentina's international human rights obligations.⁵²⁷

The Human Rights Committee has similarly condemned amnesties in France,⁵²⁸ El Salvador,⁵²⁹ Lebanon⁵³⁰ and Burundi⁵³¹ as a violation of those countries' duty to investigate, prosecute and provide an effective remedy for victims of gross human rights violations. The Committee's pronouncements show a profound aversion to amnesties, even those said to be necessary for purposes of national reconciliation and peace, insofar as such amnesties undermine efforts to establish respect for human rights. So far, the Committee has not endorsed amnesty laws which cover human rights violations. It will be interesting to see how the Committee reacts to the South African amnesty law when South Africa submits its report in 2004.⁵³²

⁵²⁷ Sentencing of Fernando Maturana and Miguel Krasshoff Marchenko, Santiago Court of Appeal, 5 January 2004.

⁵²⁸ *Comments by the Human Rights Committee - France*, UN Doc., CCPR/C/79/Add. 80, 4 August 1989, para. 13 "The Committee is obliged to observe that the Amnesty Acts of November 1988 and January 1990 for New Caledonia are incompatible with the obligation of France to investigate alleged human rights violations."

⁵²⁹ *Comments by the Human Rights Committee - El Salvador*, UN Doc., CCPR/C/79/Add. 34, 21 September 1994.

⁵³⁰ *Comments by the Human Rights Committee - Lebanon*, UN Doc., CCPR/C/Add.78, 1 April 1997.

⁵³¹ *Comments by the Human Rights Committee - Burundi*, UN Doc., CCPR/C/79/Add.41, para. 12 (1994).

⁵³² At the time of writing, the report has still to be approved by Cabinet before being submitted to the UN Human Rights Committee in terms of article 40 of the 1966 Covenant.

5.2.2. The Inter-American Convention on Human Rights

The Inter - American Convention on Human Rights (the American Convention)⁵³³ was adopted in 1969 and has, to date, been ratified by twenty-four of the thirty-four member states of the Organisation of American States (OAS).⁵³⁴ Both the American Human Rights Commission and the Inter-American Court of Human Rights are responsible for monitoring the implementation and enforcement of the Convention and have developed a body of jurisprudence on impunity and reparations for victims of gross human rights violations.

In several cases, the Inter American Commission and the Court on Human Rights examined amnesty laws enacted by state parties and concluded that such laws violated the American Convention on Human Rights and in particular the right to an effective remedy (article 25).⁵³⁵

In October 1996, the Inter-American Commission overruled the decision of the Chilean Supreme Court which had declared Chile's 1978 Amnesty Decree constitutional. The Commission concluded that the Amnesty Decree violated articles 1(1) & (2) (the right to justice) of the American Convention. In this respect the Commission said,

⁵³³ OASTS (1969), reprinted in 9 *International Legal Materials* (1970) 99.

⁵³⁴ For the status of ratification of the Convention see <http://www.cidh.org/basics/>.

⁵³⁵ *Las Hojas Case* (El Salvador), Case No. 10287, Inter-Am.C.H.R.88(1993); *Hugo Leonardo et al* (Uruguay), Case No. 10029, Inter-Am.C.H.R.154 (1993); *Garay Hermosilla et. al* (Chile), Case No. 10843, Inter-Am.C.H.R. 156 (1997). Cf. Naomi Roht-Arriza, "Truth Commissions and Amnesties in Latin America: The Second Generation" *American Society of International Law Proceedings of the 92nd Annual Meeting*, 1-4 April 1998, Washington, D.C. (1998)1313-6; Douglass Cassel, "Lessons From the Americas: Guidelines for International Response to Amnesties for Atrocities" 59 *Law & Contemporary Problems* (1996) 198; Juame Lloret, "Impunity in Cases of Serious Human Rights Violations: Argentina and Chile" 3 *Spanish Yearbook of International Law* (1993/4) 3; Kai Ambos, "Impunity and International Criminal Law – A Case Study of Colombia, Peru, Bolivia, Chile and Argentina" 18 *Human Rights Law Journal* (1997) 1; Hillary Richard, "The Salvadoran Amnesty Bill" 12 *Human Rights Internet Reporter* (1988) 7; Robert Goldman, "International Law and Amnesty Laws" 12 *Human Rights Internet Reporter* (1988) 9.

...the act through which the military regime implanted itself in Chile, and dictated in 1978 the self-amnesty Decree law 2191 is incompatible with provisions of the American Convention on Human Rights, ratified by that State on August 21, 1990.⁵³⁶

In 1999, in the *Anetro Castillo Peso & Others v Peru* case,⁵³⁷ the Commission considered petitions received between September 1989 and November 1993 from complainants who accused the government of Peru of arbitrary and unlawful arrests by members of the armed forces. It was alleged that those who had been arrested were either summarily executed or buried in secret places. The Commission stated that the burden rested on the state of Peru to prove that those who were arrested did not “disappear”. An obstacle for victims and their next of kin was the fact that the 1995 Amnesty Law prevented the prosecution of those allegedly responsible for these disappearances. The Commission noted that:

In general, cases of disappearances in Peru were not seriously investigated. In practice, those responsible almost enjoyed total immunity, since they were carrying out an official State plan. Despite that, the authorities decided to go even further by passing Act No. 26, 479 (the Amnesty Act) in 1995. Article 1 of the Law grants a blanket amnesty to all members of the security forces and civilian personnel accused, investigated, indicted, prosecuted or convicted for human rights violations committed between May 1980 and June 1995. That law was later strengthened by Act No. 26, 492, which prohibited the judiciary from ruling on the legality or applicability of the amnesty law.⁵³⁸

The Inter-American Court confirmed the decision of the Commission in the *Loayza Tamayo* case⁵³⁹ when it held that the Peruvian general amnesty, and the subsequent laws that excluded the Amnesty Law from judicial review, violated the international law obligation to investigate and prosecute those found to be responsible for past human rights violations.

⁵³⁶ *Annual Report of the Inter-American Commission on Human Rights 1995-1996*, (Chile) 92.

⁵³⁷ *Annual Report of the Inter-American Commission on Human Rights 1998*, vols. II –III, p. 823.

⁵³⁸ *Id.*, para. 825.

⁵³⁹ *Loayza Tamayo* Case Judgement of 27 November 1998, Inter-Am.C.H.R., (Series C, 42), para. 67.

Similarly in the *Barrios Altas* case,⁵⁴⁰ the court ruled that state parties to the Convention were under an obligation to protect victims' rights and that a failure to do so constituted a violation of the duty to ensure and respect human rights. The court ruled that reparations should be paid, based on identifiable damages suffered as a result of gross human rights violations, which included lost opportunities or enjoyment of life.

5.2.3. The African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights (the African Charter)⁵⁴¹ is the foremost human rights instrument in Africa having been ratified by all the 53 member states of the African Union (AU).⁵⁴² The African Charter emphasises "people's rights"(collective rights) alongside individual rights as compared to the American Convention on Human Rights and the European Convention on Human Rights which emphasise individual rights and freedoms.⁵⁴³ The African Charter guarantees every individual the right to have his cause heard, including "the right to an appeal to competent national organs against acts violating fundamental rights as recognised and guaranteed by conventions, law, regulations and customs in force."⁵⁴⁴ Article 21 of the African Charter refers to "the right to adequate compensation."

⁵⁴⁰ *Chumbipuma Aquirre et al. v Peru*, Judgment on the Merits, of 14 March 2001 (Series C 75) at paras. 41 – 44.

⁵⁴¹ OAU Doc. CAB/LEG67/3/Rev. 5 (1981), reprinted in 21 *International Legal Materials* (1982) 58.

⁵⁴² On the African Charter, see, generally, Rachel Murray, *The African Commission on Human and Peoples' Rights & International Law* (2000); Oji Umzurike, *The African Charter on Human and Peoples' Rights* (1992).

⁵⁴³ Rachel Murray, "The African Charter and Peoples' Rights 1987 – 2000: An Overview of its Progress and Problems" 1 *African Human Rights Law Journal* (2001) 1.

⁵⁴⁴ Article 7 of the Charter.

The Charter established the African Commission on Human and Peoples Rights as the supreme structure responsible for monitoring and enforcing the Charter's obligations by member states. The Commission has in recent years handled several communications in which persons affected were denied the right to benefit from a general amnesty law for allegedly plotting to overthrow their governments and such laws have been selectively applied.

In *Abdoulaye Mazou v Cameroon*,⁵⁴⁵ the Commission considered a communication submitted by Amnesty International which intervened on behalf of Mr. Mazou, a magistrate accused, along with others, of plotting to overthrow the government of Cameroon. He was tried and imprisoned by a military tribunal in 1984 and was never afforded the opportunity to defend himself before a court of law. He was never reinstated as a magistrate, despite his appeal to the Supreme Court. He did not benefit from the Amnesty Law of 23 April 1992 which *inter alia* provided that, "...persons condemned who have been granted amnesty and who had public employment will be reinstated." The Commission ruled that the government was not justified in subjecting Mazou to administrative detention or refusing him the benefit of the Amnesty Law. The action of the government violated article 15 ("every individual shall have the right to work under equitable and satisfactory conditions...") of the Charter. The Commission ordered the government to reinstate Mazou.

In *Moto v Equatorial Guinea*,⁵⁴⁶ a complaint was communicated to the Commission on

⁵⁴⁵ Communication 39/90, Annette Pagnouille (on behalf of Abdoulaye Mazou/Cameroon), May 1990. Reprinted in Rachel Murray & Malcolm Evans (eds.), *Documents of the African Commission on Human and Peoples' Rights* (2001) 609.

⁵⁴⁶ Communication 144/95 William A Courson/Equatorial Guinea. Reprinted in Rachel Murray &

behalf of Mr. Moto. Moto and 12 others had been tried and sentenced on charges of plotting to overthrow the government of Equatorial Guinea. Subsequently, the death sentence imposed on the accused was substituted with a sentence of twenty years' imprisonment. The accused had served only three months of his sentence when he was granted amnesty and released. Despite having been released, the complaint alleged that Moto's conviction and imprisonment nevertheless violated the African Charter. The Commission dismissed the complaint on the basis that given the fact that Moto had been granted amnesty, it was unlikely that there were other remedies available to him, be it under domestic law or under the African Charter.

The last communication concerning cases of amnesties considered by the African Commission is that of *Mouvement des Refugies Mauritanians au Senegal v Senegal*.⁵⁴⁷ It concerned atrocities committed against black Mauritians who, it was alleged, were murdered, expelled from their land, forcefully deported to Mali and Senegal, and even denied the right to speak their language by the armed forces of the government. In 1993, the Mauritanian National Assembly passed an amnesty law which excluded the possibility of prosecuting members of the armed forces or any other citizen responsible for the abuses committed between 1991 and 1992. The Commission concluded that it "deplore[d] all the tragic events that have occurred in Mauritania and their consequences" and "...urged the government to accelerate the process of *reparations*" for victims of gross human rights violations.⁵⁴⁸

In June 1999, two international human rights NGOs, the International Federation of

Malcolm Evans (eds.), *Documents of the African Commission on Human and Peoples' Rights* (2001) 610 – 613.

⁵⁴⁷ Communication 162/97. Reprinted in *Eleventh Annual Activity Report* (1997) 551.

⁵⁴⁸ *Id.*, at p. 556. Emphasis added.

Human Rights and *Ligue Droits L' Homme*, filed an action for torture against Captain Ely Ould Dah of Mauritania before the Montpellier Court of Appeal in France, based on article 689-1-2 of the French Criminal Procedure Code, which grants French courts universal jurisdiction over torture. The action was brought on behalf of the black Mauritians who were tortured in Jreida prison, Mauritania, between 1990 and 1991 by Captain Ely. Those who escaped fled Mauritania and sought political asylum in France. The court rejected Ely's argument that his actions were covered by the 1993 Mauritanian amnesty law. He appealed against the decision and in October 2002, the French *Cour de Cassation* upheld the decision of the Court of Appeal and rejected the recognition of the 1993 Mauritanian amnesty law in the circumstances.⁵⁴⁹ The court held that "the exercise of universal jurisdiction by a French court entails the application of French law, even in the instance of a foreign amnesty law" and, further, that a recognition of such an amnesty process would be a violation of France's international law obligations which include the principle of universal jurisdiction.

5. 2. 4. The Constitutive Act of the African Union

The impact of the global campaign against impunity, as illustrated by the Rome Statute, is similarly evident in the Constitutive Act of the African Union (AU), adopted by 53 African States in Lomè, Togo, in July 2000, to replace the 36 year old Organisation of African Unity (OAU).⁵⁵⁰ The core principles of the founding document indicate a break with the blind protectionism of the past and a desire to combat the dangers of impunity on the African continent.⁵⁵¹ Article 4 of the Constitutive Act lists at least 16 principles,

⁵⁴⁹ See, *Ely Ould Dah Case* Court of Cessation Decision, 23 October 2002, *Bulletin Criminel*, 2002, No. 195, p. 725.

⁵⁵⁰ Constitutive Act of the African Union adopted in Lomè, Togo, 11 July 2000. The only African country, which is not a member of the AU, is Morocco.

⁵⁵¹ Following the era of decolonisation, newly independent African countries focused on the liberation of

including the promotion of gender equality,⁵⁵² respect for democratic principles, the rule of law, good governance⁵⁵³ and, more importantly, respect for the sanctity of human life, and the condemnation and *rejection of impunity*,⁵⁵⁴ of political assassinations and of unconstitutional changes of governments.⁵⁵⁵ This means that the AU would reject amnesty granted for gross human rights violations that resulted from an unconstitutional change of government and would view it as a form of impunity. Another important paradigm shift is that, while the 1963 OAU Charter was based on principles of the inviolability of colonial borders (*uti possidetis*)⁵⁵⁶ and non-interference in the internal

the continent from colonial rule and little attention was paid to the protection and enforcement of human rights. The tendency of most African countries then was to ratify those international human rights instruments relating to the liberation of the continent from colonial oppression and the dismantling of apartheid. African leaders cherished the principles of territorial integrity, sovereign equality of states, self-determination of peoples and the non-interference in the internal affairs of other states enshrined in the 1963 Charter of the Organisation of African States. Unfortunately, these principles were later to be used by African leaders to turn a blind eye to gross human rights violations committed on their own doorsteps. Just to mention a few, the OAU failed to investigate grave human rights violations in Zaire (now the DRC) under the Mubutu regime and President Kamuzu Banda. Even the 1994 genocide in Rwanda was never investigated, instead the OAU appointed an International Panel of Eminent Persons to probe the genocide. The Panel concluded that there was no political will by African leaders or the UN to stop the genocide in Rwanda. See *Report of the International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and Surrounding Events* 40 *International Legal Materials* (2000).

⁵⁵² Article 4(l).

⁵⁵³ Article 4(m).

⁵⁵⁴ Article 4 (o). Emphasis added.

⁵⁵⁵ The 1995 Milbrook Commonwealth Action Programme on the Harare Declaration issued by Heads of Government at Milbrook, New Zealand) stated *inter alia* that:

B.3 (Where a member country is perceived to be clearly in violation of the Harare Commonwealth Declaration, and particularly in the event of an unconstitutional overthrow of a democratically elected government, appropriate steps should be taken to express the collective concern of Commonwealth countries and to encourage the restoration of democracy within a reasonable time frame. These include:

...

(vii) suspension of participation at all Commonwealth meetings and of Commonwealth technical assistance if acceptable progress is not recorded by the government concerned after a period of two years

Five years later the AU Heads of State and Governments, at the Ordinary Session in July 1999, adopted the Algiers Declaration, in which they agreed not to admit within their ranks any leader who came to power through unconstitutional means. This commitment is indeed a positive development given the lack of respect for human rights across the continent.

⁵⁵⁶ The Roman law principle of "*uti possidetis ita possideatis*" roughly means "as you possess, so may you possess." The *uti possidetis* principle, which originated in Latin America and was subsequently applied in Africa, is articulated in article II (1) (c) of the OAU Charter. According to this principle, colonial boundaries must be as they were at the time of the declaration of independence. More recently the *uti*

matters of member states, this absolutism seems to have shifted under the AU. Even though the principle of non-interference by any member state in the internal affairs of another⁵⁵⁷ is still maintained in the Constitutive Act, the Union reserves the right:

...to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, *namely war crimes, genocide and crimes against humanity*.⁵⁵⁸

Limiting the right of non-interference in the affairs of other states to the extent that it is not used to commit serious human rights violations, is an acknowledgement by African states that this principle has resulted in the severe human rights violations in countries such as Rwanda and elsewhere on the continent. It would seem there is now a *political will* among African heads of state to enforce international human rights norms and standards. By implication, amnesty granted for war crimes, genocide and crimes against humanity would be a contravention of the Constitutive Act and thus entitle the AU to intervene in a member state, pursuant to the decision of the Assembly of States. Given the *jus cogens* nature of crimes for which intervention is justified, those responsible for such crimes will automatically be obliged to pay compensation.

5. 2. 5. The AU African Peer Review Mechanism and the Balanced Approach Model Compared

How does the AU hope to achieve the lofty objectives and principles outlined in the Constitutive Act? How will this new continental body address issues of human rights violations, including amnesty granted for such acts? In order to answer these questions it

possidetis principle was addressed by a Commission established by the European Union following the declaration of independence by Slovenia and Croatia in 1991 (Badinter Commission), *International Conference on the Former Yugoslavia, Arbitration Commission Opinion no. 2*, 31 *International Legal Materials* (1992) 1497.; Stephen Ratner, "Drawing a better Line: *uti possidetis* and the Border of New States" 90 *American Journal of International Law* (1996) 590.

⁵⁵⁷ Principle 4 (g).

⁵⁵⁸ Article 4(h). Emphasis added.

is important to understand the institutions and mechanisms created by the AU to operationalise its objectives and principles.

In order to operationalise the objectives and principles in the Constitutive Act, the African Union has developed a number of mechanisms and institutions to address impunity in the continent. Notable institutions established by the AU include, principally, the Peace and Security Council (PSC), composed of fifteen members who will be responsible for the promotion of peace, security and stability in Africa, including the encouragement of democratic practices, good governance, the rule of law, the protection of human rights and fundamental freedoms by member states, as part of its mandate to prevent and avert conflicts in the continent.⁵⁵⁹ The PSC will be supported by the Commission of the African Union which will serve as the Secretariat of the Union;⁵⁶⁰ the Panel of the Wise,⁵⁶¹ an advisory body to the PSC, on conflict resolution and security management issues, and the Continental Early Warning System,⁵⁶² which will help to predict famine, natural disasters, signs of genocide and instability and the African Standby Force (ASF)⁵⁶³ to observe and monitor peace support missions; and, lastly, a Military Staff Council⁵⁶⁴ to co-ordinate military and defence activities as required by the PSC.

⁵⁵⁹ Article 3 of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union, adopted by the 1st Ordinary Session of the Assembly of the African Union, Durban, South Africa, 9 July 2002.

⁵⁶⁰ Article 5 (1) (e).

⁵⁶¹ Article 11 of the Protocol Establishing the PSC.

⁵⁶² *Id.*, article 12.

⁵⁶³ *Id.*, article 13.

⁵⁶⁴ *Id.*, article 13 (8).

The PSC will foster “close cooperation” with a number of institutions such as the United Nations Security Council,⁵⁶⁵ the Pan African Parliament,⁵⁶⁶ civil society organisations⁵⁶⁷ and the African Commission on Human and Peoples’ Rights.⁵⁶⁸ Unlike the OAU, where the reports of the African Commission on Human Rights were rarely discussed by heads of state and governments, under the new dispensation, the Commission has the power to “...bring to the attention of the Peace and Security Council any information relevant to the objectives and mandate of the Peace and Security Council.”⁵⁶⁹ The PSC and its concomitant structures and arrangements have the power and potential to address impunity, and this includes amnesties granted for gross human rights violations.

One mechanism through which amnesties, which violate the principles and objectives of the Constitutive Act may be addressed, is NEPAD’s⁵⁷⁰ African Peer Review Mechanism (APRM), a self-monitoring review by African countries to ensure compliance with human rights, good governance and democratic principles.⁵⁷¹ The APRM provides specific guidelines on objectives, standards, criteria and indicators for assessing and

⁵⁶⁵ *Id.*, article 17.

⁵⁶⁶ *Id.*, article 18.

⁵⁶⁷ *Id.*, article 20.

⁵⁶⁸ *Id.*, article 19.

⁵⁶⁹ *Id.*, article 19.

⁵⁷⁰ The New Partnership for Africa’s Development.

⁵⁷¹ It is important to note that there are two forms of APRM. Firstly, the NEPAD Peer Review Mechanism, which is restricted to countries which subscribe to the NEPAD principles, particularly the NEPAD Declaration on Democracy, Political, Economic and Corporate Governance, and is restricted to economic and corporate governance issues. Secondly, the AU Peer Review Mechanism, which applies to all members of the AU and includes aspects of political and human rights, including compliance with all AU treaties and instruments. NEPAD is the socio-economic programme of the African Union. This study only refers to the AU APRM mechanism.

monitoring progress by respective AU member states.⁵⁷² Some of the key objectives for democracy and political governance include the reduction of intra-and inter-state conflicts; the promotion of constitutional democracy which at a minimum embodies periodic elections, the rule of law, a Bill of Rights, supremacy of the Constitution, independence of the judiciary and an effective parliament.⁵⁷³ Standards used to assess efforts to prevent and reduce intra-and inter-state conflicts include the Constitutive Act, the NEPAD Framework Document of 2001, and relevant AU and international law instruments.⁵⁷⁴ The level of ratification and accession to relevant African and international instruments for conflict prevention, management and resolution, and the existence of institutions to manage, prevent and resolve conflicts are some of the indicators used to assess compliance with the APRM.⁵⁷⁵

The criteria, standards and indicators used in the APRM to assess the performance of AU member states resemble, in many respects, the elements of the balanced approach model advocated in this study. Firstly, for an amnesty to pass muster it must have been passed by a legitimate democratic process. When assessing this criterion, the PSC, or any of its structures, will determine whether or not all the democratic principles enshrined in the AU Constitutive Act, and the NEPAD documents, have been met. Secondly, given the fact that the mandate of the PSC is to prevent conflict and to ensure peace and stability, the PSC may determine if, indeed, the amnesty was passed by a legitimate and democratic government and, further, whether the amnesty was proportional and rationally connected to the peace process. The PSC, using all the

⁵⁷² Objectives, Criteria, and Indicators for the African Peer Review Mechanism, 9 March 2003.

⁵⁷³ *Id.*, para. 2 of the document.

⁵⁷⁴ *Id.*, para. 2.3 of the document.

⁵⁷⁵ *Id.*, para. 2.3.3 of the document.

relevant AU and international instruments, will determine, for example, whether the reasons for granting amnesty were influenced by a lack of evidence and resources, and whether there are mechanisms to ensure that victims of gross human rights violations and their next of kin are compensated accordingly. Lastly, the APRM indicator to assess the level of ratification of the AU and international legal instruments is similar to the last element of the balanced approach model, in that a state which grants amnesty must demonstrate a general commitment to fulfil its human rights and other international law obligations. In this regard, the PSC may investigate the extent to which a country under review has complied with its periodic reporting obligations to the African Commission on Human and Peoples' Rights. Consequently, a country which fails the APRM criteria, will also fail to fulfil the constituent elements of the balanced approach model

5.2.6. Conclusion on General Human Rights Instruments

The conclusion to be reached in respect of the general human rights treaties is that, although silent on the subject of amnesties, they impose on state parties the duty to ensure and to promote the human rights enshrined in the Covenant. The Human Rights Committee, the Inter-American Commission and the Inter-American Court of Human Rights, as bodies responsible for tracking the implementation of the respective human rights treaties, have consistently ruled that the duties to prosecute and provide an effective remedy, which includes compensation, are binding on member states and thus, by implication, exclude the possibility of amnesty. The Human Rights Committee has gone so far as to reject all amnesties without exception. This approach of rejecting amnesties in favour of the duty to prosecute and pay reparations to victims has been supported by some domestic courts, legislatures and other international forums (e.g., 1993 Vienna Conference), which were discussed earlier.⁵⁷⁶ This is indeed consistent

⁵⁷⁶ See earlier discussions on the International Covenant on Civil and Political Rights (1966).

with the balanced approach model advocated by this study, in that the rulings of treaty monitoring bodies created by general human rights treaties confirm that the granting of an amnesty which is disproportionate to the gravity of the wrongfulness of the acts committed and excludes the right of victims to an effective remedy (i.e., right to justice and compensation) will not pass muster in the balanced approach model.

To a large extent, many of the criteria, objectives and indicators developed under the AU's APRM Mechanism to assess compliance by AU member states with the objectives of the AU Constitutive Act and NEPAD, share similarities with the constituent elements of the balanced approach model proposed by this study. However, it should be noted that the criteria, objectives and indicators developed in each of the elements of the balanced approach model are not exhaustive.

5. 3. Amnesty in Specific Human Rights Instruments

Unlike general human rights instruments, the specific human rights instruments discussed hereunder explicitly oblige state parties to exercise universal jurisdiction in the prosecution of perpetrators of serious human rights violations. There is consensus that grave breaches give rise to the obligation, *aut dedere aut judicare*, that is, the duty either to extradite or to prosecute perpetrators of international crimes under international law.⁵⁷⁷ The obligation offers alternatives, because the subject of the obligation has the option either to extradite or to prosecute the alleged perpetrator.⁵⁷⁸ States are therefore

⁵⁷⁷ Cherif Bassiouni & Edward Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (1995); Cherif Bassiouni *International Criminal Law: Procedural and Enforcement Mechanisms*, vol. II (1999) 15-29; Robert Jennings, *Oppenheim's International Law*, vol.1 (1992) 948 *et seq.*

⁵⁷⁸ Cherif Bassiouni, *International Criminal Law: Procedural and Enforcement Mechanisms*, vol. II (1999) 15-29.

under an obligation to adopt *domestic* measures which punish such offences.⁵⁷⁹ Arguably, to grant amnesty for such offences will constitute a violation of the *aut dedere aut judicare* principle by a state party to a specific international human rights instrument which imposes such an obligation.

The concept of universal jurisdiction has existed for centuries, and was first applied to pirates during the seventeenth and eighteenth centuries.⁵⁸⁰ The concept gained momentum at the end of the Second World War and was used by the Allied Powers as the authoritative basis for putting the Nazi leaders on trial.⁵⁸¹ The rationale for universal jurisdiction is its supposed deterrent effect, and the fact that the international community uses it to signal that certain categories of crime are a threat to the international legal order.⁵⁸²

Universal jurisdiction is mandated in the following conventions: the Genocide Convention, the Geneva Conventions, the Torture Convention, the Apartheid Convention and, now, the 1998 Rome Statute of the International Criminal Court. Consequently, international law would preclude crimes of torture, crimes against humanity, war crimes and genocide from the protection of amnesties or the category of

⁵⁷⁹ See 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (articles III & IV).

⁵⁸⁰ Richard Goldstone, "Globalisation of Justice" 9 *South African Yearbook International Affairs* (2000/1) 423.

⁵⁸¹ See *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences*, in *Report of the 69th Conference of the International Law Association* (2000) 403 – 31; Menno Kamminga, "Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses" 23 *Human Rights Quarterly* (2001) 940.

⁵⁸² Menno Kamminga, "Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses" 23 *Human Rights Quarterly* (2001) 943 - 944.

political offences. Persons found guilty of crimes against humanity, for example, are not considered political refugees,⁵⁸³ and cannot be granted political asylum.⁵⁸⁴

5. 3. 1. The Convention on the Prevention and Punishment of the Crime of Genocide

Immediately after the end of the Second World War, the United Nations formally recognised genocide as an international crime that “shocks the conscience of mankind.”⁵⁸⁵ The Genocide Convention was the world’s response to the expulsion and systematic policy of the extermination of Jews in Nazi Germany.⁵⁸⁶ The UN General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide on 9 December 1948. The Genocide Convention entered into force on 12 January 1952.⁵⁸⁷ As of October 2004 about 132 countries have ratified the Genocide Convention.⁵⁸⁸ The crime of genocide is one of the “core crimes” defined in the Rome Statute.⁵⁸⁹

⁵⁸³ 1951 Convention Relating to the Status of Refugees (article 1(f)).

⁵⁸⁴ Declaration on Territorial Asylum (article 1) (General Assembly Res. 2312 XXII, 14 December 1967).

⁵⁸⁵ UN GA Res. 96(I), 11 Dec 1946. The term “genocide” was coined by a Polish lawyer, Raphael Lemkin, who fled the German occupation and lost his family during the Holocaust. He derived the word from the Greek word “genos” (race, nation, tribe) and Latin “cide” (killing). The killing should have been directed not at individuals but at members of a national group with the aim of annihilating them completely. See Raphael Lemkin, *Axis Rule in Central Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (1944); Cf. Warren Freedman, *Genocide: a People’s Will to Live* (1992) 11-14.

⁵⁸⁶ *UN Whitaker Report on Genocide* (1985), E/CN.4/Sub.2/1985/6, 2 July 1985, paras. 17 – 24.

⁵⁸⁷ UN G/A Res. 260 A (III), 9 December 1948.

⁵⁸⁸ UN Multilateral Treaties deposited with the Secretary-General as of 25 October 2003.

⁵⁸⁹ The definition of genocide in the ICC Statute is similar to that in the Genocide Convention, that only perpetrators whose intention is to destroy, “...in whole or in part, a national, ethnic, racial or religious group” in society must be tried.

Article V of the Genocide Convention obliges state parties to try those, in their custody, suspected of crimes of genocide. The imperative “*shall*” in articles V and VII indicates that the duty to investigate and prosecute is non-derogable. The ICJ has observed that states have an obligation to punish perpetrators of crimes of genocide irrespective of whether the conflict is internal or international.⁵⁹⁰ The Genocide Convention is one of the few conventions which contemplated the establishment of an international criminal court to prosecute those responsible for crimes of genocide.⁵⁹¹ Unfortunately, such a permanent court was never established due to the lack of political will.

State obligations, which arise from article VI read with article V of the Convention, and the fact that crimes of genocide are considered to be a violation of the highest normative values of international law (*jus cogens*), as expressed in the 1969 Vienna Convention on the Law of Treaties,⁵⁹² suggest that a general amnesty would be contrary to the spirit and letter of the Convention. The 1969 Convention on the Law of Treaties establishes that there are certain rules or principles of international law which are of such a fundamental nature that they bind all states without exception. These rules are often referred to as the peremptory norms of international law.⁵⁹³

⁵⁹⁰ *Case Concerning Application of the Convention on the Prevention and Punishment of Crimes of Genocide (Bosnia-Herzegovina v Yugoslavia)*, I.C.J. Reports, 1996, para. 32.

⁵⁹¹ Article VI 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, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

⁵⁹² The Convention came into operation on 23 May 1969. The text of the Convention is reproduced in Eric Suy, *Corpus Iuris Gentium: a Collection of Basic Texts on Modern Interstate Relations* (1992)106 *et seq.*

⁵⁹³ Article 53 of the Vienna Convention on the Law of Treaties provides :

...peremptory norm of general international law is a norm accepted and recognised by the

The Genocide Convention is nevertheless silent on compensation. However, on the basis of the 1952 Reparations Agreement between Israel and the Federal Republic of Germany, it may be inferred that compensation is contemplated for the purposes of the Genocide Convention. Furthermore, the fact that genocide is one of the crimes within the jurisdiction of the ICC for which victims are entitled to compensation, further supports this proposition.⁵⁹⁴ In that sense, for purposes of the balanced approach model, the Genocide Convention, as one of the early specific human rights treaties, explicitly excludes the possibility of amnesty and links the duty of states to prosecute to the duty to pay compensation.

5. 3. 2. The Convention on the Non-Applicability of Statutory Limitation to War Crimes and Crimes against Humanity

Crimes against humanity originated from the concept of “crimes against the laws of humanity” developed in the aftermath of the Second World War. Since 1945, no international convention has been developed *specifically* to address crimes against humanity. There is no rational explanation for this except that there has been no political will to develop such an international convention. For a number of years, crimes against

international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Cf. Jochen Frowein, “Jus Cogens” in Rudolf Bernhardt (ed.), 3 *Encyclopaedia of International Law* (1997) 65; Lauri Hannikainen, *Peremptory Norms (Jus Cogens) in International Law* (1988); Oscar Schachter, *International Law in Theory and Practice* (1991): “It seems clear that the general concept of obligations *erga omnes* has become part of existing international law even if its precise scope and significance are still uncertain in state practice or judicial application.” 15; *Barcelona Traction Case*, ICJ Rep. 1970, p. 32 “...they are obligations towards the international community as a whole...In view of the importance of the rights involved, all States can be held to have a legal interest in their protection... “.

⁵⁹⁴ Article 75(2) of the Rome Statute.

humanity lacked an authoritative definition.⁵⁹⁵ Fortunately, article 7 of the ICC, which defines crimes against humanity, has attempted to fill this gap. Crimes against humanity are defined as including, amongst others, acts of murder, torture, persecution, enforced disappearances of persons committed as part of a widespread or systematic attack directed against the civilian population.⁵⁹⁶ The definition of crimes against humanity includes in its list sexual offences, persecution and apartheid as punishable crimes within the jurisdiction of the court.⁵⁹⁷

The UN Convention on Non-Applicability of Statutory Limitation to War Crimes and Crimes against Humanity calling for the prosecution of war crimes and crimes against humanity came into force on 11 November 1970.⁵⁹⁸ As of October 2004, only 44 countries had ratified the Convention.⁵⁹⁹

A sister convention, the European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes (25 January 1974), which similarly provides for the statutory limitation of war crimes and crimes against humanity has equally received little support in Europe. To date, only two parties have ratified the Convention since 1974.⁶⁰⁰

⁵⁹⁵ See Geoffrey Robertson, *Crimes against Humanity: The Struggle for Global Justice* (2000); John Dugard, "Universal Jurisdiction for Crimes Against Humanity" 6 *Africa Legal Aid Quarterly*, April – June (2000) 7.

⁵⁹⁶ Article 7(1).

⁵⁹⁷ Article 7(1) (g), (h) &(j).

⁵⁹⁸ UN G/A Res. 2391 (XXIII), 26 November 1968.

⁵⁹⁹ UN Multilateral Treaties Deposited with the Secretary-General as of 25 October 2003.

Despite the lack of political will to develop a specific convention on crimes against humanity, some states have taken the measures necessary to outlaw such crimes. The Ethiopian Constitution, for example, explicitly provides that crimes against humanity are not subject to statutes of limitation.⁶⁰¹ Equally, in Greece, amnesty is prohibited for crimes against humanity.⁶⁰² Again, in 2003, the government of Argentina acceded to the 1968 UN Convention and passed a law granting constitutional hierarchy to the Convention in an effort to avoid constitutional challenges to the retroactive application of the Convention.⁶⁰³ Crimes within the jurisdiction of the ICC, including crimes against humanity, are not subject to statutes of limitation.⁶⁰⁴

Although it may be argued that the prohibition of statutory limitations of war crimes and crimes against humanity is not a universally recognised principle, it is generally accepted that such offences afford all states universal jurisdiction. A number of national courts continue to prosecute Nazi war criminals for crimes against humanity committed after the end of the Second World War, and defences based on statutory limitations have

⁶⁰⁰ Namely, Belgium and Denmark.

⁶⁰¹ Section 28 (1) of the Ethiopian Constitution provides:

Criminal liability of persons who commit crimes against humanity, so defined by international agreements ratified by Ethiopia and by other laws of Ethiopia, such as genocide, summary executions, forced disappearances or torture shall not be barred by statute of limitation. Such offences may not be commuted by amnesty or pardon of the legislature or any other state organ.

⁶⁰² Section 47(4).

⁶⁰³ Law 25, 778 (Constitutional Hierarchy of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, Buenos Aires), 20 August 2003, *Official Bulletin*, 3 September 2003. Article 1 provides:

The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, adopted by the General Assembly of the United Nations on the 26th of November 1968 and approved by law 24, 584, shall herewith be granted constitutional hierarchy.

⁶⁰⁴ Article 29 of the Rome Statute.

been rejected. Since the Second World War, alleged perpetrators such as Klaus Barbie⁶⁰⁵ and Finta⁶⁰⁶ have been charged and convicted for crimes against humanity. Recently, Maurice Papon, aged 86, was charged with the deportation and deaths of French Jews between 1942 and 1944. In April 1998, he was sentenced to 10 years imprisonment for crimes against humanity.⁶⁰⁷

The fact that no specific convention on crimes against humanity has been developed since 1945, and only a handful of states have ratified the Convention on Non-Applicability of Statutory Limitation to War Crimes and Crimes against Humanity, does not make the convention less significant. As pointed out above, domestic courts have prosecuted perpetrators of crimes against humanity. Crimes against humanity form part of *jus cogens* crimes penalised by the ICC for which victims are entitled to claim reparations. In that sense, amnesty is explicitly excluded in favour of the duty to prosecute those responsible for crimes against humanity.

5. 3. 3. The Convention on the Suppression and Punishment of the Crime of Apartheid

In 1968, the Tehran International Conference on Human Rights *inter alia* stated that:

Gross denials of human rights under the repugnant policy of apartheid is a matter of the gravest concern to the international community. This policy of apartheid, condemned as a crime against humanity, continues seriously to disturb international peace and security. It is therefore imperative for the international community to use every possible means to eradicate this evil. The struggle against apartheid is recognised as legitimate.⁶⁰⁸

⁶⁰⁵ *Federation Nationale des Deportés et Internes Résistants et Patriotes and Others v Barbie*, Cour de Cassation., Judgement 6 October 1983.

⁶⁰⁶ *R v Finta* 28 C. L. R. (1994) (4th) 265.

⁶⁰⁷ See Yves Beigbeder, *Judging War Criminals: The Politics of International Justice* (1999) 128.

⁶⁰⁸ Final Act of the International Conference on Human Rights, 22 April – 13 May 1968, UN Doc. A/CONF. 32/41, para. 7.

Five years later, in 1973, the UN General Assembly adopted the International Convention on the Suppression and Punishment of the Crime of Apartheid which came into force in 1976.⁶⁰⁹ The Convention defines apartheid as “inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them.”⁶¹⁰ The Convention calls for the prosecution of those responsible for crimes of apartheid.⁶¹¹ Apartheid forms part of a list of crimes under the rubric of crimes against humanity punishable under the Rome Statute if committed as part of a “widespread and systematic” campaign “directed against any civilian population,” and more importantly, if it is the result of or is supported by a state policy.⁶¹² Like the Genocide Convention, the Apartheid Convention also makes provision for the possibility of creating an international criminal court to prosecute those responsible for crimes of apartheid.⁶¹³ Such an international criminal tribunal never saw the light of day due to lack of political will.

State parties to the Apartheid Convention may be confronted with challenges in their efforts to exercise extra-territorial jurisdiction over the crime of apartheid. Firstly,

⁶⁰⁹ As of October 2003 about 101 countries have ratified the Apartheid Convention. See UN Multilateral Treaties deposited with the Secretary-General as of 25 October 2000. South Africa has not acceded to the Apartheid Convention.

⁶¹⁰ Article I of the Convention. A similar definition has been used in the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, and the Rome Statute.

⁶¹¹ Convention on the Suppression and Punishment of the Crime of Apartheid (article II); *Cf.* article 8(2)(h) of the Rome Statute.

⁶¹² Article 7(2) (h).

⁶¹³ Article V of the Convention provides:

Persons charged with acts enumerated in article II of the present Convention may be tried by a competent tribunal of any State Party to the Convention which may acquire jurisdiction over the person of the accused or by an international penal tribunal having jurisdiction ...

countries which have not ratified the convention have contended that criminalising apartheid would serve no purpose, since racial discrimination has already been made an offence under the 1966 International Convention on the Elimination of all Forms of Racial Discrimination.⁶¹⁴ Secondly, extra-territorial jurisdiction may be objectionable due to the vague definition of the term apartheid.⁶¹⁵ Lastly, to date, there is no state practice on the prosecution of crimes of apartheid. South Africa has also not ratified the Apartheid Convention arguing that it has ratified the 1966 International Convention on the Elimination of all Forms of Racial Discrimination.⁶¹⁶

On the question of linking the duty to prosecute crimes of apartheid to compensation, it is hoped that the current class action by victims of apartheid against Swiss and US multi-national corporations will perhaps shed some light on this linkage, if any, since the Apartheid Convention, like the Genocide Convention, is silent on the question of reparations. Similarly, it may, like the other conventions that are silent on the question of reparations, be argued that the fact that the crime of apartheid is within the jurisdiction of the ICC, for which compensation is obligatory, indicates that the link between the duty to prosecute and compensation is well-established.⁶¹⁷ Schabas⁶¹⁸ has nevertheless suggested that amnesties granted for crimes of apartheid “...may be deemed, in effect, to be [an exception] to the obligation to prosecute” to the extent that such amnesties were the only way to ensure majority rule without bloodshed and thus

⁶¹⁴ For example, The Netherlands.

⁶¹⁵ The argument is not correct, because the crime of apartheid is defined in both the Apartheid Convention and the Rome Statute, otherwise it would not have been included in the Rome Statute.

⁶¹⁶ South Africa ratified on 10 December 1998.

⁶¹⁷ *Lungisiwe Ntsebeza & Others v Citigroup Inc & Others* (Heads of Argument), United States District Court for the Southern District of New York, November 2003 (on file).

⁶¹⁸ William Schabas, *Genocide in International Law: The Crimes of Crimes* (2000) 400.

contribute to national reconciliation.

5. 3. 4. The Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment

Although article 6(c) of the Charter of the Nuremberg International Military Tribunal (1945)⁶¹⁹ did not mention torture as a crime against humanity, the words “and other inhumane acts committed against any civilian population” may be interpreted to cover acts of torture. Subsequently, Control Council Law No. 10 of 1945 - Punishment of Persons Guilty of War Crimes - removed the ambiguity, when it explicitly included torture as an inhumane act or a crime against humanity.

The 1984 UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment came into force on 26 June 1987.⁶²⁰ The Convention defines torture as “a deliberate infliction of severe pain or suffering, which is mental or physical in nature and must be caused by a single or number of acts.”⁶²¹ In terms of this definition three essential elements are necessary for a particular act or number of acts to qualify as torture – (i) the act must have resulted in severe mental or physical pain; (ii) there must have been consent or acquiescence by state authorities; and (iii) the act must have been committed while attempting to solicit information from the victim.⁶²² In the Rome

⁶¹⁹ 1945 *UNTS* 82 at p. 279.

⁶²⁰ UN Doc. A/39/51 (1984).

⁶²¹ Article 1 of the Convention. A similar definition is found in the 1985 Inter-American Convention to Prevent and Punish Torture (article 2).

⁶²² In 1986 the UN Special Rapporteur on Torture identified acts of beating, extracting of teeth, electric shocks, prolonged denials of rest or sleep, total isolation as torture. There are “grey areas” in which there is no consensus as to whether they qualify as acts of torture and they include for example, disappearances, and poor prison conditions. Such acts may perhaps be classified as other forms of ill-treatment since the intensity of suffering does not amount to torture. See *Report of the UN Special Rapporteur on Torture E/CN.4/1986 para. 119.*

Statute, the crime of torture falls within the jurisdiction of the ICC when it is committed within the context of crimes against humanity, that is, committed as part of a widespread or systematic attack directed against the civilian population.⁶²³

The Torture Convention, which to date has been ratified by 123 countries,⁶²⁴ obliges state parties to the Convention to take necessary steps under their domestic laws to ensure that acts of torture are criminalized.⁶²⁵ Article 5 of the Convention establishes jurisdiction to prosecute acts of torture by alleged offenders present in their territories. Article 7 establishes universal jurisdiction by obliging state parties to prosecute or to extradite the alleged offender to another state willing to prosecute.⁶²⁶ The rationale is to ensure that there are no safe havens for suspects and also to deter potential torturers.⁶²⁷

Universal jurisdiction for acts of torture also extends to public officials including heads of states and government.⁶²⁸ In *Ex Parte Pinochet Ugarte (No.3)*, the House of Lords

⁶²³ Article 7(2)(e) of the Rome Statute defines torture as “...the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.”

⁶²⁴ UN Multilateral Treaties Deposited with the UN Secretary-General as of 25 October 2003.

⁶²⁵ Article 4 of the Convention.

⁶²⁶ Article 7 of the Convention. *Cf. R v Bow Street Metropolitan Stipendiary Magistrate & Others, Ex Parte Pinochet (No.3)* [1999] 2 WLR 841 “I have no doubt that long before the Torture Convention of 1984 state torture was an international crime in the highest sense...the objective was to ensure a general jurisdiction so that the torturer was not safe wherever he went...The purpose of the Convention was to introduce the principle of *aut dedere aut punire*— either you extradite or you punish”. *Per* Lord Browne-Wilkinson.

⁶²⁷ See, Chris Ingelse, *The UN Committee against Torture: An Assessment* (2001) 196; J. Small & R. Thomas, “Human Rights and State Immunity: Is there Immunity from Civil Liability for Torture?” 1 *Netherlands International Law Review* (2003)1.

⁶²⁸ For example, in *Filartiga v Pena-Irala* 630 F. 2d. (Cir. 1980), the United States Appeals Court admitted an action brought by relatives of victims of torture committed by a Paraguayan official in the United States. The Appeals Court held that torture committed under the guise of official authority is a crime under international law and under the Alien Tort Act. The Court further held that it had jurisdiction to provide remedies to aliens who are victims of torture irrespective of where the acts had been committed.

stated that “the systematic use of torture [is] an international crime for which there could be no immunity...”.⁶²⁹

The Convention attempts to strike a balance between the duty of states to prosecute and the right of victims of torture to seek redress.⁶³⁰ The Convention entitles victims to lodge complaints with their respective national authorities and to seek recourse for such acts of torture.⁶³¹ Redress in terms of the Convention includes the right of dependants to claim compensation.⁶³²

Actions of state parties are also monitored through the Committee against Torture (CAT), a treaty monitoring body established to supervise and monitor the implementation of state parties’ obligations under the Convention.⁶³³ CAT has, in several instances, expressed criticism of amnesties granted for acts of torture by state parties suggesting that the duty to prosecute under article 7 of the Convention extended to acts of alleged offenders who might have been granted amnesty from criminal prosecution. Like the Committee on Human Rights (CCPR), the Committee on Torture observed that:

... [Some] States have granted amnesty in respect of acts of torture. Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in

⁶²⁹ [1999] 2 WLR 827 at p. 829.

⁶³⁰ Kai Ambos, “Judicial Accountability of Perpetrators of Human Rights Violations and the Role of Victims” 6 *International Peacekeeping* (2000) 66.

⁶³¹ Article 13 of the Convention.

⁶³² Article 14 of the Convention.

⁶³³ Article 19(1) of the Convention obliges state parties to submit a report to CAT on the measures taken to give effect to their obligations under the Convention within one year after the Convention entered into force for the state party concerned. Thereafter the State Party shall submit supplementary reports every four years on any new measures taken and such other reports as the Committee may request.

the future....⁶³⁴

The Committee later reaffirmed its earlier decision when it examined the 1978 Amnesty Law (Decree Law 2.191) passed by the Chilean government of General Augusto Pinochet.⁶³⁵ The amnesty law exempted from prosecution persons implicated in certain offences, including acts of torture committed between 11 September 1973 (when the democratically elected government was overthrown by the military *junta*) and 10 March 1978 (when the state of siege was lifted). Similar concerns were raised in respect of Peru's Amnesty Law of 14 June 1995, which absolved those accused, charged or convicted for crimes committed in Peru between May 1980 and June 1995 from criminal responsibility.⁶³⁶ In both cases, the Committee expressed the opinion that the amnesty decrees violated those countries' obligation to ensure an "effective remedy" to anyone whose rights and freedoms under the Torture Convention and the Covenant on Civil and Political Rights had been violated.

A much-cited authority for the proposition that states have a duty to investigate and prosecute acts of torture is the landmark decision of the Inter-American Court of Human Rights in the *Valasquez Rodriguez* case.⁶³⁷ The case concerned the disappearance of Manfred Valasquez, a student political activist at the University of Honduras, in September 1981. According to the evidence presented before the court, Velasquez was tortured and killed by members of the Honduran security forces. The court held that failure on the part of the Honduran government to investigate those responsible

⁶³⁴ General Comment No. 20 (article 7), UN Doc. CCPR/C21/Rev.1/Add.3, (19902), para. 15.

⁶³⁵ Cited in the report of Amnesty International, *End Impunity: Justice for the Victims of Torture* (2001) 84.

⁶³⁶ UN Doc. CCPR/79/Add.67 (1996).

⁶³⁷ Inter-Am. C.H.R (Series C), no. 4 (1988).

constituted a violation of article 1(1) of the American Convention on Human Rights. It further held that the Honduran government had the legal duty to take reasonable measures to prevent human rights violations, including using its resources to carry out an investigation into the matter and that fair and equitable compensation should be paid to the victim's next of kin.⁶³⁸

Recently in the *Furundja* case,⁶³⁹ the ICTY held that the prohibition of torture as a crime against humanity has reached the level of *jus cogens* in international law from which states cannot derogate, and any amnesty granted for such crimes would be null and void *ab initio*. The Tribunal said:

The fact that torture is prohibited by a peremptory norm of international law has other effects at the inter-state and individual levels. At the inter-state level, it serves to internationally de-legitimise any legislative, administrative or judicial act authorising torture. It would be senseless to argue,...that an account of the *jus cogens* value of the prohibition against torture, treatise or customary rules providing for torture would be null and void *ab initio*, and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law. If such a situation were to arise, the national measures, violating the general principle and any relevant treaty provision would produce the legal effects discussed above and in addition would not be accorded international legal recognition. Proceedings could be initiated by political victims if they had *locus standi* before a competent international or national judicial body with a view to asking it to hold the national measure to be internationally unlawful or the victims could bring a civil suit for damage in a foreign court which would therefore be asked *inter alia* to disregard the legal value of the national authorising act.⁶⁴⁰

The body of jurisprudence developed by the CAT, fortified by similar pronouncements of domestic courts and international tribunals, confirms that the granting of amnesty is explicitly excluded for those responsible for crimes of torture in favour of the duty to prosecute and pay compensation in line with the spirit of the Rome Statute.

⁶³⁸ *Velasquez* case, *id.*, para. 164.

⁶³⁹ *Prosecutor v Anto Furundja* Case, IT-95-17/1-T-10.

⁶⁴⁰ *Id.*, para. 155 (footnote omitted).

5.4. Amnesty in Humanitarian Law Instruments

5.4.1. The Four Geneva Conventions of 12 August 1949

In the case of the four Geneva Conventions of 12 August 1949, a distinction should be drawn between two categories of war crimes.⁶⁴¹ Firstly, grave breaches of the four Geneva Conventions of 1949 are limited to conflict of an international character.⁶⁴² Parties to the four Geneva Conventions have an obligation to investigate and prosecute those responsible for such offences irrespective of their nationality.⁶⁴³ Secondly, war crimes committed within the context of article 3, common to the four Geneva Conventions of 12 August 1949, and other serious violations of a non-international character.⁶⁴⁴ The distinction between “grave breaches” and “other violations” in common article 3 and Protocol II contains equally enforceable consequences because of the increasing number of “internationalised” armed conflicts in the post-Second World War period. Hence the UN Security Council specifically mandated the ICTR to try

⁶⁴¹ On war crimes see Hans-Heinrich Jescheck, “War Crimes” 4 *Encyclopedia of Public International Law* (1992) 294-296; Cherif Bassiouni, “The Normative Framework of International Humanitarian Law – Overlaps, Gaps and Ambiguities” 75 *International Law Studies* (2000) 1; Gabriella Venturini, “War Crimes in International Armed Conflicts” in Mauro Politi & Giuseppe Nesi (eds.), *The Rome Statute of the International Criminal Court: A Challenge to Impunity* (2001) 95; Luigi Condorelli, “War Crimes and Internal Conflicts in the Statute of the International Criminal Court” in Mauro Politi & Giuseppe Nesi, (eds.), *id.* at p. 107.

⁶⁴² Geneva Convention I (article 49); Geneva Convention II (article 50); Geneva Convention III (article 129); Geneva Convention IV (article 146). Grave breaches in terms of the four conventions include wilful killing, torture, inhuman treatment, wilfully causing great suffering or serious injury to body or health, destruction of property, unlawful treatment of civilians such as denial of fair trial and solitary confinement.

⁶⁴³ As of October 2004, about 188 countries had ratified the four Geneva Conventions of 12 August 1949. The Convention has also been endorsed in both the Yugoslav and Rwanda statutes respectively. The four Geneva Conventions of 1949 are reproduced in Michael Reisman & Chris Antoniou (eds.), *The Laws of War: A Comprehensive Collection of Primary Documents on International Laws Governing Armed Conflicts* (1994).

⁶⁴⁴ The 1977 Additional Protocol I to the four Geneva Conventions was introduced to protect victims of international armed conflicts, while Protocol II covered victims of non-international armed conflict. As of October 2003, Protocol I has 156 and Protocol II 149 ratifications. See *Report of the Secretary-General on the Status of Protocols Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims in Armed Conflicts*, UN GA/55/173, 24 June 2000; Cf. Christopher Greenwood, “A Critique of the Additional Protocols to the Geneva Conventions of 1949” in Helen Durham & Timothy McCormack (eds.), *The Changing Face of Conflicts and the Efficacy of International Humanitarian Law* (1999) 3.

perpetrators of serious violations of common article 3 and Protocol II to the four Geneva Conventions of 12 August 1949.⁶⁴⁵ This is also because the number of victims of war in the post-Second World War era has increased dramatically, and failure to protect the civilian population would defeat the purpose of the two regimes of international humanitarian law. In the *Tadic* Decision on Jurisdiction,⁶⁴⁶ the Appeal Chamber stated that it has jurisdiction over serious violations of international humanitarian law irrespective of whether they were committed “within the context of an international or an internal armed conflict... .”

The question of amnesties for war crimes remains unclear. Common article 3 does not categorically establish that *all* “violations” which constitute war crimes are punishable. On this basis, it may be argued that amnesties are permissible in respect of those “violations” which do *not* meet the threshold of “serious” or “grave breaches.” In the same breath, the fact that common article 3 is silent on the question of amnesties may be interpreted as not excluding them.⁶⁴⁷ The Appeals Chamber in the *Tadic* Decision on Jurisdiction⁶⁴⁸ held that common article 3 is customary in nature, and as a result, gives rise to individual criminal responsibility. If the Appeals Chamber’s interpretation of common article 3 is accepted as correct, amnesty granted for all war crimes, irrespective of whether they constitute grave breaches or not, would be prohibited.

⁶⁴⁵ Article 4 of the ICTR Statute.

⁶⁴⁶ *Prosecutor v Dusko Tadic*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 94.

⁶⁴⁷ Avril McDonald, “Sierra Leone’s Uneasy Peace: The Amnesties Granted in the Lome Peace Agreements and the United Nations’ Dilemma” 1 *Humanitares Volkerrecht* (2000) 11 at p. 19.

5. 4. 2. A Critique of Article 6(5) of the 1977 Additional Protocol II

The 1977 Protocol II (Relating to the Protection of Victims of Non-International Armed Conflicts) additional to the four Geneva Conventions of 12 August 1949, unlike common article 3, specifically makes reference to amnesty. The most controversial aspect of the Protocol is article 6 paragraph 5, which provides that:

...[at] the end of hostilities, the authorities in power shall endeavour to grant the *broadest possible amnesty* to persons who have participated in the armed conflict.⁶⁴⁹

The drafting history and the commentary on article 6(5) supports the proposition that not all “violations” which constitute war crimes are punishable.⁶⁵⁰ The original article 10 (8)⁶⁵¹ read as follows:

8. At the end of hostilities, the authorities in power shall endeavour to grant amnesty to as many as possible of those who have participated in the armed conflict, or those whose liberty has been restricted for reasons in relation to the armed conflict, whether they are interned or detained.

A slightly revised article 10(8), now article 10 (6),⁶⁵² reads:

6. At the end of hostilities, the authorities in power shall endeavour to grant amnesty to as many as possible of those who have participated in the armed conflict, in particular those whose liberty has been restricted for reasons in relation to the armed conflict, whether they are interned or detained.

⁶⁴⁸ *Tadic* Case, *supra* at para. 134.

⁶⁴⁹ Emphasis added.

⁶⁵⁰ Yves Sandoz, Christopher Swinarski & Bruno Zimmermann (eds.), *Commentary on the Protocol Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)* (1987) 467.

⁶⁵¹ See *Report to Committee I on the Work of Working Group B on the new Article 10 of Draft II*, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable to Armed Conflicts*, Geneva, vol. X, 21 April – 11 June 1976, CDDH/I/317/Rev. 2, p.145.

⁶⁵² *Draft Protocol Additional to the Geneva Conventions of August 12, 1949 and Relating to the Protections of Victims of Non-International Armed Conflicts*, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Geneva (1974-1977), vol. I, p. 36.

The *travaux préparatoires* show that the final version adopted by the Diplomatic Conference of “the broadest possible amnesty” has the same meaning and intention as the earlier versions. The main purpose of article 6(5), as envisaged by the drafters of Protocol II, was to establish a normal relationship after a state of war between the government and combatants in non-international armed conflicts, but not to cover grave breaches of humanitarian law.⁶⁵³

The authoritative interpretation of article 6(5) is confirmed by Dr Tani Pfanner, Head of the Legal Division of the International Committee of the Red Cross Headquarters in Geneva, in a letter addressed to the Prosecutor of the ICTR and ICTY on 15 April 1997 that:

Article 6(5) of Protocol II is the only and very limited equivalent in the law of non-international armed conflicts of what is known in the law of international armed conflict as ‘combatant immunity’, i.e., the fact that a combatant may not be punished for acts of hostility, including killing enemy combatants, as long as he respects international humanitarian law, and that he has to be repatriated at the end of active hostilities. In non-international armed conflict, no such principle exists, and those who fight may be punished, under national legislation, for the mere fact of having fought, even if they respect international humanitarian law. The ‘travaux préparatoires’ of article 6(5) indicate that this provision aims at encouraging amnesty, i.e., a sort of release at the end of hostilities. It does not aim at amnesty for those who violated international humanitarian law.⁶⁵⁴

In essence, article 6(5) was intended to encourage amnesty in order to liberate those who had been detained or punished merely for having taken part in hostilities, and it was certainly not the intention of the drafters of the Protocol to have amnesty granted to all and sundry.

However, there is no consistency in state practice on the interpretation and applicability

⁶⁵³ *Ibid.*

⁶⁵⁴ Letter to the prosecutor of the ICTR & ICTY, 15 April 1997 (on file with the author).

of article 6(5). Some national courts have relied on article 6(5) of Protocol II to excuse the international law obligations of states to prosecute grave breaches of international humanitarian law. The South African Constitutional Court,⁶⁵⁵ for instance, relied on article 6(5) to justify and condone the 1995 amnesty process. The court interpreted the phrase “the broadest possible amnesty” to cover “serious” violations of international humanitarian law, including war crimes committed during the apartheid era. This has led some commentators to observe that such a broad interpretation falls foul of the holistic nature of Protocol II.⁶⁵⁶

Unlike the South African Constitutional Court, the Criminal Appeal Chamber of Santiago (Chile) in the *Lumi Videla* case⁶⁵⁷ considered whether a state of war existed in Chile when Lumi Videla was kidnapped, tortured and killed in 1974, giving rise to the application of Protocol II of the Geneva Conventions which had become part of Chilean law in 1951. The court ruled that:

...[accordingly], such offences as constitute grave breaches of the Convention are imprescriptable and unamenable to amnesty; the ten-year prescription of legal action in respect of the crimes ...cannot apply, nor is it appropriate to apply amnesty as a way of extinguishing criminal responsibility. Any attempt by a State to tamper with the criminality of and consequent liability for acts which infringe the laws of war and the rights of persons in wartime is beyond the State's competence while it is a Party to the Geneva Convention on humanitarian law.⁶⁵⁸

The conclusion to be drawn from the history of article 6(5) is that the omission of the

⁶⁵⁵ See *Azanian People's Organisation (AZAPO) v President of the Republic of South Africa & Others* 1996 (6) BCLR 1015 (CC). See discussions in Chapters Four and Eight of this study.

⁶⁵⁶ Naomi Roht-Arriaza & Lauren Gibson, “The Developing Jurisprudence on Amnesty” 20 *Human Rights Quarterly* (1998) 843.

⁶⁵⁷ *Lumi Videla* Case No. 16, Roll No. 13.597-94, 26 September 1994 (original in Spanish, unofficial translation) reprinted in Marco Sassoli & Antoine Bouvier (eds.), *How Does Law Protect in War?* (1999) 895.

⁶⁵⁸ *Id.*, para. 12.

provision on amnesty in Protocol I (international armed conflicts) was a deliberate and a rational one, because in the case of international armed conflicts, combatants captured by the enemy automatically enjoy prisoner-of-war status.⁶⁵⁹ Prisoners of war who have not violated the laws of war must be released and repatriated at the end of hostilities, while those who have violated international humanitarian law will accordingly be punished as war criminals for grave breaches or other violations.⁶⁶⁰ In such situations it is not necessary to grant reciprocal amnesties at the end of hostilities of an international character.

In the case of internal armed conflicts, those who take up arms violate domestic law because they are not entitled to take up arms against the government, for example, even though South Africa's 1996 Constitution provides for freedom of expression, the exercise of this freedom does not extend to propaganda for war.⁶⁶¹ Those who propagate war may be charged with treason or sedition punishable under South African domestic law. In such situations of internal strife, those guilty of taking up arms against the government do not, in principle, enjoy prisoner-of-war status but may be granted "the broadest possible amnesty" by state authorities at the end of hostilities to pave a way for national reconciliation.⁶⁶²

Protocol I recognises the obligation of belligerent parties to pay reparations for acts

⁶⁵⁹ This is in terms of article 44 of the Protocol and article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War ("Third Geneva Convention").

⁶⁶⁰ Article 118 of the Third Geneva Convention .

⁶⁶¹ Section 16(2)(a).

⁶⁶² Marco Sassoli & Antoine Bouvier, *supra* at pp. 1369-1370.

committed by members of the armed forces.⁶⁶³ Given the fact that a distinction is no longer made between international and non-international armed conflict because grave breaches can be committed in peace time, it follows that the duty to prosecute applies irrespective of whether the conflict is international or of a non-international character. The conclusion to be drawn from the analysis of the four Geneva Conventions of 1949 and the two additional protocols of 1977, particularly article 6(5) of Protocol II, is that amnesty is explicitly excluded and grave breaches of humanitarian law are penalised, and the obligation is imposed on belligerent parties to pay reparations for acts committed during the war.

5.5. Amnesty in other International Law Instruments

5.5.1. The Rome Statute and the Amnesty Debate

The Rome Statute of the International Criminal Court is silent on the question of amnesty. The advent of the 1998 Rome Statute for the International Criminal Court has generated a great deal of academic literature⁶⁶⁴ on whether the ICC should recognise amnesties granted for international crimes. The question is whether the drafters of the Rome Statute deliberately avoided the question because of the practical uniqueness it presents.

⁶⁶³ Article 91 of Protocol I additional to the Four Geneva Conventions of 12 August 1949.

⁶⁶⁴ See for example, William Burke-White, "Reframing Impunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation" 42 *Harvard International Law Journal* (2001) 467; Michael Scharf, "The Amnesty Exception to the Jurisdiction of the International Criminal Court" 32 *Cornell International Law Journal* (1999) 507; Jessica Avron, "Amnesties in the Light of Developments in International Law and the Establishment of the International Criminal Court" 51 *International and Comparative Law Quarterly* (2002) 91; Charles Villa-Vicencio, "Why Perpetrators Should not Always be Prosecuted: Where the International Criminal Court and the Truth Commission Meet" 49 *Emory Law Journal* (2000) 203; John Dugard, "Dealing with Crimes of a Past Regime— Is Amnesty Still an Option?" 12 *Leiden Journal of International Law* (1999) 1001; John Dugard, "Possible Conflicts of Jurisdiction with Truth Commissions" in Antonio Cassese, Paola Gata & John Jones (eds.), *The Rome Statute of the International Court: A Commentary*, vol. 1(2002) 693; Leila Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium* (2002) at 53 –75.

Those who argue against amnesty, suggest that if the drafters wanted amnesty they could have said so in clear and unambiguous language.⁶⁶⁵ The fact that crimes within the court's jurisdiction are not subject to a statute of limitations is a clear indication that amnesties are forbidden for all intents and purposes.⁶⁶⁶ Indeed, paragraph 5 of the Preamble to the Statute states that state parties to the Rome Statute are "determined to put a end to impunity" by prosecuting the perpetrators of crimes within the court's jurisdiction.⁶⁶⁷

The *travaux préparatoires* of the ICC Statute show that during the sessions of the Preparatory Committee (PrepCom),⁶⁶⁸ the American delegation presented a document on amnesty and pardons for discussion.⁶⁶⁹ Although the proposal was finally rejected, the delegation, in its submission, argued that the prohibition or rejection of amnesty laws would violate state sovereignty.⁶⁷⁰ Besides the sovereignty issue, there are at least two

⁶⁶⁵ On this debate see discussions by Ruth Wedgwood, "The International Criminal Court: An American View" 10 *European Journal of International Law* (1999) 93; Gerhard Hafner, Kristen Boon, Anne Rübesame & Jonathan Huston, "A Response to the American View as Presented by Ruth Wedgwood" 10 *European Journal of International Law* (1999) 109.

⁶⁶⁶ Article 29 of the Rome Statute.

⁶⁶⁷ Article 5(1) (a)–(c) of the Rome Statute.

⁶⁶⁸ See *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, Part One, A/Conf.183/2/Add.1, 14 April 1998.

⁶⁶⁹ See *US Informal Paper on Amnesties and Pardons* submitted in August 1997 Session of the PrepCom. (on file with the author); Cf. *Handbook of the Draft Statute for an International Criminal Court*, The European Law Students Association, May 1998, 17 "The purpose of the Court will be to bring grave violations of international law to justice. There is an obligation to the States to record such crimes and it was repeated during the PrepCom sessions that amnesties under national law or pardons could constitute a violation of the concerned States' obligation under international law" (footnote omitted).

⁶⁷⁰ This is perhaps the reason why in December 1998, the President and the Prime Minister of France filed an application before the French *Conseil Constitutionnel* in which they requested an opinion on whether the presidential powers to grant amnesty or pardon under the French Constitution will comply with the Rome Statute after ratification by the French parliament. In January 1999, the French *Conseil Constitutionnel* ruled that the ratification of the Statute required the revision of the Constitution, because the fact that France is under an obligation to arrest and hand over suspected war criminals to the International Criminal Court would violate the sovereignty of France. See the decision of the *Conseil*

obvious reasons why this matter was deliberately dropped from the agenda of the PrepCom.⁶⁷¹ Firstly, for many years, particularly in Latin America, military dictatorships have abused amnesty as a mechanism for peace and reconciliation. Secondly, treaty crimes such as genocide, torture, war crimes and crimes against humanity oblige state parties to investigate and prosecute such serious violations. Therefore, the recognition of amnesty laws may undermine the credibility and legitimacy of the International Criminal Court in exercising universal jurisdiction over international crimes.

There are several provisions in the Rome Statute, which could be interpreted as either allowing for, or, alternatively, prohibiting the granting of amnesty.⁶⁷² The Preamble of the Rome Statute affirms that “...the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international co-operation.”⁶⁷³ In essence, the Rome Statute encourages member states to co-operate by bringing those responsible to the International Criminal Court.⁶⁷⁴

Article 17 of the Rome Statute sets out circumstances under which the court may prosecute, but the list does not include amnesties. Article 17 of the Rome Statute, deals

Constitutionnel no. 98-408 DC du 22 janvier 1999 in Paul Tavernier, “Correspondents’ Reports” 2 *Yearbook of International Humanitarian Law* (1999) 360. The decision is also discussed by Beate Rudolf in 94 *American Journal of International Law* (2000) 391-396; Cf. *Report on the Constitutional Issues Raised by the Ratification of the Rome Statute of the International Criminal Court adopted by the Venice Commission at its 45th Plenary Meeting*, Venice, Italy, 15-16 December 2000.

⁶⁷¹ *Report of the Preparatory Committee on the Establishment of an International Criminal Court A/CONF. 18372/Add.1*, 14 April 1998.

⁶⁷² See generally Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observer’s Notes, Article by Article* (1999).

⁶⁷³ Paragraph 4 of the Preamble.

⁶⁷⁴ Paragraph 4 of the Preamble.

with the admissibility of cases before the court, points out that the court is not meant to replace national jurisdictions,⁶⁷⁵ but rather, the court will step in when the latter are “...unwilling or unable genuinely to carry out the investigation or prosecution.”⁶⁷⁶ What this means is that the jurisdiction of the court will complement national jurisdiction. Basically, the ICC may prosecute whenever the jurisdictional requirements are met, and need pay no heed to whether an outside state, or even a member state, has granted an amnesty for the crime in question. National amnesty laws may be interpreted as evidence of the inability or unwillingness of a national authority to prosecute, hence some have expressed dissatisfaction with the lack of supremacy of the court over national jurisdictions. Antonio Cassese puts it thus:

Complementarity might lend itself to abuse. It might amount to a shield used by states to thwart international justice. This might happen with regard to those crimes (genocide, crimes against humanity) which are normally perpetuated with the help and assistance, or the connivance or acquiescence, of national authorities. In these cases, state authorities may pretend to investigate and try crimes, and may even conduct proceedings, but only for the purpose of actually protecting the allegedly responsible persons.⁶⁷⁷

Article 17(1)(b) may be interpreted differently, to say that the ICC *can* establish its jurisdiction, which the court *does not* have to exercise, but rather creates the *power* and not necessarily the *duty* to investigate and prosecute.

⁶⁷⁵ Article 17 in part provides:

- (1)..., the Court shall determine that a case is inadmissible where:
 - (a)...
 - (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
 - (c) The person concerned has already been tried for conduct which is the subject of the complaint, and the trial by the Court is not permitted under article 20, paragraph 3.

⁶⁷⁶ Article 17 of the Rome Statute.

⁶⁷⁷ Antonio Cassese, “The Statute of the International Criminal Court: Some Preliminary Reflections” 10 *European Journal of International Law* (1999) 158.

Another comparable provision is article 20, which arguably excludes amnesties. In terms of article 20 (*ne bis in idem*), the ICC shall not try a person for crimes for which he has already been convicted or acquitted by another court.⁶⁷⁸ Nevertheless, such a person shall only be proceeded against by the ICC if the previous proceedings were either intended to shield the person concerned from criminal prosecution, or, such proceedings were not conducted impartially or independently in accordance with the norms of international law.⁶⁷⁹ In cases of “sham trials” the prosecutor may, for the purposes of Article 20, decide that the amnesties granted do not qualify as judgments. On a hypothetical level, Senator Pinochet may be brought before the ICC on the ground that the 1978 “self-amnesty law” was passed to shield him and his generals from criminal responsibility for crimes of torture and crimes against humanity. It may also be argued that the process under which he was granted immunity was not in accordance with “the norms of due process recognised by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.”⁶⁸⁰

It is also likely that the prosecutor, in exercising his or her discretionary powers, may take amnesty into consideration. In article 53(2)(c) the prosecutor shall inform the Trial Chamber, and the state making a referral, or the Security Council acting in terms of article 13, of his/her decision not to prosecute if such “prosecution is not in the interests of justice, taking into account all the circumstances... .” In such circumstances, the prosecutor has the discretion to decide whether or not to proceed with investigations

⁶⁷⁸ See Christine van den Wyngaert & Tom Ongena, “*Ne Bis in Idem* Principle, Including the Issue of Amnesty” in Antonio Cassese, Paola Gaeta & John Jones (eds.), *supra*, at pp. 726-727.

⁶⁷⁹ Article 21(1) (c).

⁶⁸⁰ Article 20 (3) (b).

with a view to prosecution. In exercising this discretion, the prosecutor may regard the amnesty passed by a state party as unacceptable and therefore decide to proceed with investigations with a view to prosecution.

It is also possible in terms of the deferral in article 16, that the UN Security Council could refer a matter to the prosecutor to investigate and prosecute.⁶⁸¹ The Security Council could declare, especially where it is alleged that one or more of the core crimes within the jurisdiction of the ICC have been committed, that any form of amnesty is unacceptable and request the prosecutor to investigate and prosecute. The Council may argue that such an amnesty process is a threat to international peace and security in terms of article 39 of the UN Charter, and thus necessitate its intervention in terms of Chapter VII.

Likewise, the amnesty debate in relation to the Rome Statute must be linked to the question of reparations for victims of serious crimes within the jurisdiction of the court. The significance of the Rome Statute is not only that it has codified most of the specific human rights treaties discussed earlier, but also that the court may order the convicted person to pay compensation or restitution after the person has been found guilty of the alleged offence. In the event that the person is unable to pay, the government and other agencies may be requested to assist. A Victims Reparations Fund has, therefore, been established to fulfil this purpose.⁶⁸²

⁶⁸¹ Article 16 provides as follows:

No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

⁶⁸² Article 75 of the Rome Statute.

It is generally agreed that crimes within the jurisdiction of the ICC form part of customary international law, hence it was easy for states to agree that they be penalised. Consequently, if there is a duty to prosecute violations of customary international law, then the ICC should be able and, indeed, obliged to ignore all amnesties granted to perpetrators of crimes which are of the “...most serious concern to the international community as a whole... .”⁶⁸³ Given these possible interpretations on the reading of the Statute, a strong argument could be made that the drafters did not intend to include amnesty in the Rome Statute.

Based on the balanced approach model, for purposes of the interpretation suggested above, when exercising the discretion of whether or not to prosecute in cases where amnesty has been granted, the prosecutor of the ICC will consider all the circumstances, including the extent to which article 75 (reparations) of the Rome Statute has been met by the accused; whether it is in the interest of justice to prosecute (i.e., there is sufficient evidence, or a lack of evidence, and the necessary resources to prosecute); and finally whether such an amnesty process was legitimate and rationally connected to the peace process.

5. 6. Amnesty and Customary International Law

The treaty obligation to investigate and prosecute violations of human rights is limited to state parties. In cases where there is no treaty obligation, a duty may nevertheless exist under customary international law.⁶⁸⁴ Determining whether a particular norm has

⁶⁸³ Paragraph 4 of the Preamble to the Rome Statute.

⁶⁸⁴ On custom as a source of international law see, generally, Ian Brownlie, *Principles of Public International Law* (1998) 4-11; Anthony D’Amato, *The Concept of Custom in International Law* (1971)

reached the level of custom is important in that customary law is binding on all states, including those who elect not to be party to a treaty which articulates the norm in question.⁶⁸⁵ Custom has basically two elements: state practice (‘evidence of a general practice’) and *opinio juris ac sive necessitatis* (‘practice generally accepted as law’).⁶⁸⁶ State practice refers to a general and consistent practice, while *opinio juris* means that a practice is adhered to by states out of a sense of legal obligation to follow that practice.⁶⁸⁷

5. 6. 1. State Practice under Customary International Law

The traditional approach of formulating rules of custom from the behaviour of states is confronted with difficulties in the field of international humanitarian law. The practice of belligerents, whose actions international humanitarian law is designed to limit (so as to limit the suffering of civilians and others protected by international humanitarian law instruments), would be difficult to qualify as “general” and “accepted as law.” Hence repeated violations by belligerents cannot, as a matter of fact, be accepted as “law.” What compounds this problem even further is the fact that in war the truth is often the first casualty, thus making it difficult to know whether the military objective was within

49; Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989) 59-62; Michael Akehurst, “Custom as a Source of International Law” 12 *British Yearbook of International Law* (1974/5) 1 at 35 *et seq*; Bruno Simma & Philip Alston, “The Sources of Human Rights Law: Custom, *Jus Cogens*, and General Principles” 23 *Australian Yearbook of International Law* (1988/9) 82; Rudolf Bernhardt, “Customary International Law” 1 *Encyclopedia of Public International Law* (1997) 898.

⁶⁸⁵ Theodor Meron *Human Rights and Humanitarian Norms as Customary Law* (1989) 3 noting that the only exception to the universal application of a norm is that it does not apply to states which have persistently objected to the norm since it was articulated or practised.

⁶⁸⁶ Article 38(1) (b) of the Statute of the International Court of Justice describes custom as “evidence of a general practice accepted as law.”

⁶⁸⁷ The ICJ in the *North Sea Continental Shelf Cases* [1969] ICJ Rep. 3 at p. 44 has described these two essential components of customary international law as follows:

... not only must the acts concerned amount to a settled practice, but they must also be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.

the legal constraints. Finally, while it is correct that states are responsible for the behaviour of their soldiers, it is difficult to determine which behaviour of the soldiers would constitute part of state practice for the purposes of ascertaining the rules of customary international humanitarian law.⁶⁸⁸ Apart from military manuals, which constitute a “general practice” of the behaviour expected of soldiers by their states, it remains debatable whether, in order to identify the rules of custom, statements (including accusations of belligerents or views of third parties) on the non-adherence to rules of international humanitarian law, deserve consideration.⁶⁸⁹

Although treaty-based crimes (war crimes, torture and genocide) explicitly oblige state parties to prosecute, an evaluation of state practice yields mixed results. The number of states which have investigated and prosecuted those responsible for international crimes is significant. At the same time, the number of states which employ amnesty as a tool for peace and reconciliation cannot be ignored and continues to grow. The 1992 Mozambique Agreement between Frelimo and Renamo, for example, provided for a blanket amnesty and a power-sharing deal with the rebels who today occupy positions in the new government.⁶⁹⁰ Similarly, the 1997 Peace Agreement between the Government of Sudan and the South Sudan United Democratic Salvation Front provided for a “general and unconditional amnesty for all offenses (political and war-related) committed between ...May 1983...[and]... 1997...”.⁶⁹¹ The accord created an *ad hoc*

⁶⁸⁸ Marco Sassoli & Antoine Bouvier, *How Does Law Protect in War?* (1999) 108 - 109.

⁶⁸⁹ Christopher Greenwood, “Customary Law Status of the 1977 Additional Protocols” in Delissen J & Tanja J (eds.), *Humanitarian Law of Armed Conflicts, Challenges Ahead: Essays in Honour of Frits Kalshoven* (1991) 119-126; Theodor Meron, “The Geneva Conventions as Customary Law” 81 *American Journal of International Law* (1987) 348.

⁶⁹⁰ General Peace Agreement for Mozambique is available online at <http://www.c-r.org/acc-moz/rome1.htm> (accessed 18 July 2003). Cf. Law No. 16/ 92 of 14 October 1992, *Diary of the Republic of Mozambique*, 1 Series, No. 42 (author’s translation).

⁶⁹¹ The 1997 Peace Agreement between the Government of Sudan and the South Sudan United Democratic Salvation Front signed on 21st April 1997, see Articles 1-5 of Annex 2 headed “General
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Joint Amnesty Commission to implement the provisions of the amnesty proclamation order by the compilation of a report about all the persons eligible to benefit from the amnesty process, whether they are in detention or have been released.⁶⁹² Another body, the Special Amnesty Tribunal, was established with judicial powers to receive, examine and determine cases covered by the Amnesty Proclamation.⁶⁹³ The peace agreement makes no provision for reparations to victims of the war.

In 2003, the Government of Uganda enacted an amnesty law in an effort to encourage members of the Lord's Resistance Army (LRA) to return to civilian life. In January 2004, the law was changed to exclude the LRA leadership who bear the greatest responsibility for gross human rights violations committed in Uganda.⁶⁹⁴ No provision is made for reparations. In September 2003, the National Assembly of the Republic of Congo Brazzaville approved an amnesty for the Nija militias who fought against the government forces between 1993 and 1998 in an effort to bring about peace and national reconciliation.⁶⁹⁵

Another problem associated with state practice is that often third countries are reluctant to enforce the duty to prosecute, largely for diplomatic reasons. In March 2001, for example, the Senegalese *Cour de Cassation* acquitted the former Chadean dictator, Hissene Habre, who was arrested and brought to trial in Senegal for alleged acts of

Amnesty Proclamation Order 1997" (on file with the author).

⁶⁹² Article 6(a) of the General Amnesty Proclamation Order 1997.

⁶⁹³ Article 7 of the General Amnesty Proclamation Order 1997.

⁶⁹⁴ Regulations to the Amnesty Act 2 of 2002 (Uganda).

⁶⁹⁵ "Congo: National Assembly Approves Bill on Amnesty for Ninja Militias" IRINnews.org, (accessed 1 September 2003).

torture.⁶⁹⁶ South Africa refused to prosecute the former Ethiopian dictator, Mengistu Heille Merium, who is currently in Zimbabwe where he has been granted asylum. The South African prosecuting authorities argued that it was impossible to prosecute, because there was no extradition agreement between South Africa and Ethiopia, and further that Ethiopia had not made the request. Again, South African authorities argued that there was no implementing legislation on torture and genocide, or crimes against humanity. Dugard⁶⁹⁷ believes that South Africa could have prosecuted under customary international law.

In the *Pinochet* case,⁶⁹⁸ Lord Lloyd, although being in the minority, acknowledged the existence of a practice by states to grant amnesty for crimes for torture and crimes against humanity, such as Algeria (1962), Bangladesh (1971), and most of the South American countries, in order to restore peace and democracy in such countries.⁶⁹⁹

5. 6. 2. *Opinio Juris* under Customary International Law

Opinio Juris, the second element of custom, is about what states believe and not their actual actions, and consequently, treaties and declarations are an expression of what states believe rather than of their actions.⁷⁰⁰ The main problem though is that it is

⁶⁹⁶ *Souley Guengueng et al. v Hissene Habre*, Decision no. 14 of 20 March 201 (unreported).

⁶⁹⁷ Dugard, *supra*, 6 *Africa Legal Aid Quarterly* (2000) at p. 9.

⁶⁹⁸ *R v Bow Street Metropolitan Stipendiary Magistrate. Ex Parte Pinochet* [1998] 4 ALL ER 897 (HL).

⁶⁹⁹ *Id.* at para. 1490 B-C. Cf. Robert Quinn, "Will the Rule of Law End? Challenging Grants of Amnesty for the Human Rights Violations of a Prior Regime: Chile's New Model" 62 *Fordham Law Review* (1994) 905; Andreas O' Shea, "Pinochet and Beyond: The International Law Implications of Amnesty" 16 *South African Journal on Human Rights* (2000) 642.

⁷⁰⁰ Whether or not treaties and declarations by states constitute *opinio juris* or state practice remains a controversial issue in contemporary international law. A rule of custom may be crystallised in a treaty or declaration following a multilateral conference in which there was international consensus (*North Sea Continental Shelf Case*, ICJ Rep. 1969 at para. 41). For example, it is a common practice in a number of human rights treaties to create both formal and informal institutional structures to operationalise the treaty such as requiring states to submit reports to treaty monitoring bodies. Although most of these provisions are not obligatory they may nonetheless have the effect of converting a non-obligatory rule into something

difficult to determine what states believe and what they say, that is, a practice generally accepted as law (*lex lata*) and law still in the making (*lex ferenda*). Given this difficulty, a number of writers⁷⁰¹ have suggested that instead of focusing on a consistent pattern of state practice, supported by evidence that states regard such a practice as a legal requirement, it is better to focus on statements of governments, resolutions of international organisations, patterns of ratification of international treaties and commentaries including, *travaux préparatoires*. The ICJ in the Merits decision in *Military and Paramilitary Activities in and Against Nicaragua*⁷⁰² derived sources of custom from the prohibition of the use of force and non-intervention from statements and resolutions of the UN General Assembly. The court observed as follows:

As regards the United States in particular, the weight of an expression of *opinio juris* can be attached to its ...acceptance of the prohibition of the use of force which is contained in the declaration on principles governing the mutual relations of States participating in the Conference on Security and Co-operation in Europe (Helsinki 1975), whereby the participating States undertake to 'refrain in their mutual relations, as well as in their international relations in general' from the threat or use of force. Acceptance of a text in these terms confirms the existence of an *opinio juris* of the participating States prohibiting the use of force in international relations.

While resolutions and statements of international organisations such as the UN support the general duty of states to prosecute, such an approach is far from being consistent. International tribunals and human rights treaty monitoring bodies (e.g., the UN Human Rights Committee, the Inter-American Court of Human Rights and the Inter-American

normative. Crystallisation may also take place even when there was no prior existence of a customary rule before. What is necessary is that a majority of states, or regional groups of states to which such a rule is applicable must regard it as a rule. However, it is not a requirement that *all* states have to engage in a usage or a particular behaviour for it to become a rule of custom. Usually the number of states engaged in a particular practice makes it easy to reach a conclusion that it is part of custom.

⁷⁰¹ See Hannikainen, (1988) 232 – 233. Cf. Michael Reisman, "The Cult of Custom in the Late 21st Century" 17 *California International Law Journal* (1997) 133 at p. 135. Reisman has questioned reliance on custom as a source of international law and has went further to characterise rightly or wrongly such a reliance on custom as a "great leap backwards" designed to serve powerful states. Powerful states will therefore rely on custom only if it advances their national interests. For example, France is not comfortable with the concept of "customary" international law but rather prefers the use of the concept "general principles" of international law as used in the Rome Statute.

⁷⁰² ICJ Rep. 1986, 3 at para. 100.

Commission on Human Rights) discussed above, have been critical of amnesties in Latin American countries on the ground that they were incompatible with states' obligation to prosecute.⁷⁰³ However, even though not binding, the jurisprudence that has emanated from these treaty-monitoring bodies not only sets standards and norms, but also creates expectations as to how governments should behave towards their citizenry. They therefore constitute a yardstick against which a state's behaviour may be measured.⁷⁰⁴

In the case of democratic transitions, the international community, with few exceptions (e.g., Sierra Leone), has refrained from condemning such states (e.g., Angola, Mozambique and South Africa), but instead has welcomed the transition. Furthermore, the national courts in transitional democracies are often reluctant to exercise their powers to compel the legislature or the executive to comply with international law in cases which involve the granting of amnesty for gross human rights violations. There is also a tendency by national courts to use principles such as state sovereignty; lack of implementing legislation; and the political question doctrine – that the courts must not cause embarrassment for the government in its relations with foreign states – to justify the view that amnesties in breach of international law are non-justiciable.⁷⁰⁵ The conclusion to be drawn here is that, while the majority of states have demonstrated their willingness to suppress serious violations of human rights and humanitarian law, and to pay compensation, this has not been supported in state practice and *opinio juris*.

⁷⁰³ Juliane Kokott, "No Impunity for Human Rights Violations in the Americas" 14 *Human Rights Law Journal* (1993) 153. Michael Scharf, "Swapping Amnesty for Peace" 31 *Texas International Law Journal* (1996) 1.

⁷⁰⁴ Nigel White, *The United Nations System: Towards International Justice* (2002) Chp. 2.

⁷⁰⁵ Benedetto Conforti, "National Courts and International Law of Human Rights" in Benedetto Conforti & Francesco Francioni (eds.), *Enforcing International Human Rights in Domestic Courts* (1997) 3.

5.7. Conclusion

This chapter has examined the extent to which modern human rights and humanitarian law treaties and customary international law allow or prohibit the granting of amnesty. Before the First World War amnesty was a well-established practice which, even when a peace treaty was silent on the subject, was presumed to have been included. Compensation was also part of the regime of peace treaties, although this was not consistently followed. This practice changed dramatically after the First and Second World Wars because, unlike the past, the victors did not consider themselves to be on the same level as the vanquished and this meant the abolition of the traditional practice of granting amnesty, and demanded rather that those responsible for aggression be prosecuted and compelled to pay compensation.

This practice gained momentum with the human rights movement, which began in 1948, which imposed the duty on states to prosecute and provide for “effective remedies” for victims of gross human rights violations. On the one hand, general human rights treaties are silent on amnesties. However, treaty monitoring bodies and international tribunals have interpreted them to exclude the granting of amnesty for gross human rights violations. Specific human rights conventions explicitly impose the duty on states to prosecute and by implication exclude the possibility of amnesty.⁷⁰⁶

On the other hand, there is a chasm between the actual state practice and the existence of a customary norm that creates a duty to prosecute. A growing number of states continue to utilise amnesty as a device for peace and reconciliation by granting amnesty for war

⁷⁰⁶ Jacob Divino, “*Delicti Jus Gentium*: a Limitation on the State's Power to Grant Amnesty” 40 *Anteneo Law Journal* (1995) 202 at p. 244.

crimes and crimes against humanity (torture, crimes of apartheid, etc.).⁷⁰⁷ However, that alone does not make such amnesties *valid* in international law.⁷⁰⁸ Although blanket amnesties would be contrary to international law, the status of the so-called “palatable amnesties” often granted as part of a truth and reconciliation process (*a là* South Africa) remains unclear. This has persuaded some, like Dugard,⁷⁰⁹ to suggest that although “...international law is clearly evolving in the direction of a duty to prosecute international crimes, it cannot be said this stage has yet been reached. Consequently, it is still open to States to grant amnesty for international crimes without violating a rule of international law... .” Carlos Nino,⁷¹⁰ while conceding that there are crimes which deserve punishment, has suggested that instead of insisting on “...[the] duty to prosecute, we should think of a duty to safeguard human rights and to prevent future violations by state officers or other parties.” Suffice it to say that the duty to prosecute international crimes is still evolving in international law.

The erosion of states’ powers to grant amnesty in favour of the obligation to suppress serious violations of human rights and to pay compensation has further been enhanced by the normative values espoused in what is referred to as *jus cogens*. This means that justifications such as lack of sufficient evidence to prosecute; or that amnesties are an

⁷⁰⁷ In terms of articles 27 of the 1969 Vienna Convention on the Law of Treaties “[a] party may not invoke provisions of its internal laws as justification for its failure to perform a treaty [obligation]...” Similarly, Article 32 of the articles on State Responsibility for Internationally Wrongful Acts adopted by the UN GA 56/83, 28 January 2002 provides that “[the] responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations [under international law]”.

⁷⁰⁸ In the *Nicaragua* case, *supra* at para. 186, the ICJ addressed the question of inconsistent state practice. In this regard, the court was of the opinion that such an inconsistency does not undermine the continuing existence of a customary norm, provided that a certain criteria is met, namely, that “the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.”

⁷⁰⁹ John Dugard, “Possible Conflicts of Jurisdiction with Truth Commissions” in Antonio Cassese, Paola Gata & John Jones (eds.), *The Rome Statute of the International Court: A Commentary*, vol. 1(2002) 693 at p. 699.

⁷¹⁰ Carlos Nino, *Radical Evil on Trial* (1996) 188.

exercise of state sovereignty; or the political question doctrine, cannot excuse states from the duty to prosecute grave breaches of the peremptory norms of international law.

As discussed in Chapter Four, the international criminal justice system is not flawless and, hence, this study advocates a balanced approach model. It is therefore important to acknowledge its limitations, such as the lack of enforcement agencies, the difficulties in collecting evidence, and the lack of evidence and resources to prosecute. It is important to strike a balance between treaty and other international law obligations, with other considerations of peace and reconciliation such as the need to respect the legitimacy of the political process that gives rise to the decision to grant amnesty, and its proportionality to the crimes committed, the interests of justice, compensation for victims and the general commitment of the state which bestows amnesty to respect international law obligations.

CHAPTER SIX

THE PRACTICE OF THE UNITED NATIONS IN THE DEVELOPMENT OF THE JURISPRUDENCE GOVERNING AMNESTIES GRANTED FOR GROSS AND SYSTEMATIC HUMAN RIGHTS VIOLATIONS

“If a tree falls in the forest and no one is there to hear it, does it make a sound?”⁷¹¹

6. 1. Introduction

As discussed in the previous chapter, the end of the Second World War saw state sovereignty limited by the adoption of general and specific human rights and humanitarian law instruments which explicitly or implicitly prohibit the granting of amnesty by states. However, states have to decide to what extent they are prepared to give up their sovereignty. The restriction of sovereignty has two aspects. On the one hand, sovereignty is limited through the integration of states in supra-national or international bodies such as the European Union.⁷¹² On the other hand, sovereignty is limited by international instruments which grant citizens of countries direct access to human rights bodies without interference from the state. The most illustrative example is the United Nations Compensation Commission (UNCC), created in 1991 as a subsidiary organ of the UN Security Council to process claims and to pay compensation for losses and damage suffered as a result of Iraq’s unlawful invasion and occupation of Kuwait.⁷¹³

⁷¹¹ Anonymous.

⁷¹² States generally feel more secure when they take action as members of multilateral institutions than taking action alone and outside the support of such institutions, so as to bestow legitimacy upon their actions in future. During the recent invasion of Iraq by the US, the latter first sought the support of the UN Security Council, and when this support was not forthcoming, it solicited support from the so-called “coalition of the willing” to legitimise its actions against Iraq.

⁷¹³ UN SC Res. 687 (1991), 2 May 1991.

The United Nations (UN) is the starting point for an understanding of the attitudes of states towards amnesties granted in the aftermath of conflicts. This is because the UN is one of the oldest international organisations in the world today, and with more than 200 state members it boasts the highest membership of all international organisations. The mandate of the UN is to ensure that peace prevails across the globe. The mandate is expressed profoundly in the UN Charter as, “to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind.”⁷¹⁴ Besides “peace and security,” the Charter emphasises “conformity with the principles of justice and international law... .”⁷¹⁵ It is against this self-imposed standard that this chapter evaluates and critiques the role of the United Nations (i.e., its principal organs, subsidiary and specialised agencies) in the development of the jurisprudence on amnesty. In this chapter, we examine how the transfer of the equal sovereign authority of states to the supervision of the United Nations has limited the state’s power to grant amnesty.

6. 2. The History of the United Nations in the Development of the Jurisprudence on Amnesties

Since the end of the Cold War, the UN has taken an increasingly pro-active role in the campaign to end the culture of impunity worldwide. A number of UN organs and agencies, including the Secretary-General and the Security Council, have urged member states to prosecute those responsible for violations of international humanitarian law, and in several instances, specifically discouraged the granting of amnesty for such violations. Nevertheless, the practice of the UN on the question of amnesties and accountability mechanisms has been far from consistent. The history of the UN’s peace

⁷¹⁴ Paragraph 1 of the Preamble to the UN Charter.

⁷¹⁵ Article 1 of the UN Charter.

building efforts is characterised by at least two approaches.⁷¹⁶

The first approach may be seen in those cases in which the United Nations has endorsed political settlements such as Angola, South Africa, Haiti and Mozambique despite evidence of serious human rights violations. The second approach is manifest in situations where the United Nations has approved peace processes that granted general amnesties accompanied by the creation of a truth and reconciliation process. The UN was involved, for example, in the El Salvadorean Peace Process.⁷¹⁷ The Mexico Agreements of 27 April 1991,⁷¹⁸ signed under the auspices of the UN, provided for the creation of a truth commission charged with investigating “serious acts of violence” in El Salvador between the years 1980–1991. Immediately after the presentation of the report of the truth commission, the government of El Salvador adopted a law granting, “full, absolute and unconditional amnesty to all those who participated in the commission of political crimes or common crimes linked to political crimes.”⁷¹⁹ Although the UN Secretary-General expressed concern that the amnesty was not based upon a broad national consensus, the granting of the amnesty, as such, was not condemned.⁷²⁰

Similarly, the UN was involved in the Guatemalan Peace Accord which provided amnesty, except for crimes punishable under the international treaties to which

⁷¹⁶ See Carsten Stahn, “United Nations Peace-Building, Amnesties and Alternative Forms of Justice: A Change in Practice?” 84 *International Review of the Red Cross* (2002) 191.

⁷¹⁷ United Nations, *El Salvador Agreements: the Path to Peace* (1991).

⁷¹⁸ Thomas Buergenthal, “The United Nations Truth Commission in El Salvador” 27 *Vanderbilt Journal of Transnational Law* (1994) 498.

⁷¹⁹ The General Amnesty Law for the Consolidation of Peace of 20 March 1993 (Decree 486).

⁷²⁰ See *Report of the Secretary-General on the United Nations Observer Mission in El Salvador*, UN Doc. S/25812/Add.1, 24 May 1993.

Guatemala was a party.⁷²¹ The amnesty process was accompanied by a commission responsible for the clarification of “human rights violations and acts of violence connected with the armed conflict that has caused the Guatemalan population to suffer.”⁷²²

6. 3. The Practice of the Principal Organs of the United Nations

6. 3. 1. The United Nations Security Council

The UN Security Council⁷²³ is one of the six principal organs of the United Nations.⁷²⁴ The member states of the UN have conferred upon the UN Security Council the primary responsibility for the maintenance of international peace and security,⁷²⁵ and to this extent, the decisions of the Security Council are binding on member states, not because it represents them, but because they have agreed in the Charter to be bound by its decisions.⁷²⁶

During the Cold War years, the UN Security Council was paralysed, on occasion, due to the bipolar blocs led by Russia, on the one hand, and the USA and its alliance partners in the Council on the other. During this period, the Council generally opposed interference in the internal affairs of member states. So, for example, after the abduction of Adolf

⁷²¹ Agreement on the Basis for the Legal Integration of the *Unidad Revolucionaria Guatemalteca*, UN Doc. A/51/776- Doc.S/1997/51. 17 *et seq.*

⁷²² Accord on the Establishment of the Commission to Clarify Past Human Rights Violations and Acts of Violence that have Caused the Guatemalan Population to Suffer, Oslo, 23 June 1994, UN Doc. 4/48/954-S/1994/751 of 1 July 1994.

⁷²³ Hereafter the “Council”.

⁷²⁴ Article 7 of the UN Charter.

⁷²⁵ Article 24(1) of the UN Charter.

⁷²⁶ Article 25 of the UN Charter. On the interpretation of article 25 see Bruno Simma (ed.), *The Charter of*

Eichman by Mossad agents in Argentina for the alleged persecution of Jews in Germany and Poland during the Second World War, the government of Argentina petitioned the UN Security Council,⁷²⁷ and the Council took the view that "...the transfer of Adolf Eichmann to the territory of Israel constitutes a violation of the sovereignty of the Argentine Republic..."⁷²⁸ The Council went on to say that:

...such an act [was] incompatible with the UN Charter because the '...reciprocal respect for and the mutual protection of the sovereign rights of States are essential conditions for their harmonious co-existence.' The Council regards the action by Israel as a breach of the principles upon which international order is founded, creating an atmosphere of insecurity and distrust incompatible with the preservation of peace.⁷²⁹

The Council requested the State of Israel to make appropriate reparation in accordance with the UN Charter and the rules of international law.

With the end of the Cold War there was an expectation that the UN Security Council would act collectively to deal with global crises considered a threat to international peace and security. Despite the fact that the Council has stressed that persons responsible for serious violations of humanitarian law must be brought to justice and that compensation should be paid to victims, its approach has not been consistent. This is evident particularly in those cases in which the Council has considered "threats" to international peace and security.⁷³⁰

In 1993, the UN was instrumental in the negotiation of a peace deal, which included amnesty for the military leaders in Haiti in exchange for their acquiescence to the return

the United Nations: A Commentary(1994) 408 -413.

⁷²⁷ *Attorney General of Israel v Eichmann* (1962) 36 ILR 18 (Dist. Ct. Jerusalem, 1961).

⁷²⁸ UN SC Res. 138 (1960), 23 June 1960, (Question Relating to the Case of Adolf Eichmann).

⁷²⁹ *Ibid.*

⁷³⁰ Its failure to intervene in Chechnya, for example, despite evidence of human rights violations on the part of Russia, which is a permanent member of the Security Council. Similarly, the last time the Security Council discussed the question of Tibet was in 1957.

of the ousted President Aristide. While in exile in the United States, President Aristide stated that he would be willing, once restored to power, to grant amnesty to General Raoul Cedras, the Commander-in-Chief of the Armed Forces of Haiti and his colleagues responsible for the *coup d' état*.⁷³¹ In February 1992, an agreement was reached between President Aristide and the Parliamentary Negotiating Commission to find a definitive solution to the Haitian problem. The agreement conceded, amongst other things, that there was a need to “proclaim a general amnesty, save for common criminals.”⁷³² Another agreement was signed in July 1993 at the United Nations Headquarters in New York, known as the New York Pact,⁷³³ in which the parties agreed as a matter of urgency to pass an “act concerning amnesty”⁷³⁴ and an “act establishing a compensation fund for the victims of the *coup d' état*”⁷³⁵.

The UN Security Council subsequently approved the decision to grant amnesty to senior military leaders as “the only valid framework for resolving the crisis in Haiti”.⁷³⁶ However, the UN Security Council’s decision is silent on whether those responsible for serious human rights violations must be prosecuted. This is despite the fact that the UN Human Rights Commission had documented human rights violations committed in Haiti between 1991 and 1992, and which included arbitrary arrests, summary executions and

⁷³¹ See *Report on the Situation of Human Rights in Haiti Submitted by Marco Tulio Celli, Special Rapporteur, in accordance with the Commission Resolution 1992/77*, E/CN.4.4/1993/47, 4 February 1993, para. 106.

⁷³² Article V(1) of the *Protocol Between President Jean-Aristide and the Parliamentary Negotiating Commission to Find a Definitive Solution to the Haitian Crisis*, Annex I of the UN Report on the Situation in Haiti, 4 February 1993.

⁷³³ New York Pact of 16 July 1993, Annex II to the *UN Secretary-General’s Report on the Situation of Democracy and Human Rights in Haiti*.

⁷³⁴ Article 4(ii) of the New York Pact.

⁷³⁵ Article 4(iii) of the New York Pact.

⁷³⁶ Statement of the Security Council of 15 July 1993, UN Doc. S/26633 (1993).

torture by members of the military establishment.⁷³⁷ Both the UN Human Rights Committee⁷³⁸ and the Inter-American Commission on Human Rights⁷³⁹ have condemned the amnesty as an act of impunity and have called for the investigation and prosecution of those members of the Haitian military establishment responsible for such violations. The Inter-American Commission ruled that the fact that a government lacking democratic legitimacy committed the violations does not absolve the international responsibility of the Haitian state.⁷⁴⁰ The Commission relied on the principle of the *continuity of the state*, that is, the responsibility of the Haitian state exists independently from the changes in government.⁷⁴¹

In the same year, further to the UN observer mission sent to Somalia (UNOSOM), the United Nations sponsored a meeting with the Somali warring factions in an effort to achieve peace and national reconciliation in Somalia.⁷⁴² On 5 June 1993, twenty-four Pakistani peacekeepers were killed, allegedly by forces loyal to the Somali warlord, Mohamed Farrah Aidid.⁷⁴³ On 6 June 1993, the UN Security Council passed Resolution 837 of 1993, the operative part of which provided that:

...the Secretary-General [is] authorised...to take all necessary measures against all those responsible for the armed attacks...including to secure the investigation of their actions and their arrest and detention for prosecution, trial and punishment.

Pursuant to Resolution 837, the Secretary-General appointed Tom Farer to investigate

⁷³⁷ *Report on the Situation of Human Rights in Haiti, supra*, paras. 14 – 60.

⁷³⁸ See discussion of the Human Rights Committee in Chapter Five of this study.

⁷³⁹ See *Report on the Situation in Haiti*, Report No. 8/00, Case 11.378 (Haiti), 24 February 2000.

⁷⁴⁰ *Id.*, para. 35.

⁷⁴¹ *Id.*, paras. 36 – 40.

⁷⁴² *Report of the Secretary-General on the United Nations Observer Mission in Somalia*, UN Doc., S/26738, 3 March 1993.

⁷⁴³ UN SC Res. 837, 6 June 1993.

the 5 June 1993 attack on the United Nations' forces in Somalia. After his investigation, Farer concluded that there was *prima facie* and convincing evidence that General Farah Aidid was responsible for the attack, and in so doing he had violated the humanitarian law principle of respect for the distinction between combatants and non-combatants.⁷⁴⁴

He concluded that:

The attack of 5 June violated multiple provisions of the 1962 Penal Code, which has never been repealed. It also constitutes a violation of international law and thus makes General Aidid and his senior colleagues liable to prosecution before an international tribunal or the criminal courts of any state.⁷⁴⁵

It was suggested that a local Somali human rights committee be created to investigate and facilitate the prosecution of serious violations of international humanitarian law, with the help of international judges if the Somali judges declined to hear cases as a result of threats or intimidation.⁷⁴⁶ In this case, the UN Security Council did not use Resolution 837 to link the prosecution of General Farah Aidid to the compensation of the victims of the gross human rights violations in Somalia, as it had done in other resolutions.⁷⁴⁷

In 1996, following the war and the disintegration of the former Federal Republic of Yugoslavia (FRY) and the subsequent declaration of independence by Slovenia and Croatia, the Council pleaded with the government of Croatia to grant a comprehensive amnesty to the local Serb population who were alleged to have committed serious

⁷⁴⁴ *Report of an Investigation into the 5 June 1993 Attack on United Nations Forces in Somalia by Professor Tom Farer Submitted Pursuant to Paragraph 5 of Security Council Resolution 837 (1993)*, UN Doc. S/26351, 24 August 1993.

⁷⁴⁵ *Id.*, para. 25.

⁷⁴⁶ *Report by Mr. Fanuel Jarirentundu Kozonquizi, the Independent Expert, on the Conditions in Somalia, Prepared in Accordance with Paragraph 6 of Commission on Human Rights Resolution 1993/86*, UN Doc. A/48/519, 26 October 1993.

⁷⁴⁷ UN SC Res. 687 (1991), 2 May 1991, where the Council declared that Iraq was "liable under international law for any direct loss, damage...or injury to any foreign states or nationals as a result of its invasion of Kuwait."

human rights violations and collaborated with Serbia in order to create confidence in the region.⁷⁴⁸ The UN Committee on Human Rights, on the contrary, concluded that the amnesty law should not cover war crimes, as this would encourage impunity.⁷⁴⁹ Once again no attempt was made by the UN Security Council to link the amnesty to the compensation of the victims of the gross human rights violations perpetrated by the Serbs in Croatia.

Another case considered by the Security Council was that of the Pacific Island of Papua New Guinea. In 1998, after many years of fighting that began in the 1970s between the government of Papua New Guinea and the Bougainville Liberation Front of the Secessionist Island of Bougainville, a peace agreement, sponsored by the government of New Zealand, was finally reached. Article 10 of the Lincoln Agreement on Peace, Security and Development on Bougainville provided that:

The Papua New Guinea National Government will,

- (a) grant amnesty to persons involved in crisis-related activities on all sides.
- (b) following receipts of advice from the Advisory Committee on the Power of Mercy, recommend pardons for persons convicted of crisis offences.⁷⁵⁰

The Security Council welcomed the Lincoln Agreement, but did not call the attention of the parties to the need to respect the rules of international law in granting the proposed amnesty, or to the need for compensation for the people of Bougainville, who suffered at the hands of the successive governments of Papua New Guinea.⁷⁵¹

⁷⁴⁸ UN Doc. S/PRST 1996/35, 14 August 1996.

⁷⁴⁹ *Concluding Observations on Croatia*, UN Doc. CCPR/Co/71/HRV, para. 11.

⁷⁵⁰ Article 10(a) & (b) of the Lincoln Agreement, Lincoln, Christ Church, New Zealand, 23 January 1998. The agreement does not define the meaning of “crisis-related activities”. Presumably, the amnesty would not cover serious human rights violations such as war crimes, crimes against humanity and genocide.

⁷⁵¹ Statement by the President of the Security Council, UN Doc. S/PRST/1998/10, 22 April 1998.

The only exception so far is the amnesty granted to the Revolutionary United Front (RUF) leader, the late Foday Sankoh, following the Lomé Peace Agreement between the RUF and the government of Sierra Leone. The Council unanimously rejected the amnesty clause in the Lomé Peace Agreement and *inter alia* stated that:

...the amnesty provisions of the Agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law.⁷⁵²

Based on the case studies examined above, it would seem that, as a general rule, the Council tends to reject self-assumed/auto-amnesties particularly those granted for war crimes, crimes against humanity and genocide, as it has done in the case of Sierra Leone. Indeed, the Council has repeated its call to parties involved in conflicts⁷⁵³, especially on the African continent, to respect the relevant provisions of international humanitarian law and human rights, and to deal with the problem of impunity.⁷⁵⁴

At the same time, the attitude of the UN Security Council is to recognise and accept amnesties that are granted as part of a peace and reconciliation process in transitional societies (South Africa, Croatia, Haiti, Mozambique) and for the neutralisation, demobilisation, demilitarisation, disarmament and reintegration of armed opposition groups (Angola, Rwanda⁷⁵⁵ and Papua New Guinea). In fact, in certain instances, such

⁷⁵² UN SC Res. 1315 (2000).

⁷⁵³ For example, in UN SC Res. 1542 of 30 April 2004 (Haiti) the Council *inter alia* urged the Transitional Government of Haiti “to take all necessary measures to put an end to impunity” by ensuring “individual accountability for human rights abuses and redress for victims” of such violations.

⁷⁵⁴ UN SC Res. 1216 (1998) of 12 December 1998 (Guinea-Bissau); UN SC Res. 1059 (1996), 31 May 1996 (Liberia) the Council stresses “the importance of respect for human rights in Liberia”. In a letter of 24 September 1996 to the Secretary-General on Burundi, the Council stated that it was “vital that measures to deal with the problem of impunity should be addressed in the context of a negotiated political settlement in Burundi”.

⁷⁵⁵ See *Report of the Security Council Mission to the Great Lakes Region*, 15 – 26 May 2001, UN Doc. S/2001/521/Ass.1, 30 May 2001. See discussions *infra*.

as Croatia,⁷⁵⁶ the Security Council actively encouraged the granting of amnesty.

Depending on the circumstances of each case the Council also seems amenable to the recognition of limited amnesties, especially where the government has no resources to investigate and prosecute *all* offenders and it is in the interests of justice to do so (Rwanda, and East Timor).⁷⁵⁷ In so doing, the Council has adopted a balanced approach model by recognising that while the prosecution of serious international crimes is warranted, peace and national reconciliation mechanisms are equally necessary to complement prosecution, with amnesty for less serious offences. To sum up, the Council has sought to link gross human rights violations to the compensation of victims (Papua New Guinea) or reparations for internationally wrongful acts committed by states (Israel).

Be that as it may, it does not seem from these examples of the practice of the UN Security Council that there is a clear *criteria or juridical line* adopted by the Council to deal with “palatable” amnesties. This is why in certain instances (Croatia and Haiti), the Human Rights Commission differed from the Council on the basis that such amnesties encouraged a culture of impunity and that those responsible should be punished. On the contrary, it is possible that the Security Council’s decision to approve the amnesties in the cases of South Africa, Mozambique, Haiti and Angola, was the “least intrusive instrument amongst those [factors] which [could] achieve the desired result,”⁷⁵⁸ namely, peace and national reconciliation.

⁷⁵⁶ UN SC Presidential Statement of 14 August 1996 (S/PRST/1996/35) the Council noted with concern that the amnesty law had been insufficient to create confidence among the local Serb population in the region. The Council called for a comprehensive amnesty process.

⁷⁵⁷ See discussions *infra*.

⁷⁵⁸ *General Comment of the Committee on Civil and Political Rights*, no. 27, CCPR/C/21/Rev.1/Add.9, para. 14 (principle of proportionality).

However, the lack of explicit criteria in the practice of the Council as to where and when amnesties for gross human rights violations are “palatable” might have far-reaching implications, for example, when it comes to the Council’s powers in terms of article 16 of the Rome Statute, which empowers the Council to refer matters to the prosecutor of the ICC for investigation. The lack of criteria to ascertain which amnesties are “palatable” and which are not could potentially weaken the legitimacy and the credibility of the UN Security Council as an institution, and undermine the normative values of international law.⁷⁵⁹ As Ratner puts it, “...the Council will always be a political body, the veto will survive reform attempts, and the Council will pick its targets with politics and not law in mind. International lawyers can no longer tell the Council to be consistent than can diplomats.”⁷⁶⁰ Even though the UN Security Council’s decisions have a binding effect, such decisions cannot violate the peremptory norms of international law (*jus cogens*).⁷⁶¹

6. 3. 2. The United Nations General Assembly

The UN General Assembly, constituted by representatives of all member states, is the main deliberative organ of the UN.⁷⁶² The General Assembly derives general powers and functions from the UN Charter, which include the consideration, and the making, of

⁷⁵⁹ Ronald Dworkin, *Law’s Empire* (1990) 193 –194 arguing that “fair play” is the hallmark of legitimacy in any legal system.

⁷⁶⁰ Steven Ratner, “The Security Council and International Law” in David Malone (ed.), *The UN Security Council: From the Cold War to the 21st Century* (2004) 591 at 604.

⁷⁶¹ Karl Doehring, “Unlawful Resolutions of the Security Council and their Legal Consequences” 6 *Max-Planck Yearbook of United Nations Law* (2002) 1 argues that peremptory norms of international law cannot be set aside by an unlawful act of the Security Council and cannot therefore produce binding force upon UN member states affected by the decision.

⁷⁶² Article 9 of the UN Charter.

recommendations on a wide range of issues pertaining to international peace and security; the initiation of studies and the making of recommendations to promote international co-operation, the peaceful settlement of disputes, and so on.⁷⁶³ The Charter uses the terms “recommendations”, “decisions” and “declarations” to express the powers of the General Assembly. Although these terms are not defined in the Charter, one commentary⁷⁶⁴ has suggested that they denote the expression of the collective will of member states represented in the Assembly. The Charter empowers the General Assembly to make legally binding decisions only on issues that relate to the internal operation of the organisation, such as the admission, suspension and expulsion of members.⁷⁶⁵ Besides the “housekeeping” matters, the Charter speaks of “recommendations,” which are not legally binding.

The UN General Assembly has adopted a number of resolutions and declarations as a response to serious international crimes such as torture, genocide, crimes against humanity and the issue of impunity. In these resolutions, the Assembly has sought to emphasise the obligation member states have to prosecute and to provide victims with effective remedial measures within their domestic laws and, therefore, it would appear that the Assembly excludes the granting of amnesty in favour of the duty to prosecute and to pay compensation to victims of serious human rights violations. Some of these resolutions include:

- (a) The 1973 Resolution 3074(XXVIII) on the Principles of International Co-operation in the Detention, Arrest, Extradition and Punishment of Persons Guilty

⁷⁶³ Articles 10 -17.

⁷⁶⁴ Bruno Simma, *The Charter of the United Nations: A Commentary* (1994) 236.

⁷⁶⁵ Articles 4, 5 & 6 of the UN Charter.

of War Crimes and Crimes against Humanity.⁷⁶⁶ The resolution provides, in part, that:

War crimes and crimes against humanity wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment.⁷⁶⁷

- (b) The 1985 Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power, which provides *inter alia* that victims are entitled "... to prompt redress, as provided for by national legislation, for the harm that they have suffered."⁷⁶⁸ A UN commentary on the implementation of the Declaration states that domestic jurisdictions have jurisdiction over the violations of general and specific human rights treaties, such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child, and the Convention on the Prevention and Punishment of the Crime of Genocide.⁷⁶⁹ The guidelines also interpret "redress" to include compensation, restitution and reparations for victims of human rights violations covered by the general and specific human rights treaties referred to earlier.⁷⁷⁰
- (c) In 1990, the General Assembly adopted the UN Model Treaty on Extradition.⁷⁷¹ Article 3(e) of the Model Treaty provides that one of the mandatory grounds for

⁷⁶⁶ 3 December 1973.

⁷⁶⁷ Para. 1 of the Resolution.

⁷⁶⁸ UN GA Res. 40/34 of 29 November 1995, Art. 4. See also Roger Clark, "The 1985 United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power" in Gudmundur Alfredsson & Peter Mcalister-Smith (eds.), *The Living Law of Nations* (1996) 355.

⁷⁶⁹ Para. 18 of the Guide for Policy Makers on the Implementation of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, United Nations (1999).

⁷⁷⁰ *Ibid*.

⁷⁷¹ UN GA Res. 45/119 of 14 December 1990.

a refusal to grant extradition is:

If the person whose extradition is requested has, under the law of either party, become immune from prosecution or punishment for any reason, including lapse of time or amnesty.

Given the earlier decisions of the General Assembly, such as the 1973 resolution on the punishment of war crimes and crimes against humanity, article 3(e) of the model treaty cannot be interpreted to protect amnesties for gross human rights violations. It should be taken rather to refer to acts considered and defined as political offences.⁷⁷²

(d) In 1992 the UN General Assembly adopted the Declaration on the Protection of All Persons from Enforced Disappearances, which obliges state parties to end forced disappearances.⁷⁷³ States are urged to take the necessary legislative measures to prevent enforced disappearances.⁷⁷⁴ Article 18(1) of the Declaration provides that “Persons who have or are alleged to have committed offences of [enforced disappearances]:”

... shall not benefit from any special amnesty or similar measures that have the effect of exempting them from any criminal proceedings or sanction.

The views of states expressed through their declarations and resolutions constitute evidence of *opinio juris*, or what is often referred to as the “soft” international law of the General Assembly. Some of the “soft” laws adopted by the General Assembly, such as the prohibition of enforced disappearances, subsequently became “hard” international law. Enforced disappearance of persons is a crime against humanity under the Rome

⁷⁷² See, for example, article 3(a) of the Model Treaty, which covers political offences as one of the mandatory grounds for refusal to grant extradition.

⁷⁷³ UN Doc. A/47/49 (1992).

⁷⁷⁴ Articles 2 & 3.

Statute.⁷⁷⁵

However, the voting pattern of the member states in the UN General Assembly is not, in itself, sufficient, for this public expression must be supported by the actual practice of states. The actual practice of states as pointed out by the ICJ in the *Continental Shelf Case* is a prerequisite for establishing rules of customary international law.⁷⁷⁶ Although member states have consistently condemned gross human rights violations and called on the duty to prosecute those responsible for heinous international crimes, such pronouncements have rarely been backed by a uniform and consistent state practice.

6. 3. 3. The United Nations Economic and Social Council

The Charter established the Economic and Social Council (ECOSOC) as the third principal organ of the United Nations.⁷⁷⁷ ECOSOC is responsible for the co-ordination of social and economic issues and those of related specialised agencies within the United Nations.⁷⁷⁸ As the main forum of policy formulation on socio-economic issues, the Council plays an important role in fostering co-operation between civil society organisations and the United Nations.⁷⁷⁹ The Commission on Human Rights was established by ECOSOC in 1946 to provide guidance, undertake studies and monitor the observance of human rights globally. In the execution of its mandate the Commission is

⁷⁷⁵ In terms of article 7(1) (i) of the Rome Statute the crime of enforced disappearance of persons means the arrest, detention or abduction of persons by, or with the authorisation, support or acquiescence of, a state or a political organisation, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

⁷⁷⁶ Bruno Simma, *The Charter of the United Nations: A Commentary* (1994) 236-413.

⁷⁷⁷ Article 7 of the UN Charter.

⁷⁷⁸ On the powers and functions of ECOSOC see articles 62-66 of the UN Charter.

⁷⁷⁹ Article 71 of the UN Charter.

free to examine information from states, non-governmental organisations and any other relevant sources. In 1947, the Commission established the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, later to be known as the Sub-Commission on the Promotion and Protection of Human Rights. The Sub-Commission consists of twenty-six independent experts in the field of human rights who do not represent their governments. The Sub-Commission initially focused on the issues of discrimination and of minorities, but has over the years extended its scope to cover a broad range of human rights issues.⁷⁸⁰

In September 1988, the Sub-Commission acknowledged that victims of gross human rights violations are entitled to compensation depending on the extent of the damage.⁷⁸¹ The following year, the Sub-Commission appointed a Special Rapporteur, Mr. Theodor van Boven, to develop basic principles and guidelines on remedies for gross human rights violations.⁷⁸² The Special Rapporteur noted, in the course of developing these guidelines, that although there was no universally accepted definition of gross human rights violations, the work of the UN Law Commission's Draft Code of Crimes against the Peace and Security of Mankind and common article 3 of the Geneva Conventions of 12 August 1949, provided some guidelines on the types of human rights violations which are penalised. Such violations include acts of genocide, slavery and torture.⁷⁸³

⁷⁸⁰ Edward Lawson, *Encyclopaedia of Human Rights* (1991) 1414 -1416.

⁷⁸¹ Res.1988/11 of 1 September 1988.

⁷⁸² Res. 1989/13 of 31 August 1989.

⁷⁸³ *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, Preliminary Report Submitted by Theo van Boven, Special Rapporteur*, E/CN.4/Sub.2/1993/8 at 7-8. See also Theo van Boven, "The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms" in Gudmundur Alfredsson & Peter Macalister-Smith (eds.), *The Living Laws of Nations* (1996) 339; Theo Bowen, Cees Flinteman & Fred Grunfeld (eds.), *Report of the Maastricht Seminar* (1992) collection of papers on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms.

Van Boven submitted two progress reports⁷⁸⁴ and in 1993 a final report,⁷⁸⁵ with a list of recommendations based on best state practice. A set of principles on restitution, compensation and rehabilitation for victims of gross human rights violations are attached to the report.

Following the 1992 Vienna Conference on Human Rights,⁷⁸⁶ which supported the work of the Commission and the Sub-Commission, the latter vigorously pursued the question of impunity for perpetrators of gross human rights violations. In this regard, the Sub-Commission in 1994 appointed two Special Rapporteurs, Mr. El Hadji Guisse, to look at impunity in respect of economic, social and cultural rights, and Mr. Joinet, to report on civil and political rights.⁷⁸⁷ In his final report, submitted in June 1997, Mr. Guisse concluded that states have the obligation to establish the necessary legal framework to fight violations of economic, social and cultural rights. Some of the recommendations suggested to combat impunity in respect of economic, social and cultural rights included declaring them international crimes and the adoption of an optional protocol that requires states to report on measures of implementation similar to those of civil and political rights.⁷⁸⁸

The study of amnesty laws in respect of civil and political rights preceded the study of economic, social and cultural rights, and was approved by a resolution of the Sub-

⁷⁸⁴ Progress Reports E/CN.4/Sub.2/1991/7 & E/CN.4/Sub.2/1992/8.

⁷⁸⁵ Final Report, E/CN.4/Sub.2/1993/8.

⁷⁸⁶ See the Vienna Declaration and Program of Action, A/CONF/157/3, para.II.91.

⁷⁸⁷ *Preliminary Report on the Question of the Impunity of Perpetrators of Human Rights Violations, Prepared by Mr. Guisse and Mr. Joinet*, E/CN.4/Sub. 2/1993/6, Corr.1

⁷⁸⁸ *Final Report on the Question of the Impunity of Perpetrators of Human Violations (Economic, Social and Cultural Rights), Prepared by the Special Rapporteur, Mr. El Hadji Guisse*, E/CN.4/Sub. 2/1997/8. para. 142.

Commission in September 1983.⁷⁸⁹ In that resolution the Sub-Commission requested the Special Rapporteur to prepare a general study of a technical nature on amnesty laws and their role in safeguarding and promoting human rights. The Special Rapporteur submitted a preliminary report on the modalities of the study for consideration by the Sub-Commission in 1985.⁷⁹⁰ In August 1997, nearly a decade later, and after an extensive study of state practice, which included the consultation of governments, civil society and other non-governmental organisations, the Special Rapporteur submitted a final report to the Sub-Commission.⁷⁹¹ The final report outlined forty-two *Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*.⁷⁹² The principles emphasise three fundamental rights in respect of civil and political rights, namely:

- (i) the right to know, which includes the right to truth and the right to remember. Extra-judicial commissions of inquiry are proposed, as an initial phase, to establish the truth and to take measures to preserve access to records during the period of human rights violations,⁷⁹³
- (ii) the right to justice, which implies taking all the measures necessary to prevent any form of impunity. This includes guarantees of non-recurrence, which would involve the repeal of draconian emergency laws and to outlaw paramilitary organisations and unofficial armed groups

⁷⁸⁹ Resolution 1983/34 of 6 September 1983.

⁷⁹⁰ *Study on Amnesty Laws and their Role in the Safeguard and Promotion of Human Rights, Preliminary Report by Mr. Joinet, Special Rapporteur, C/CN.4/Sub.2/1985/16.*

⁷⁹¹ *Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political), Revised Final Report by Mr. Joinet, E/CN.4/Sub. 2/1996/18, E/CN.4/Sub. 2/1997/20/Rev.1.*

⁷⁹² *Id.*, Annex 2 of the Revised Final Report.

⁷⁹³ *Id.*, Principles 1-17.

- which directly or indirectly, benefit from war and violence;⁷⁹⁴ and
- (iii) the right to individual and collective measures of restitution, compensation and rehabilitation.⁷⁹⁵

In 2003, the UN Human Rights Commission passed a resolution which appointed an independent expert to study best practices on how to assist states to combat impunity in all its forms, taking into account the Joinet principles.⁷⁹⁶ The Special Rapporteur, Dianne Orentlicher, in her 2004 report to the Commission, reviewed state practice and showed that most domestic jurisdictions have applied the Joinet principles by rejecting amnesties which sought to undermine the duty of states to investigate and prosecute those allegedly responsible for serious human rights violations.⁷⁹⁷ She concluded that the Joinet principles were still relevant, but needed to be updated.⁷⁹⁸

The studies undertaken by the special rapporteurs appointed by the Sub-Commission often identify the gaps in the norms or implementation of international rules, and their recommendations may become the basis for future studies or formal declarations, and perhaps for conventions. In this case, the impunity studies undertaken by the Sub-Commission have confirmed two important issues, namely, that punishment must always be accompanied by compensation for victims of human rights violations, and that there is a direct link between impunity for economic, social and cultural rights and

⁷⁹⁴ *Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, Principles 18–32.

⁷⁹⁵ *Id.*, Principles 33 - 42.

⁷⁹⁶ UN Human Rights Commission Resolution 2003/72.

⁷⁹⁷ See *Independent Study on Best Practices, including Recommendations, to Assist States in Strengthening Their Domestic Capacity to Combat all Aspects of Impunity*, by Professor Diane Orentlicher, E/CN. 4/2004/88, 27 February 2004.

⁷⁹⁸ *Id.*, para. 65.

for civil and political rights. Even though the Sub-Commission recommended the criminalization of violations of economic, cultural and social rights, the matter was never vigorously pursued by either the ECOSOC or the General Assembly. This may be attributed to the fact that studies and the reports of experts do not enjoy any legal standing, because they are an authoritative interpretation of neither conventional nor customary international law. Hence, the reports are never “approved” by the United Nations bodies and remain the opinion of the author. The reports are nevertheless authoritative and credible sources because of the independence of the special rapporteurs. Like the resolutions of the General Assembly, they may form the basis for future studies or the adoption of a treaty. Lastly, the impunity study is another indication of the extent to which the campaign to end the culture of impunity through United Nations agencies, like ECOSOC, have eroded the ability of states to grant amnesty in favour of the right to justice, the right to know and reparations.

6. 3. 4. The International Court of Justice

The International Court of Justice (ICJ) is the principal judicial organ of the United Nations.⁷⁹⁹ Only states can be a party to a matter before the World Court. The ICJ does not have automatic jurisdiction. It is a prerequisite that the offending state consent to the jurisdiction of the court before the matter can be adjudicated by the court.⁸⁰⁰ The General Assembly, the Security Council and other authorised agencies of the United Nations may ask the court for an advisory opinion.⁸⁰¹ The advisory opinion is important as it offers guidance on issues submitted to the court, including issues of gross human

⁷⁹⁹ Article 92 of the UN Charter.

⁸⁰⁰ Articles 36 – 38 of the ICJ Statute.

⁸⁰¹ Article 96 of the UN Charter.

rights violations including compensation for victims of such violations.⁸⁰²

The ICJ has not had the opportunity to address the issue of amnesties granted for serious human rights violations. However, the court may in future be at cross purposes with other courts, particularly the ICC, and with third states exercising universal jurisdiction. This was demonstrated in its judgment of 14 February 2002, *Democratic Republic of the Congo v Belgium* (“International Arrest Warrant Case”),⁸⁰³ where the court ruled that Belgium violated international law when a Belgian judge was allowed to issue an international arrest warrant against Mr. Abdulaye Yerodia, then Minister of Foreign Affairs of the Republic of the Congo, for allegedly committing war crimes and crimes against humanity. The court concluded that foreign ministers enjoy full immunity on the basis of customary international law.⁸⁰⁴

Ad hoc Judge Van der Wyngaert dissented on the ground that the majority had erred by adopting a minimalist approach in deciding the matter. She based her attack of the majority’s opinion on three grounds. Firstly, the warrant of arrest was issued at a time when Mr. Yerodia had ceased to be Minister of Foreign Affairs. Secondly, the immunity of heads of states and governments did not extend to grave breaches of humanitarian law, and international law permits universal jurisdiction for such crimes. Thirdly, the majority’s opinion that the immunity of foreign ministers is part of customary law has no support in state practice and *opinio juris*.⁸⁰⁵ She cautioned against the development of

⁸⁰² See, for example, *Factory at Chorzow, Merits, Judgment no. 13, 1928, P.C.I.J., Series A, no. 17*, p. 47 “The essential principle ...is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed... .”

⁸⁰³ Arrest Warrant Case of 11 April 2000, *Democratic Republic of Congo v Belgium*, 14 February 2002, 41 *International Legal Materials* (2000) 532.

⁸⁰⁴ *Id.*, para. 58.

⁸⁰⁵ Arrest Warrant Case of 11 April 2000, *Democratic Republic of Congo v Belgium*, 14 February 2002, 41

“*de facto* impunity” through which governments could appoint people as ministers in order to shield them from criminal prosecution for international crimes.⁸⁰⁶

The ICJ has sought to link human rights violations with compensation for victims of such violations as is evident in its advisory opinion of 9 July 2004, on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.⁸⁰⁷

The court concluded that the legal consequences of the construction of the wall in the Occupied Palestinian Territory, which entailed the destruction of homes, businesses and agricultural holdings, constituted an internationally wrongful act by the state of Israel and as such the latter was under an obligation:

...to compensate the persons in question for the damage suffered...in accordance with the applicable rules of international law, all natural or legal persons having suffered any form of material damages as a result of the wall's construction.⁸⁰⁸

The court rejected Israel's contention that the construction of the wall was justified by the requirements of national security.⁸⁰⁹ The court observed that the construction of the wall by Israel was disproportionate to its intended objectives of national security, and breaches the obligations of Israel under humanitarian⁸¹⁰ and human rights instruments, such as the right to free movement of the inhabitants of the Occupied Palestinian Territory as guaranteed under the International Covenant on Civil and Political Rights

International Legal Materials (2000) 532, para. 32 (dissenting opinion of Judge Van der Wyngaert).

⁸⁰⁶ *Id.*, para. 87.

⁸⁰⁷ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, paras. 149 – 153.

⁸⁰⁸ *Id.*, para. 152.

⁸⁰⁹ *Id.*, paras. 136 – 138.

⁸¹⁰ Article 53 of the Fourth Geneva Convention, for example, provides that:

Any destruction by the Occupying Power of real or personal property belonging individually or collectively to a private person, or to the State, or to other public authorities, or to social or cooperative organisations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.

(article 12).⁸¹¹ Consequently, Israel has a duty to investigate and prosecute those responsible for serious violations of humanitarian and human rights instruments to which Israel is a party.

6. 3. 5. The United Nations Secretary-General

Since becoming the Secretary-General of the United Nations on 1 January 1997, Kofi Annan has repeatedly urged warring parties to protect civilians in armed conflicts, to respect the principles of human rights and humanitarian law,⁸¹² and to “strive to end the culture of impunity” in the new millennium.⁸¹³ He has gone one step further and rejected the proposals for amnesty for acts of torture, war crimes, crimes against humanity and genocide in Sierra Leone, Cambodia and East Timor. In the case of Sierra Leone, he specifically instructed his Special Representative to accept the 1999 Lomè Ceasefire Agreement, except for the proposed “absolute and free pardon” for the Late Corporal Foday Sankoh and others responsible for gross human rights violations. In his report to the Security Council he wrote:

...some of the terms under which this peace has been obtained, in particular the provisions on amnesty, are difficult to reconcile with the goal of ending the culture of impunity, which inspired the creation of the United Nations Tribunals for Rwanda and the Former Yugoslavia, and the International Criminal Court...the amnesty cannot cover international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law.⁸¹⁴

The Secretary-General has emphasised that member states can no longer use sovereignty

⁸¹¹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra*, para. 136.

⁸¹² See *Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict* (S/2001/331), 30 March 2001.

⁸¹³ Kofi Annan, *The Role of the United Nations in the 21st Century* (2000) 46.

⁸¹⁴ *Seventh Report of the Secretary-General on the United Nations Observer Mission in Sierra Leone* S/1999/836, 30 July 1999, para. 54.

to justify their lack of respect for human rights and humanitarian law. In his 2000 millennium report to the United Nations General Assembly, *We the Peoples: the Role of the United Nations in the 21st Century*, the Secretary-General alluded to the inadequacy of the existing multilateral instruments to protect the civilian population:⁸¹⁵

International conventions have traditionally looked to states to protect civilians, but today this expectation is threatened in several ways. First, states are sometimes the principal perpetrators of violence against the very citizens that humanitarian law requires them to protect. Second, non-state combatants, particularly in collapsed states, are often either ignorant or contemptuous of humanitarian law. Third, international conventions do not adequately address the specific needs of vulnerable groups, such as internally displaced persons, or women and children in complex emergencies.

To strengthen protection, we must reassert the centrality of international humanitarian law and human rights law. We must strive to end the culture of impunity – which is why the creation of the International Criminal Court is so important. We must also devise new strategies to meet changing needs.

Despite his forthrightness, the Secretary-General nevertheless took a different position on South Africa in respect of which he argued against any possible prosecution by an *ad hoc* international criminal court. He was of the opinion that it was:

...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 it and build a better future.⁸¹⁶

The Secretary-General's remarks are contrary to the General Assembly's resolution of 14 December 1990 on the status of the International Convention on the Suppression and Punishment of the Crime of Apartheid, in which the Assembly requested the Secretary-General "to include in his next annual report under General Assembly resolution 3380(XXX) of 10 December 1975 a special section concerning the implementation of the convention."⁸¹⁷ In 1993, the Human Rights Committee appointed a Group of Three

⁸¹⁵ *Id.*, at p. 46.

⁸¹⁶ Kofi Annan, Speech at the Witwatersrand University Graduation Ceremony on the occasion of the conferment of an Honorary Doctor of Laws Degree, Johannesburg, 1 September 1998 (on file with the author).

⁸¹⁷ A/RES/45/90, para.12.

in terms of article IX of the Apartheid Convention to consider reports submitted by state parties on the implementation of the Convention. The Group not only noted that the number of countries which had ratified the Apartheid Convention had increased to 95 states since 1992, but also linked the Apartheid Convention to the Genocide Convention.⁸¹⁸ Nevertheless, given the inconsistency in the practice of the United Nations and its failure to develop clear criteria for “palatable” amnesties, we may only speculate at this stage as to why the United Nations accepted amnesty in South Africa despite having declared apartheid a crime against humanity and its intention to “implement the convention” on apartheid. The Human Rights Committee of the CCPR which must still consider the report of South Africa under article 40 of the Covenant may perhaps shed further light on the legitimacy and proportionality of the South African amnesty law under the Covenant and other principles of international law, particularly the right of victims of apartheid to claim compensation.⁸¹⁹

6. 4. Specialised Agencies of the United Nations

6. 4. 1. The United Nations International Law Commission

The UN International Law Commission (ILC) was established in 1947 with a mandate to promote the codification and progressive development of international law.⁸²⁰ The

⁸¹⁸ *Implementation of the International Convention on the Suppression and Punishment of the Crime of Apartheid: Report of the Group of Three Established under the Convention*, UN Doc. E/CN.4/1993/54, 5 February 1993. In paragraph 43 of its Report the Group of Three stated as follows:

...the crime of apartheid was a form of genocide, similar in nature to Fascist and Nazi crimes and, as such, fell under the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. The Group recommended to the Commission on Human Rights that it should reflect that similarity in its respective resolutions and stress the fact that accession to the International Convention on the Suppression and Punishment of the Crime of Apartheid was a step towards the implementation of the Convention on the Prevention of Punishment of the Crime of Genocide.

⁸¹⁹ See discussions in Chapter Eight of this work.

⁸²⁰ Article 13 of the UN Charter. On the work of the ILC see, generally, United Nations, *The Work of the International Law Commission* (1996); John Dugard, “How Effective is the International Law Commission in the Development of International Law? A Critique of the International Law Commission

ILC supported the duty to prosecute violations of international crimes in its 1996 Draft Code of Crimes against the Peace and Security of Mankind, the forerunner to the Rome Statute of the International Criminal Court. Article 6 of the Draft Code says that states are obliged to try or extradite those allegedly responsible for crimes against humanity.⁸²¹

Another project of the ILC, which supports the duty to prosecute, is the Articles on Responsibility of States for Internationally Wrongful Acts, which was completed after forty years in 2001.⁸²² The Articles constitute an important component of the law of treaties. By contrast to the 1969 Convention on the Law of Treaties, the Articles are concerned with the observance of treaty obligations by holding states responsible for their internationally wrongful acts.⁸²³ Such an international responsibility includes “...a serious breach by a State of an obligation arising under peremptory norms of general international law.”⁸²⁴ A breach is considered to be of a serious nature “...if it involves a *gross or systematic* failure by the responsible State to fulfil [its] obligation.”⁸²⁵ Article 31 provides:

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

on the Occasion of its Fiftieth Anniversary” 23 *South African Yearbook of International Law* (1998) 34.

⁸²¹ Article 6 of the *Draft Code of Crimes against Peace and Security of Mankind, Report of the International Law Commission of the Work of its Fifty-Eighth Session*, 51st Sess., Supp. no.10, UN Doc A/51/10 (1996).

⁸²² The articles were adopted by the General Assembly on 12 December 2001, UN GA Res 56/83 and proposed that a plenipotentiary conference be convened to consider the articles with a view to the adoption of a convention on state responsibility. See James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text & Commentaries* (2002); 10 *European Journal of International Law* (1999) (series of scholarly articles on State Responsibility) 339 – 435.

⁸²³ Articles 1- 4 of the Articles on State Responsibility.

⁸²⁴ Article 40(1) of the Articles on State Responsibility. Emphasis added.

⁸²⁵ Article 41 (2) of the Articles on State Responsibility. Emphasis added.

Repairing the damage caused shall take the form of reparations, restitution, compensation and satisfaction⁸²⁶ State responsibility excludes necessity as a justification for wrongfulness unless the purpose of the act was to prevent a grave and imminent danger and/or such a breach “does not affect the international community as a whole.”⁸²⁷ Therefore peremptory norms of international law represent the core of state responsibility for internationally wrongful acts.

If states decide to adopt a convention on state responsibility, this will be a further limitation on their sovereign power to grant amnesty for crimes of torture, genocide, crimes against humanity and other grave breaches of humanitarian law. It is not surprising that the Rome Statute in its Preamble states, *inter alia*, that the ICC has “...jurisdiction over the most serious *crimes of concern to the international community as a whole*” which includes war crimes, crimes against humanity, aggression and genocide.⁸²⁸ It follows, therefore, that amnesty granted for acts arising from internationally wrongful acts as defined in the articles on state responsibility would be contrary to the peremptory norms (*jus cogens*) of international law. Nevertheless, one of the criticisms levelled against the Commission even by some of its members, is that it has avoided such topics as state sovereignty and human rights, and perhaps believes they fall outside its domain.⁸²⁹ Regrettably, it has missed opportunities to clarify the status of amnesty in international law, or at least, to develop guidelines for the granting of amnesty for gross and systematic human rights violations.

⁸²⁶ Articles 34 – 37 of the Articles on State Responsibility.

⁸²⁷ Article 25 (1) (a) & (b) of the Articles on State Responsibility.

⁸²⁸ Article 5 of the Rome Statute.

⁸²⁹ John Dugard, “How Effective is the International Law Commission in the Development of International Law? A Critique of the International Law Commission on the Occasion of its Fiftieth Anniversary” 23 *South African Yearbook of International Law* (1998) 34.

6. 4. 2. The United Nations *Ad Hoc* International Criminal Tribunals for the Former Yugoslavia and Rwanda

The establishment of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia (ICTY) in 1993⁸³⁰ and the International Criminal Tribunal for Rwanda (ICTR) in 1994⁸³¹ by the UN Security Council, acting pursuant to Chapter VII of the UN Charter, was a milestone in the enforcement of international humanitarian law. The practice of the ICTY, in particular, has been to reject any suggestions of amnesty for crimes of genocide, crimes against humanity and torture within the jurisdiction of the tribunal.⁸³² During the negotiations for the Rules of Procedure of the ICTY, the United States proposed that low-level perpetrators be granted immunity from prosecution.⁸³³ In a statement issued in 1994, the President of the Tribunal stated that:

[after] due reflection, we have decided that no one should be immune from prosecution for crimes [within the tribunal's jurisdiction], no matter how useful their testimony may otherwise be.⁸³⁴

When a draft law on the establishment of a truth and reconciliation commission for Bosnia and Herzegovina was debated and the ICTY was invited to comment, the President of the ICTY, Claude Jordan, suggested that the aim of such a commission should be to complement the work of the Tribunal. She acknowledged however that the

⁸³⁰ UN SC Res. 827 reprinted in 32 *International Legal Materials* (1993) 166.

⁸³¹ UN SC Res. 955 reprinted in 35 *International Legal Materials* (1994) 1598.

⁸³² *Prosecutor v Anto Furundja*, Case No. IT-95-17-1-T-10.

⁸³³ The US proposal is reprinted in V Morris & Michael Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia*, vol. 2 (1995) 560.

⁸³⁴ United Nations, Statement of the President made at a Briefing to Members of the Diplomatic Missions, UN Doc. IT/ 29 reprinted in V Morris & Michael Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia*, vol. 1, (1995) 112.

peacemaking role of the ICTY was limited because the tribunal:

...cannot try all perpetrators of serious violations of humanitarian law committed during the conflict...in the long term, this would risk undermining the reliability of the testimony and do damage to the credibility of the International Tribunal. Ideally, the Tribunal's priority should be to try the highest ranking military and political leaders, that is, those ...[who]...truly endangered international public order.⁸³⁵

In a similar vein, on the occasion of a conference to discuss the proposed truth and reconciliation commission for the Republic of Yugoslavia (Serbia-Montenegro), the Registrar of the ICTY stated that:

...a reconciliation process which is set up to understand a past conflict cannot start by declaring amnesty for all indicted war criminals or those which may, in the future, have to be held accountable for serious violations of humanitarian law, either by the Tribunal or the national courts.⁸³⁶

In essence, while supporting reconciliation for the people of the former Republic of Yugoslavia, the ICTY has rejected the possibility of supporting an amnesty process, which has the effect of undermining individual criminal responsibility for crimes within its jurisdiction.

However, as proposed in the balanced approach model in this study, a general amnesty may be justified where the state has limited resources to investigate and prosecute those alleged to be responsible for crimes of genocide.⁸³⁷ The circumstances in Rwanda after the 1994 genocide created an exception under which a general amnesty was inevitable. In May 2001, during a visit by a UN Security Council Mission to the Great Lakes region, President Paul Kagame of Rwanda informed the Council that he was prepared to grant amnesty to those perpetrators of the 1994 genocide who were not wanted by the

⁸³⁵ Claude Jorda, "The ICTY and the Truth and Reconciliation Commission in Bosnia and Herzegovina" Speech made in Sarajevo, Bosnia-Herzegovina, 12 May 2001, ICTY Press Release JL/P.I.S./591-e.

⁸³⁶ Address by the Registrar of the ICTY, Mr. Hans Holhuis, at a Conference "In Search of Truth and Responsibility: Towards a Democratic Future" 19 May 2001, Serbia, Belgrade, ICTY Press Release CC/P.I.S./592-2.

⁸³⁷ See discussions in Chapter Five of this study. Cf. ICTY Regulation No. 1 of 1994 (as amended in 1995) in *ICTY Basic Documents* (1995) 135.

UN International Criminal Tribunal for Rwanda in Arusha, Tanzania. The amnesty process formed part of the disarmament, demobilization, reintegration and resettlement, or repatriation, (DDRRR) process.⁸³⁸ The amnesty process was based on two factors. Firstly, the government had no resources to investigate and prosecute all offenders. Secondly, there was pressure from human rights organisations to release suspects imprisoned, without access to legal representation, under deplorable conditions that fell short of internationally accepted standards.⁸³⁹ Under these circumstances it would be difficult to argue that Rwanda was in violation of its obligations under articles V and VI of the Genocide Convention.⁸⁴⁰

6. 4. 3. The Interim United Nations Civilian Administration in East Timor

The end of the Cold War saw a fundamental shift in the classical principles of non-intervention and the inviolability of state sovereignty. In some instances this shift has included UN-controlled administration such as the establishment of the United Nations Peacekeeping Mission in Kosovo (UNMIK),⁸⁴¹ and in East Timor (UNTAET)⁸⁴² in 1999, endowed with executive police powers.⁸⁴³ The element of executive enforcement of peacekeeping operations was a necessary and inevitable response in failed states with

⁸³⁸ *Report of the Security Council Mission to the Great Lakes Region, 15 -26 May 2001*, UN Doc. S/2001/521/Ass.1, 30 May 2001.

⁸³⁹ Paul Nantulya, "The Gacaca System in Rwanda" 4 *Conflict Trends* (2001) 51.

⁸⁴⁰ William Schabas, *Genocide in International Law: Crime of Crimes* (2000) 339.

⁸⁴¹ UN SC Res. 1244.

⁸⁴² UN SC Res. 1272.

⁸⁴³ On executive police administration see Espen Eide & Tor Tanke Holm, "Towards Executive Authority Policing? The Lessons of Kosovo" in Tor Tanke Holm & Espen Barth Eide (eds.), *Peacebuilding and Police Reform* (2000) 210 *et seq*; Jarat Chopra, "UN Civil Governance-in-Trust" in Thomas Weiss (ed.), *The United Nations and Civil Wars* (1995) 69.

a fragile criminal justice system, including the courts and the penal system.⁸⁴⁴

Nearly five months after the creation of UNMIK, the United Nations was confronted with a similar situation in East Timor. In 1999, the Indonesian controlled territory of East Timor was rocked by unrest, which claimed the lives of many East Timorese. The pro-integration militia burned and looted houses in villages and towns. Hundreds of civilians were murdered or forcefully displaced to West Timor. Following the violence in East Timor, the United Nations established an international commission of inquiry to investigate the alleged atrocities in East Timor. In March 2000, the Commission submitted a report to the Secretary-General in which it concluded that gross human rights violations had been committed and proposed the creation of "...an international human rights tribunal" to prosecute those responsible for the violation of international humanitarian law in East Timor.⁸⁴⁵ Declaring that the conflict in East Timor was a threat to international peace and security in terms of Chapter VII of the UN Charter, the UN Security Council passed Resolution 1272 and created a Transitional Administration in East Timor to exercise legislative and executive powers, and to administer justice in the region.⁸⁴⁶

Acting in accordance with UN Security Council Resolution 1272 and the recommendations of the International Commission of Inquiry of East Timor, UNTAET promulgated a law to establish a panel with exclusive jurisdiction over serious criminal offences. This panel was created as part of the UN civilian administration in East Timor.

⁸⁴⁴ See, Stahn Carsten, "The United Nations Transitional Administration in Kosovo and East Timor: A First Analysis" 5 *Max-Planck Yearbook of United Nations Law* (2001) 105.

⁸⁴⁵ See *Report of the International Commission of Inquiry on East Timor to the Secretary-General*, UN GA A/54/726, S/2000/59, para. 153.

⁸⁴⁶ UNTAET Regulation 1(1).

The power of UNTAET to create a special war crimes tribunal, as part of the UN civilian administration, was necessary given the magnitude of the atrocities committed.

The Panel has jurisdiction to prosecute those allegedly responsible for war crimes, rape, torture, crimes against humanity and the violations of the four Geneva Conventions of 1949 committed in East Timor during the armed conflict.⁸⁴⁷

In July 2001, UNTAET promulgated a law that established a Commission on Reception, Truth and Reconciliation (CRTR).⁸⁴⁸ The main objective of the CRTR was to promote national reconciliation following atrocities committed during the 1999 turmoil in East Timor. The Commission also facilitated the reintegration of East Timorese from West Timor and established an historical record of human rights abuses from 1974 - 1999.⁸⁴⁹ Perpetrators were required to meet with affected communities and offer public apology and undertake some form of community service as part of the Community Reconciliation Agreement (CRA).⁸⁵⁰ The Regulations exclude the possibility of granting amnesty to perpetrators of gross human rights violations and regulation 33(1), for example, makes it clear that serious violations of international humanitarian law fall within the jurisdiction of the Panel and not of the CRTR:

In no circumstances shall *serious criminal offences* be dealt with in a Community Reconciliation Process.⁸⁵¹

⁸⁴⁷ UNTAET Regulation 1.

⁸⁴⁸ UNTAET Regulation 2001/10 on the Establishment of a Commission on Reception, Truth and Reconciliation in East Timor, 13 July 2001.

⁸⁴⁹ Section (c) of Regulation 10(2000). The mandate of the Commission covers the period between 25 April 1974 and 25 October 1999. See also Frederick Rawski, "Truth-Seeking and Local Histories in East Timor" 21 *Asia-Pacific Journal on Human Rights and the Law* (2002) 75; Carsten Stahn, "Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Truth Commission for East Timor" 95 *American Journal of International Law* (2001) 952.

⁸⁵⁰ UNTAET Regulation 10 (2000), section 27(7).

⁸⁵¹ Schedule 1, Section 4 (emphasis added).

The statute of the Panel with Exclusive Jurisdiction is in many respects a carbon copy of the ICTY and the Rome Statute. Another important element of the statute is that the role of the victim is strongly emphasised.

6. 4. 4. The Office of the United Nations Special Representative of the Secretary-General for Children in Armed Conflicts

The use of children as combatants and sex slaves deployed in armed conflict to the front line zones is one of the features of contemporary armed conflicts.⁸⁵² Besides being a war crime, punishable under the 1977 Protocol I⁸⁵³ & II⁸⁵⁴ Additional to the four Geneva Conventions of 12 August 1949 and the Rome Statute,⁸⁵⁵ the United Nations has taken a number of initiatives to address the problem.⁸⁵⁶ Some of the key initiatives included the adoption of an Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict (2001)⁸⁵⁷ and the establishment of the Office of the Special Representative of the Secretary-General to deal with the problem of children involved in armed conflicts. The purpose of the Optional Protocol was to strengthen the other international instruments that prohibit the use of children in armed conflicts, particularly the Convention on the Rights of the Child (1989).⁸⁵⁸

⁸⁵² See generally Jenny Kuper, *International Law Concerning Child Civilians in Armed Conflict* (1997).

⁸⁵³ Article 77(2).

⁸⁵⁴ Article 4(3) (c).

⁸⁵⁵ Article 8(2).

⁸⁵⁶ On these initiatives see, Graca Machel, *Report on the Impact of Armed Conflict on Children*, August 1996; Secretary-General's Guidelines on the Role of United Nations Peacekeeping in Disarmament, Demobilization and Reintegration, February 2000; UN SC Res. 1261(1999); UN SC Res. 1314 on Children in Armed Conflict, August 2000.

⁸⁵⁷ GA Res. A/RES/54/263 of 25 May 2000.

⁸⁵⁸ GA Res. 44/25, 44 UN GAOR, Supp. (No. 49) 166 (1989). The Optional Protocol came into force on 12 February 2002. As of October 2004 191 states had ratified the protocol.

The Office of the Special Representative has also lobbied for the ICC to reflect the interests of children through Rules of Procedure and that those who exploit children for war must be punished accordingly.⁸⁵⁹ The Special Representative has argued that:

A common approach is needed to ensure the exclusion of war crimes against children from amnesty provisions and legislation, and the inclusion of child protection provisions and staff within the statutes and structures of international and *ad hoc* criminal tribunals and truth commissions.⁸⁶⁰

He further added that:

...when amnesty legislation is contemplated in transitions from war to peace, we must ensure that perpetrators of child rights violations are not exempted from responsibility for their actions.⁸⁶¹

In the same breath, the UN Secretary-General in his report to the Security Council on the promotion and protection of the rights of children recommended that “[genocide], war crimes and crimes against humanity and other egregious crimes perpetrated against children should be excluded from amnesty provisions contemplated during peace negotiations.”⁸⁶²

6. 5. Conclusion

In the aftermath of the Second World War, the principles of territorial integrity, sovereign equality of states and non-interference in the internal affairs of states became

⁸⁵⁹ See *Additional Report of the Special Representative of the Secretary-General for Children in Armed Conflict*, Mr. Olara Otunnu, Submitted in Accordance with General Assembly Resolution 55/79, E/CN.4/2001/76, 25 January 2001, para. 18.

⁸⁶⁰ Press Release SC/6895, 4176th Meeting, 26 July 2000.

⁸⁶¹ Statement of Olara Otunnu, Under-Secretary-General of the Secretary-General for Children in Armed Conflict to the Commission on Human Rights, 11 April 2000, Geneva, Switzerland (on file with the author).

⁸⁶² UN Doc. A/55/163-S/2000/712, 19 July 2000, para. 39.

the basis of modern statehood. The United Nations championed these principles as reflected in its founding instrument and, as a result, amnesties granted for gross human rights violations were often ignored.

As a general rule, the practice of the principal organs and specialised agencies of the United Nations has been to reject amnesties granted for war crimes, crimes against humanity and genocide. However, the United Nations in the main, has been weak in enforcing these decisions. The UN Security Council in particular, with its powers having a binding effect on member states, has been inconsistent in its approach to amnesties granted in conflict-ridden societies. The end of the Cold War meant that the UN Security Council would act unanimously to prevent conflicts regarded as a threat to international peace and security. It became increasingly clear that principles of state sovereignty, territorial integrity and non-interference could no longer be sustained in cases of serious violations of human rights particularly where states are themselves perpetrators of such violations.

Although inconsistent, the approach of the UN Security Council since the end of the Cold War has been to recognise and accept amnesties granted as part of a peace and reconciliation process in transitional societies and for the neutralisation, demobilisation, demilitarisation, disarmament and reintegration of armed opposition groups. The Council also seems amenable to the idea of limited amnesties, especially where the government has no resources to investigate and prosecute *all* offenders. In certain cases (Croatia) the Council encouraged the granting of amnesty.

Like the UN Security Council, the UN General Assembly, at the end of the Cold War, began to discuss human rights violations without invoking the principle of non-

interference in the international affairs of other states. Some of the crimes recognised today by the Rome Statute, such as apartheid, began as “soft” international law and later, at the insistence of the General Assembly, were recognised as a threat to international peace and security by the UN Security Council. Today apartheid is punishable as a crime against humanity.

Equally, specialised agencies of the United Nations played an important role in the development of the law governing amnesties granted for serious human rights violations. However, they often laid emphasis on civil and political rights while little attention was paid to impunity emanating from violations of economic, social and cultural rights. The effect of this artificial dichotomy has been the commission of crimes, which traditionally are not recognised as “international crimes” such as corruption, drug trafficking and the plunder of natural resources.

The nature of contemporary conflicts which are characterised by huge numbers of civilian casualties, collapsed or failed states, refugees and the plundering of natural resources by non-state actors, has compelled the United Nations to intervene. In certain instances (e.g., East Timor and Kosovo) the UN adopted a balanced approach model when it instituted civilian controlled administrations with executive police powers. The balanced approach model recognises that while prosecution of serious international crimes is warranted, peace and national reconciliation mechanisms are equally necessary as a complement to prosecution with the result that amnesty for less serious offences may be approved.

PART III

THE BALANCED APPROACH MODEL IN PRACTICE: A COMPARATIVE STUDY OF TWO AFRICAN CONFLICTS

CHAPTER SEVEN

IN SEARCH OF JUSTICE AND SOCIAL RECONSTRUCTION: AMNESTY AND THE DUTY TO PROSECUTE IN SIERRA LEONE

...civil wars are always more devastating than international conflicts because they are never won or lost.⁸⁶³

7. 1. Historical Background to the Conflict in Sierra Leone

The armed conflict in Sierra Leone ignited in March 1991 when the Liberian warlord and former President of Liberia, Charles Taylor, supported a group of armed dissidents from Sierra Leone led by the late Corporal Foday Sankoh, leader of the Revolutionary United Front (RUF), a rebel movement founded in the late 1980s to fight the government of Sierra Leone.⁸⁶⁴ Close ties developed between the RUF and Charles Taylor's National Patriotic Front of Liberia (NPFL), before Taylor became president of Liberia.⁸⁶⁵ There were repeated border incursions from Liberia in support of the RUF from 1991 until the end of the conflict in January 2002.⁸⁶⁶

⁸⁶³ Ken Wiwa, *In the Shadow of a Saint: A Son's Journey to Understand his Father's Legacy* (2000) 40.

⁸⁶⁴ On the history and chronology of Sierra Leone's conflict, see Joe Alloe, *A New History of Sierra Leone* (1990); Ibrahim Abdullah, "Bush Path to Destruction: the Origin and Character of the Revolutionary United Front/Sierra Leone" 36 *Journal of Modern African Studies* (1998) 203; Joe Alie, "Background to the Conflict (1961–1991): What Went Wrong and Why?" in Anatole Ayissi & Edward Poulton (eds.), *Bound to Co-operate: Conflict, Peace and People in Sierra Leone* (2000) 15; Nikki Funke & Hussein Solomon, *Towards Sustainable Peace in Sierra Leone* (2000) 1 *et seq.*

⁸⁶⁵ The Special Court for Sierra Leone has indicted Charles Taylor currently in exile in Nigeria, for war crimes, and crimes against humanity committed during the armed conflict in Sierra Leone. See Charles Ghankay Taylor, Case No. SC-SL-2003-01). The indictment was issued while Taylor was attending the Accra peace negotiation in August 2003. The Accra Accord *inter alia* recommended amnesty for all parties involved in the 14 year Liberian conflict, a move supported by the transitional government. The Special Court has, to date, issued 12 indictments, which include AFRC leader Paul Koroma and Sam Bockarie. Unfortunately, Foday Sankoh, leader of the RUF died in prison in July 2003 having been indicted by the Special Court. For more on the indictments see <http://www.sc-sl.org>.

⁸⁶⁶ See Arthur Abraham, "The Quest for Peace in Sierra Leone" in *Engaging Sierra Leone: Round Table Talks on Reconciliation and State-Building: Report by the Centre for Democracy & Development*, Lome, Togo 21-22 June 1999, Series No 4 (1999) 12.

Unlike many civil wars in Africa, the conflict in Sierra Leone was not an ethnic conflict. In fact, belligerent parties on both sides of the conflict consist of the Mende, who dominate the government, and the Temne, the second largest ethnic group. The conflict in Sierra Leone may be characterised as *inter-generational*, that is, it was about a deep sense of anger in the youth at the abuse of political power, corruption, and the lack of economic and educational opportunities. The conflict is rooted in the prolonged lack of accountability of successive governments, a history of systematic exclusion, neglect and misuse of the rural population, and of the youth in particular. It is not surprising that it became easy for the RUF to exploit that anger and recruit young people to join the rebel movement, led by Foday Sankoh, who was viewed by many as an opportunistic leader who lacked depth and vision. The conflict was, therefore, the direct result of the state's failure to provide economic security.⁸⁶⁷

Beyond the catalyst represented by Charles Taylor and the RUF, the conflict in Sierra Leone was perpetuated by other factors, namely, the exploitation of natural resources by multinational corporations and foreign states; it is widely suspected that Libya and Burkina Faso trained Foday Sankoh and Charles Taylor in the hope of benefiting from Sierra Leone's rich mineral resources.⁸⁶⁸ Other factors which exacerbated the conflict in Sierra Leone included the use of mercenaries, child combatants and neglect by the major powers of the world (Russia, China, USA, France and Britain). Successive ceasefire agreements were aborted due to lack of political will by the leadership of the RUF and

⁸⁶⁷ See generally Robert Mathews (ed.), *Civil Wars in Africa: Roots and Resolutions* (1993).

⁸⁶⁸ David Keen, "Incentives and Disincentives for Violence" in Mats Berdal & David Malone (eds.), *Greed and Grievance: Economic Agendas in Civil Wars* (2000) 19 at pp. 35-36.

the Sierra Leone government, and this too contributed to the worsening situation in Sierra Leone.⁸⁶⁹

These factors derailed the peace process and perpetuated the violence, which resulted in 2.5 million civilian casualties, many of whom were maimed, internally displaced, pressed into service as war combatants, or became refugees.⁸⁷⁰ The violations were characterised by mass rapes, kidnapping, and the amputation of the limbs of women, men and children.⁸⁷¹ As a result the people of Sierra Leone were the victims of gross human rights violations committed by both the rebels and the members of the military establishment of Sierra Leone, contrary to the government's commitments under the various peace agreements and international human rights treaties.⁸⁷² Between 1994 and 1995, the violence against the civilian population was carried out by combatants believed to be members of the security forces.⁸⁷³

It is against this troubling background that this chapter examines the justice of the amnesty provisions in the various peace agreements in Sierra Leone since 1991, and their validity under international law *vis-à-vis* the duty imposed on Sierra Leone by various international humanitarian law and human rights treaties to investigate and prosecute these gross violations of human rights. The chapter concludes that the reason why the amnesty process in Sierra Leone was rejected by the United Nations and other

⁸⁶⁹ Abubakar Kargbo, "The Long Road to Peace: 1991–1997" in Anatole Ayissi & Robin–Edward Poulton (eds.), *Bound to Co-operate: Conflict, Peace and People in Sierra Leone* (2000) 37.

⁸⁷⁰ See generally Phenyo Rakate, Mark Malan & Angela Mcyntre, *Peacekeeping in Sierra Leone: UNAMSIL Hits the Home Straight*, Institute for Security Studies Monograph, no. 68, (2001) 1 *et seq.*

⁸⁷¹ Amnesty International Report, *Sierra Leone: A Disastrous Set-Back for Human Rights*, 20 October 1997.

⁸⁷² *Ibid.*

⁸⁷³ International Crisis Group (ICG), *Sierra Leone: Time for a New Military and Political Strategy*, ICG Report No. 28, 11 April 2001.

actors was because it did not comply with the balanced approach model proposed in this study; even though the amnesty was a product of a legitimate political process it was, nevertheless, disproportionate to the atrocities committed and had no rational connection to the peace process. Lack of resources has had an influence on who will be prosecuted by the Special Court for Sierra Leone which has been created to prosecute only those who “bear the greatest responsibility” for atrocities committed since 1996. In balancing the duty to prosecute and the rights of victims, it is expected that the Truth and Reconciliation Commission for Sierra Leone will make recommendations on reparations for victims of war.

7. 2. Peace at all Costs? Amnesty and the Abidjan Peace Accord

Since the beginning of the conflict in 1991, several efforts were made by regional organisations like the African Union, the Commonwealth and the Economic Community of West African States (ECOWAS), and by such international organisations as the United Nations, to bring an end to the protracted armed conflict in Sierra Leone. The United Nations, for instance, was instrumental in bringing about participatory democracy and good governance, the latter being essential to a lasting peace in war-torn Sierra Leone.⁸⁷⁴ This led to the elections that were held in February 1996, and the emergence of Ahmad Tejan Kabbah of the Sierra Leone People’s Party (SLPP) as President on 29 March 1996.⁸⁷⁵ Two months later, in May 1996, the SLPP government met with the RUF leadership in Yamoussoukro, Ivory Coast, in an attempt to bring about a peaceful resolution to the conflict.⁸⁷⁶

⁸⁷⁴ Mark Malan, Sarah Meek *et al.*, *Sierra Leone: Building the Road to Recovery*, Institute for Security Studies Monograph, No. 80, (2003) Chp. 3.

⁸⁷⁵ *Ibid.*

⁸⁷⁶ Abubakar Kargo, *supra* at p.39.

On 30 November 1996, the Abidjan Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (RUF/SL), the “Abidjan Accord”, was signed.⁸⁷⁷ The Abidjan Peace Accord consisted of 28 articles and addressed socio-economic issues, and disarmament, demobilisation and reintegration (DDR) of ex-combatants.⁸⁷⁸ The DDR process was a strategic policy decision to reintegrate combatants estranged from society back into civilian life and it took some thoughtful strategies to entice the numerous child soldiers, particularly those who had committed serious human rights violations, to lay down their arms and be reintegrated into society.⁸⁷⁹

The Abidjan Accord provided for the granting of amnesty while at the same time it endorsed the duty to prosecute human rights violations. Article 14 of the Abidjan Accord promised to grant amnesty to those allegedly responsible for human rights violations:

To consolidate the peace and promote the cause of national reconciliation, the government of Sierra Leone shall ensure that no official or judicial action is taken against any member of the RUF/SL in respect of anything done by them in pursuit of their objectives as members of that organization up to the time of the signing of this agreement. In addition, legislative and other measures necessary to guarantee former RUF/SL combatants, exiles and other persons, currently outside the country for reasons related to the armed conflict shall be adopted ensuring the full exercise of their civil and political rights, with a view to their reintegration within a framework of full legality.

In the same breath, article 20 of the Abidjan Accord provided in part that:

⁸⁷⁷ Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (RUF/SL), 30 November 1996. See <http://www.sierra-leone/abidjanaccord> (accessed 30 October 2001).

⁸⁷⁸ Article 3 of the Abidjan Accord.

⁸⁷⁹ Articles 5 – 10 of the Abidjan Accord.

...The National Commission on Human Rights shall have the power to investigate human rights violations and to institute legal proceedings where appropriate.

Similarly article 21 stated that:

The parties undertake to respect the principles of international humanitarian law.

Arguably, the amnesty provided for in the Abidjan Accord was the product of a legitimate and democratically elected government which was appointed in March 1996. It remained to be seen whether the National Commission on Human Rights would institute legal actions against those who failed to respect human rights and international humanitarian law rules when required to do so.⁸⁸⁰ Such a determination was for the Commission to make, and at the same time to take into account the rights of victims to an effective remedy, including reparations. The Abidjan Accord further guarantees the right to a fair trial and that war victims and other vulnerable groups shall be given “special attention.”⁸⁸¹ Unfortunately, the Abidjan Accord proved short-lived. The agreement failed to establish lasting peace due to a lack of trust and political will by the RUF and the government of Sierra Leone. Soon afterwards, the situation in Sierra Leone deteriorated significantly. Fighting resumed and human rights violations became rampant.⁸⁸²

7. 3. Amnesty and the ECOWAS Six - Month Plan for Sierra Leone

In May 1997, the newly elected President Kabbah was overthrown by a small group of young officers in the national armed forces, known as the Armed Forces Revolutionary

⁸⁸⁰ Article 19 provides that the parties shall respect the UN Declaration on Human Rights and the African Charter on Human and Peoples’ Rights.

⁸⁸¹ Article 22 of the Abidjan Accord.

⁸⁸² Abdoulaye Diallo, “Why did the Abidjan Peace Accord Fail? Internal and External Factors” in Olayinka Oludipe (ed.), *Sierra Leone: One Year After Lomé, One Day Analytical Conference on the Peace Process* (2000) 39.

Council (AFRC), which was composed of members of the Sierra Leone Army (SLA) and the RUF under Major John Koroma as Chairman.⁸⁸³ The government went into exile in Guinea. The United Nations and regional organisations like ECOWAS condemned the *coup d' état*, and called for the implementation of the Abidjan Peace Accord.⁸⁸⁴ In June 1997, the AU's 33rd Heads of State Summit in Harare, Zimbabwe also condemned the *coup* and appealed for the military *junta* to respect the Abidjan Accord as the framework for peace and reconciliation in Sierra Leone.⁸⁸⁵ Diplomatic efforts were pursued by ECOWAS to bring an end to the conflict in Sierra Leone, and the ECOWAS Committee of Four was established to facilitate talks between the AFRC/RUF and the exiled government of President Kabbah in Guinea. The ECOWAS Six Month Plan for Sierra Leone (the "Conakry Accord") was signed in April 1998.⁸⁸⁶ The main objective of the Conakry Accord was to restore the constitutional government of President Kabbah.⁸⁸⁷

Article 8 of the Conakry Accord guaranteed amnesty to the RUF/ ARFC government of John Koroma:

It considered essential that unconditional limitations and guarantees from prosecution be extended to all involved in the unfortunate events of 25 May 1997 with effect from 22 May 1998.⁸⁸⁸

⁸⁸³ Address by Major Johnny Paul Koroma, Head of the AFRC, Freetown, Sierra Leone, 1 June 1997 (on file).

⁸⁸⁴ See, for example, UN SC Res. 1132 (1997).

⁸⁸⁵ Reuters News Service, "OAU Agrees to Act on Sierra Leone and Former Zaire", 9 March 2000.

⁸⁸⁶ ECOWAS Six Month Peace Plan for Sierra Leone ("Conakry Accord"), 23 October 1997 – 22 April 1998. See <http://www.sierra-leone.org>.

⁸⁸⁷ Article 5 of the Conakry Accord.

⁸⁸⁸ *Ibid.*

During the nine months of the rebel regime's rule, numerous gross human rights violations were committed against ordinary civilians. The Conakry Accord was silent on whether the "guarantees from prosecutions" covered the most serious human rights violations committed by the RUF/AFRC government, nor was there any indication that reparations for victims of gross human rights violations were to be balanced with the proposed amnesty. However, it would seem that the amnesty covered acts of treason, namely, the overthrow of the legitimate civilian government of President Ahmed Kabbah. The failure, again due to lack of political will, of the AFRC government to heed calls to restore the civilian government of President Ahmed Kabbah, forced ECOWAS to make a militarily intervention to restore the democratically elected government of President Kabbah.

On 6 January 1999, the RUF and the AFRC invaded Freetown, the capital of Sierra Leone, resulting in horrendous human rights violations. The mayhem prompted serious discussions in and outside Sierra Leone which called into question the political will of the RUF and the government of Sierra Leone to bring about lasting peace in the region.⁸⁸⁹ Civil society organisations and the people of Sierra Leone called on President Kabbah to act firmly and decisively. One of the controversial issues central to the peace process was how to deal with war crimes and war criminals in a post-conflict Sierra Leone.

One school of thought was that, in order to achieve sustainable peace and national reconciliation in Sierra Leone, a blanket amnesty should be granted to the RUF and its allies. It was argued that blanket amnesty would encourage rebels to come out of the

⁸⁸⁹ Emmanuel Tom-Rad Kaillie, "Sierra Leone: At the Brink of Complete National Disintegration" Freetown, June 1999 (on file); Bu-Buakei Jabbi, "Appointive and Political Options in the Peace Process", Freetown, May 1999 (on file).

bush without fear of reprisals and the possibility of being ostracised by society.⁸⁹⁰ Mozambique was used as a point of reference, and so the Abidjan Accord bears some similarity to the 1994 General Peace Agreement for Mozambique between Renamo and the government of Mozambique, which also provided for blanket amnesty and power-sharing with the rebels, and was an example of how national reconciliation could be achieved by means of a blanket amnesty.⁸⁹¹

Article 14 of the 1996 Abidjan Peace Accord, which conferred amnesty on all perpetrators of human rights violations, gave credence to the argument in support of granting blanket amnesty to war criminals. The government and civil society organisations agreed, in principle, that article 14 of the Abidjan Peace Accord must be retained and used as the basis for future negotiations with the RUF.⁸⁹² Another document used to support the granting of a blanket amnesty was the 1991 Constitution of Sierra Leone, specifically section 63 (1) which is headed “Prerogative of Mercy.” It provided that:

- (1) The President may, acting in accordance with the advice of a Committee appointed by the Cabinet over which the Vice President shall preside:
 - (a) Grant any person convicted of any offence against the laws of Sierra Leone a pardon, either free or subject to lawful conditions;
 - (b) Grant to any person a respite, either indefinite or for a specified period, of the execution of any punishment imposed on that person...;
 - (c) Substitute a less severe form of punishment for any punishment imposed on any person...;
 - (d) Remit the whole or any part of any punishment imposed upon any person for such an offence or any penalty or forfeiture otherwise due to the Government on account of such an offence.⁸⁹³

⁸⁹⁰ Joe Alie, “A Price for Peace? Justice and Reconciliation in Post-War Sierra Leone” in Anatole Ayissi & Robin-Edward Poulton (eds.), *Bound to Co-operate: Conflict, Peace and People in Sierra Leone* (2000) 163 at p. 168.

⁸⁹¹ *Ibid.*

⁸⁹² Joe Alie, *supra* at p. 169.

⁸⁹³ Act 6 of 1991. See www.sierra-leone.org/constitution.html (accessed 20 November 2001).

It would appear that the government of Sierra Leone was truly committed to bringing peace to Sierra Leone, whatever the cost. In such a desperate situation the rights of victims were ignored when compared for example to the earlier Abidjan Peace Accord. No efforts were made to balance non-prosecution with reparations and the right of victims to an effective remedy. It was argued that to insist on possible prosecutions would result in the collapse of the peace process and the continued suffering of the civilian population who had already suffered so much at the hands of the RUF/AFRC alliance.⁸⁹⁴ A collapse of the peace process would afford the RUF the opportunity for the continued exploitation of the mining areas under their control and to use the proceeds to finance the war. Finally, the blanket amnesty was justified on the basis that it would be difficult to ascertain the level of responsibility for the atrocities committed by the RUF/AFRC alliance and that those willing to testify might fear future victimisation. AFRC members who participated in the overthrow of the civilian government of President Kabbah were charged with treason and the case was pending before the Supreme Court of Sierra Leone in Freetown.⁸⁹⁵ Already allegations were made that during the 6 January 1999 invasion of Freetown some AFRC members directed their attacks against colleagues who had testified against them.⁸⁹⁶ It was in view of these circumstances that a blanket amnesty was included in the Lomè Peace Agreement between the Government of Sierra Leone and the RUF of Sierra Leone, signed at Lomè, Togo on 7 July 1999.⁸⁹⁷

⁸⁹⁴ Joe Alie, *supra* at p. 170.

⁸⁹⁵ *S v Leslie Modibo Lymone & Others*, *The Sierra Leone Gazette (Extraordinary)*, Gov. Notice No. 59, vol. CXXIV, High Court of Sierra Leone, 4 May 1998.

⁸⁹⁶ Joe Alie, *supra* at p. 169.

⁸⁹⁷ Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone ("Lomè Peace Agreement"), Appendix, *Seventh Report of the Secretary-General on the United Nations Observer Mission in Sierra Leone*, S/1999/836, 30 July 1999. Cf. Georges Nzongola-Ntalaja, "Unpacking the Lomè Peace Accord" in Olayinka Oludipe (ed.), *Sierra Leone: One Year After Lomè, One Day Analytical Conference on the Peace Process*, London, United Kingdom, 15 September 2000, p. 47.

7. 4. The Amnesty Provision in the Lomé Peace Agreement and the Reaction of the International Community

The Lomé Peace Agreement contained a number of provisions on the protection of human rights. The preamble committed the parties to promote full respect for human rights and international humanitarian law.⁸⁹⁸ The agreement recognised basic civil and political liberties adopted by the AU, in the African Charter on Human and Peoples' Rights, and the United Nations, in the Universal Declaration of Human Rights⁸⁹⁹, which include amongst others, the right to freedom from torture and the right to a fair trial.⁹⁰⁰ The agreement called for the existing machinery to address the grievances of the people in respect of alleged violations of their basic human rights, to be strengthened by the establishment of an autonomous, quasi-judicial, national Human Rights Commission.⁹⁰¹

One provision of the Lomé Peace Agreement which elicited criticism from human rights organisations and the United Nations was the article that included the RUF leader, Foday Sankoh, and others responsible for serious human rights violations, in the blanket amnesty.⁹⁰² Article IX entitled "Pardon and Amnesty" provided as follows:

1. In order to bring lasting peace to Sierra Leone, the Government of Sierra Leone shall take appropriate legal steps to grant Corporal Foday Sankoh *absolute and free pardon*.

2. After the signing of the present agreement, the Government of Sierra Leone shall grant *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.

⁸⁹⁸ Paragraph 4 of the Preamble of the Lomé Peace Agreement.

⁸⁹⁹ Article XXIV (1) of the Lomé Peace Agreement.

⁹⁰⁰ Article XXIV (2) of the Lomé Peace Agreement.

⁹⁰¹ Article XXV of the Lomé Peace Agreement.

⁹⁰² Article IX of the Lomé Peace Agreement.

3. To consolidate the peace and promote the cause of national reconciliation, the Government of Sierra Leone shall *ensure that no official or judicial action is taken against any member of the RUF/SL, ex-AFRC, ex-SLA or CDF in respect of anything done by them in pursuit of their objectives as members of those organisations, since March 1991*, up to the time of the signing of the present agreement. In addition, legislative and other measures necessary to guarantee immunity to former combatants, exiles and other persons, currently outside the country for reasons related to the armed conflict shall be adopted ensuring the full exercise of their civil and political rights, with a view to their reintegration within a framework of full legality.⁹⁰³

Human rights organisations and the United Nations objected to the granting of “absolute and free pardon” to the RUF leader Foday Sankoh and to members of the armed forces of Sierra Leone and the civil defence forces.⁹⁰⁴ It was argued that peace and justice are inextricably linked to each other in the sense that justice is a pre-condition to peace and, therefore, that a blanket amnesty does not augur well for national unity and reconciliation.⁹⁰⁵ The fact that Foday Sankoh and the RUF were granted blanket amnesty in the earlier Abidjan Peace Accord and then proceeded to commit further serious human rights violations called the effectiveness of the amnesty provision into question and also the cynical nature of the rebel leader’s participation in the peace process. The case of Rwanda in which gross human rights violations were committed against the Hutus in 1959 and which went unpunished, and resulted directly in the 1994 genocide against the Tutsis was cited as an example of how one impunity breeds another.⁹⁰⁶

⁹⁰³ Emphasis added.

⁹⁰⁴ Amnesty International Report, “A Peace Agreement but no Justice” 9 July 1999, AI Index: AFR 51/07/99; Human Rights Watch, “Sierra Leone: Getting Away with Murder, Mutilation, Rape” 9 July 1999 (HRW: A1103, 6/99); *Report of the United Nations High Commissioner for Human Rights on the Human Rights Situation in Sierra Leone*, U.N. Doc. A/56/281, 9 August 2001.

⁹⁰⁵ See generally, *Report of the United Nations High Commissioner for Human Rights on the Human Rights Situation in Sierra Leone*, U.N. Doc. A/56/281, 9 August 2001.

⁹⁰⁶ Joe Alie, *supra* at p. 171.

7. 4. 1. The Constitutionality of the Amnesty Provision

Arguably, the blanket amnesty in the Lomé Agreement violated several provisions of the 1991 Constitution of Sierra Leone.⁹⁰⁷ The 1991 Constitution is the supreme law of Sierra Leone and any other law inconsistent with the Constitution shall, to the extent of its inconsistency, be declared null and void and of no effect.⁹⁰⁸ Chapter II of the Constitution is headed “Fundamentals of State Policy” and provides that the Republic of Sierra Leone is founded on social objectives based on the principles of freedom, democracy and justice.⁹⁰⁹ In order to realise these objectives, the government shall ensure the independence, impartiality and integrity of the courts of law and unfettered access thereto, and further that the legal system promotes justice.⁹¹⁰ In ratifying the Lomé Agreement, the Sierra Leone parliament violated its obligation in Chapter II of the Constitution to give effect to the social objectives of the state, namely to grant unfettered access to the courts and to ensure that justice is not denied to its citizens.

Chapter III of the Constitution guarantees the protection of several basic fundamental rights and freedoms including *inter alia* protection from arbitrary arrest or detention,⁹¹¹ secure protection of law,⁹¹² and protection from inhuman treatment,⁹¹³ to mention but a few. A person who alleges that his or her fundamental rights and freedoms contained in the Constitution have been violated may seek redress before the Supreme Court of Sierra

⁹⁰⁷ The Constitution of the Republic of Sierra Leone Act 6 of 1991 (hereinafter the “Constitution”) was suspended in 1992 and 1997 by the military juntas until reinstated in March 1998.

⁹⁰⁸ Section 175 (15) of the Constitution.

⁹⁰⁹ Section 5(1) of the Constitution.

⁹¹⁰ Section 8(1) of the Constitution.

⁹¹¹ Section 17 of the Constitution.

⁹¹² Section 23 of the Constitution.

⁹¹³ Section 20 of the Constitution.

Leone, which is the highest court in the land,⁹¹⁴ and has original jurisdiction in constitutional matters.⁹¹⁵ The effect of the amnesty was to infringe upon the rights of the victims of the gross human rights violations to seek redress before the Supreme Court of Sierra Leone. It is submitted that the amnesty provision in the Lomé Agreement not only violated the Constitution, but also obliterated constitutionally guaranteed rights and freedoms. Unlike, the South African situation, the drafters of the 1991 Constitution did not authorise the granting of amnesty but, on the contrary, they guaranteed the principles and objectives of justice, the rule of law and unfettered access to the courts.

7. 4. 2. Amnesty and the Pursuit of Political Objectives

Article IX (2) and (3) of the Lomé Agreement seemed to have limited the granting of amnesty to “...anything done...in pursuit of [political] objectives.” The amnesty was limited, therefore, to crimes committed in the pursuit of political goals. However, the agreement does not define what constitutes a crime committed with a political motive. It is also not clear who would investigate and determine whether such offences fall within the ambit of article IX (2) and (3). It is submitted that, legally, the burden of proof would be upon the accused person to establish that their acts were of a political nature and the courts would then have to determine whether such a burden has been discharged or not. The RUF in its manifesto *Footpath to Democracy: Towards a New Sierra Leone* stated, in part, that its primary objective was to bring an end to corruption, mismanagement and the illegal exploitation of natural resources and to address the plight of the youth of Sierra Leone.⁹¹⁶

⁹¹⁴ Section 122 of the Constitution.

⁹¹⁵ Section 124 of the Constitution.

⁹¹⁶ See RUF Manifesto adopted in 1995, “Footpaths to Democracy: Towards a New Sierra Leone” (1995) vol. 1, p. 19. See <http://www.sierra-leone.org/footpaths.html>.

In the event of the amnesty being challenged, the Supreme Court of Sierra Leone would have had to determine whether the amputations, looting, and the mass rapes of civilians by both the RUF and military juntas (ARFC and CDF) were in pursuance of the political objectives of their respective organisations. If that interpretation is correct, and the amnesty was granted only for acts committed “in pursuit of political objectives” and *not* for war crimes and crimes against humanity, then it would meet one of the requirements of the balanced approach model, that the amnesty must be proportional and rationally connected to the peace process. This approach is confirmed by the fact that the United Nations Special Representative of the Secretary-General for Sierra Leone supported the Lomè Agreement with the caveat that the blanket amnesty would not cover war crimes and crimes against humanity. This was an indication that article IX (2) & (3) was not intended to cover atrocities committed against the civilian population.⁹¹⁷

7. 4. 3. The International Law Status of the Amnesty Provision

The government of Sierra Leone supported the amnesty provision in the Lomè Agreement despite atrocities committed against the civilian population in Sierra Leone since 1991, which included rapes, the forced recruitment of child combatants, kidnapping and mutilations, which may be classified as war crimes and crimes against humanity. The government justified its decision on the basis that the Lomè Agreement was premised on the understanding that a blanket amnesty was a *quid pro quo* in exchange for the RUF’s undertaking to cease hostilities,⁹¹⁸ because had the blanket amnesty not been offered, the Lomè talks would have not materialised.

⁹¹⁷ See *Seventh Report of the Secretary-General on the United Nations Observer Mission in Sierra Leone*, UN Doc. S/1999/836, 30 July 1999, para. 54.

⁹¹⁸ See *Seventh Report of the Secretary-General on the United Nations Observer Mission in Sierra Leone*, UN Doc. S/1999/836, 30 July 1999, para. 54

One of the constituent elements of the balanced approach model is that the country that grants amnesty must demonstrate a commitment to its general human rights treaty obligations. Sierra Leone is party to a number of humanitarian law and human rights law instruments applicable to the conflict, some of which contain basic principles which are non-derogable.⁹¹⁹ The blanket amnesty granted in terms of article IX of the Lomé Agreement may be rejected on the principle of *aut dedere aut judicare*, namely, that every state is under a non-derogable obligation to either prosecute or extradite persons responsible for grave breaches of international humanitarian law. The *aut judicare* principle rendered void the subsequent actions of the government of Sierra Leone to implement article IX of the Lomé Agreement.

Sierra Leone has ratified the four Geneva Conventions of 12 August 1949,⁹²⁰ including the 1977 Additional Protocols⁹²¹ and the 1998 Rome Statute for the ICC⁹²², which provide for the explicit duty to prosecute war crimes and crimes against humanity. Even though the Geneva Conventions and its additional Protocols have not been implemented under the domestic law of Sierra Leone as required, they nevertheless reflect customary international law and, therefore, are binding on Sierra Leone.

Sierra Leone has also ratified international human rights treaties such as the Convention on the Rights of the Child⁹²³ and the Optional Protocol to the Convention on the Rights

⁹¹⁹ UN SC Res. 1315(2000), 14 August 2000.

⁹²⁰ Ratified on 10 June 1965.

⁹²¹ Ratified on 21 October 1986.

⁹²² Sierra Leone signed the ICC Statute on 17 October 1998, and it was ratified by the Sierra Leone parliament on 15 September 2000. However, it is important to note that the statute does not operate retrospectively.

⁹²³ Signed 13 February 1990.

of the Child on the Involvement of Children in Armed Conflicts.⁹²⁴ The instruments are relevant given the fact that Sierra Leone had to wrestle with the problem of child soldiers. Human rights treaties oblige state parties to provide for an effective remedy to victims of human rights violations who seek redress. Another regional human rights treaty, the African Charter of Human Rights, which Sierra Leone ratified and the RUF agreed to respect in the Lomè Agreement,⁹²⁵ provides that “every individual shall have the right to have his cause heard.”⁹²⁶ The granting of a sweeping amnesty violated the rights of the victims of the gross human rights violations in Sierra Leone to be heard. A general amnesty in the Lomè Agreement would only apply to acts of treason, sedition and rebellion.⁹²⁷

The involvement of Liberia, Burkina Faso and ECOMOG, it may be argued, rendered the conflict international, and if so, the Geneva Conventions of 12 August 1949 and the additional Protocols also bind Liberia and Burkina Faso.⁹²⁸ However, it is not enough that third parties be involved in an armed conflict to render it international, but one of the parties, at least, must control some part of the national territory. In this case, the RUF did control parts of the territory of Sierra Leone.⁹²⁹ This means that the amnesty granted in the 2003 Accra Agreement to all combatants involved in the war in Liberia, including former Liberian President Charles Taylor, who has been indicted by the Special Court for Sierra Leone, will not cover war crimes and crimes against humanity committed in

⁹²⁴ Ratified 15 May 2000.

⁹²⁵ Article XXIV of the Lomè Agreement.

⁹²⁶ Article 7(1) of the African Charter.

⁹²⁷ Abdul Tejan-Cole, *supra* at p. 249.

⁹²⁸ Avril McDonald, “Sierra Leone’s Uneasy Peace: the Amnesties Granted in the Lomè Agreement and the United Nations’ Dilemma” 13 *Humanitares Volkerrecht* (2000) 11 at 15.

⁹²⁹ *Ibid*.

Sierra Leone.⁹³⁰ Non-state actors, like RUF, are also bound in terms of common article 3 of the Geneva Conventions.⁹³¹ Equally, article 6(5) of Protocol II which provided for granting the “broadest possible amnesty at the end of hostilities” would not apply to grave breaches such as the war crimes and the crimes against humanity committed in Sierra Leone.⁹³² In essence, the blanket amnesty in the Lomè Agreement was not proportional and rationally connected to the atrocities committed in Sierra Leone since 1991, because the rights of victims to an effective remedy, which includes reparations, were not guaranteed as a *quid pro quo* to the granting of amnesty. More significantly, the human rights violations documented by the United Nations and civil society organisations were of such a gross and systematic nature that the government of Sierra Leone had a clear obligation, as a party to the human rights treaties discussed earlier, to prosecute those who bear the greatest responsibility. It is in this context that the blanket amnesty failed to receive the support of human rights organisations and the United Nations, let alone the people of Sierra Leone.

7. 4. 4. The Response of the United Nations to the Amnesty in the Lomè Agreement

The United Nations stood as one of the moral guarantors of the Lomè Peace Agreement.⁹³³ However, during the signing of the Agreement, the UN Secretary-General

⁹³⁰ Article XXIV of the Comprehensive Peace Agreement between the Government of Liberia and the Liberians United for Reconciliation and Democracy (LURD) and the Movement for Democracy in Liberia (MODEL) and Political Parties signed in Accra on 18th August 2003 provides:

The NTGL [National Transitional Government of Liberia] shall give consideration to a recommendation for general amnesty to all persons and parties engaged or involved in military activities during the Liberian civil conflict that is the subject of this Agreement.

⁹³¹ Article 8(2) of the Rome Statute provides that “Common Article 3 apply to protracted armed conflict between government authorities and *organised armed groups or between such groups*” (emphasis added). See also Antonio Cassese, “The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts” 30 *International & Comparative Law Quarterly* (1981) 416 at p. 424.

⁹³² Abdul Tejan-Cole, “Painful Peace: Amnesty under the Lomè Agreement on Sierra Leone” 9 *Review of the African Commission on Human and Peoples’ Rights* (2000) 238.

⁹³³ Article XXXIV of the Lomè Agreement.

instructed his special representative to register a reservation regarding the blanket amnesty granted to the RUF leader, Foday Sankoh.⁹³⁴ In his report to the UN Security Council, the Secretary General argued that a blanket amnesty could not be reconciled with the goal of ending the culture of impunity.⁹³⁵ Firstly, the nature and extent of the atrocities committed in Sierra Leone since 1991, constituted grave breaches of international humanitarian law under the four Geneva Conventions of 12 August 1949, as well as the 1977 Additional Protocols, and the parties had agreed to respect the rules and customs of warfare. Secondly, the establishment of the *ad hoc* International Criminal Tribunals for the former Yugoslavia (ICTY) in 1993, and for Rwanda (ICTR) a year later, had already created a significant precedent. The subsequent adoption of the Rome Statute for the permanent ICC made it even more difficult for the United Nations to ignore the situation in Sierra Leone.⁹³⁶

The momentum to create some mechanism of accountability for Sierra Leone was reinforced when the RUF took some 500 peacekeepers hostage in June 2000.⁹³⁷ It was after this incident that the government of Sierra Leone wrote a letter to the UN Security Council to request that it authorise the creation of a special court to prosecute those responsible for the atrocities committed in Sierra Leone since 1991.⁹³⁸ Did this request for the assistance of the UN mean that the government of Sierra Leone had acted *mala*

⁹³⁴ *Seventh Report of the United Nations Secretary-General, supra*, para. 54.

⁹³⁵ *Ibid*.

⁹³⁶ Pheno Rakate, "Towards Global Justice in the 21st Century?" *Institute for Security Studies Occasional Paper Series*, No. 50, (2001).

⁹³⁷ On 17 May 2000, Foday Sankoh was arrested in Freetown by the UN Peacekeeping Forces and placed in the custody of the government, but unfortunately he died apparently of natural causes before being prosecuted.

⁹³⁸ See *Report of the Secretary on the Establishment of a Special Court in Sierra Leone*, paras. 22 - 24.; Cf. Nicole Fritz & Alison Smith, "Current Apathy for Coming Anarchy: Building the Special Court for Sierra Leone" 25 *Fordham International Law Journal* (2001) 391.

fides and contrary to its obligations under Lomè? Why did the government actively want to prosecute the very people to whom it had purported to grant amnesty? It may be argued that it was the RUF which first breached the Lomè Agreement and, thus, released the government from its obligations. The government could further justify its decision to limit the amnesty to “anything done in pursuit of political objectives” and explain that it was never intended to cover violations of international humanitarian law, but rather was meant to avoid penalising combatants for simply having participated in the armed conflict. In fact the Lomè Agreement emphasised respect for human rights and humanitarian law by the RUF and the government.

At least two reasons compelled the President of Sierra Leone, Ahmed Kabbah, to request the UN Security Council for assistance to create the Special Court for Sierra Leone. Firstly, that the court should not be seen as a witch-hunt against anyone and avoid the perception that it was “victor’s justice over the vanquished.” Secondly, lack of resources and the incapacity of the criminal justice system to deal with the complexity and magnitude of the crimes committed during the armed conflict.⁹³⁹ Access to justice remains one of the acute problems facing Sierra Leone, especially in the rural areas. In 2001, there were only 100 practicing lawyers for the whole of Sierra Leone, and of this number, eight were in Bo and Kenema, and there are no practicing lawyers in the Northern Province. The High Court of Sierra Leone sits only in Freetown.⁹⁴⁰

⁹³⁹ The combination of the office of the Attorney-General and the Minister of Justice, for example, is one anomaly. The Attorney-General is the chief public prosecutor and legal advisor to the government. As Minister of Justice, he/she also sits in the Cabinet of ministers and takes political decisions. Moreover, the fact that judges are poorly remunerated exposed them to the temptation of using irregular methods to gain extra income. This, in practice, undermines the independence of the judiciary; for more discussion on this issue, see Nicholas Thompson, *In Pursuit of Justice: A Report of the Judiciary in Sierra Leone*, Commonwealth Human Rights Initiative and the Sierra Leone Bar Association, September 2002. See <http://www.humanrightsinitiative.org>.

⁹⁴⁰ See generally, N Thompson, *In Pursuit of Justice: A Report of the Judiciary in Sierra Leone*, Commonwealth Human Rights Initiative and the Sierra Leone Bar Association, September 2002.

The UN Security Council members, although aware of the need to promote “peace and reconciliation” in Sierra Leone, were also opposed to the blanket amnesty in the Lomé Agreement.⁹⁴¹ The Security Council, influenced to some degree by the then US Representative to the UN, Richard Holbrooke, supported the creation of the Special Court and even pledged financial support.⁹⁴² The UN Security Council adopted resolution 1315 which authorised the creation of a special court to prosecute those who “bear the greatest responsibility” for war crimes, crimes against humanity and other serious violations of international humanitarian law committed in Sierra Leone.⁹⁴³ Since the beginning of the conflict in Sierra Leone in 1991, the Security Council issued a number of resolutions that appealed to parties to the conflict to respect human rights and humanitarian law.⁹⁴⁴

On 14 August 2000, the UN Security Council requested the Secretary-General to negotiate an agreement with the government of Sierra Leone to create a special court.⁹⁴⁵ On 4 October 2000, the Secretary-General tabled a report for consideration by the Security Council.⁹⁴⁶ Two years later, on 26 July 2002, the UN Secretary-General and the government of Sierra Leone announced the appointment of judges of the Special

⁹⁴¹ 4035th Meeting of the UN Security Council, 20 August 1999.

⁹⁴² Remarks by Ambassador Richard Holbrooke, US Permanent Representative to the UN on the Situation in Sierra Leone, UNSC Meeting, 27 July 2000, USUN Press Release, no. 100.

⁹⁴³ UN SC Res. 1315 (2000), 14 August 2000.

⁹⁴⁴ For example, UN SC Res. 1171(1998), 5 June 1998; UN SC Res. 1231(1999), 11 March 1999; UN SC Res. 1260 (1999), 20 August 1999.

⁹⁴⁵ See *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, UN Doc. S/1999/915, October 2000.

⁹⁴⁶ *Ibid.*

Court.⁹⁴⁷

7. 5. The Special Court and the Question of Resources

As indicated in the balanced approach model, lack of resources often plays an important role in determining whether to grant amnesty or to prosecute those responsible for serious crimes, especially in poor countries like Sierra Leone. At the time the decision to create the Special Court was taken some commentators cautioned that the court might be seen by some as representing “victor’s justice over the vanquished” or a witch-hunt against the RUF, and that if the court were to function properly, and provide some guarantee of fairness, then the government of Sierra Leone needed considerable international assistance in the form of resources to set it up.⁹⁴⁸ Moreover, given the devastating impact of the war on the economy of Sierra Leone, the government did not have the necessary financial resources to set up a Special Court. When the proposal for the Special Court for Sierra Leone was considered, the Security Council was not prepared to assume the cost of another UN tribunal along the lines of those for Rwanda and the former Yugoslavia. So it was under these financial constraints that a hybrid national institution, with UN oversight, similar to the war crimes tribunal for Cambodia, was selected as an acceptable option.

⁹⁴⁷ The court consists of a minimum of eight independent judges, three of whom were appointed by the Government of Sierra Leone and five by the Secretary-General of the United Nations. The Secretary-General appointed the Chief Prosecutor, and the government of Sierra Leone appointed the Deputy Prosecutor (in consultation with the UN). While the Deputy Prosecutor will make recommendations regarding indictments, the final decisions rest with the Chief Prosecutor. Although international oversight will ensure independence and impartiality, the “internationalised” aspect of the Tribunal may have some negative effects, because some of the judges may have a little understanding of the political and legal culture of Sierra Leone. However, the judges from West African and Commonwealth states will be a mitigating factor. See UN Press Release, SG/A/813 AFR/444, 26 July 2002.

⁹⁴⁸ Michael Scharf, “The Special Court for Sierra Leone” *American Society of International Law Insights*, 12 October 2000 <http://www.asil.org/insights.htm>; Robert Cryer, “A ‘Special Court’ for Sierra Leone” 50 *The International & Comparative Law Quarterly* (2001) 435; Stuart Beresford, “The Special Court for Sierra Leone: An Initial Comment.” 14 *Leiden Journal of International Law* (2001) 635; Abdul Tejan-Cole, “The Special Court for Sierra Leone: Conceptual Concerns and Alternatives” 1 *African Human*

The Special Court for Sierra Leone is funded by voluntary contributions, which many have criticised as not viable when compared to the ICTY and ICTR, since the voluntary contributions for the latter only constitute a small fraction of their budget. The budget of the court was initially estimated at 56 million US dollars for the first three years of operation.⁹⁴⁹ A UN Management Committee of the Sierra Leone Special Court was set up to co-ordinate the contributions of countries interested in supporting the court financially and otherwise.⁹⁵⁰ The Management Committee consisted of Canada, Lesotho, the Netherlands, Nigeria, the USA and the UK. The main function of the Committee was to oversee the non-judicial functions of the court.⁹⁵¹ Resources are still needed for a detention facility, and for the protection of victims and witnesses, that meet international norms and standards. Those opposed to a voluntary contribution, rather than a UN funded court similar to the ICTR and ICTY, argued that a limited budget would force the prosecutor to make selective choices about whom to prosecute and thus bring into question the quality of justice rendered, and the independence and integrity of his/her office.⁹⁵² Another implication of the voluntary nature of the funding was that countries which had pledged financial support might change their minds dictated by their changing national interests, and thus the lifespan of the Special Court might be in jeopardy.

Rights Law Journal (2001) 107.

⁹⁴⁹ Avril McDonald, "Sierra Leone's Shoestring Special Court" 84 *International Review of the Red Cross* (2002) 121.

⁹⁵⁰ See *Report of the UN Planning Mission for the Special Court for Sierra Leone*, UN Doc. S/2002/246, February 2002.

⁹⁵¹ See *Report of the UN Planning Mission for the Special Court for Sierra Leone*, UN Doc. S/2002/246, February 2002.

⁹⁵² See *Report of the UN Planning Mission for the Special Court for Sierra Leone*, UN Doc. S/2002/246, February 2002.

International criminal prosecution is known to be slow and expensive. The ICTY, for example, has secured only twelve convictions since its establishment in 1994. It is estimated that it will have spent one billion US dollars by 2008, which is the estimated time scheduled for the completion of its work.⁹⁵³ By way of comparison, it took the ICTY eighteen months to issue its first indictment. Similarly since 1994, the ICTR has secured only seven convictions. It would therefore be unrealistic to expect the Special Court to complete its work within a period of three years, or to expect it to deal with more than a handful of those suspected of bearing the greatest responsibility for crimes committed in Sierra Leone since 1991. Resources, or the lack thereof, play an important role in determining whether a transitional government will pursue the option of amnesty or of prosecution.

7. 6. Amnesty and the Jurisdiction of the Special Court for Sierra Leone

The Special Court for Sierra Leone was conceived as a non-UN body. Rather, it was created as an agreement between the government of Sierra Leone and the United Nations.⁹⁵⁴ The Secretary-General's role in the process is a supervisory one. With hindsight, it would not have been acceptable to set up an internationalised court outside the framework of the United Nations because the crimes committed are a concern to the international community as a whole.

In his report on the establishment of the Special Court for Sierra Leone the Secretary-

⁹⁵³ Financing of the International Criminal Tribunal for the Prosecutions of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994, GA Res. 55/266 (2001).

⁹⁵⁴ Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, appended to the *Report of the Secretary-General, supra*.

General stated that the government of Sierra Leone concurred with the position of the United Nations that:

While recognising that amnesty is an acceptable legal concept and a gesture of peace and reconciliation at the end of a civil war or an international armed conflict, the United Nations has consistently mentioned the position that amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law.⁹⁵⁵

The Special Court for Sierra Leone unlike the ICTY and ICTR, is not a Chapter VII institution.⁹⁵⁶ The former are UN institutions operating independently of the domestic courts.⁹⁵⁷ The court has primacy over the national courts of Sierra Leone, and does not enjoy primacy over the national courts of third states, as do the ICTY and ICTR.⁹⁵⁸ It was argued that the Special Court's lack of Chapter VII powers may hinder its capacity to issue binding orders, to enforce arrest warrants, to authorise the search and seizure of documents and materials, and to demand that third states, like Liberia and Guinea, surrender suspects. Nevertheless, the fact that the Security Council has authorised the Special Court places an obligation on UN member states to co-operate.⁹⁵⁹

⁹⁵⁵ Para. 22 of the *Report*.

⁹⁵⁶ The difference, though, between the Special Court for Sierra Leone and other *ad hoc* UN tribunals is that in the latter the legislative framework was imposed on the state concerned (Cambodia, Rwanda, the former Yugoslavia), while in the case of Sierra Leone it was an equal negotiating partner with the United Nations. The equal partnership relationship between the member state and the UN stems from the fact that the UN Charter includes respect of the sovereignty of a member state. Another unique feature of the Special Court is its location in Freetown. The court is therefore easily accessible to the victims, and the people of Sierra Leone, who are able to follow its proceedings. The fact that trials will take place in Freetown will send a powerful message to the people of Sierra Leone that justice is being done within the framework of the rule of law. In contrast, the ICTY, with its seat in The Hague, and the ICTR with its seat in Arusha, are far removed from the victims in the former Yugoslavia and Rwanda, and thus the trials of people accused of war crimes have little public impact in these countries.

⁹⁵⁷ Statute for the ICTY, articles 1–3, 23 May 1993 reprinted in 32 *International Legal Materials* (1993) 1192; Statute for the ICTR, articles 1–3, 8 November 1994, reprinted in 33 *International Legal Materials* (1994) 1598. The Sierra Leone Special Court is innovative in that it applies both Sierra Leone penal law and international law, and its jurisdiction is limited to war crimes committed within the territory of Sierra Leone.

⁹⁵⁸ Article 8(2) of the Statute of the Special Court for Sierra Leone, 16 January 2002.

⁹⁵⁹ In cases where a third state refuses to do so, the Security Council may take punitive measures against it, such as imposing sanctions, as it has done with President Charles Taylor. An indictment issued against a suspected war criminal by the proposed Special Court will have the effect of making such a suspect an “international fugitive”, as has happened with Rodovan Karadic and Ratko Mladic of Bosnia, who are

The Special Court's personal jurisdiction is to try *only* those persons who bear "the greatest responsibility for serious violations of international humanitarian law..." since 30 November 1996, when the Abidjan Peace Accord was signed.⁹⁶⁰ The expression "those who bear the greatest responsibility" is subjective, because trying the top commanders will not necessarily produce sufficient justice when lower ranking soldiers responsible for serious offences are not prosecuted.⁹⁶¹ The fact that the temporal jurisdiction does not cover the period since 1991, when the war started, is an acknowledgement of the weaknesses of international criminal prosecution, including the lack of resources.

Like the ICTY and ICTR, the Special Court's subject matter jurisdiction covers crimes against humanity, war crimes and other grave breaches of international humanitarian law.⁹⁶² The Statute of the Special Court explicitly prohibits the granting of amnesty. Article 10 states that amnesty granted to any person falling within the jurisdiction of the Special Court, for crimes against humanity,⁹⁶³ for violations of article 3 common to the four Geneva Conventions and additional Protocol II⁹⁶⁴ and for other serious violations of

wanted by the ICTY, but are still at large. Besides other countries are necessary partners particularly in respect of extradition and general co-operation with the court. The Statute of the Special Court for Sierra Leone makes no provision for the co-operation of the court with third states. It assumes that all accused persons will be found in Sierra Leone.

⁹⁶⁰ Article 1 of the Statute of the Special Court.

⁹⁶¹ International Crisis Group, "The Special Court for Sierra Leone: Promises and Pitfalls of a New Model" Freetown, Brussels, 4 August 2003.

⁹⁶² See *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, supra*, para. 12.

⁹⁶³ Article 2 of the Statute.

⁹⁶⁴ Article 3 of the Statute.

international humanitarian law,⁹⁶⁵ should not be a bar to prosecution. Technically, those who do not fall into this category, even though responsible for serious human rights violations, will benefit from a *de facto* amnesty. However, it seems that amnesty may be granted for such crimes under Sierra Leone's law (also within the jurisdiction of the Special Court) as the destruction of property and arson.⁹⁶⁶

7.7. Reparations and the Reconciliation Function of the Sierra Leone Truth and Reconciliation Commission

The Lomé Agreement provided for the creation of a Truth and Reconciliation Commission (TRC) in order to *inter alia*, address impunity; break the cycle of violence; provide a forum for both the victims and the perpetrators of human rights violations to tell their stories; and to get a clear picture of the past in order to facilitate genuine healing and reconciliation.⁹⁶⁷ The mandate of the TRC was to deal with questions of human rights violations since the beginning of the Sierra Leonean conflict in 1991 and to recommend measures to be taken for the rehabilitation of victims of human rights violations.⁹⁶⁸ The agreement also called for the establishment of a Special Fund for War Victims.⁹⁶⁹ The Commission is expected to make recommendations regarding the Fund, but it will not exercise any control over the operations or the disbursement of the Fund.⁹⁷⁰

The TRC is an independent body, established through an act of parliament, by the

⁹⁶⁵ Article 4 of the Statute.

⁹⁶⁶ Article 5 of the Statute.

⁹⁶⁷ Article XXVI (1) of the Lomé Agreement.

⁹⁶⁸ Article XXVI (2) of the Lomé Agreement.

⁹⁶⁹ Article XXIX of the Lomé Agreement.

⁹⁷⁰ Section 8(6) of the Sierra Leone Truth and Reconciliation Act 4 of 2000, *Gazette*, vol. CXXXI, No. 9, 10 February 2000.

government of Sierra Leone.⁹⁷¹ While the Lomé Agreement unrealistically envisaged that the Commission would be set up within 30 days of signing the agreement, this vision was only realised on 5 July 2002, when the TRC was inaugurated in Freetown.⁹⁷² The Commission is required to submit a comprehensive report with a set of recommendations to the government. The specific mandate of the Commission is:

...to create an impartial historical record of violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone, from the beginning of the conflict in 1991 to the signing of the Lomé Peace Agreement; to address impunity, to respond to the needs of victims, to promote healing and reconciliation and to prevent a repetition of the violations and abuses suffered.⁹⁷³

The main purpose of the TRC is two-fold. Firstly, it aims to investigate the “causes, nature and extent” of gross human rights violations and abuses, and to determine whether such violations “were the result of deliberate planning, policy of authorisation by any government, group or individual, and the role of both internal and external factors in the conflict.”⁹⁷⁴ Secondly, it aims to restore the human dignity of the victims by providing both victims and perpetrators with the opportunity to give an account of human rights violations committed during the armed conflict.⁹⁷⁵ In carrying out these

⁹⁷¹ The TRC for Sierra Leone is a mixed commission, composed of seven commissioners, four of whom are nationals of Sierra Leone and three non-nationals. In order to ensure the transparency and independence of the Commission, the selection of the four national commissioners was co-ordinated by the Secretary-General’s Special Representative, and the office of the United Nations Higher Commissioner for Human Rights (UNHCHR) co-ordinated the appointment of the three international commissioners who are people of integrity and high moral standing. The TRC process enjoyed the support of the UN Commission for Human Rights (UNCHR) since its inception. Even before the idea of a truth and reconciliation process was agreed upon by the parties to the conflict in the Lomé Agreement, the UNCHR had already proposed the establishment of an international commission of inquiry to investigate the gross human rights violations committed in Sierra Leone. The UNHCHR solicited funds from the donor community, and a regular contribution to this process is made through a trust fund. The projected budget of the TRC is US \$ 8.5 million for 15 months. The Commission was inaugurated in Freetown on 5 July 2002.

⁹⁷² International Crisis Group, *Sierra Leone’s Truth and Reconciliation Commission: A Fresh Start?*, Freetown/Brussels, 20 December 2002. Cf. Michelle Parlevliet, “The Truth Commissions in Africa: the Non-Case of Namibia and the Emerging Case of Sierra Leone” 2 *International Law Forum* (2000) 98.

⁹⁷³ Section 6(1) of Act 4 of 2000.

⁹⁷⁴ Section 6(2)(a) of Act 4 of 2000.

⁹⁷⁵ Section 6(2) (b) of Act 4 of 2000.

functions, the Commission shall pay “special attention to the subject of sexual abuse and to the experiences of children within the armed conflict.”⁹⁷⁶ This broad mandate ensures that all parties to the conflict are subject to investigation, including the government and other internal and external agencies.

In addition to engaging in a pedagogical exercise and attempting to reconstruct the national identity for future generations of Sierra Leoneans, the Commission is expected to make recommendations:

...concerning the reforms and other measures, whether legal, political, administrative or otherwise, needed to achieve the object of the Commission, namely, the object of providing an impartial historical record, preventing the repetition of the violations or abuses suffered, addressing impunity, responding to the need of victims and promoting healing and reconciliation.⁹⁷⁷

However, no provision is made for amnesty in exchange for the truth. During the Lomé ceasefire negotiations, blanket amnesty seemed acceptable to all of the parties, who thought it was the best thing to do under the circumstances, even though it was inconsistent with the norms and standards of international law. However, it is expected that the Sierra Leone Truth Commission will make important recommendations on the Special Fund for Victims, and in that way, strike a balance between the rights of victims to an effective remedy and those who *de facto* benefited from the amnesty in the Lomé Agreement. Already the Statute for the Special Court specifically provides that amnesty will not be a bar to the prosecution of serious violations of international humanitarian law.⁹⁷⁸ A decision of the Special Court regarding the compensation of victims of human

⁹⁷⁶ Section 6(2) (b) of Act 4 of 2000.

⁹⁷⁷ Section 15(2) of Act 4 of 2000.

⁹⁷⁸ Article 10 of the Statute of the Special Court.

rights violations is final and binding.⁹⁷⁹

7. 8. The Balanced Approach Model of the Special Court and the TRC: Is Amnesty Still an Option?

Unlike the Special Court, the TRC for Sierra Leone is a home-grown initiative, agreed upon by the conflicting parties during the 1999 Lomè Peace Agreement.⁹⁸⁰ The Special Court, for practical reasons, cannot be expected to try *all* the perpetrators. It will *only* try those “bearing the greatest responsibility,”⁹⁸¹ which leaves room for many other cases to be considered by the TRC, or to be tried by the national courts of Sierra Leone.⁹⁸²

Be that as it may, of particular importance is the relationship between the TRC and the Special Court. The TRC and the independent prosecutor of the Special Court are to investigate all parties, including government forces, who took part in the atrocities. These relate primarily to issues of evidence that might be used before either of these institutions, for example, if both institutions needed to investigate an alleged massacre at a certain place, they surely cannot exhume the same mass grave independently. This implies that, if a proper *modus operandi* is worked out, the two institutions can cooperate to include the sharing of information and resources.⁹⁸³

⁹⁷⁹ Rule 105(B) of the Rules of Procedure and Evidence adopted Pursuant to Article 14 of the Statute of the Special Court for Sierra Leone adopted on 12 April 2002. See www.sierra-leone.org.

⁹⁸⁰ Article XXVI of the Lomè Agreement.

⁹⁸¹ Article 1 of the Statute of the Special Court.

⁹⁸² The TRC will attempt both to avoid a collective allocation of guilt and to set the historical record straight. It will also encourage national reconciliation across the political spectrum and further address the plight of the youth in Sierra Leone including women and young girls. The Special Court, unlike the TRC, cannot be expected to give a historical account of the causes and nature and extent of the conflict in Sierra Leone. However, the Special Court may contribute to a number of important outcomes, such as, restoring the rule of law and setting a precedent for future prosecution of war crimes and crimes against humanity by courts in Sierra Leone (and thus help to improve the legal system of Sierra Leone, since no provision is currently made for the prosecution of war crimes under the penal laws); bringing an end to the culture of impunity, by conveying a clear message that the international community will not tolerate the kinds of atrocities committed in Sierra Leone; avoiding retribution by victims, if those bearing the “greatest responsibility” are punished by an independent and impartial institution.

⁹⁸³ Laura Hall & Nahal Kazemi, “Prospects for Justice and Reconciliation in Sierra Leone” 44 *Harvard*

Moreover, since the TRC is not a court of law, defendants appearing before the TRC might also be *subpoenaed* to appear before the Special Court. As the TRC has only quasi-judicial powers to issue summons and *subpoenas* for the purpose of carrying out its investigations, the Special Court would not be able to invoke the *non bis idem* rule, that is, the accused cannot be tried twice for the same offence.⁹⁸⁴ Obviously, this will affect the willingness of people to testify openly before the TRC. Moreover, in the event of a conflict between an investigation or request of the prosecutor and the TRC, who will resolve it – the courts in Sierra Leone? Such dilemmas need to be discussed in a candid and open forum.

Some may argue that the concerns outlined above are irrelevant, or at least of only academic interest. Counter-arguments on the one hand, include the reminder that the TRC has only a 15-month mandate, after which it is expected to submit its report to the government. However, this mandate can be renewed for a further six months if necessary, bringing the total duration to 21 months. On the other hand, the Special Court will run for at least three years. Also, although the TRC has the power to withhold information provided to it in confidence, the Special Court has primacy over the national courts of Sierra Leone and may also have the power to override the TRC and force it to provide the confidential information.

It is submitted that co-operation between the TRC and the Special Court could be facilitated by addressing the perpetrator's fear of prosecution by granting amnesty to those making statements before the TRC. Those appearing before the Commission must

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⁹⁸⁴ Article 9 of the Statute of the Special Court.

be assured that the information they provide will not be used subsequently as evidence against them before the Special Court. This is consistent with the Act which established the TRC, which states that the Commission shall not be compelled to disclose any information provided to it in confidence.⁹⁸⁵ Such an approach is consistent with the principle of due process and of protection against self-incrimination. However, the information may still be used to prosecute others. In essence, the prosecutor of the Special Court would only proceed against a perpetrator on the basis of independently obtained evidence. The onus of proving that the information was independently obtained lies with the prosecutor of the Special Court.⁹⁸⁶

7. 9. Conclusion

In terms of the balanced approach model proposed in this study, the blanket amnesty in the Lomè Agreement was rejected by human rights organisations and the United Nations, in spite of being the outcome of a legitimate political process, because it was not proportional to the atrocities committed in Sierra Leone, and thus had no rational connection to the peace process. An attempt was made to subvert the rights of victims to seek redress through the courts, by framing the blanket amnesty within the pardon process provided for under the 1991 Constitution of Sierra Leone. Subsequently, the Statute of the Special Court made a clear distinction between pardon and amnesty, and explicitly rejected the latter.

The attributes of any judicial process are legitimacy and independence. Lack of resources due to the economic devastation caused by the war and the perceived lack of

⁹⁸⁵ Section 8 (3) of the TRC Act.

⁹⁸⁶ Priscilla Heyner, Paul van Zyl & Marieke Wierka, "The Special Court and the Truth and Reconciliation Commission in Sierra Leone: Structural and Operational Collaboration" International Centre for Transitional Justice, New York, USA, 20 December 2001 (on file).

independence of the Sierra Leone judiciary prompted the establishment of the Special Court to prosecute only those who bore the greatest responsibility for the atrocities committed since 1996. The TRC is mandated to make recommendations regarding reparations to victims of gross human rights violations. It may bring legal action before the courts in Sierra Leone in terms of relevant national legislation or other competent bodies to claim compensation and, in that way, balance the rights of victims and perpetrators. Finally, the fact that the Special Court will target only the most responsible perpetrators of atrocities committed in Sierra Leone means that it is not necessarily at variance with the TRC process; instead it reinforces the idea that the two institutions are complementary. The underlying message of both institutions is that, while it is necessary to have reconciliation, the people of Sierra Leone also recognise the need for justice.

CHAPTER EIGHT

A TEN-YEAR REVIEW OF SOUTH AFRICA'S AMNESTY PROCESS: TOWARDS A TEMPLATE FOR THE BALANCED APPROACH MODEL

South Africa is not inventing new problems nor is it likely to invent entirely novel solutions. The one novelty it could do itself the favour of inventing would be to learn from history.

Mamphelle Ramphele.⁹⁸⁷

8.1. Introduction

The history of South Africa is characterised by a culture of impunity, not least with respect to norms of humanitarian law. By the end of the 17th century, the nomadic Khoi-Khoi and San people, believed to be the first indigenous people of Southern Africa, were hunted down like game and exterminated by the European settlers.⁹⁸⁸ Later, the Anglo-Boer War (1899-1902) between the British and the Boer Republics, saw the destruction of forty white-inhabited towns and villages, and some 30 000 farms, the lives of more than 27 927 Afrikaner women, old men and children, as well as 17 236 black men, women and children interned in ninety-six concentration camps.⁹⁸⁹ A little-known historical fact is that concentration camps date from that period. Even though the deaths were not deliberate, but were caused by maladministration that resulted in hunger and diseases, no one was held criminally liable for this violation of the laws and customs of war. Instead, amnesty was granted under the 1902 Vereeniging Peace Treaty for all acts related to the war.⁹⁹⁰

⁹⁸⁷ Mamphelle Ramphele, *ALife* (1999) 222.

⁹⁸⁸ *Truth and Reconciliation Commission of South Africa Report*, October, 2000, Chp. 1 *et seq.* (hereinafter the "TRC Final Report"). Cf. David Lewis-Williams (ed.), *Stories that Float from Afar: Ancestral Folklore of the San of Southern Africa* (2001).

⁹⁸⁹ See, generally, AWG Raath & HA Strydom, "The Hague Conventions and the Anglo-Boer War" 24 *South African Yearbook of International Law* (1999) 149.

⁹⁹⁰ See discussion in Chapter Three of this study.

Nearly four decades after the Anglo-Boer War, another war ensued between the National Party (NP) government and the opponents of its racial policies. This came after twelve years of Nationalist Party rule, during which the African National Congress (ANC) had fruitlessly sought to resolve the plight of black people, through both negotiation and passive resistance. After the 1960 Sharpeville massacre, the ANC decided to resort to armed revolt as a means to overcome the government's intransigence. The Pan Africanist Congress (PAC), initiated in 1960 by people who had broken away from the ANC, also decided to resort to armed struggle. Both movements created armed wings; the ANC established *Umkhonto weSizwe* (MK), and the PAC set up the Azanian People's Liberation Army (APLA). Almost simultaneously, and for similar reasons, the South West Africa People's Organisation (SWAPO) decided on an armed revolt against the continued rule of Namibia by the NP government.

In 1961, the NP government passed an amnesty law which exempted security officers involved in the Sharpeville massacre from civil and criminal prosecution.⁹⁹¹ After the 1976 Soweto uprisings the government appointed a commission of inquiry into public violence (the Malan Commission), and a year later passed yet another indemnity law to exempt those who committed serious human rights violations from criminal and civil prosecution.⁹⁹² The NP government almost set a pattern of appointing commissions of inquiry in the aftermath of public uprisings by the oppressed majority, and thereafter, would grant amnesty to the members of the security establishment who were responsible.⁹⁹³ This approach was out of step with mainstream international

⁹⁹¹ Section 2 (1) of the Indemnity Act 61 of 1961.

⁹⁹² Section 1(1) of the Indemnity Act 13 of 1977.

⁹⁹³ For example, other commissions of inquiry on public violence included the Witwatersrand

humanitarian law as it had developed during the previous fifty years, particularly with respect to the four Geneva Conventions of 12 August 1949.⁹⁹⁴

Amnesty was once more granted to the perpetrators of gross human rights violations as part of the political compromise reached after South Africa's first democratic elections in 1994. It is against this background that this chapter examines the amnesty process in the first ten years of South Africa's transitional democracy, its historical genesis, its constitutionality and its validity under international law. The chapter further provides a critique of the extraterritorial effect of the amnesty in the light of South Africa's international law obligations, and particularly in light of the recent decision of the Constitutional Court in the *Basson* case.⁹⁹⁵ Finally, the chapter concludes that, when compared to the amnesties of transitional democracies elsewhere, in particular Sierra Leone, the South African amnesty process is closer to the balanced approach model proposed by this study.

8. 2. The History and Early Genesis of the Amnesty Process in South Africa

The 2nd February 1990 was a turning point in the history of South Africa. President FW de Klerk, former leader of the National Party (NP), committed his government to unbanning the anti-apartheid liberation movements in South Africa; a moratorium was placed on the death penalty; the state of emergency was lifted; and the security legislation was repealed. Nine days later, the world witnessed with awe the

Disturbances (1913); 1914 Rebellion (1916); Disturbances at Moroka, Johannesburg (1948); Durban Riots (1949); Langa Uprisings (1961); Paarl Riots (1963). See Mark Shaw, "The Goldstone Commission: In the Public Eye" 11 *Indicator South Africa* (1993) 55.

⁹⁹⁴ Although the old South African government acceded to the four Geneva Conventions in 1952, it repeatedly refused to ratify the 1977 Additional Protocols Relating to the Protection of Victims of International Armed Conflicts (Protocol I) and Non-International Armed Conflicts (Protocol II), because article 1(4) of Protocol I extended to "armed conflicts in which people are fighting against...racist regimes in the exercise of the right to self-determination."

⁹⁹⁵ *S v Wouter Basson* 2004 (6) BCLR 620 (CC).

unconditional release of Nelson Mandela. The reform process was part of the government's plan to pave the way for a new constitutional order.⁹⁹⁶

Immediately after these dramatic political changes, the country was plunged into widespread violence, particularly in the African townships and hostels. Political instability threatened the ongoing political negotiations between the ANC and the government. In October 1991, FW de Klerk appointed a commission of inquiry, chaired by Justice Richard Goldstone (the Goldstone Commission).⁹⁹⁷ The mandate of the commission was to investigate incidents of public violence and intimidation, and to make recommendations on appropriate measures to prevent such violence. The last commission of inquiry prior to the Goldstone Commission was the Harms Commission, also charged with a similar mandate to investigate allegations of systematic and widespread unlawful activities in the country, including the self-governing territories.⁹⁹⁸ Unlike the self-serving Harms Commission, the Goldstone Commission produced interim reports which made recommendations that were never implemented by either the government or the political actors involved. Nevertheless, the Commission successfully revealed the presence of "Third Force" activities in the security forces, which led to the prosecution of Vlakplaas Commander, Eugene De Kock. This was possible only after

⁹⁹⁶ Address to Parliament, 2 February 1990, *Hansard*, Col. 2, p. 343.

⁹⁹⁷ The Commission was appointed on the 24 October 1991, by the President, in terms of section 3 of the Prevention of Public Violence and Intimidation Act 39 of 1991. The Goldstone Commission investigated, *inter alia*, incidents of taxi violence; activities of the military wing of the Pan Africanist Congress (PAC), the African People's Liberation Army (APLA); alleged activities of the "Third Force" in the security forces of the government; the events surrounding the assassination of the South African Communist Party (SACP) leader, Chris Hani; the illegal importation of arms and the Bisho massacre, which involved ANC supporters and the Ciskei security forces, and led to the death or injury of many people.

⁹⁹⁸ The Commission submitted its report in September 1990, finding that there was no evidence that members of the security forces were linked to the deaths of human rights activists such as Anton Lubowski, Griffith Mxenge and Mathews Goniwe and that there were no "Third Force activities." The Commission was perceived by many as a "cover up" by the government to exonerate itself from criminal liability. See *Report of the Commission of Inquiry into Alleged Murders* (Harms Commission) 1990.

the Chairperson of the Commission, supported by the UN Secretary-General, recommended that some form of indemnity⁹⁹⁹ for members of the security forces was necessary to ensure that those responsible would come forward and give evidence, which would lead to an understanding of the causes of the on-going violence.¹⁰⁰⁰ Subsequently, two high profile meetings followed between the ANC and the government in which it was agreed that in order to break the political impasse it was necessary to grant indemnity to political prisoners.¹⁰⁰¹

8. 3. The 1990 and 1992 Indemnity Legislation

Following agreements reached between the ANC and the NP government, legislation was passed by parliament that set out the criteria for political indemnity. The Indemnity Act¹⁰⁰² provided that the president, as head of the executive, could grant indemnity “...if he was of the opinion that it was necessary *for the promotion of a peaceful constitutional*

⁹⁹⁹The word “indemnity” is used here generally to mean amnesty.

¹⁰⁰⁰ Lynn Berat, “South Africa: Negotiating Change?” in Roht-Arriozza (ed.), *Impunity and Human Rights in International Law Practice* (1995) 271.

¹⁰⁰¹ The first meeting was held in Groote Schuur, Cape Town, in May 1990. At that meeting both parties agreed that there was a need to indemnify certain political prisoners for political offences committed inside or outside South Africa. See “Groote Schuur Minutes” 6 *South African Journal on Human Rights* (1990) 318-322. The ANC and the government agreed that since there was no generally accepted definition of “political offences” or “political prisoners” in international law, the Norgaard principles which applied during the transfer of power in Namibia would be followed. However, a distinction was drawn between political offences and common law crimes. It was agreed that, in determining whether an offence was political, each case would be judged on its own merits and the guiding principles would include, *inter alia*, the reasons why the offence was committed; the context in which the offence was committed; the political objective of the offence; the legal and factual nature of the offence; the relationship between the offence and the political objective sought to be achieved by the perpetrator and whether the act was committed with the approval of the organisation or institution concerned. A second meeting was held in August 1990 in Pretoria at which both parties committed themselves once more to the Groote Schuur Minutes. The ANC agreed to suspend its military operation in return for the NP’s repeal of the security laws. Both parties made a commitment “to do everything in their power to bring about a peaceful solution” in South Africa. See “Pretoria Minutes” reprinted in 6 *South African Journal on Human Rights* (1990) 322 – 324. These meetings were followed by the DF Malan Accord (February 1991) and the National Peace Accord (September 1991), which were also important in paving the way for a new constitutional order in South Africa.

¹⁰⁰² Act 35 of 1990.

solution in South Africa.”¹⁰⁰³ The Act gave the president wide discretionary powers to grant or refuse indemnity. The Act prohibited the civil or criminal prosecution of any person to whom indemnity had been granted.¹⁰⁰⁴

The ANC was dissatisfied with the manner in which the NP government had dealt with the question of indemnity. The ANC maintained that, since apartheid was a crime against humanity, a future democratic government was under an affirmative obligation to prosecute those responsible for such crimes.¹⁰⁰⁵ In October 1992, the government passed yet another law in an attempt to extend the scope of political offences to cater for those who, it was alleged, did not satisfy the criteria laid down in the 1990 Indemnity Act. Despite criticisms, both from within and outside parliament, the President referred the Bill to the President’s Council, largely dominated by the NP. The Bill saw the light of day as the Further Indemnity Act.¹⁰⁰⁶

In terms of this Act, indemnity was extended to take into account the objective of the political act that had been committed. The President could exercise his prerogative powers to grant indemnity, acting in consultation with a newly created body, the Indemnity Council.¹⁰⁰⁷ Like the 1990 Indemnity Act, no civil or criminal prosecution could be instituted against any person to whom amnesty had been granted. The President had the sole power to appoint persons to sit as members of the Indemnity Council.

¹⁰⁰³ Section 1(2) of the Act (emphasis added).

¹⁰⁰⁴ Section 3(4) of the Act

¹⁰⁰⁵ Kader Asmal, “Human Rights and Reparations” *Mayibuye*, November (1991) 30-32; Kader Asmal, “Should De Klerk be Tried?” 3 *Mayibuye*, September (1992) 8 -11.

¹⁰⁰⁶ Act 151 of 1992.

¹⁰⁰⁷ Section 1 of Act 51 of 1992.

Proceedings of the Council were held *in camera* and its records were confidential.¹⁰⁰⁸

The Act further provided that, before people could be granted indemnity, they had to show that they believed that they were promoting or defending a political objective.¹⁰⁰⁹

The Act excluded proportionality in which consideration is given to the relationship between the alleged offence and the political objective as a criterion. Unlike the 1990 Indemnity Act, which required that each case be assessed on its own merits, the new Act excluded such a possibility. As in the case of the 1990 Indemnity Act, the proceedings of the Council were held *in camera* and its records were confidential. No representation was allowed before the Committee. Any disclosure of evidence given before the Committee was punishable with a sentence of twelve months imprisonment.¹⁰¹⁰ A person who had been granted indemnity would have his or her name published in the *Government Gazette*.

The Further Indemnity Act was widely criticised.¹⁰¹¹ The Act opened the way for government to release prisoners who had committed common law crimes.¹⁰¹² The fact

¹⁰⁰⁸ In *Rapholo v State President* 1993 (1) SA 679, Van Dijkhorst J held that the President's discretion as to whether to grant indemnity or not was not fettered by the guidelines agreed upon between the ANC and the government. Cf. *Smith v Minister of Justice* 1991 (3) SA 336.

¹⁰⁰⁹ Section 1(1) defines an "act with a political object" as any act or omission which has been advised, commanded, ordered or performed (a) with a view to the achievement of a political object, or the promoting or combating of an object of any organisation, institution, or body of political nature; (b) with a bona fide belief that such an object will be served; and (c) with the approval or in accordance with the policy of such organisation, institution or body.

¹⁰¹⁰ Section 10 (4) (9).

¹⁰¹¹ For more discussion on this issue see Raylene Keightley, "Political Offences and Indemnity in South Africa" 9 *South African Journal on Human Rights* (1993) 334; Lourens du Plessis, "Observations on Amnesty or Indemnity for Acts Associated with Political Objectives in the Light of South Africa's Transitional Constitution" 57 *Tydskrif vir Hedendaagse-Romeins Hollanse Reg* (1994) 479; Peter Parker, "The Politics of Indemnities, Truth Telling and Reconciliation in South Africa: Ending Apartheid without Forgetting" 17 *Human Rights Law Journal* (1996) 1.

¹⁰¹² For example, many people criticised the release of the ANC's Robert McBride, who was sentenced to life imprisonment for planting a bomb which killed and maimed innocent civilians, and of Barend Strydom ("White Wolf"), leader of the ultra right-wing organisation, for the cold-blooded murder of blacks in the centre of Pretoria, who were believed to have committed common law crimes which were

that the proceedings of the Council were held behind closed doors and that the Committee could not give reasons for its decisions was a clear indication of the government's political opportunism and manipulation of the entire process.¹⁰¹³ The indemnity question became a controversial and highly politicised issue. Suffice it to say that the Further Indemnity Act failed the standards of the balanced approach model proposed in this study because it was the result of an illegitimate government process. Neither did it guarantee the victims of gross human rights violations an effective remedy, nor was provision made for reparations. In short, the two indemnity laws were a charter of self-impunity by a government that anticipated, and sought to avert, the likelihood of prosecution of its agents under a majority government.

8. 4. The ANC and its Human Rights Abuses

Skeletons in the cupboard know no political boundaries. Despite the criticism of the apartheid government, the ANC's record of human rights was not a clean one.¹⁰¹⁴ Even before it was unbanned, the ANC had instituted several internal inquiries regarding allegations of human rights violations among those in exile.¹⁰¹⁵ These investigations came about as a result of several media reports on how the ANC had ill-treated political prisoners and cadres and violated their human rights. These allegations raised more questions than answers regarding the organisation's responsibility to prevent violations and promote respect for human rights, so, in response to these allegations, the ANC

racially and not politically inspired.

¹⁰¹³ Andrie du Toit, "Laying the Past to Rest" 11 *Indicator South Africa* (1994) 63 at 67.

¹⁰¹⁴ *Amnesty International Report*, October, 1992.

¹⁰¹⁵ See for example, *Commission of Inquiry into Recent Developments in the People's Republic of Angola*, Stuart Commission, 14 March 1984; *Report of the Commission of Inquiry set up in November 1989 by the National Working Committee of the National Executive Committee of the African National Congress to Investigate Circumstances Leading to the Death of Mzwakhe Ngwenya (also known as Thami Zulu or TZ)*, Jobodwana Commission, n.d. In the latter, the commission found that Thami Zulu died as a result of TB and AIDS and had been poisoned prior to his death.

instituted several internal commissions of inquiry.

In 1991 a group of former ANC detainees accused of being state agents formed a committee called the Returned Exiles Committee. They demanded that the ANC investigate the allegations that they were state agents. In March 1992, ANC President Nelson Mandela instituted a commission of inquiry chaired by Dr. Zola Skweyiya, with three other members of the ANC, to investigate complaints by former ANC prisoners and detainees in Angola, Tanzania and Zambia, and to make recommendations regarding possible actions to be taken against those found to have been involved in any human rights violations (the Skweyiya Commission).¹⁰¹⁶ The Commission implicated senior ANC members in gross human rights violations and recommended a further investigation into the matter. Although the ANC accepted collective responsibility for human rights abuses among those in exile, it refused to publish the report, on the basis that the report contained inaccuracies. In January 1992, Mr. Mandela, acting in response to the recommendations of the Skweyiya Commission, appointed yet another commission of inquiry, to inquire into complaints by former ANC prisoners and detainees, and to establish if *prima facie* evidence existed that certain members of the ANC had committed cruel and inhuman acts towards such prisoners and detainees (the Motswenyane Commission).¹⁰¹⁷ The Commission found that through the action or inaction of some senior ANC members, serious breaches of human rights had been committed. The Commission recommended that an apology be issued by the organisation to the persons involved or to their next of kin, and that an appropriate form

¹⁰¹⁶ *Report of a Commission of Inquiry into Complaints by Former ANC Prisoners and Detainees*, Skweyiya Commission, Johannesburg, August 1992.

¹⁰¹⁷ See *Report of Inquiry into Certain Allegations of Cruel and Human Rights Abuses Against ANC Prisoners and Detainees by ANC Members*, 20 August, 1993.

of compensation be made.¹⁰¹⁸

Like the indemnity laws passed by the NP government, several internal commissions of inquiry into human rights violations by the ANC during its years in exile failed to comply with the balanced approach model. However, compared to the NP approach, the Motswenyane Commission recommended some form of compensation to those involved or to their next of kin as a *quid pro quo* for the harm suffered. It is clear that there were skeletons in the cupboard on both sides of the political spectrum. Perhaps the only differences were the circumstances and the moral justifications for the violations. Therefore, the question of past human rights violations had to be dealt with carefully to ensure a peaceful transition. It soon became clear that a truth-seeking mechanism, coupled with the granting of amnesty, would be an appropriate model for reconciliation, peace and stability in the new South Africa.¹⁰¹⁹

8. 5. The Kempton Park Constitutional Deal and the Basis for the Granting of Amnesty

A number of circumstances persuaded the political actors in South Africa to consider amnesty as an option over prosecution. Firstly, a number of commissions of inquiry into the violence which plagued the country after the unbanning of political parties had not

¹⁰¹⁸ Cf. the report of the US based human rights organisation, the International Freedom Foundation, which instituted a one-man commission of inquiry into alleged human rights abuses in the ANC detention facilities in July 1992. The Commission implicated senior ANC officials in human rights abuses. Unlike the Motswenyane Commission, the Douglas Report did not receive any serious public attention because the report was perceived as less than even-handed; thus the depth and motive of the investigation were questioned. It was generally observed that the Freedom Foundation had never previously indicated a serious interest in the status of human rights in South Africa. See, *The Report of the Douglas Commission*, 1993.

¹⁰¹⁹ Kader Asmal, "Coping with the Past: A Truth Commission for South Africa" 1 *Mayibuye* (1994) 924: "It was because of the need for a comprehensive opening of the books, for full disclosure and accountability that the National Executive Council (ANC) at its August 1993 meeting proposed that a National Truth Commission be set up to investigate all abuses that had flowed from the policy of apartheid".

come up with clear answers. It was widely perceived that there was a “Third Force” that orchestrated “black on black” violence, but there was insufficient evidence to support the allegation. The Goldstone Commission’s achievements were made possible mostly because it promised to grant amnesty in exchange for the truth. It therefore laid the foundation for the later decision to grant amnesty.

Secondly, even though the ANC pushed for the prosecution of perpetrators of apartheid atrocities, it was apparent that apartheid perpetrators had successfully covered their tracks. The question of evidence and the expense of pursuing prosecutions were highlighted as critical factors in the balanced approach model, and they played an important part in South Africa’s peace process. General Magnus Malan, charged with the 1989 Kwamakhuta massacre, was acquitted after a marathon trial which cost the taxpayer approximately R12 million, is a case in point. The question of obtaining the evidence needed to convict perpetrators of apartheid crimes weighed heavily on the minds of those who came to consider amnesty in preference to futile prosecutions. Moreover, prosecutions were likely to be seen by supporters of the apartheid government as a “witch-hunt”.

Thirdly, the power of the security establishment to undermine a legitimate democratic order was real.¹⁰²⁰ The fear that a bath blood would sooner or later ensue had been widely predicted.¹⁰²¹ Legend has it that amnesty was never a subject of full discussion

¹⁰²⁰ In 1993, President FW De Klerk dismissed or suspended 23 senior white military officers and six generals – including Wouter Basson - who were involved in “third force” activities. Again, immediately after the 1994 democratic elections and the establishment of a single defence force consisting of seven defence forces of the former homelands, former South African Defence Force (SADF) and non-statutory forces (ANC, APLA, IFP Self-Defence Units), rumours circulated of a possible mutiny and even a *coup d’etat* by lower ranking officers of the defence force. An investigation by Justice Richard Goldstone uncovered an organised campaign within the military and the police to discredit the ANC during the transition process.

¹⁰²¹ This was indeed true, particularly after the Johannesburg International Airport was bombed a few days before the 1994 first democratic elections.

at the Kempton Park negotiations and that it came about by sheer accident.¹⁰²² It is for this reason that the initial draft of the Interim Constitution (IC) did not contain a substantive provision on amnesty.¹⁰²³ After the arduous task of drafting the Constitution had been completed and the draft text had become available to all, members of the security forces became aware that the Constitution made no provision for amnesty in a post-apartheid South Africa. Senior members of the security forces stated their position unequivocally: that they would not guarantee the safety of the elections if the amnesty issue was not settled in the Constitution itself.¹⁰²⁴ This position no doubt posed a potential threat of civil war, a disruption of the first democratic election, and the derailment of the peace and reconciliation process. The threat was indeed serious, considering the influence of such senior members of the security establishment as General Constand Viljoen, who commanded a great deal of respect within the military establishment and amongst some right-wing organisations. Intense political discussions resulted in the convening of an urgent meeting to address the issue of amnesty. It was agreed that a provision dealing with amnesty be written into the Interim Constitution, which would bind the new government to pass an amnesty law.¹⁰²⁵

Amnesty, therefore, came about as a result of a compromise initiated and driven by domestic political leaders. Amnesty, in the context of the need for co-existence, reconciliation and justice, was one of the most difficult issues that faced the negotiators

¹⁰²² Speech by Justice Albie Sachs, “The Origin of the South African Truth and Reconciliation Commission” Seminar Series by Judges’ Researchers, Constitutional Court of South Africa, 23 March 1998 (on file).

¹⁰²³ See, John Dugard, “Retrospective Justice: International Law and the South African Model” in James McAdams (ed.), *Transitional Justice and the Rule of Law in New Democracies* (1997) 269.

¹⁰²⁴ Albie Sachs, *supra*.

¹⁰²⁵ John Dugard, *supra*.

after the demise of apartheid. Prosecution of those responsible for gross human rights violations would have threatened a peaceful transition to democratic rule. Prosecution was also not possible given the fact that there was no victor from either side of the conflict. The compromise was conditional amnesty upon application only. It was given effect through legislative means in terms of the 1993 Interim Constitution (IC)¹⁰²⁶, confirmed by the 1996 new Constitution (NC),¹⁰²⁷ and given effect by the 1995 Promotion of National Unity and Reconciliation Act.¹⁰²⁸ The Act established a commission whose task was to assemble a complete picture of the past atrocities, facilitate the amnesty process, and promote national reconciliation among the people of South Africa. A significant development during this period was that, for the first time in the history of South Africa, an amnesty process was the result of a legitimate political process, which is an important element in the balanced approach model.

8. 6. The Constitutional Framework of the Truth and Reconciliation Commission and the Amnesty Process

When the 1993 Interim Constitution came into effect, a Postamble appeared at the end of the Constitution headed, *National Unity and Reconciliation*, which *inter alia* provided that:

In order to advance such *reconciliation and reconstruction*, *amnesty shall be granted* in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedure, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.¹⁰²⁹

¹⁰²⁶ Section 132(4) of Act 200 of 1993.

¹⁰²⁷ Section 22 (Transitional Arrangements), of Act 108 of 1996.

¹⁰²⁸ Act 34 of 1995.

¹⁰²⁹ Emphasis added.

Subsequently, the amnesty cut-off date was set at 6 December 1993, the date on which the negotiations for an Interim Constitution and multiparty democracy concluded. It was extended to 10 May 1994 (when the first democratically elected President, Nelson Mandela, was inaugurated). The rationale of this decision, which required the amendment of the Interim Constitution, was:

...due largely to pressure by, on the one hand, the white right-wing (the Afrikaner Weerstandsbeweging (AWB) and Afrikaner Volksfront which opposed the elections by violent means, and on the other hand, black groups such as the Pan Africanist Congress (PAC) and Azanian Peoples Liberation Army (APLA), which had continued the 'armed struggle' during the negotiation process. It became clear...that such an extension would enhance the prospects of national unity and reconciliation, because it would allow these groupings to participate in the amnesty process.¹⁰³⁰

In terms of section 232(4) of the Interim Constitution, headed *Transitional Arrangements*, it is stated that the Postamble:

...shall not...have lesser status than any other provision of this Constitution and such provision shall for all purposes be deemed to form part of the substance of the Constitution.¹⁰³¹

Section 22 (*Transitional Arrangements*) of the new Constitution provides that:

(1) Notwithstanding the other provisions of the new Constitution and despite the repeal of the previous Constitution, all the provisions relating to amnesty contained in the previous Constitution under the heading "National Unity and Reconciliation" are deemed to be part of the new Constitution for the purposes of the Promotion of National Unity and Reconciliation Act, 1995 (Act 34 of 1995), as amended, including for the purposes of its validity.

(2) For the purposes of subitem (1), the date "6 December 1993", where it appears in the provisions of the previous Constitution under the heading "National Unity and Reconciliation", must be read as "11 May 1994".¹⁰³²

¹⁰³⁰ TRC Final Report, vol. 1, para. 63.

¹⁰³¹ Emphasis added.

¹⁰³² It is important to note that in the *First Certification* case, one of the reasons for the Constitutional Court not to certify the draft text of May 1996 submitted before it by the Constitutional Assembly was that, effectively, the Promotion of National Unity and Reconciliation Act 34 of 1995 (as amended) was immunised from constitutional review. See *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (10) BCLR 1253 para. 150.

The Postamble to the IC was therefore the constitutional basis for the creation of the Truth and Reconciliation Commission with its power to grant amnesty. This sparked the debate on how a truth and reconciliation commission should deal with the legacy of apartheid. Those opposed to amnesty predicted that any legislation granting amnesty to perpetrators of gross human rights violations would not pass constitutional muster when challenged before the Constitutional Court.¹⁰³³ The right-wing views were that a truth and reconciliation commission process would be perceived as a “witch-hunt” against the white community.¹⁰³⁴ In June 1995, after a highly heated debate in parliament, the Bill was adopted. The Promotion of National Unity and Reconciliation Act came into operation in July 1995.¹⁰³⁵

8. 6. 1. Objectives of the Truth and Reconciliation Commission (TRC)

The objectives of the TRC as set out in the Act were to *promote national unity* and bring about *reconciliation* between all the peoples of South Africa; to facilitate the granting of *amnesty* and to make recommendations regarding *measures to be taken in respect of victims* of human rights violations and ways to prevent any future recurrence of human rights violations.¹⁰³⁶ The Commission was expected to give “*as complete a picture as*

¹⁰³³ This view was supported by two decisions of the Ciskei Supreme Court. In *Mantinkinca and Another v Council of State, Ciskei & Another* 1994 (1) BCLR 17 (Ck) an application was made by the applicants seeking a declaration of invalidity of the Special Indemnity Decree 7 of 1993, passed by the Ciskei government after the Bisho massacre, in which several people were killed and many injured. The decree granted unconditional indemnity to members of the Ciskei security forces for such actions. Heath J held that the decree was unconstitutional because it violated fundamental rights to equal protection before the law; it interfered with citizen’s rights to freedom of security of the person and the right to life and it violated the right to be heard by an impartial court of law. Similarly in *Qokose v Chairman, Ciskei Council of State & Others* (1994) 2 SA 198 (Ck) the General Division of the Ciskei court declared certain impugned provisions of the 1958 Police Act and the Defence Act of 1957, providing for civil and criminal immunity for crimes committed by members of the security forces, to be unconstitutional on the basis that they violated civilians’ rights to equal protection of the law.

¹⁰³⁴ Gerhard Werle, “Without Truth No Reconciliation: The South African *Rechtstaat* and the Apartheid Past” 1 *Journal on Law and Politics in Africa, Asia and Latin America* (1996) 59.

¹⁰³⁵ Act 34 of 1995 (as amended).

¹⁰³⁶ Sections 3(1) - (4). Emphasis added.

possible of the causes, nature, and extent of human rights violations committed from 1 March 1960 to 10 May 1994.”¹⁰³⁷ In essence, as the balanced approach model proposes, apart from being the result of a legitimate political process, the Act attempted to balance the granting of amnesty with “measures to be taken in respect of victims” and in that way prevent future human rights violations.

The balancing process was evident in the manner in which the Commission was structured for the purposes of performing its tasks. The Commission consisted of three committees: the Committee on Human Rights Violations (HRV); the Committee on Rehabilitation and Reparations (RR); and the Amnesty Committee.¹⁰³⁸

8.6.2. The Human Rights Violations Committee

The Committee on Human Rights Violations was responsible for gathering information on human rights violations that took place between 1 March 1960 and 10 May 1994.¹⁰³⁹ Whenever necessary, the Human Rights Committee could make such information available to the Amnesty or to the Rehabilitation Committees. After investigations and

¹⁰³⁷ Several features distinguish the South African Truth and Reconciliation Commission from those in Latin American countries. Although the Commission was not a court of law, it had powers to enable it to carry out its functions properly and efficiently. Like a criminal court, the Commission had the power to *subpoena* witnesses to appear before it. The person subpoenaed to give evidence before the Commission could not be compelled to give evidence, or to produce an article, which could incriminate him unless such a demand was justifiable and reasonable in an open and free society. Witnesses had the right to legal representation. The Commission could provide legal representation at its own cost if the person so subpoenaed was indigent. The Commission also had the right to search and seize. The Commission had an Investigation Unit which carried out investigations on behalf of the Commission. Investigations were similar to those in criminal proceedings and included inspection *in loco* and the protection of witnesses. A warrant to search for, and seize, documents was issued in direct consultation with either a magistrate or a judge with jurisdictional powers. The hearings of the Commission were held in public unless the interests of justice required otherwise. As in a court of law, a person appearing before the Commission was obliged to make an oath before the Commission. The Act made provision for the creation of a Limited Witness Protection Programme to be initiated by the Minister of Justice, to ensure transparency and accountability. Sections 29 – 35 of the Act.

¹⁰³⁸ See Chp. 3 of the Act.

¹⁰³⁹ Section 14.

the gathering of information, the Human Rights Committee could make recommendations regarding reparations to victims, immediate temporary measures of reparation to victims and the witness protection programme.¹⁰⁴⁰

In terms of section 15(1) of Act 34 of 1995:

When the Committee finds that a gross violation of human rights has been committed and if the committee is of the opinion that a person is a victim of such violation, it *shall* refer the matter to the Committee on Reparation and Rehabilitation for its consideration in terms of section 26.

and, further:

...*shall*, at the request of the Committee on Reparation and Rehabilitation, furnish that Committee with all the evidence and other information relating to the victim concerned or conduct such further investigation or hearing as the said Committee may require.¹⁰⁴¹

The Human Rights Violations Committee (HRV) “*shall* at the conclusion of its functions submit to the Commission a comprehensive report of all its activities and findings... .”¹⁰⁴²

8.6.3. Victims and the Procedure of the Rehabilitations and Reparations Committee

The Rehabilitation and Reparations Committee “...*shall* consider matters referred to it by ...the Committee on Human Rights Violations in terms of section 15(1).”¹⁰⁴³ The Rehabilitations and Reparations Committee may request the Human Rights Violations Committee to furnish it with information regarding victims concerned as the Committee

¹⁰⁴⁰ Section 4 (f) - (g).

¹⁰⁴¹ Section 15 (2). Emphasis added.

¹⁰⁴² Section 14 (2).

¹⁰⁴³ Section 25 (1) (a) (bb).

may require.¹⁰⁴⁴ Section 26 provides another route for a person referred to the Human Rights Violations Committee to gain access to the Rehabilitation and Reparations Committee. Section 26 provides that a person referred to the Rehabilitation and Reparations Committee by the Human Rights Committee “*may* apply to the committee for reparation in the prescribed form.” After considering the matters referred to it, and if:

...the Committee is of the opinion that the applicant is a victim, it *shall*, having regard to criteria as prescribed, *make recommendations*...in an endeavour to restore the human and civil dignity of such victim.¹⁰⁴⁵

The recommendations of the Rehabilitation and Reparations Committee “...*shall* be considered by the President with a view to making recommendations to Parliament and making regulations.”¹⁰⁴⁶ The President’s recommendations:

...*shall* be considered by the joint committee and the decision of the said committee *shall*, when approved by Parliament, be implemented by the President by making regulations .¹⁰⁴⁷

The “Joint Committee *may* also advise the President in respect of measures that should be taken to grant urgent interim reparation to victims.”¹⁰⁴⁸ Once the recommendations of the President have been accepted and approved by the Joint Committee, the President will make regulations governing reparations. In making regulations the President:

- (a) *shall*-
 - (i) determine the basis and conditions upon which reparation *shall* be granted;
 - (ii) determine the authority responsible for the application of the regulations;and
- (b) *may*-
 - (i) provide for the revision and, in appropriate cases, the discontinuance or

¹⁰⁴⁴ Section 15(2).

¹⁰⁴⁵ Section 26 (3). Emphasis added.

¹⁰⁴⁶ Section 27(1). Emphasis added.

¹⁰⁴⁷ Section 27 (2).

¹⁰⁴⁸ Section 27 (4).

- reduction of any reparation;
- (ii) prohibit the cession, assignment or attachment of any reparation in terms of the regulations, or the right to any such reparation;
- (iii) determine that any reparation received in terms of the regulations *shall* not form part of the estate of the recipient should such estate be sequestered;
- and
- (iv) provide for any other matter which the President *may* deem fit to prescribe in order to ensure an efficient application of the regulations.¹⁰⁴⁹

The President “*may*... in consultation with the...Minister of Finance, establish a Fund” to be known as the President’s Fund.¹⁰⁵⁰ The purpose of the fund is to ensure that money appropriated by parliament and that donated by other sources “*shall* be...payable to victims by way of reparation in terms of regulations made by the President.”¹⁰⁵¹ Let us now examine whether, in reality, the rights of victims to claim compensation, as one of the constituent elements of the balanced approach model, was attainable or not.

8. 6. 4. Do Victims have a Right to Reparations Under the Act?

While the Act empowered the TRC to grant amnesty, it had no similar powers in respect to reparations. It could only make recommendations regarding individual reparations to victims, including urgent interim measures. The power to implement these recommendations was reserved to the President in consultation with parliament.¹⁰⁵² The Human Rights Violations Committee and the Rehabilitation and Reparations Committee are required to make “recommendations” regarding reparation.¹⁰⁵³ Reparation includes “any form of compensation, *ex gratia* payment, rehabilitation, restitution or

¹⁰⁴⁹ Section 27(3). Emphasis added.

¹⁰⁵⁰ Section 42.

¹⁰⁵¹ Section 42(2).

¹⁰⁵² Section 42.

¹⁰⁵³ Sections 26 & 27.

recognition.”¹⁰⁵⁴

The language used in the provisions cited above seems to suggest that victims have a justiciable right to reparations. In the interpretation of statutes the use of the imperative “shall,” depending on the context in which it is used, is generally directive or mandatory.¹⁰⁵⁵ The consistent use of the imperative “shall” as used in the context of the Act denotes a language of command.¹⁰⁵⁶ It is a strong indication that parliament has a mandatory obligation to pay reparations to victims of past human rights violations. The Act therefore excludes the discretionary powers of parliament or the executive.

If victims can establish a right to reparations, do they have an enforceable remedy where either parliament or the executive has failed to fulfil its statutory obligations? The Act does not provide a mechanism for appeal, either internally or externally, against the decision of any of these committees. It is therefore not clear to what extent parliament or the executive can be compelled to fulfil its statutory functions. According to Lawrence Baxter:

¹⁰⁵⁴ Section 15(1).

¹⁰⁵⁵ Lourens du Plessis, *Interpretation of Statutes* (1986) 143 - 147.

¹⁰⁵⁶ See *Black's Law Dictionary* (1994) “In common or ordinary parlance, and in its ordinary signification, the term ‘shall’ is a word of command, and one which has always or which must be given a compulsory meaning as denoting obligation. It has a peremptory meaning, and it is generally imperative or mandatory. It has the invariable significance of excluding the idea of discretion, and has the significance of operating to impose a duty which may be enforced, particularly if public policy is in favour of this meaning, or when addressed to public officials or where the public or persons have rights which ought to be exercised or enforced, unless a contrary intent appears”.); *Cf. Sader v Natal Committee, Group Areas Board* 1957 (2) SA 300 (N) (“The legislature has chosen to say that the petition shall be signed by the petitioner, and this is equivalent to providing that it *must* be so signed”) (*Per* Kotze J); *Messenger of Magistrate's Court, Durban v Pillay* 1952 (3) SA 678 (AD) 683 (“The Afrikaans version has the categorical imperative ‘moet.’ If a statutory command is couched in such peremptory terms it is a strong indication ... that the issuer of a command intended disobedience to be visited with nullity.”); *In re Burton & Blinkhorn* (1903) 2 KB 300 (“providing that a solicitor committing certain offences set out in the provisions of the act ‘shall and may be struck from the roll’ was held by the court to mean that the court had no discretion but to strike the solicitor off the roll.”).

Although public power is always coupled with some duty, this does not necessarily imply that there is a duty owed to specific individuals: it might only be owed to the legislature or the “public in general.” Only [in those circumstances] where the statute may be construed in such a way that it is clear that the duty is one which is owed not only to the public but also to specific individuals will an individual right to demand its performance arise. If this is not the case, the complainant will have no standing (*locus standi*) to challenge the breach of the duty in court.¹⁰⁵⁷

It would seem that victims do not have *locus standi* to compel the present or subsequent parliaments to fulfil their statutory obligation. Even if they can prove the existence of a right to compensation, it would be difficult to compel either parliament or the executive to adhere to its statutory duties. What the Act does is to create *ahope* for victims that some day they will receive reparations, without providing a remedy in cases where such a “promise” is not fulfilled. As Werle says:

The exclusion of claims is an act of charity for the responsible persons, but can affect the victims severely. The harshness of the provision is tempered only by the fact that cases relevant to damages issues are passed on to the Compensation Committee.¹⁰⁵⁸

In addition, the Act provides *inter alia* that when dealing with victims’ procedures the Commission “shall be expeditious... and accessible.”¹⁰⁵⁹ In short, the Act does not provide a *quid pro quo* mechanism for the obliteration of victims’ rights. Instead it creates a “hope” that someday victims of gross human rights violations will receive reparations. It therefore comes as no surprise that both the amnesty and reparations processes were challenged in court because they do not live up to the balanced approach model proposed by this study. Before considering these challenges, let us consider the amnesty procedure for perpetrators of gross human rights violations under the Act.

¹⁰⁵⁷ See Lawrence Baxter, *Administrative Law* (1984) 411.

¹⁰⁵⁸ Gerhard Werle, *supra* at p. 61.

¹⁰⁵⁹ Section 11 (c).

8. 6. 5. Perpetrators and the Amnesty Procedure

A person seeking amnesty had to apply to the Amnesty Committee. S/he had to prove that an act for which amnesty was sought was committed during the period within the mandate of the Commission and was *politically motivated*, or, was committed in order to carry out the objectives of a particular political organisation or institution.¹⁰⁶⁰ More importantly, the applicant had to make a *full disclosure* of all the acts committed.¹⁰⁶¹ The granting of amnesty extinguished criminal and civil liability.¹⁰⁶² An applicant who failed to comply with any of the stipulated conditions was denied amnesty by the Committee. The Amnesty Committee was a quasi-judicial body and any person aggrieved by its decision could apply for judicial review in terms of the Constitution.¹⁰⁶³ Where an application for amnesty is refused and “criminal or civil proceedings were suspended pending a decision of the amnesty committee, and such an application is refused, the court concerned *shall* be notified accordingly.”¹⁰⁶⁴

Despite the fact that the Amnesty Committee has been criticised¹⁰⁶⁵ on the basis that it negated the work of the two other committees - the Human Rights Violations Committee and the Rehabilitation and Reparations Committee - it has been complimented equally,

¹⁰⁶⁰ In terms of section 20(3) whether a particular act constitutes an “act associated with a political objective” shall be decided with reference to the following criteria: (a) the motive of the person who committed the act; (b) the context in which the act was committed; (c) the legal and factual nature of the act, including its gravity; (d) the target of the act whether it was directed against private or public institutions, private individuals or political opponents; (e) the ordering or approval of the act by the state or a political body; and (f) the proportionality between the act and its goal.

¹⁰⁶¹ Section 20(1) (c).

¹⁰⁶² Section 20 (7) (a).

¹⁰⁶³ *Gerber v Kommissie vir Waarheid en Versoening* 1998 (2) SA 559 (T).

¹⁰⁶⁴ Section 21 (2) (a).

¹⁰⁶⁵ See Tapio Puurunen, *The Committee on Amnesty of the Truth and Reconciliation Commission of South Africa*, Faculty of Law, University of Helsinki (2000); Tapio Puurunen, “The Committee on Amnesty of the Truth and Reconciliation Commission of South Africa: A New Model for Conflict Resolution” 9 *Finnish Yearbook of International Law* (1998) 297.

not only on the number of amnesty applications it received,¹⁰⁶⁶ but also on its uniqueness and innovative approach:

No other state had combined this quasi-judicial power with the investigative tasks of a truth-seeking body. More typically, where amnesty was introduced to protect perpetrators from being prosecuted for the crimes of the past, the provisions were broad and unconditional, with no requirement for individual application or confession of particular crimes. The South African format had the advantage that it elicited detailed accounts from perpetrators and institutions, unlike commissions elsewhere which have received very little co-operation from those responsible for past abuses.¹⁰⁶⁷

However, with hindsight, because one incentive for coming forward was the threat of prosecution, the results of the process were mixed. Perpetrators who did not apply for amnesty failed to do so because in many cases their identities were unknown.

Comparatively speaking, the work of the Amnesty Committee was entirely different from that of the President's Council under the 1992 Further Indemnity Act. Unlike the President's Council, which held its proceedings behind closed doors, the proceedings of the Amnesty Committee were open to the public unless the interests of justice required otherwise.¹⁰⁶⁸ Unlike the other two Committees, which were expected to write a report to the Commission, the Amnesty Committee had comparatively greater powers. The Amnesty Committee enjoyed *some* form of independence and autonomy within the Commission, except that its decisions could be overruled by a court of law.

While an attempt was made to strike a balance between the "hope" of victims that they might receive reparations, and the perpetrators, by making amnesty conditional upon application (proportionality test), this did not go far enough. The "promise" of reparations did not stop victims from testing their rights to an effective remedy, hence

¹⁰⁶⁶ It is estimated that some 8 000 people applied for amnesty.

¹⁰⁶⁷ *TRC Final Report*, vol. 1, p. 54.

¹⁰⁶⁸ Section 29.

the challenge to the amnesty provisions of the Promotion of National Unity and Reconciliation Act.

8.7. The Constitutionality of the Amnesty Provisions

The establishment of the Truth and Reconciliation Commission was preceded by several challenges before the High Courts.¹⁰⁶⁹ The Azanian People's Organisation (AZAPO) supported by family members of the prominent political and human rights activists, Steve Biko and Griffith Mxenge, challenged amongst others the civil and criminal provisions in the National Unity and Reconciliation Act.¹⁰⁷⁰

The attack was based on three grounds. Firstly, it was alleged that the word “amnesty” as used in the Postamble was not intended by the drafters of the Constitution to exonerate perpetrators, including the state, from criminal and civil liability. Secondly, applicants alleged that section 20(7) of the Act, which effectively granted immunity against criminal and civil liability once amnesty had been granted, violated the right of access to courts in terms of section 22 of the interim Constitution. Thirdly, applicants contended that not only did the impugned section violate a fundamental constitutional right, it was also a breach of international customary law, and in particular the 1977 Additional Protocols to the 1949 Geneva Conventions.

The High Court held that the violation of section 22 of the Constitution was justified on the basis that the granting of amnesty was an incentive for perpetrators to “make full

¹⁰⁶⁹ See, for example, *Nieuwoudt v The Truth and Reconciliation Commission* 1997 (2) SA 70 (C); *Truth and Reconciliation Commission v Du Preez & Another* 1996 (3) SA 997 (CPD), and *Williamson v Schoon* 1997 (3) SA 1053 (C).

¹⁰⁷⁰ *Azanian People's Organisation (AZAPO) & Others v President of the Republic of South Africa & Others* 1996 [6] All SA 15 (C).

disclosure” about past atrocities. Should a person coming forward to tell the truth expose himself or herself either to civil or criminal liability, this would have been a great disincentive, and could have defeated the purposes of the Act, namely, truth, reconciliation and the reconstruction of society. The application was turned down.

The applicants’ subsequently filed an application for direct access to the Constitutional Court. Due to the urgency of the matter, the Constitutional Court rapidly handed down a unanimous ruling that the impugned provisions of the Act were not unconstitutional.¹⁰⁷¹

Writing on behalf of the majority, the late Ishmael Mahomed, then Deputy President (DP) of the court, held that although impunity was wholly unacceptable, the philosophy underpinning the transitional process in South Africa was unique:

It was wisely appreciated by those involved in the preceding negotiations that the task of building such a new democratic order was a very difficult one because of the previous history and the deep emotions and indefensible inequities it had generated; and that this could not be achieved without a firm and generous commitment to reconciliation and national unity.¹⁰⁷²

Mahomed DP held that as a result of “...what transpired in this shameful period... shrouded in secrecy it would have been difficult to uncover the truth.”¹⁰⁷³ The Act sought to deal with this problem by ensuring that victims of human rights violations “receive the collective recognition of a new nation” through a cathartic process of revealing what happened to their loved ones.¹⁰⁷⁴ Perpetrators were only granted amnesty in exchange for the truth. Criminal and civil immunity was therefore an

¹⁰⁷¹ *AZAPO & Others v The President of the Republic of South Africa & Others* 1996 (8) BCLR 1015 (CC).

¹⁰⁷² *AZAPO* case, para. 2.

¹⁰⁷³ *AZAPO* case, para. 17.

¹⁰⁷⁴ *AZAPO* case, para. 17.

incentive to attract perpetrators to come forward. Besides, truth-telling gives perpetrators the opportunity “to obtain relief from the burden of guilt or an anxiety they might be living with for many years.”¹⁰⁷⁵

As in the court *a quo*, the Constitutional Court came to the conclusion that the decision to grant amnesty to perpetrators was a “deliberate choice” by the negotiators of the Constitution.¹⁰⁷⁶ The court particularly emphasised that the amnesty procedure in the Act calls for accountability and is “not a blanket amnesty against criminal prosecution for all and sundry...”.¹⁰⁷⁷ After a brief comparative survey of the experiences of truth commissions elsewhere in the world, Mahomed DP concluded that there was no universal method for dealing with past human rights violations.¹⁰⁷⁸

On the question of state immunity, the court concluded that it had the same consequences and effects as individual immunity. There is a great risk that former government officials could destroy evidence, thus leaving victims without knowledge of what had happened during the dark years of our history. Another strong possibility was that victims could use the testimony of perpetrators to hold the state liable for gross human rights violations.¹⁰⁷⁹ The decision not to hold the state vicariously liable does not mean that the state gets off scott free. The Act provides that the state shall oversee the

¹⁰⁷⁵ AZAPO case, para. 17.

¹⁰⁷⁶ AZAPO case, para. 19.

¹⁰⁷⁷ AZAPO case, para. 32.

¹⁰⁷⁸ AZAPO case, para. 24.

¹⁰⁷⁹ AZAPO case, para. 57 (*per* Didcott J).

reparations process, and no other structure could do so.¹⁰⁸⁰ Without amnesty, the situation might have led to anarchy and the transition to democracy might have failed.

Mahomed DP acknowledged that the question of reparation was indeed the most difficult issue, considering the scarcity of resources. However, it was nevertheless, part of the “reconstruction of society” as contemplated by the Constitution and the Act.¹⁰⁸¹ Regarding the applicability of the 1977 Additional Protocols, the court held they did not apply to the South African conflict because the government was not a signatory to the convention. In terms of articles 95 and 96 of Protocol II of the Geneva Conventions a copy of the declaration was never deposited with the Swiss Federal Council by the ANC as required.¹⁰⁸²

The late Justice Didcott in his concurring opinion emphasised the dilemma of the balanced approach model particularly the difficulty confronting victims in securing reparations. Justice Didcott acknowledged that it would have been appropriate in the present case to test the violation of section 22 through a conventional section 33 limitations analysis, because “...once a claim is unenforceable...it can never generate a justiciable dispute over its substantiation and the right does not then enter into the reckoning.”¹⁰⁸³ Considering whether section 33 has any application in the present case, Justice Didcott concluded that the denial of the right will not pass constitutional muster, unless one adopts the approach that the amnesty provision is authorised by, and is part

¹⁰⁸⁰ *AZAPO* case, para. 57 (*per* Didcott J).

¹⁰⁸¹ *AZAPO* case, para. 48.

¹⁰⁸² *AZAPO* case, para. 29.

¹⁰⁸³ *AZAPO* case, para. 48.

of, the Constitution which the court adopted.¹⁰⁸⁴

It is important to consider the significance and correctness, or otherwise, of the *AZAPO* decision. Firstly, the textual meaning of the word “amnesty” as used in the Postamble to determine whether its usage and meaning are consistent with what the legislature intended to achieve when promulgating the Promotion of National Unity and Reconciliation Act. Secondly, it must be asked whether the manner in which the court applied international law could have materially affected its reasoning and conclusion in an attempt to balance the interests of victims *vis-à-vis* the amnesty process.

8.7.1. The Textual Meaning of the Word “Amnesty” as Used in the Postamble

Firstly, section 39 (2) of the 1996 Constitution places an injunction on the courts, tribunals or forums, that when developing the common law or customary law (i.e., indigenous law) they “must promote the spirit, purport and objects of the Bill of Rights.” It may be argued that the Postamble is not part of the Bill of Rights and therefore reference to “the need for *ubuntu* but not for victimisation” was irrelevant for the purposes of prosecution or claims for reparation by victims of gross human rights violations. On the contrary, in terms of section 36, the rights contained in the Bill of Rights are not absolute and may be limited to the extent that such a limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. It was in the national interest to limit the right of access (section 22 of the IC) in order to achieve national reconciliation by granting amnesty to perpetrators of gross human rights violations committed during the apartheid years. Conditional amnesty was therefore the least restrictive means to achieve national

¹⁰⁸⁴ *AZAPO* case, para. 54.

reconciliation as expressed in the African concept of *ubuntu*.¹⁰⁸⁵ Equally, the Constitution would also require that reparations as a *quid pro quo* for the granting of amnesty be paid in order to restore the human dignity of victims of gross human rights violations committed during the years of apartheid. It is in that context that the Promotion of National Unity and Reconciliation Act provides that whenever it is possible:

informal mechanisms for the resolution of disputes, including mediation, arbitration and any procedure provided for by *customary law and practice* shall be applied, where appropriate, to facilitate reconciliation and redress for victims.¹⁰⁸⁶

The TRC as a “forum” sought to promote the development of customary law through its embrace of the restorative model of justice as opposed to the retributive model. Hence the personal views of victims and perpetrators alike, articulated in the Commission’s report, is that reconciliation in the new South Africa was not possible without forgiveness.¹⁰⁸⁷ Indeed the Commission found the notion of reconciliation inextricably linked to the African concept of *ubuntu* and to restorative justice.¹⁰⁸⁸ Although it found the reconciliation process a complex issue, it emphasised that reconciliation was a crucial element of a restorative model of justice. On that basis it may be argued that the drafters of the Constitution and subsequently the Promotion of National Unity and Reconciliation Act, were well aware of the challenges of transition, and opted for the balanced approach model in which amnesty would be counterbalanced with reparations,

¹⁰⁸⁵ On the concept of *ubuntu* see *S v Makwanyane* 1995(6) BCLR 665 (CC) paras. 300 – 308 (*per* Mokgoro J) & paras. 345– 392 (*per* Sachs J).

¹⁰⁸⁶ Section 11(g). Emphasis added.

¹⁰⁸⁷ *TRC Final Report, supra*, vol. 5, Chp. 9.

¹⁰⁸⁸ *Ibid.*, vol. 1, Chp. 5, paras. 80 - 100.

rather than acquiesce in the international demand for prosecution of apartheid as a crime against humanity.

8.7. 2. Amnesty and International Law

Secondly, critics of the *AZAPO* decision have argued that international law was ignored by the Constitutional Court in a way reminiscent of the treatment of international law by the apartheid judiciary.¹⁰⁸⁹ Despite many international instruments condemning apartheid as a crime against humanity, as supported by a host of UN General Assembly and Security Council resolutions and the Rome Statute for the International Criminal Court, the court did not acknowledge that apartheid is a crime against humanity.¹⁰⁹⁰ The court also failed to examine whether the Act met the international law requirements (treaty and customary law) on compensation for victims of gross human rights violations. As John Dugard puts it:

...one might have expected a thorough examination of international law in order, first, to dispel any suggestion that the Constitution was out of line with international law and, secondly, to reaffirm the Constitution's commitment to the law and values of the international order. Unfortunately this did not happen.¹⁰⁹¹

Dugard criticises the court for not sufficiently traversing the jurisprudence of foreign jurisdictions, such as the Australian High Court's decision in *Polyukhovich v Commonwealth of Australia*¹⁰⁹² and *R v Finta*,¹⁰⁹³ or the international jurisprudence of

¹⁰⁸⁹ See Ziyad Motala, "The Constitutional Court's Approach to International Law and its Method of Interpretation in the 'Amnesty Decision': Intellectual Honesty or Political Expediency" 21 *South African Yearbook of International Law* (1996) 30; Andreas O' Shea, "Should Amnesty be Granted to Individuals who are Guilty of Grave Breaches of Humanitarian Law?: A Reflection on the Constitutional Court's Approach" 1 *Human Rights & Constitutional Law Journal of Southern Africa* (1997) 24.

¹⁰⁹⁰ Christina Murray, "The Status of the ANC and *SWAPO* and International Humanitarian Law" 100 *South African Law Journal* (1983) 402 at 405.

¹⁰⁹¹ John Dugard, "Is the Truth and Reconciliation Process Compatible with International Law? An Unanswered Question" 2 *South African Journal on Human Rights* (1997) 258 at p. 261.

¹⁰⁹² *Polyukhovich v Commonwealth of Australia* 172 *Commonwealth Law Reports* (1991) 501.

¹⁰⁹³ *R v Finta* (1989) DLR (4th) 85.

the two *ad hoc* International War Crimes Tribunals for the former Yugoslavia and Rwanda.¹⁰⁹⁴ Despite this criticism, Dugard observes that:

I do not believe that the conclusion reached by Mahomed DP was wrong in law or in policy...however I believe that at the outset Mahomed DP should have inquired more thoroughly into the compatibility of the epilogue with both conventional and customary law.¹⁰⁹⁵

However, it may be argued that concerns raised by critics, including Dugard, have very little to do with the outcome of the case, namely that the amnesty was valid. Even if the court had adopted the approach preferred by Dugard, the *outcome* would have been the same because the Promotion of National Unity and Reconciliation Act was immunised from constitutional scrutiny. As the Constitutional Court stated in its decision it was a “deliberate choice” of the drafters of the Constitution. Moreover, had the court ruled otherwise the life and work of the Commission would have been jeopardised. Dugard contends that the court’s approach was disappointing when compared with its earlier decisions, such as the death penalty decision,¹⁰⁹⁶ in which international law was extensively canvassed. It is submitted that Dugard’s criticism is only *methodological*. The drafters of the constitution had a choice between prosecution and non-prosecution and they decided to adopt a less damaging means to achieve justice and national reconciliation by appealing for reparations and amnesty rather than prosecution. Nevertheless the court’s amnesty decision was not the last word in attempting to balance amnesty against the rights of victims to claim reparations, as the Commission was expected to make recommendations on reparations to parliament once it had completed its work. Let us now consider how the Commission has attempted to strike a balance

¹⁰⁹⁴ John Dugard, “Is the Truth and Reconciliation Process Compatible with International Law? An Unanswered Question” 2 *South African Journal on Human Rights* (1997) 258 at p. 263.

¹⁰⁹⁵ John Dugard, “Is the Truth and Reconciliation Process Compatible with International Law? An Unanswered Question” 2 *South African Journal on Human Rights* (1997) 258 at p. 267.

¹⁰⁹⁶ *S v Makwanyane* 1995(6) BCLR 665 (CC).

between amnesty and the rights of victims to an effective remedy, including reparations.

8. 8. Amnesty and the Report of the Truth and Reconciliation Commission

On 29 October 1998 the chairperson of the Truth and Reconciliation Commission, Archbishop Desmond Tutu, handed in a Final Report to the then president, Nelson Mandela.¹⁰⁹⁷ After the Commission submitted its Final Report the Amnesty Committee continued to hear amnesty applications. It was agreed that once it has completed its task, the Amnesty Committee would attach a codicil to the TRC Final Report.¹⁰⁹⁸ The codicil to the Final Report or the Report of the Amnesty Committee was delayed due to a legal challenge by the Inkatha Freedom Party which sought a court order to compel the Commission to provide all the information collected and received, and upon which it made its findings that the IFP had collaborated with apartheid security agents in committing gross human rights violations.¹⁰⁹⁹ After an out of court settlement, the codicil to the Final Report of the TRC was released in March 2003.¹¹⁰⁰

The seven-volume report detailed the nature and extent of the gross human rights violations South Africa suffered from 1960 to 1994 when Nelson Mandela was inaugurated as the first president of a democratic South Africa. The release of the report was preceded by much disquiet, particularly from political parties. The bone of contention was that the human rights violations committed by liberation organisations during the struggle against apartheid were treated similarly to those committed by

¹⁰⁹⁷ *TRC Final Report*, vols . 1-5, October, 1998.

¹⁰⁹⁸ *TRC Final Report*, vol. 6, March 2003. (Hereinafter “Report of the Amnesty Committee or Amnesty Report”).

¹⁰⁹⁹ *Inkatha Freedom Party & Others v Truth & Reconciliation Commission* 2000 (5) BCLR 534 (C).

¹¹⁰⁰ *Amnesty Report*, vol. 6, paras. 41 – 45.

apartheid perpetrators. This followed the ANC's unsuccessful court interdict against the TRC to prevent the release of the final report unless this treatment of the liberation organisations was altered. It was argued that the ANC fought a legitimate war against a pariah state branded by the international community for committing crimes against humanity and therefore could not be placed on a par, legally and morally, with the apartheid state. However, the ANC lost the case.¹¹⁰¹ FW de Klerk, the last president of apartheid South Africa, successfully sought an order from the High Court, which instructed the Commission to remove sections of the report which implicated him in the bombing of Khotso House, which housed the headquarters of the ANC in 1989.¹¹⁰²

While the challenge by FW de Klerk and Mangosuthu Buthelezi did not surprise many who believed that they were involved in, and knew about, extra-judicial killings and other human rights violations, it was the ANC's legal challenge which raised eyebrows. Both the Final Report¹¹⁰³ and the codicil¹¹⁰⁴ concluded that while apartheid was a crime against humanity, limited aspects of the ANC's armed struggle constituted gross human rights violations. The findings were premised upon the principle that even though the ANC fought a just war, just means had to be employed. More significantly, the ANC had, in 1980, accepted the Geneva Conventions, an indication of its willingness to adhere to the principles in the Geneva Conventions.¹¹⁰⁵ In its submission to the Commission, the ANC only accepted collective responsibility for "excesses" during the

¹¹⁰¹ *The African National Congress v The Truth & Reconciliation Commission*, Case no. 1480/98 (Cape Provincial Division). Decision appears in *Amnesty Report* vol. 6, para . 5- 21.

¹¹⁰² *FW de Klerk & Another v The Chairperson of the Truth & Reconciliation Commission & the President of the Republic of South Africa*, Case No. 14030/98 (Cape of Good Hope Provincial Division). Decision appears in *Amnesty Report*, paras. 22 – 30.

¹¹⁰³ *TRC Final Report*, vol. 1, paras. 64-81.

¹¹⁰⁴ *Amnesty Report*, vol. 6, para. 28 *et seq.*

¹¹⁰⁵ *Amnesty Report*, vol. 7, para. 38 full text of the ANC's declaration is attached as an appendix.

struggle, which constituted collateral damages in pursuit of a just cause against an unjust system. Thus, to the ANC, the TRC findings on the ANC “criminalized” a significant portion of the liberation movement by equating its actions with those of a pariah state.¹¹⁰⁶

It is submitted that the ANC’s rejection of the findings of the TRC were less than candid because although the Commission found that liberation organisations such as the ANC, UDF and the PAC were responsible for gross human rights violations, the preponderance of responsibility was placed on the apartheid government and its agencies. In respect of the gross human rights violations committed by the apartheid government on the one hand, and liberation movements on the other, the Commission said:

At the same time, the Commission is not of the view that all such parties can be held to be equally culpable for violations committed in the mandate period. Indeed, the evidence accumulated by the Commission and documented in this report shows that this was not the case. The preponderance of responsibility rests with the state and its allies.

Even if it were true that both major groupings to the conflicts of the mandate era - the state and its allies and the Liberation Movements - had been equally culpable, the preponderance of responsibility would still rest with the state.¹¹⁰⁷

Not only were political parties held morally liable for their actions, but blame was also apportioned to the health, labour and business sectors, the media, the judiciary and religious communities for allowing the apartheid system to flourish,¹¹⁰⁸ and thus they were all equally responsible for the “reconstruction of a new society,” including contribution to a reparation scheme for victims of apartheid. Another significant

¹¹⁰⁶ Madeleine Fullard & Nicky Rousseau, “An Imperfect Past: The Truth and Reconciliation Commission in Transition” in John Daniel, Adam Habib & Roger Southall (eds.), *State of the Nation: South Africa 2003 – 2004* (2003) 78 at p. 85.

¹¹⁰⁷ *TRC Final Report*, vol. 5.

¹¹⁰⁸ *TRC Final Report*, vol. 5, paras. 151 - 158.

recommendation was that political organisations implicated in gross violations of human rights must apologise to the victims or their next of kin.¹¹⁰⁹ However, the Commission did not recommend lustration or purging, a procedure which aims to bar people implicated in human rights violations from holding public office. It concluded, without furnishing reasons, that such measures would be inappropriate in the South African situation.¹¹¹⁰

With regard to perpetrators who refused to apply for amnesty, the Commission recommended that the National Director of Public Prosecution investigate and prosecute.¹¹¹¹ The Report further stated that:

*...[in] order to avoid a culture of impunity and to entrench the rule of law, the granting of general amnesty in whatever guise should be resisted in future.*¹¹¹²

Soon after the publication of the Final Report, a special unit was created under the elite investigative unit of the National Director of Public Prosecutions, the Scorpions, to investigate the possible prosecution of failed amnesty applications and of those persons who did not apply for amnesty. In 2002, the unit brought an unsuccessful action against officers of the former Ciskei defence force involved in the Bisho massacre.¹¹¹³ The intention of the state to pursue prosecution is evident in the recent decision of the National Directorate of Public Prosecutions to prosecute Gideon Nieuwoudt.

¹¹⁰⁹ *TRC Final Report*, vol. 5. A similar recommendation was made by the Motswenyane and Skweyiya commissions of inquiry.

¹¹¹⁰ *TRC Final Report*, vol. 5, paras. 17 - 19.

¹¹¹¹ See National Prosecution Act 32 of 1998.

¹¹¹² *TRC Final Report*, vol. 5, para. 14. Emphasis added.

¹¹¹³ Gilbert Marcus, Legal Opinion on the Constitutionality of the Proposed General Amnesty Law, 5 June 2002 (on file).

In terms of the Act amnesty applications expired on 30 September 1997 and no further amnesty may be entertained.¹¹¹⁴ The only exception are those matters, which need to be dealt with further, or anew, as a result of an order or finding of a court of law or any settlement agreement reached as a result of pending litigation.¹¹¹⁵ The Promotion of National Unity and Reconciliation Act (as amended) empowers the Minister of Justice to appoint a sub-committee to deal with outstanding matters relating to amnesty after the dissolution of the Amnesty Committee.¹¹¹⁶ Therefore, in balancing amnesty with the rights of victims to an effective remedy, the Commission recommended that those who failed to use the amnesty process or were unsuccessful in their amnesty applications, must be prosecuted to avoid a culture of impunity.

8. 9. Reparations as a *Quid Pro Quo* for the Granting of Amnesty

In its Final Report the Commission explained that “reparation [was] essential to counterbalance amnesty”.¹¹¹⁷ The rationale for linking amnesty to individual reparation grants was:

...an acknowledgement of a person’s suffering due to his/her experience of a gross human rights violation. It is based on the fact that survivors of human rights violations

¹¹¹⁴ Neil Boister & Richard Burchell, “The Implications of the *Pinochet* Decisions for the Extradition or Prosecution of Former South African Heads of State for Crimes Committed under Apartheid” 11 *African Comparative and International Law Journal* (1999) 619.

¹¹¹⁵ Section 47A *bis* of the Promotion of National Unity and Reconciliation Amendment Act 23 of 2003.

¹¹¹⁶ Section 47A of Act 23 of 2003 provides:

Minister may appoint subcommittee on amnesty after dissolution of Commission

...

(6) If a subcommittee appointed in terms of subsection 1(1) grants amnesty to any person, the Minister shall by notice in the *Gazette*, make known the full names of any person to whom amnesty has been granted, together with sufficient information to identify the act, omission or offence in respect of which amnesty has been granted.

(7) If a subcommittee has refused to grant amnesty to any person, the provisions of section 21 shall apply, with the necessary changes required by the context.

¹¹¹⁷ *TRC Final Report*, vol. 1, paras. 253 - 254.

have a right to reparations and rehabilitation. The individual reparation grant provides resources to victims in an effort to restore their dignity...¹¹¹⁸

However, the contradiction of this balanced approach model as seen by the Commission, was the ability of the Commission to deliver amnesty on the one hand, and its inability to deliver reparations, on the other. In the *AZAPO* case, the late Justice Didcott acknowledged that '[t]he *statute does not...grant any legally enforceable rights* in lieu of those lost by claimants whom the amnesties hit.'¹¹¹⁹ He nevertheless concluded that reparation measures were the only *quid pro quo* mechanism for the obliteration of victims' rights. As indicated earlier, it is doubtful on a textual interpretation of the Act that the latter affords victims the right to compel parliament to pay reparations since the state is immune from liability for actions perpetrated in its name. This perhaps explains why the government has delayed the implementation of the TRC's recommendations on individual reparations and the promulgation of the reparations regulations. Since July 1998 individual reparations still hang in the balance.

The Commission not only identified 21 300 people as victims of gross human rights violations, but also made a number of recommendations on reparations.¹¹²⁰ The Final Report recommended the maximum individual reparation grant of a total of R23 023 per annum for a period of six years to be administered by the President's Fund.¹¹²¹ The government rejected the proposal on the basis that the government could not afford the amount, which would cost it 3 billion rands. Finance Minister, Trevor Manuel, announced in his 2001 budget speech that the government had budgeted R 800 million

¹¹¹⁸ *TRC Final Report*, vol. 5, para. 68.

¹¹¹⁹ *TRC Final Report*, vol. 5, para 65. Emphasis added.

¹¹²⁰ *TRC Final Report*, vol. 7, March 2003 containing a list of persons declared as victims of gross human rights violations.

¹¹²¹ *TRC Final Report*, vol. 5, paras. 119 - 230.

for a once-off payment of R30 000 per victim which will be paid to victims of gross human rights violations.¹¹²² Only those who *participated* in the TRC process and had been *declared* victims by the TRC qualify for individual reparation.¹¹²³ The Unit of the President's Fund situated in the Department of Justice and set up in 1997 to administer the fund, is responsible for tracing and identifying victims who qualify for reparations.¹¹²⁴ The Unit has indicated that of the 22 000 victims identified by the TRC only 18 000 will receive reparations.¹¹²⁵ The Fund will also be used for "community reparations" in which property destroyed during the apartheid years such as schools, clinics and hospitals will be renovated.¹¹²⁶

As indicated earlier, victims do not have a legally enforceable right to reparations under the 1995 Promotion of National Unity and Reconciliation Act to compel the state to pay out reparations. However, that does not foreclose the right of victims to institute civil suits against those who did not apply for amnesty or whose amnesty applications were unsuccessful. The government's intransigent approach towards reparations for victims of gross human rights violations explains why a reparations lawsuit has come before US courts. The lawsuit is against multinational corporations, such as Swiss Banks, Credit

¹¹²² Trevor Manuel, *Budget Speech*, February 2001, *Hansard*, Col. 3, p. 13.

¹¹²³ *TRC Final Report*, vol. 7.

¹¹²⁴ Section 1 of the Promotion of National Unity and Reconciliation Amendment Act 23 of 2003.

¹¹²⁵ Telephonic conversation with Mr. Farrouk, Reparations Fund Unit, Department of Justice, 18 March 2004.

¹¹²⁶ Section 42 (2A *bis*) of the Promotion of National Unity and Reconciliation Amendment Act 23 of 2003 provides that:

There shall be paid from the Fund all amounts payable by way of reparations towards the rehabilitation of communities as prescribed.

Suisse, UBS as well as US-based Citicorp, for “aiding and abetting” in the crime of apartheid in violation of UN sanctions.¹¹²⁷

The government has opposed the litigation on the ground that matters relating to reparations are of a domestic nature and thus fall within its sovereign domain and as such must be respected. More importantly, the government argues that the litigation has the potential of discouraging foreign direct investment, badly needed in South Africa for “the reconstruction of a new society.”¹¹²⁸ The TRC in its Final Report concluded that reparations claims against multinational corporations like Anglo American were possible based on the principle of unjust enrichment.¹¹²⁹ Unjust enrichment gives rise to an obligation in terms of which the enriched party incurs a duty to repair the harm made to the impoverished party to the extent possible. This confirms that victims have a right to an effective remedy. Besides, perpetrators who did not apply for amnesty or failed to make a full disclosure remain subject to lawsuit under South African law.

Contrary to the government’s objection, holding multinational corporations accountable will ensure that in future multinational corporations do not invest in countries with a bad human rights record.¹¹³⁰ As the Amnesty Committee concluded in its report, under customary international law, the fact that previous apartheid governments were not party

¹¹²⁷ *Lungisile Ntsebeza v Citigroup Inc & Others*, Civil Action no. 02 Civ.4712 (RCC), Heads of Argument, 19 September 2003 (on file).

¹¹²⁸ Panuel Maduna’s Affidavit, para. 12, dated September 2003 (on file); *Cf.* Hlengiwe Mkhize, “Reparation Issue Needs Political Solution” *Sunday Times*, 7 July 2002, p. 19 arguing that the reparation’s lawsuit will not only undermine the TRC process but also make potential investors ask themselves whether the rainbow nation being championed worldwide is real or just an illusion.

¹¹²⁹ *TRC Final Report*, vol. 6, para. 60.

¹¹³⁰ Johannes Terreblanche’s Affidavit, para. 19, dated September 2003 (on file).

to human rights treaties does not exonerate the current government from paying reparations to victims of past human rights violations.¹¹³¹

The “promise” of reparations made in the Act, created a *legitimate expectation* on the part of victims of gross human rights violations. In sharp contrast to the Constitutional Court in the *AZAPO* case, the Amnesty Committee reviewed human rights treaties and customary international law on reparations and concluded that the legitimacy of the South African amnesty process depended on the payment of adequate reparations to victims of gross human rights violations. Giving credence to the balanced approach, the Committee stated that failure to make:

...good the injuries to victims of gross violations of human rights where their ability to seek reparation has been taken away from them...would be a gross injustice and betrayal of the spirit of the Act, the Constitution and the country.¹¹³²

8. 10. Corporate Amnesty or Amnesty through the Back-Door of the Presidential Pardon?

Having dragged its feet on the payment of individual reparations to victims of gross human rights violations that the TRC had recommended in its Final Report, and having opposed the attempts to enforce reparation payments through litigation, the government proposed a “second” amnesty to cover those within their ranks who, for whatever reasons, had failed to apply for amnesty and possibly feared future prosecutions. This took place during the 1999 Parliamentary debate of the Final Report of the TRC. Both former President Mandela and his then deputy, Thabo Mbeki, refused to consider the possibility of a further general amnesty and suggested limited future prosecutions by the National Director of Public Prosecutions.¹¹³³ However, during the debate, Thabo Mbeki

¹¹³¹ *Amnesty Report*, vol. 6, paras. 47 - 48.

¹¹³² *Amnesty Report*, paras. 44 - 45.

¹¹³³ Joint Sittings of the National Assembly and National Council of Provinces, 25 February 1999, 316

remarked that there was a need to address the question of organisational liability which had not been addressed by the amnesty provision, particularly for people who had been advised by their leaders not to apply for amnesty. He suggested that amnesty should be considered for this category of persons and arrangements should be made with the National Director for Public Prosecutions for possible plea-bargaining. The proposal was met with the criticism that an additional amnesty process would undermine the earlier TRC process, particularly the requirement of individual disclosure and accountability.¹¹³⁴ The rationale and purpose of the individual amnesty application was to “undermine the solidarity of security forces” who would otherwise conspire to conceal the truth.¹¹³⁵ Based on Mbeki’s speech, commentators suggested that a “second amnesty” was possible in future. It was widely believed that such an amnesty process was intended to benefit apartheid generals and the ANC leadership, whose collective amnesty application to the TRC was overturned by the Cape High Court as unconstitutional in 1998. The amnesty would also secure SADC co-operation as it would avert any prosecutions for incidents in neighbouring states.¹¹³⁶

Eleven months before the release of the Commission’s Amnesty Report, the government’s action became clear. President Mbeki granted pardon to 33 prisoners from the Eastern Cape convicted of serious crimes, of whom 20 had been denied

Hansard, Col. 55. p. 431.

¹¹³⁴ For more discussion on the legal and policy implications of the proposal by President Mbeki see Jonathan Klaaren & Howard Verney, “A Second Bite at the Amnesty Cherry? Constitutional and Policy Issues around Legislation for a Second Amnesty” 117 *South African Law Journal* (2001) 572.

¹¹³⁵ Dorothy Shea, “Are Truth Commissions Just a Fad? Indicators and Implications from the South African TRC” Paper Presented at a Conference on “The TRC: Commissioning the Past”, Wits University, 11-14 June 1999 (quoting an interview with Willie Hofmeyer, one of the key negotiators of the TRC Act) (on file).

¹¹³⁶ Christelle Terreblanche, “New Amnesty Deal on the Cards for Apartheid-era Combatants” *Sunday Independent*, 18 May 2003, p. 1 stating that former SADF chiefs, Constand Viljoen, Jannie Geldenhuys and army chief, Georg Meiring, were among the generals who held discussions with Maduna and the ANC on the possibility of a further general amnesty.

amnesty by the Amnesty Committee. The justifications given for the granting of these pardons was that the beneficiaries were offenders who either failed, for technical reasons, to have their amnesty applications processed, whose applications were rejected for technical reasons, or who had wanted to apply but were bound by the positions adopted by their political parties when the window for the amnesty application was open. The granting of these pardons was criticised by political parties, civil society and human rights organisations on the basis that it was a selective quick-fix for political gain and, more importantly, for the way it undermined the entire TRC process.¹¹³⁷ The consequence of the President's action was that persons responsible for allegedly political offences (who did or did not apply for amnesty) were able to make use of the pardon procedure to be released from prison. The arbitrariness of the process was that it would be difficult for the President to determine accurately whether common law offences, such as murder, were committed with a political motive. The granting of pardons by the President further victimised the victims (who still had not received reparations) and the pardon would not have passed constitutional muster if challenged before the Constitutional Court.¹¹³⁸ The President's actions not only overrode the recommendation of the TRC in its Final Report that amnesty should be resisted in future in order to avoid a culture of impunity, but, more importantly, it upset the balanced approach model built into the Promotion of National Unity and Reconciliation Act in the form of reparations in exchange for the granting of amnesty. The Amnesty Committee was also critical of the President's actions in its report and cautioned that an amnesty reached through the

¹¹³⁷ Molefe Tsele, "A General Amnesty is not the Way to Heal the Wounds of Apartheid" *Sunday Times*, 23 March 2003, p. 18; John Battersby, "De Klerk Adds Voice to Call for Wide-Ranging Amnesty" *The Star*, 21 May 2002, p. 5.; John Daniel, "De Kock should be Pardoned Too" *Mail & Guardian* 24 May 2002 arguing that the government's amnesty policy should apply across the board and include others responsible for heinous crimes like Eugene De Kock, Clive Derby-Lewis and Janus Walus responsible for the death of SACP leader Chris Hani.

¹¹³⁸ Gilbert Marcus, Legal Opinion on the Constitutionality of the Proposed General Amnesty Law, 5 June 2002 (on file).

back-door of the President's powers of pardon was unacceptable and violated the Act that established the TRC.¹¹³⁹ Moreover, the Amnesty Committee emphasised the balanced approach model when it recommended that, in future, where amnesty and pardons are granted, consideration should be given to the constitutional rights of the victims.¹¹⁴⁰ Given the TRC's attempts to balance amnesty with the rights of victims to claim reparations, the question remains moot as to whether the amnesty granted for apartheid related offences has extraterritorial effect.

8. 11. The Extraterritorial Application of Amnesty for Apartheid Related Crimes

The Commission has been criticised in certain quarters for not investigating such legally sanctioned apartheid activities, as forced removals, and for not determining whether such actions violated international law,¹¹⁴¹ even though the crimes listed in the Apartheid Convention (to which South Africa has not acceded since 1994) were government policies in South Africa and were accordingly not criminalized under South African law.¹¹⁴² One of the shortcomings of the Act that established the TRC was the narrow definition of "gross human rights violations" because it precluded crimes of apartheid, despite apartheid having been declared a crime against humanity by the international community, a fact acknowledged by the Commission in its Final Report.¹¹⁴³ While the Commission acknowledged that apartheid was a crime against

¹¹³⁹ *Amnesty Report*, vol. 6, paras. 29 -31.

¹¹⁴⁰ *Amnesty Report*, vol. 6, p ara. 33.

¹¹⁴¹ John Dugard, "Is the Truth and Reconciliation Process Compatible with International Law? An Unanswered Question: *AZAPO v President of the Republic of South Africa*" 2 *South African Journal on Human Rights* (1997) 258.

¹¹⁴² Shannon Bosch, "Amnesties as a Trump to Foreign Prosecution of International Crimes? A South African View" XXXVI *Comparative International Law Journal of Southern Africa* (2003) 138 at p. 143.

¹¹⁴³ *TRC Final Report*, vol 5, para. 114 & *Amnesty Report* vol. 6, paras. 19-24.

humanity, it pleaded with the international community to recognise its amnesty process as valid.¹¹⁴⁴

In its investigation the Commission devoted little attention to crimes committed by the apartheid government in neighbouring countries. The question that arises: was the amnesty granted for criminal acts committed in those countries valid? The case in point is Namibia, which was under the League of Nations mandate at the end of the Second World War. South Africa's last Administrator-General, Louis Pienaar, issued an Amnesty Proclamation on 6 June 1989 which aimed to facilitate the return of exiled Namibians before the 1989 independence elections. The proclamation stated that no criminal proceedings may be instituted or continued in any court for any crimes committed both in Namibia and elsewhere before 7 July 1989 by any person either born in Namibia or born of Namibian parents and who at the time of the proclamation did not live in Namibia.¹¹⁴⁵ On 9 February 1990, the day the Constituent Assembly adopted the Namibian Constitution, the Administrator-General amended the Amnesty Proclamation AG 13 of 1989 to extend the amnesty to cover:

...all members of the South African Defence Force, the South African Police, the SWA Territory Force, and the SWA Police who in the performance of their duties and functions in the territory (of Namibia) have performed or failed to perform any act which amounts to a criminal offence.¹¹⁴⁶

Both Amnesty Proclamations remain in force in terms of section 140 of the 1990 Constitution of Namibia, which provides that all laws which were in force immediately before the date of independence, remain in force until repealed, amended or declared unconstitutional by a court of law.

¹¹⁴⁴ *Amnesty Report*, vol. 7, paras 19– 24.

¹¹⁴⁵ Amnesty Proclamation AG 12 of 1989.

¹¹⁴⁶ Section 2(1) of the Proclamation.

The status and legality of South Africa's second amnesty became a subject of litigation in the marathon trial against Dr Wouter Basson, former Captain in the former SADF, who headed the SADF Chemical and Biological warfare programme (known as Project Coast) during the apartheid era. Basson qualified for amnesty as a former member of the SADF. Basson had originally been charged in the Pretoria High Court on 67 counts of fraud, murder, conspiracy to commit crimes abroad, drug offences and possession of classified information relating to apartheid era crimes.¹¹⁴⁷ The presiding judge, Judge Harzenberg, quashed six counts in the original indictment, including the killing of 200 SWAPO cadres in Namibia, and conspiracy to commit crimes abroad in terms of the Riotous Assemblies Act¹¹⁴⁸ on the basis of the amnesty granted in the 1991 Amnesty Proclamation. The state applied for the recusal of the presiding judge on the ground that there was a reasonable perception that he was biased. When he refused to recuse himself, the state appealed to the Supreme Court of Appeal, which also ruled in favour of Judge Harzenberg.¹¹⁴⁹

The acquittal of Basson was met with mixed reactions by South African society generally, and by human rights organisations and politicians in particular; some viewed it as a "travesty of justice" and "a shameful day for truth and justice in post-apartheid South Africa."¹¹⁵⁰ The then Namibian Minister of Foreign Affairs, Mr. Theo-Ben Gurirab, reported that Namibia would apply for the extradition of Wouter Basson to face

¹¹⁴⁷ *S v Basson* 2000 (3) All SA 59(T).

¹¹⁴⁸ Section 18(2) of Act 17 of 1956.

¹¹⁴⁹ *S v Basson* 2004 (6) BCLR 620 (CC).

¹¹⁵⁰ Molefe Tsele, "A General Amnesty is not the Way to Heal the Wounds of Apartheid" *Sunday Times*, 23 March 2003, p. 18; John Battersby, "De Klerk Adds Voice to Call for Wide-Ranging Amnesty" *The Star*, 21 May 2002, p. 5.

the charge of killing 200 SWAPO cadres which had been expunged from the original South African indictment.¹¹⁵¹

In November 2003, the state filed for special leave to appeal before the Constitutional Court against a decision of the Supreme Court of Appeal and against the refusal of the High Court to remove the presiding judge.¹¹⁵² The state argued that South African common law was applicable to Namibia at the time of the commission of the offences, which are crimes under South African law, including conspiracy to murder which was criminalized by the Riotous Assemblies Act.¹¹⁵³ At the time of the commission of the offence, the 1957 Defence Act¹¹⁵⁴ and the Military Disciplinary Code¹¹⁵⁵ applied to members of the former South African Defence Force (SADF) beyond the borders of the country, and those who breached these laws were accordingly held accountable.

In March 2004, the majority of the Constitutional Court ruled in favour of the state, which held that the quashing of the charges and the refusal of the presiding judge to recuse himself raised constitutional and international law issues, and thus opened the way for the state to retry Basson on the six charges quashed by Harzenberg.¹¹⁵⁶ The court further held that the question of whether Basson would be exposed to double jeopardy would not arise in this matter because the charges had been quashed, and as such, the question of the interests of justice raised by section 35(3)(d) of the Constitution which provides that accused persons are entitled to be tried without unreasonable delay,

¹¹⁵¹ “Basson may be Extradited to Face Trial in Namibia” *Namibian*, 16 September 2003, p. 7.

¹¹⁵² *S v Wouter Basson* 2004 (6) BCLR 620 (CC).

¹¹⁵³ Section 18(2) of the Riotous Assemblies Act 17 of 1956.

¹¹⁵⁴ The Act has been repealed by the Defence Act 42 of 2002.

¹¹⁵⁵ Section 47 of the Act.

¹¹⁵⁶ *S v Wouter Basson*, 2004 (6) BCLR 620 (CC), paras. 17 – 38.

had not been triggered.¹¹⁵⁷ As the court stated, “[the] accused did not plead to the charges that were subsequently quashed and was therefore never in jeopardy of conviction upon them.”¹¹⁵⁸

According to Sachs J, the case raised three fundamental constitutional matters, namely, whether the charges constitute war crimes, and if so, whether that imposed a constitutional obligation on the state to prosecute, and lastly, that the quashing of the charges constituted a failure to give effect to South Africa’s international law obligation to prosecute under the constitution.¹¹⁵⁹ Sachs J concluded that the consequences of the High Court’s decision to quash the charges, and the subsequent refusal of the Supreme Court of Appeal to entertain the appeal by the state, had a direct impact “on the legal order as envisaged by the Constitution, particularly insofar as war crimes may be involved.”¹¹⁶⁰

On the first question Sachs J concluded that if the material facts in the charge sheet (counts 31 and 61), subsequently quashed by the trial judge, namely, that in 1989 Basson furnished cholera bacteria to poison the water supply of a SWAPO refugee camp in order to manipulate the outcome of the elections in Namibia were proved to be correct, such actions would constitute war crimes.¹¹⁶¹ Secondly, if it were proved that war crimes had been committed, should consideration be given to South Africa’s international law obligations? Sachs J concluded that indeed the rules of humanitarian

¹¹⁵⁷ *Ibid.*, paras. 61 – 69.

¹¹⁵⁸ *Ibid.*, para. 67.

¹¹⁵⁹ *Ibid.*, paras. 110 – 126.

¹¹⁶⁰ *Ibid.*, para. 115.

¹¹⁶¹ *S v Wouter Basson* 2004 (6) BCLR 620 (CC), paras. 117 - 120.

law, including customary international law, constitute an integral part of our constitution and therefore there is a duty on the state to impose penal sanctions on persons involved in grave breaches of international humanitarian law.¹¹⁶² Finally, Sachs J concluded that failure by the Supreme Court of Appeal to take into account South Africa's international law obligations, raised constitutional questions that were within the competence of the Constitutional Court.¹¹⁶³

The decision of the court raises two important issues. Firstly, the net effect of the court's ruling is that the amnesty granted by the last Administrator-General of Namibia for crimes committed in Namibia, which was the basis for the trial court to quash some of the charges against Basson, is invalid and has no extraterritorial effect. The Namibian prosecuting authorities have a right to apply for the extradition of Basson to face trial in Namibia for the murder of 200 SWAPO prisoners of war. Although South Africa and Namibia do not have a formal extradition agreement, the latter is one of the designated countries for purposes extradition in terms of section 2(1)(b) of the Extradition Act 67 of 1962.¹¹⁶⁴

The four Geneva Conventions of 12 August 1949 (including the 1977 Additional Protocols), which Namibia ratified after independence in 1991, impose an obligation on states to extradite or prosecute (*aut dedere aut judicare*) perpetrators of war crimes. In principle, the amnesty granted by the TRC does not extend to crimes committed outside the borders of South Africa. This line of argument finds support from the Supreme Court

¹¹⁶² *Ibid.*, paras. 121– 123.

¹¹⁶³ *Ibid.*, paras. 124 – 126.

¹¹⁶⁴ See *Government Gazette* No. 18663, 13 February 1998.

of Appeal in *Stopforth v Minister of Justice & Others*,¹¹⁶⁵ which ruled that the Amnesty Committee had no jurisdiction to grant amnesty for crimes committed outside South Africa. The Amnesty Committee has confirmed that when approached by senior former SADF members, the Commission indicated that it could not offer safety from prosecution for violations committed outside South Africa.¹¹⁶⁶ This opens the way not only for Namibia, but also for other Southern African Development Community (SADC) countries, to apply for extradition to prosecute for crimes committed in their respective countries if they so wish. Already the SADC heads of state and government adopted the SADC Protocol on Extradition (although not yet in force) on 3 October 2002 which would further make it possible for SADC countries to extradite perpetrators of serious human rights violations committed in their respective countries.¹¹⁶⁷

Secondly, there is a need to caution against too much optimism. There are obstacles to any decision by the state to try Wouter Basson on the six charges that were initially quashed by the trial court. One such obstacle is the evidence necessary for a successful prosecution of Basson and others, who were either unsuccessful in their amnesty applications, or simply did not apply for amnesty. The recent revelation by the Department of Justice and the National Intelligence Agency (NIA) that files relating to the chemical and biological weapons that linked Wouter Basson and other overseas agents, such as the Swiss Secret Service, are reported missing or destroyed, is a cause for concern.¹¹⁶⁸ If sufficient evidence no longer exists, it may be difficult to make a

¹¹⁶⁵ 2001(1) SA 113 (SCA).

¹¹⁶⁶ *Amnesty Report*, vol. 6, para. 376.

¹¹⁶⁷ The South African Parliament ratified the Protocol, 14 April 2003. The Protocol will come into operation once two-thirds of members states have ratified the Protocol.

¹¹⁶⁸ The SA History Archives has applied, in terms of the Access to Information Act, to access the files, which are alleged to have disappeared. The matter is still pending before the Pretoria High Court.

convincing case against Basson, with the result that he may be acquitted and this will vindicate the proponents of the TRC who believe that trials of this nature are costly, time-consuming and in the end, yield nothing for the victims of gross human rights violations. The burden of proof to successfully prosecute Basson rests on the state, and on the victims of gross human rights violations. However, until such time as the issue of reparations for all victims, including those of apartheid related crimes committed in other countries, has been fully addressed there are no guarantees that demands by victims for an effective remedy will cease.

8. 12. Conclusion

Let us start where we began: is the South African amnesty process a template for the balanced approach model proposed in this study? Except for the reparations process, the South African approach is close to the balanced approach model. As shown in this chapter, the decision to prosecute, or grant amnesty to, those allegedly responsible for gross human rights violations in South Africa, depended largely on a myriad of social, economic, military and political factors. Amnesty was a product of a legitimate political process, and was approved by people who were themselves victims of the apartheid system. Even though parliament sought to balance amnesty with the rights of the victims to claim compensation, it expunged both civil and criminal liability against perpetrators and the state, and thus limited the rights of victims to seek redress before a competent tribunal or courts in the event of their being dissatisfied with the government's reparations policies.

However, on the basis of the balanced approach model, the South African amnesty process may be justified on the grounds that, since 1994, South Africa has demonstrated a commitment to respect international humanitarian law by ratifying a number of

international law instruments,¹¹⁶⁹ notably the Rome Statute of the International Criminal Court,¹¹⁷⁰ and has created oversight mechanisms such as the Human Rights Commission,¹¹⁷¹ Police,¹¹⁷² intelligence¹¹⁷³ and Defence¹¹⁷⁴ Civilian Secretariats, to ensure democratic civilian control of the security establishment and thus prevent human rights abuses, particularly by members of the security establishment. Chapter 11 of the 1996 Constitution, dealing with security services, specifically obliges members of the security establishment when executing their functions to “...act in accordance with the Constitution and the law, including customary law and international agreements binding the Republic.”¹¹⁷⁵ This is particularly important given the conclusion of the TRC Final Report that, by far the majority of perpetrators of human rights violations who applied for amnesty were members of the security establishment.

In conclusion, the decision of the National Director of Public Prosecutions to prosecute Niuwoldt does not seek to undermine the commitment, expressed in the Constitution, to promote “*ubuntu* and not victimisation.” The state has a legal duty to prosecute those responsible for serious human rights violations. Failure to prosecute stretches the notion of amnesty and national reconciliation too far, and undermines the proportionality test,

¹¹⁶⁹ For example, the 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and the 1948 Convention on the Prevention and Punishment of Genocide.

¹¹⁷⁰ South Africa ratified the Rome Statute in 1998 and implemented it as part of her municipal law in terms of the Implementation of the International Criminal Court Act 27 of 2002.

¹¹⁷¹ Section 184 of the 1996 Constitution.

¹¹⁷² Section 208 of the 1996 Constitution.

¹¹⁷³ Section 210(b) of the Constitution creating the position of Inspector-General to monitor the activities of the intelligence services.

¹¹⁷⁴ Section 204 of the Constitution (creating the position of Secretary for Defence as principal policy advisor to the Minister of Defence and provide civilian oversight over the South African National Defence Force (SANDF)).

¹¹⁷⁵ Section 199 (5) of the 1996 Constitution.

which is an important constituent element of the balanced approach model proposed in this study.

The next and concluding chapter proposes a set of policy guidelines for amnesties granted as part of a negotiated peace settlement for gross human rights violations.

CHAPTER NINE

CONCLUSIONS AND RECOMMENDATIONS

History is lived forward but understood backward.¹¹⁷⁶

9. 1. Introduction

This study has attempted to answer the question: given the international law rules that govern, or do not govern amnesties, how should international bodies like the International Criminal Court (ICC) and the United Nations handle amnesties that form part of a negotiated peace agreement? Put differently, what should the future relationship between the ICC and domestic truth and reconciliation commissions, or similar mechanisms with the power to grant amnesty, be? In order to answer this question, the balanced approach model was used as an analytical device. In terms of this approach, the amnesty process is weighed against the following factors: whether the amnesty was a product of a legitimate and home-grown political process, whether it was proportional, and rationally connected to the peace process in terms of the rights of victims to an effective remedy (which includes the right to claim reparations), and finally, whether the state granting amnesty has demonstrated a general commitment to international law treaty obligations.

The purpose of this concluding chapter is to describe, in broad terms, what was covered in the previous chapters and to make some recommendations. The chapter proposes twelve model guidelines on the definition, application, general principles and the criterion under which amnesty for gross and systematic human rights violations may be

¹¹⁷⁶ Quoted by Harold Kushner, *To Life!* (1993) 42.

granted.¹¹⁷⁷ It is proposed in this study that the guidelines may be adopted by states party to the ICC, but will not have binding effect, as it is unlikely at this stage that the international community will reach consensus on the issue of amnesties granted for gross and systematic human rights violations for the reasons set out in this concluding chapter. Lastly, four appendices are attached. They are: the 1903 Natal Amnesty Proclamation passed by the Governor of the Colony of Natal, Sir Henry McCallum, at the end of the Anglo-Boer War (Appendix A); an amnesty agreement reached between the transitional government of Burundi and the main rebel movement; and the CNDD-FDD signed in November 2003, Pretoria, South Africa (Appendix B); an amnesty public notice by Paul Bremmer III, the former Administrator of the Coalition Provisional Authority in Iraq (Appendix C) and the Amnesty Law No. 2 for 2004 passed by the Iraqi Transitional Government of Prime Minister, Iyad Allawi on 7 August 2004 (Appendix D).

9. 2. Conclusions

Conclusion 1: Since the end of the First World War, the Westphalian concept of state sovereignty, of which amnesty is a product is gradually being limited in favour of the duty to prosecute serious human rights violations

The study began by distinguishing amnesty from other forms of legal exemption, traced its historical genesis from antiquity to the modern era, and examined the traditional debates between the idealist and realist approaches to the efficacy of amnesty as a tool for peace and national reconciliation in transitional democracies. It was established that in most cases, lack of resources and evidence to prosecute those allegedly responsible for human rights violations often compel the granting of amnesty.

¹¹⁷⁷ Hereinafter referred to as guidelines.

In many legal instruments, and in usage, amnesty is often confused with other legal exemptions, particularly that of pardon. Amnesty differs from pardon and other legal exemptions by the legal effect it purports to produce, that is, to eliminate the punitive character of an alleged or illegal act directed against the security of the state.

The Westphalia Peace Treaty of 1648 is believed to be the first modern international peace treaty to make provision for the granting of amnesty. Soon thereafter, subsequent peace treaties incorporated amnesty clauses. After the First World War, the first attempt was made to punish those responsible for war crimes, but this never materialised. In the aftermath of the Second World War, those responsible for grave breaches of the laws of war were punished and the granting of amnesty was specifically prohibited. However, the criminal prosecution was one-sided, and directed only at the “enemy countries” and no suggestion was made that the Allied countries could be equally responsible for similar offences. As a result, the first basis of universal jurisdiction for war crimes, crimes against humanity, and genocide was “victor’s justice.” The pre- and post-Second World War era was characterised by the emergence of human rights and humanitarian law instruments, which sought to criminalize grave breaches of systematic human rights violations. Since 1948, the human rights regime has grown from strength to strength. This paradigm shift was characterised by the “fall” of state sovereignty, and the “rise” of individual autonomy in international relations. The individual was, for the first time, recognised as an important player in international law.

Before the First World War, amnesty was a well-established practice which, even when a peace treaty was silent on the subject, was presumed to have been included in a peace treaty. This practice changed dramatically after the First and Second World Wars, because, in a break with the past, the victors did not consider themselves to be on the same level as the vanquished. This resulted in the abolition of the traditional practice of granting amnesty and the demand that those responsible for aggression be prosecuted and compelled to pay compensation, as was the case with Germany. However, efforts to enforce the principle of universal criminal jurisdiction did not end the practice of granting amnesty for serious human rights violations.

Conclusion 2: National courts have a poor record in the enforcement of punishment for grave breaches of human rights. This may be attributed, in part, to the use of article 6(5) of the 1977 Protocol II to the Geneva Conventions to justify the granting of amnesties for gross and systematic human rights violations. However, the ICRC, regional human rights bodies and other human rights treaty monitoring bodies have rejected this approach.

With the advent of the Cold War, little attention was paid to averting future threats to human rights, which emerged with the proliferation of internal armed conflicts. The international community was preoccupied with the horrors of the previous wars and everything was done, presumably, to prevent another international war. Armed conflicts in the post-Cold War era were characterised by the predominance of intra-state, as opposed to inter-state, conflicts, often with no winners or losers. In some cases, especially in Africa, conflicts ended with a fragile peace agreement or no peace agreement at all. Often a fragile peace agreement made it difficult to draw a link between “conflict” and “post-conflict” situations, thus making amnesty a necessary evil to bring about a lasting peace and national reconciliation in these war-torn societies.

Military dictatorship in most Latin American countries resulted in serious human rights violations and this phenomenon rekindled the debate on the efficacy of amnesties as a tool for peace and national reconciliation in transitional democracies. National courts used article 6(5) of the 1977 Protocol II (non-international armed conflicts) to the four Geneva Conventions, which makes reference to the granting of “the broadest possible amnesty at the end of hostilities,” to justify amnesties for gross and systematic human rights violations in internal armed conflicts. This approach has been rejected by the International Committee of the Red Cross (ICRC) and treaty monitoring bodies, particularly the Inter-American Commission and Court of Human Rights, which have consistently ruled that such amnesties were incompatible with the obligation of those states to investigate and prosecute alleged human rights violations. A similar trend was followed by sister UN treaty monitoring bodies such as the Human Rights Committee, and the Committee Against Torture, which also confirmed that such amnesties conflict with the duty of member states to investigate, and prosecute perpetrators and pay compensation to victims of gross and systematic human rights violations. Even though the decisions of treaty monitoring bodies are not binding on member states, they create normative values and standards for states to follow.

The rationale and justification for the omission of an amnesty provision from the 1977 Protocol I to the four Geneva Conventions (international armed conflicts) is the fact that, in the latter case, combatants captured by the enemy automatically enjoy prisoner of war status and are automatically entitled to amnesty at the end of hostilities. In the case of Protocol II (non-international armed conflicts), those who take up arms violate domestic law because they are not entitled to take up arms against the government. Hence, at the end of hostilities they are entitled to the “broadest possible amnesty” in order to pave a way for national reconciliation. This, however, does not include granting amnesty for

grave breaches of human rights.

Deliberately, this study does not make a distinction between amnesties granted in internal and international armed conflicts, as the distinction between the two is often blurred and thus calls the value of such a distinction into question. As a matter of fact, the *ad hoc* International Criminal Tribunal for the former Yugoslavia has ruled that the distinction is no longer necessary because war crimes, crimes against humanity and genocide can be committed in peace time.

Conclusion 3: There is no conclusive evidence in general human rights treaty law and customary international law that there is a duty to prosecute. Such a duty is still developing. At the same time, the number of countries granting amnesty cannot be ignored.

The study has sought to clarify the international law status of amnesty in human rights treaties and customary international law. It was concluded that although general human rights instruments do not provide for an explicit duty upon states to prosecute human rights violations, they nevertheless provide mechanisms to ensure that victims have access to judicial forums when their rights are violated. Any government action (including amnesties), or inaction, which implicitly or explicitly denies victims the right to an “effective remedy,” brings into question the integrity of human rights norms and the rule of law proclaimed in these instruments.

The drafting history of the 1998 Rome Statute for the International Criminal Court shows that the issue of amnesty was raised by some delegates, but was never discussed in plenary session. War crimes, crimes against humanity, and genocide are now within the jurisdiction of the newly established ICC, and amnesty granted for these crimes

would constitute a violation of the most fundamental principles of international law (*jus cogens*) and obligations *erga omnes*, which are non-derogable. Although the text is silent on whether the ICC can recognize amnesties granted as part of a negotiated peace settlement, it does provide for the establishment of a Reparations Fund for victims of gross human rights violations. In the event of the court's decision to recognize an amnesty process, it will ensure that it is balanced against the right of victims to an effective remedy, including reparations.

What emerged from customary humanitarian law (state practice and *opinio juris*) is that there is no conclusive evidence in customary international law to indicate that there is a duty to prosecute gross and systematic human rights violations. Such a duty is still evolving. At the same time, the number of countries granting amnesty cannot be ignored.

Conclusion 4: While supporting the punishment of war crimes, crimes against humanity and genocide, the United Nations also recognises limited sovereignty with limited amnesty for less serious offences.

Given the international rules that govern, or fail to govern amnesties, the study examined the practice of the United Nations, its principal organs and specialized agencies in developing the law that governs amnesties. While recognizing that amnesty for war crimes, genocide and crimes against humanity is incompatible with the duty to enforce international criminal responsibility, the practice of the principal organs and other specialized agencies of the UN is marked by inconsistency and lack of coordination. This inconsistency may be attributed to the Cold War and to a lack of political will among the member states.

In the aftermath of the Cold War, the pro-active approach of the United Nations to the enforcement of universal criminal justice came as a reaction to the 1991 ethnic cleansing and concentration camps in Bosnia, which reminded the international community, in particular Europe, of the Holocaust, and thus prompted the UN Security Council to establish the ICTY followed by the ICTR, which bypassed the usual procedure followed when international institutions within the UN system are established. Confronted with complex political emergencies, the UN is beginning to refine its rules of engagement in transitional democracies by being sensitive to the historical and cultural context of the conflict, which is essential for a lasting reconciliation process, and the recognition of the need for reparations to victims of war in exchange for limited amnesty to those responsible for heinous crimes.

9. 3. Recommendations

Having touched on some of the difficulties and challenges that face transitional democracies in terms of the choice to grant amnesty or not, it is important to map out the possible solutions of how to address some of the challenges outlined above. Simply to identify the international rules, which allow or limit a state's powers to grant amnesties is not, on its own, enough. The political, military and socio-economic dimensions, which often necessitate the granting of amnesty, cannot be ignored. This is why this study suggests that the following measures will go a long way to complement the Guidelines proposed in this study.

(i) Recommendation 1: Given the fact that in most armed conflicts the majority of human rights violations are or were perpetrated by members of the security establishment for which amnesty is often sought, it is necessary to exercise civilian control of the security sector (defence, police and intelligence) in order to limit future human rights violations.

If the culture of impunity is to be addressed comprehensively (historical, moral, legal and otherwise), as the Rome Statute proclaims in its Preamble, democratic civilian control of the security sector is essential for the consolidation and survival of a democratic order.¹¹⁷⁸ There are a number of interrelated reasons why civilian oversight of the security sector is necessary if the democratisation process and practice are to become a reality.

Firstly, it is often members of the security establishment who commit the majority of human rights violations under the guise of “protecting national security interests.” When a new democratic government is formed it is put under pressure to grant amnesty to these members of the security establishment for past atrocities because the security sector, particularly the armed forces, by their nature, wield enormous power. This power is easily misused to interfere in the political process and become a potential threat to the new government.

Secondly, in a new democratic order, violations committed by members of the security establishment are still fresh in the minds of many victims of violence who will demand justice. In that sense, the granting of amnesty for those within the security establishment who are responsible for serious human rights violations becomes a matter of concern and calls for a solution by the new government in an attempt to balance the rights of victims with those who fear possible prosecution. In that context, civilian oversight by

¹¹⁷⁸ “Security sector” is defined here to include the courts, armed forces, police, and intelligence agencies, together with their policy and administrative structures.

democratic structures like parliament and the executive, becomes an imperative if such violations are to be prevented in future.

Lastly, it is important to guard against the so-called “interests of national security” being used by politicians to cover human rights abuses by members of the security establishment.¹¹⁷⁹ The intelligence sector is one sector of the security cluster which has the potential to abuse its power and hide behind the veil of secrecy, and saying by way of justification that by virtue of its nature it should remain outside the scrutiny of democratic governance. While democratic control of the security establishment is essential to ensure checks and balances and to avoid future abuses of power, the need for transparency should not be used to hamper government from making decisions which affect national security. In that context, national security policy must be balanced against the interests of accountability and transparency otherwise government will not make decisions if there is fear that it risks being embarrassed in future. In the case of South Africa, given the propensity of the security establishment to become a law unto itself during the apartheid era (for which amnesty was granted until 1992), it is not surprising that civilian oversight became the cornerstone of the transformation of the security sector under the 1993 and 1996 Constitutions. Consequently, in Africa, which accounts for two-thirds of the world’s conflict (currently Africa has seventeen armed conflicts) civilian oversight of the security establishment is equally important.

¹¹⁷⁹ See for example, *National Security Strategy of the United States* (2002); section V of the National Security Strategy emphasises a policy of pre-emptive use of force in the face of an imminent attack.

(ii) Recommendation 2: As a matter of government policy, civil-security relations should be promoted at all levels.

Civilian oversight¹¹⁸⁰ of the security establishment is insufficient if it is not linked to a new culture of civil-security relations. There is need to change the culture and values of the security establishment by promoting civil-security relations aimed at ensuring that men and women in uniform understand their responsibility and role in a democratic society. After the Second World War, Germany introduced the concept of “citizen-in-uniform,” of the *Bundeswehr* (German Army), as part of its effort to change the attitude of its uniformed members.¹¹⁸¹

The newly formed South African National Defence Force (SANDF) introduced the concept of a “citizen in uniform” after 1994 as part of its value system for a post-apartheid defence sector. The 1995 South African *White Paper on Defence*, which set out the policy framework for a new defence force in a new society stated, *inter alia*, that:

...the Minister will oversee the implementation of a civic education programme on ‘defence in a democracy’ [and shall establish] ...a working group for this purpose.

In 1997 the Minister of Defence issued a directive, which introduced civic education in the South African National Defence Force (SANDF), covering the key elements and principles of a democracy; the constitution and the bill of rights; international humanitarian law; civil-military relations in a democracy and military professionalism in a democracy. Within civic education, the Minister appointed a working group known as the Civic Education Advisory Board (CEAAB), which consists of members drawn from

¹¹⁸⁰ “Civilian oversight” is used here generally to refer to control mechanisms such as parliament, civilian secretariat or political authority (i.e. minister) to oversee the work of the military.

¹¹⁸¹ Rocky Williams, “Mapping a New African Civil-Military Relations Architecture” in Rocky Williams, Gavin Gawthra & Diane Abrahams (eds.), *Civil-Military Relations and Defence Transformation in Southern Africa* (2003) 265 at p. 280.

the universities and research institutions, parliament, the SANDF and the Secretariat.¹¹⁸²

The Board is responsible for monitoring, providing advise and evaluating the implementation of civic education so that it will make a significant contribution towards a common set of values within the SANDF.

9.4. A Protocol on Amnesty? The Case for Policy Guidelines on Amnesties Granted for Gross Human Rights Violations

O' Shea¹¹⁸³ in his doctoral thesis has proposed a Protocol to the Rome Statute of the International Criminal Court on the Proper Limitations of Municipal Amnesties Promulgated in Times of Transition as a model convention providing for "...a mechanism for the recognition of amnesties not in compliance with normal international limitations."¹¹⁸⁴ He continues:

It is proposed that the convention be adopted in the form of a Protocol to the Rome Statute open to ratification by parties to the Statute. This has three important advantages. First of all, it makes the regime for the international recognition of amnesties clearly part and parcel of the international criminal law process. Second, it thereby encourages the parties to the Rome Statute to embrace its provision. Finally, it encourages states to become parties to the Rome Statute which are concerned about the inflexibility of its provisions or which wish to benefit from a regime for the international recognition of amnesty.¹¹⁸⁵

It is submitted that although, legally, nothing prevents state parties to the Rome Statute from adopting a protocol to recognise amnesties, given the history that gave birth to the ICC such a protocol is highly unlikely to materialise in the foreseeable future.¹¹⁸⁶

¹¹⁸² See CEAAB Constitution of 19 February 2002 (on file with the author).

¹¹⁸³ Andreas O' Shea, *Amnesty for Crime in International Law and Practice*, LLD thesis, University of the Witwatersrand (2001) Chp. 15, Annexure I, pp. 427-33.

¹¹⁸⁴ *Ibid.*, p. 425.

¹¹⁸⁵ *Ibid.*, pp. 425 – 426.

¹¹⁸⁶ For example, the crime of aggression will only come under the jurisdiction of the ICC once there is a generally accepted definition by the Assembly of States.

However, this will depend entirely on whether there is a political will to recognise amnesties. The ICC is yet to be tested on how it will react to amnesties granted as part of a negotiated peace agreement. Currently, sister institutions, namely the ICTY and the Special Court for Sierra Leone, have rejected amnesties for serious human rights violations.

Contrary to what O'Shea seems to suggest, countries which are not parties to the Rome Statute will not be encouraged to accede in order to "benefit from the a regime" of international recognition for amnesty, but rather because of their commitments to general human rights treaty obligations. Countries like South Africa, for example, played a constructive role as a leading member of the Southern African Development Community (SADC) delegation during the 1998 diplomatic conference on the establishment of the ICC, despite the uncertainty of the validity of her amnesty process in international law.¹¹⁸⁷ South Africa was one of the sixty like-minded groups, supported by Germany and the United Kingdom, which came to be known as the "friends of the ICC" and who worked closely with the NGO community to support the establishment of an independent ICC.¹¹⁸⁸ If the drafting history of the Rome Statute in 1998, in which a provision on amnesty was rejected, is anything to go by, a convention of some sort specifically to recognise amnesties is unlikely. Seibert-Fohr¹¹⁸⁹ in a recent article concurs:

Taking into account that the drafters of the Rome Statute could not agree on a specific provision on amnesties, the chances for an additional protocol on this issue are quite limited. The law on amnesties is a very complex issue. The decision whether a national

¹¹⁸⁷ Sivu Maqungo, "The Establishment of the International Criminal Court: SADC's Participation in the Negotiations" 9 (1) *African Security Review* (1999) 42.

¹¹⁸⁸ *Ibid.*

¹¹⁸⁹ Anja Seibert-Fohr, "The Relevance of the Rome Statute of the International Criminal Court for Amnesties and Truth Commissions" 7 *Max-Planck Yearbook of United Nations Law* (2003) 553 at p. 589.

amnesty should be accepted requires a delicate balancing of interests, which differ from case to case.

Over and above these historical circumstances, there are pressing reasons why a protocol on amnesty will not receive international support. Firstly, adopting a protocol on amnesties means resorting to the traditional and established method by which this is done, namely, by calling a diplomatic conference of states. Such a treaty-making process, besides being complicated and time consuming (e.g., having to lobby states to ratify a treaty before it comes into effect), will open up issues already agreed upon in the Rome Statute. This is perhaps one of the reasons why the Rome Statute made no room for reservations, which it was thought could complicate and undermine the jurisdiction of the ICC.¹¹⁹⁰

The Rome Statute is the product of a hard battle won after many years of unsuccessful attempts, since World War I, to establish a permanent ICC. As indicated in this study, the drafting history of the Rome Statute reveals that delegates at the 1998 UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court rejected a US proposal for an amnesty provision in the Rome Statute. Advocates of human rights might see the presence of a protocol on amnesty as having a destabilising effect on the entire human rights regime that began at the end of the Second World War, and its aim to limit state power over the individual.

Secondly, given the poor record of national courts in the prosecution of war crimes and other international crimes, a protocol on amnesty might be used by national courts and successor regimes, which favour reconciliation or fear the military establishment, to

justify the granting of amnesty and in that way undermine the currently growing momentum of international criminal jurisdiction for international crimes. Such a protocol may also be seen by those who have campaigned tirelessly for the establishment of the ICC, particularly by civil society and international human rights NGOs, as a form of impunity reached by the back-door.¹¹⁹¹ The ICRC is on record as having rejected a broad interpretation of article 6(5) of Protocol II of the Geneva Convention to include amnesty for serious human rights violations. The ICRC is unlikely to support an international instrument which purports to legitimize impunity by recognizing municipal amnesty laws with dubious validity in international law, like the South African amnesty process. Ending the culture of impunity is consistent with the objective set out in the Preamble of the Rome Statute that it is:

...to put an end to impunity for the perpetrators of...the most serious crimes of concern to the international community as a whole.

Thirdly, countries opposed to the jurisdiction of the ICC, such as China and the US, may exploit the amnesty process to undermine the work of the court. Both countries, which are members of the UN Security Council, have refused to ratify the Rome Statute, which they see as a violation of their sovereignty. In 1998, the USA objected to the jurisdiction of the ICC, amongst others, on the ground that states parties to the ICC may hand over US citizens, and US Service Members in particular, to the ICC if required to do so by the prosecutor of the court.¹¹⁹² The US expressed concern that the ICC will hamper its commitment to deploy troops to conflict areas. To avoid this, the US Congress passed

¹¹⁹⁰ Article 120 of the Rome Statute.

¹¹⁹¹ For example, the Coalition for an International Criminal Court, Human Rights Watch and Amnesty International.

¹¹⁹² On 31 December 2000, the Clinton administration signed the Rome Statute, and on 6 May 2002 the Bush Administration repudiated the Rome Statute and declared that it was not binding on the US.

the American Service Member's Protection Act¹¹⁹³ which states that no military assistance will be given to governments which are state parties to the ICC, unless they sign a bilateral article 98 agreement¹¹⁹⁴ with countries which are parties to the Rome Statute to gain immunity from the ICC. Any country, which did not sign such a bilateral article 98 agreement by 1 July 2003, would have all US military assistance cut off immediately.¹¹⁹⁵

The US interpretation that article 98 allows for the conclusion of new agreements has been criticised by human rights organizations as they believe it will undermine and prevent the ICC from fulfilling its mandate.¹¹⁹⁶ These critics have labelled the so-called "bilateral article 98 agreements" as "impunity agreements."¹¹⁹⁷ It is therefore not by coincidence that it was the US delegation, which proposed the inclusion of an amnesty

¹¹⁹³ Section 207 of the Act of 2002.

¹¹⁹⁴ Article 98 provides as follows:

Co-operation with Respect to Waiver of Immunity and Consent to Surrender

1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the co-operation of that third State for the waiver of the immunity.
2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the co-operation of the sending State for the giving of consent for the surrender.

¹¹⁹⁵ For example, the South African government refused to sign article 98 agreement with the US on the basis that it was committed to the promotion of all instruments of humanitarian law and that it had signed and ratified the Statute of the ICC which included the promulgation of the International Criminal Court Act 27 of 2002. As a result, South Africa will lose \$1,6 million International Military Education and Training (IMET) and 6,0 million of Foreign Military Funding (FMF) for the 2004/5 financial year. See Cabinet Memorandum, May 2003 (on file with the author).

¹¹⁹⁶ A common understanding is that article 98 seeks to address conflicts between the ICC Statute and agreements existing before the introduction of the ICC such as extradition treaties and status of force agreements.

¹¹⁹⁷ For example, Human Rights Watch Press Release, *United States Efforts to Undermine the International Criminal Court: Legal Analysis of Impunity Agreements*, 30 September 2002; Amnesty International, *International Criminal Court: US Efforts to Obtain Impunity of Genocide, Crimes against Humanity and War Crimes*, 2 September 2002.

provision during the 1998 Plenipotentiary Conference for the establishment of an ICC in Rome. Resistance to the US attempt to undermine the ICC is an indication that respect for the rule of law and human rights is an important aspect of international relations. States are no longer at liberty to use state sovereignty as an excuse not to fulfil and respect their international law obligations.

This study therefore proposes a less divisive approach to policy guidelines on amnesties for the Assembly of States to take note of, and to commend, to states and to international courts and tribunals, leaving its content to be taken up in the normal processes of the application and development of international law. Rather than attempt to modify the Rome Statute with a protocol, guidelines are the simplest and most practical way to avoid lengthy treaty-making process. The guidelines will serve to assist the development, and emergence, of international law on amnesties and will provide a testing ground for new ideas or for the adaptation of old ones. In that context, the policy guidelines will serve as a Guide to Practice.

The status of the guidelines is that of a code of conduct to be adopted as a formal resolution or a recommendation to governments and international bodies. Therefore, the guidelines do not have the character of a binding legal instrument. The non-legal binding nature of the guidelines may be seen as a weakness which would result in their non-implementation, but this is not necessarily true as such a perceived weakness may indeed be their strength. The advantage of “soft” rules is that they are a transitional step between customary and treaty law which often makes codification possible. States will be willing to accept them precisely because they are not binding, and with time, they

will evolve into “hard” law. However, the “hard law” aspect does not necessarily have to take the form of an international agreement.

The guidelines proposed in this study draw on many sources, primarily state practice and codification attempts by the United Nations and the civil society organisations discussed in this study. These include the UN Sub-Commission on the Promotion and Protection of Minorities’ *Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* (1997); *Basic Principles and Guidelines with Respect to the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms* (1993) and the *Princeton Principles on Universal Jurisdiction* (2001) and the *Cairo-Arusha Principles on Universal Jurisdiction* (2002), to mention but a few. One of the key features of these documents is that they do not have a binding legal effect. Moreover, some of the principles and standards set out in these texts not only reflect customary international rules, but have already been cited as authority by international judicial bodies such as the International Court of Justice.¹¹⁹⁸ The fact that the ICJ has relied on some of these documents suggests that guidelines may have a long-term influence even if they do not take the form of a convention. These codification efforts by the UN, academic and civil society organisations have been duly acknowledged in the Preamble of the Guidelines proposed in this study.¹¹⁹⁹

Another feature of most of the above instruments is that where amnesty is envisaged, it has been recommended that it be counterbalanced with the rights of victims to an

¹¹⁹⁸ For instance, the Cairo-Arusha Principles on Universal Jurisdiction were cited by Judge Van der Wyngaert (dissenting) in the *Democratic Republic of the Congo v Belgium* (“*International Arrest Warrant Case*”), 14 February 2002, 41 *International Legal Materials* (2002) 532, para. 23.

¹¹⁹⁹ Paragraph 7 of the Guidelines.

effective remedy which includes the right to claim reparations. This is what the balanced approach model has sought to argue.

Finally, in practice, how will the Guidelines reflect the balanced approach model proposed in this study? To answer this question let us consider the amnesty law passed in January 2000 by the government of President Yoweri Museveni of Uganda with a view to benefiting members of the Lord's Resistance Army responsible for atrocities committed in Southern Uganda, and members of other rebel movements for acts committed since 1986.¹²⁰⁰

The law was intended to benefit Ugandans who participated in actual combat; who collaborated with perpetrators of the war, assisted or aided the perpetuation of the war and committed any other crime in furtherance of the war or armed rebellion against the government of Uganda.¹²⁰¹ The Act established an Amnesty Commission consisting of seven commissioners appointed by the President, with the approval of parliament, and chaired by a judge of the High Court of Uganda.¹²⁰² The Amnesty Commission also consists of seven members of the Demobilization and Resettlement Team (DRT) also appointed by the president with the approval of the Sectoral Committee on Defence and Internal Security of parliament.¹²⁰³ The functions of the Commission are to monitor programmes for the demobilization, reintegration and resettlement of persons seeking to

¹²⁰⁰ Section 3(1) of Amnesty Act 2 of 2000. The law was assented to by the President on 17 January 2000 and came into force on 21 January 2000. Section 2 of the Act defines amnesty as "a pardon, forgiveness, exemption or discharge from criminal prosecution or any other form of punishment by the state."

¹²⁰¹ Section 9 of the Act.

¹²⁰² Section 8 of the Act.

¹²⁰³ Sections 11 & 12 of the Act.

be granted amnesty (also referred to as “reporters” in the Act); sensitise the general public about the amnesty law and promote national reconciliation.¹²⁰⁴ The function of the DRT is to draw up programmes on the de-commissioning of arms, demobilization, resettlement and reintegration of reporters.¹²⁰⁵

In October 2002, loopholes were identified in the implementation of the Amnesty Act and amendments were introduced to the Act in the form of regulations. Amongst others, the Act was silent on those who, after getting amnesty, returned to rebellion and whether their amnesty must lapse in such circumstances.¹²⁰⁶

In December 2003, following the killing of more than 200 people in Barlonya camp, North Eastern Uganda, President Museveni requested the prosecutor of the ICC, Luis Moreno Ocampo, to investigate the alleged crimes which included summary executions, torture, recruitment of child soldiers, rape, forced displacement and the destruction of civilian property.¹²⁰⁷ The matter is currently being investigated by the Prosecutor’s Office of the ICC.

In terms of the balanced approach model proposed in the Guidelines, the ICC will have to determine – firstly, whether the amnesty process was a product of a legitimate democratic process. It is questionable whether Uganda is a democratic state. Since taking power in 1986, President Museveni banned political parties. The ban was lifted in

¹²⁰⁴ Section 2 of the Act.

¹²⁰⁵ Section 13 of the Act.

¹²⁰⁶ Regulations to the Amnesty Act 2 of 2000, October 2002.

¹²⁰⁷ Statement by the Prosecutor Related to Crimes Committed in Barlonya Camp in Uganda, The Hague,

2000 following a referendum. However, there is no official political opposition in Uganda. In early 2004, the Uganda Supreme Court declared the Referendum (Political Systems) Act, 2000 which sought to deny political parties the constitutional right to participate in the referendum to choose a political system, and instead instituted the “movement system” as the only recognised political system unconstitutional.¹²⁰⁸ It is therefore questionable whether the amnesty is a product of a legitimate political process or that it was granted for “palatable” purposes of political expediency. Secondly, whether the amnesty law is proportional and rationally connected to the peace process, namely, that it sought to uphold the rights of victims of gross human rights violations to an effective remedy, including reparations. Both the Amnesty Act and its regulations have no single provision on reparations, nor does it make provision for victims to institute civil proceedings against those allegedly responsible for serious human rights violations. Instead, those who benefited from the presidential pardon may also benefit from the amnesty law. Finally, the court may also consider whether the government of Uganda has demonstrated a commitment to “protect and ensure respect” of international human rights treaty obligations. This is also unlikely, given the government’s involvement in the war in the DRC. On that basis the amnesty law fails the test for the balanced approach model and the prosecutor of the ICC may reject the amnesty law as an act of impunity and prosecute those responsible for crimes within its jurisdiction.

9. 5. Guidelines Regarding Amnesties for Gross and Systematic Human Rights Violations in International Law

The policy Guidelines proposed in this study are supported by 12 model clauses covering issues related to the meaning of amnesty and its scope of application. The

23 February 2004.

¹²⁰⁸ *Paul Ssemogerere & Others v Attorney-General of Uganda, Constitutional Appeal No. 3 of 2000*, 2004 (unreported).

Guidelines also cover substantive aspects such as general principles, grave breaches of international law, effective remedies to victims of international crimes, the role to be played by the United Nations and the ICC in dealing with amnesties granted for serious human rights violations, and the extraterritorial effect of amnesty.

Accordingly, it is proposed that the Guidelines read as follows:

Guidelines Regarding Amnesties for Gross and Systematic Human Rights Violations in International Law

Preamble

The State Parties subscribing to these Guidelines,

Conscious that the Statute of the International Criminal Court (ICC) adopted in Rome in 1998 and the establishment of the Permanent Court thereunder are essential to achieving an end to the culture of impunity;

Bearing in mind that the impunity enjoyed by perpetrators of international crimes is of grave concern to the international community;

Reminding the present and future generations that the aforementioned Statute leaves space for future creativity and initiatives within the parameters established by the Statute, consistent with the spirit and purport thereof;

Mindful of the inextricable link between peace and justice, and the need to reconcile amnesty, on the one hand, with accountability, on the other;

Aware that amnesty, as a device for peace and national reconciliation in transitional democracies, has at times been abused;

Taking into consideration the duty to investigate and prosecute grave breaches of humanitarian law as embodied, in particular, in the Convention against Genocide (1948), the Apartheid Convention (1948), the four Geneva Conventions of 12 August 1949 and the two 1977 Additional Protocols thereto;

Reaffirming the Guiding Principles emanating from the studies of the UN Commission on Human Rights on the Question of Impunity for Perpetrators of Human Rights Violations; the jurisprudence of UN treaty monitoring bodies; national and regional bodies; resolutions of the Security Council and the General Assembly; other UN specialised agencies; and the codification efforts of academic and civil society organisations;

Noting the significance of the 1969 International Convention on the Law of Treaties and the Articles on State Responsibility for Internationally Wrongful Acts approved by the UN General Assembly on 12 December 2001;

Determined that nothing in the proposed Guidelines is intended to undermine the sovereignty of states and the enforcement of humanitarian law in general;

Resolving that consistent with the complementarity principle, the independence of the Prosecutor, as guaranteed in the Rome Statute, and respect for the rule of law and the sovereign equality of states as guaranteed in the Charter of the United Nations, it is necessary to establish guidelines to regulate the future relationship between national judicial and non-judicial mechanisms with the International Criminal Court, since both play a vital role in bringing about peaceful transition in deeply divided societies;

Have agreed on the following practice Guidelines Regarding Amnesties for Gross and Systematic Human Rights Violations in International Law;

Guideline 1: Definitions

For purposes of these Guidelines:

- 1.1. “Amnesty” means a sovereign act of forgiveness, exemption or general oblivion, or a discharge from criminal prosecution, or any other form of punishment for past offences associated with harmful acts committed for political purposes by state and non-state actors granted by a head of state, a legislative body or a body established in terms of legislation, to a group of identified persons and available for a fixed period of time, which may, or may not, be predicated upon the fulfilment of certain conditions;
- 1.2. “Human rights violations” means violations of regional and international human rights norms and standards, including violations which formed part of a systematic pattern of abuse committed within the context of an armed conflict or in times of peace such as crimes against humanity, war crimes, torture and genocide;
- 1.3. “Reparations” means any form of compensation, *ex gratia* payment, rehabilitation, restitution or recognition;
- 1.4. “Victim” means a person who individually, or as part of a collective, has suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of his or her rights as a result of acts or omissions by the state, its agents or non-state actors that constitute violations of national criminal laws and internationally recognised norms relating to human rights.

Guideline 2: Application and General Principles

- 2.1. A sovereign state may grant amnesty or commutation of sentence in accordance with its constitution or other laws;

2.2. Amnesty shall apply only to crimes committed in situations of armed conflict and in times of peace;

2.3. *Ad hoc* and/or individualised amnesty and pardons are generally discouraged as a mechanism for amnesty;

2.4. An amnesty erases previous criminal records of conviction.

Guideline 3: Circumstances Permitting the Granting of Amnesty

3.1. Where appropriate, amnesty may be granted for the purposes of:

- (a) Advancing peace and national reconciliation;
- (b) A pre-transitional negotiation process;
- (c) Disarmament, Demobilization and Reintegration of armed opposition forces;
- (d) The return of political exiles;
- (e) Any other appropriate circumstances.

Guideline 4: Crimes for which Amnesty is generally Permissible

5.1. As a general rule, amnesty is permissible for the following offences:

- a. Politically motivated offences;
- b. Acts of treason;
- c. Acts of sedition;
- d. Damage to civilian property caused by or consequent upon any conduct for which amnesty is granted;
- e. Offences under military law (e.g., mutiny, just desertion of the armed forces, including objection to performing military service

for reasons of conscience, also known as conscientious objection);

- f. Participation in an armed rebellion;
- g. Any other offences, save those which constitute grave breaches of humanitarian law, resulting from participation in any form of armed conflict.

Guideline 5: Blanket Amnesties and Serious Breaches of Peremptory Norms of International Law

5.1. Amnesty shall not be granted for war crimes, crimes against humanity, genocide or any other serious breaches of the peremptory norms of international law (*jus cogens*);

5.2. Self-assumed/auto amnesties are *ipso facto* incompatible with the general principles of international law.

Guideline 6: Amnesty Granted for Serious Human Rights Violations

6.1. In determining whether amnesty for gross and systematic human rights violations is appropriate, the state shall, *inter alia*, be guided by the following considerations:

- (i) The amnesty must be granted in accordance with the constitution or other laws of the state;
- (ii) Amnesty legislation shall be approved by a democratically elected body;
- (iii) Reparations for victims of gross human rights violations shall be guaranteed;
- (iv) Amnesty shall be granted for gross violations only where such acts were proportional to the political objectives sought to be achieved by the perpetrators;
- (v) A state granting amnesty shall demonstrate a general commitment to international law obligations.

6.2. The state granting amnesty should establish an independent and representative *ad hoc* body to ensure that the criteria set forth in 6.1 are met by:

- (i) Monitoring the implementation of the amnesty legislation;
- (ii) At the end of its activities, the *ad hoc* body shall make recommendations to the government regarding victims' reparations, security sector transformation, and other necessary measures to prevent future human rights violations;

- (iii) A military tribunal shall not constitute the requisite *ad hoc* body;
- (iv) The decision on the application of amnesty must be subject to appeal before a court of law.

Guideline 7: Reparations and the Right of Victims to an Effective Remedy

7.1. A general amnesty may not limit the rights of victims to an effective remedy as provided for in general and specific human rights treaties and the criminal law of the country, including the right to institute civil proceedings against the perpetrator of the alleged gross violation of human rights;

7.2. The state has a responsibility to adopt a policy framework on restitution, compensation and rehabilitation for victims of gross human rights violations in line with international law and practice;

7.3. States granting amnesty must at all times strive to balance the prerogative to grant amnesty and the need to ensure that justice is done with respect to offences committed.

Guideline 8: The International Criminal Court

8.1. The Prosecutor of the International Criminal Court shall in exercising his or her discretion refuse to recognise a domestic amnesty regime created by a signatory state party if:

- (a) The amnesty process is intended to benefit persons responsible for crimes within the jurisdiction of the International Criminal Court and thus undermines his or her independence and the work of the Court;
- (b) The judicial process was intended to shield persons accused of serious human rights violations;
- (c) Taking into account all circumstances, the process undermines the interests of justice and the general principles of law;

8.2. In the event that the Court decides not to recognise a domestic amnesty regime the Court may have regard to amnesty as a factor in mitigation of sentence.

Guideline 9: Principles of Sovereign Equality and Non-Interference in the Internal Affairs of other States

9.1. The principles of non-interference in the domestic affairs and sovereign equality in

article 2 (1) & (7) of the UN Charter, shall not in and of themselves justify derogation from the obligation of states to prosecute or extradite those responsible for international crimes.

Guideline 10: The Role of the UN Security Council

10.1. The UN Security Council may refuse to recognise an amnesty process if it constitutes a threat to international peace and security in terms of Chapter VII of the UN Charter;

10.2. In exercising its powers in terms of Chapter VII, the UN Security Council shall bear in mind the provisions of the UN Charter, particularly article 103 of the Charter.¹²⁰⁹

Guideline 11: ExtraTerritorial Effect of Amnesty

11.1. Amnesty for gross human rights violations shall not have extraterritorial effect for crimes committed outside the territory of the state granting amnesty.

Guideline 12: Status of the Guidelines

13.1. The Assembly of States of the International Criminal Court take note of these Guidelines and commend them to the ICC, regional and national courts and tribunals for implementation.

9. 6. Conclusion: Commentary on the Guidelines

The Guidelines provide that the power to grant amnesty to perpetrators of human rights violations vests with the executive, legislative or the highest political authority of a sovereign state or any other organ recognized as such.¹²¹⁰ The amnesty must be granted in accordance with the constitution or other laws of the state.¹²¹¹

¹²⁰⁹ Article 103 of the UN Charter provides as follows:

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

¹²¹⁰ Guideline 1.

Generally, amnesty may be granted for purposes of advancing peace and national reconciliation, disarmament, demilitarization and reintegration of armed opposition forces, return of exiles and any other appropriate circumstances.¹²¹²

In terms of the Guidelines, amnesty may be granted for politically related offences, offences under military law (e.g., mutiny), acts of treason, sedition and any other offence, which does not constitute a grave breach of international humanitarian law.¹²¹³

However, amnesty is prohibited for war crimes, crimes against humanity, genocide or any other serious breaches of the peremptory norms of international law (*jus cogens*).¹²¹⁴

Blanket amnesties are *ipso facto* incompatible with the general principles of international law.¹²¹⁵

The Guidelines provide that in the event that amnesty is considered for gross human rights violations, the state granting such an amnesty shall, *inter alia*, be guided by the following considerations, namely, that the amnesty is approved by a democratically elected constituent body; the amnesty is proportional to the acts committed; the state must demonstrate a commitment to international law obligations and the rights of victims to reparations and an effective remedy must be guaranteed.¹²¹⁶ Amnesty may be considered, for example, if lack of resources may result in violation of other international law obligations by the state concerned. Where necessary an independent

¹²¹¹ Guideline 2(1).

¹²¹² Guideline 3.

¹²¹³ Guideline 4.

¹²¹⁴ Guideline 5 (1).

¹²¹⁵ Guideline 5(2).

¹²¹⁶ Guideline 6(1).

ad hoc body should be established to monitor the implementation of the amnesty legislation.¹²¹⁷ A military tribunal is excluded for purposes of establishing an independent body to adjudicate the merits or demerits of the amnesty process.¹²¹⁸

States granting amnesty must at all times strive to balance the prerogative to grant amnesty and the need to ensure that justice is done with respect to offences committed. A policy framework on restitution, compensation and rehabilitation for victims of gross human rights violations must be in line with international law and practice.¹²¹⁹

The Guidelines make provision for the ICC to reject an amnesty process if it was intended to benefit persons responsible for crimes within the jurisdiction of the court, and the process was meant to shield such persons and further undermines the interests of justice.¹²²⁰ States are prohibited from invoking the principles of sovereign equality and non-interference in the internal affairs of other states to justify the granting of amnesties which violate general principles of international law.¹²²¹ The UN Security Council may refuse to recognize an amnesty process if it constitutes a threat to international peace and security, however, in exercising such powers in terms of Chapter VII of the UN Charter, the Council shall not undermine any of the fundamental principles of international law.¹²²² Amnesty for serious human rights violations committed in other countries shall

¹²¹⁷ Guideline 6(2) (i).

¹²¹⁸ Guideline 6(2) (iii).

¹²¹⁹ Guideline 7.

¹²²⁰ Guideline 8.

¹²²¹ Guideline 9.

¹²²² Guideline 10.

not have extraterritorial effect.¹²²³ Finally, the status of the Guidelines is that the Assembly of States will simply take note of them and make a recommendation to the ICC and other international judicial bodies for the application and development of international law in light of the Guidelines.¹²²⁴

¹²²³ Guideline 11.

¹²²⁴ Guideline 12.

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APPENDIX A

NATAL AMNESTY PROCLAMATION of 12 March 1903¹²²⁵

PROCLAMATION by his Excellency Colonel Sir Henry Edward McCallum, Royal Engineers, Knight Commander of the Most Distinguished Order of Saint Michael and Saint George, Aide-de-Camp to His Majesty, Governor and Commander-in-Chief in and over the Colony of Natal, Vice-Admiral of the same, and Supreme Chief over the Native Population.

WHEREAS a state of war recently existed between His Majesty's Government and the Government of the late South African Republic and the late Orange Free State;

And whereas during the said war certain British subjects and other inhabitants of this Colony, in despite of their allegiance to our late Sovereign Lady Queen Victoria and our Sovereign Lord King Edward the Seventh, did wrongfully and unlawfully take up arms against their said Majesties' Crown and Government, and did commit divers [sic] other acts of treason and treasonable offences, as well as other criminal acts arising out of the state of war then existing;

And whereas certain persons not being Burghers of the late South African Republic or Orange Free State, but being inhabitants of the territories formerly belonging to the South African Republic, and afterwards forming part of the Transvaal Colony, but which were by Act No. 1, 1903, annexed to this Colony under the title of the Northern Districts, did, during the said war, take up arms against the British Crown and Government, and did commit various acts in pursuance of the said war;

And whereas the Burgher forces of the said South African Republic did, on the 31st day of May, 1902, by their representatives, sign and accept certain terms of surrender, which terms of surrender do not, however, apply to such inhabitants not being Burghers of the said late South African Republic or Orange Free State;

And whereas in order to promote unity and goodwill amongst all classes of His Majesty's subjects in this Colony, and to remove far as possible the recollection of all the causes of enmity which existed during the late war, and as an especial token of His Majesty's clemency and forgiveness, it is His Majesty's gracious pleasure that pardon and freedom from liability to prosecution for such crimes, offences, and other acts as aforesaid should be extended to those persons hereinafter mentioned, and to that end I am empowered to exercise His Majesty's royal prerogative of pardon and mercy:

Now, therefore, in virtue of the authority committed to me, I do hereby proclaim, and make known as follows:—

1. His Majesty's pardon is hereby granted to all persons against whom any charges are now pending, but untried, or against whom any charges may hereafter be brought, for the crime of treason, or for treasonable offences heretofore committed, or for any other offences committed during and arising out of the state of war which existed as aforesaid, and such persons shall be forever exempted from prosecution for any such crimes and offences.

¹²²⁵ Reproduced in David Throup (ed.), *British Documents on Foreign Affairs: Reports and Papers from the Foreign Office Confidential Print, Part 1, Series G, vol. 9 (Anglo-Boer War II: Attitude of European Powers and Post-War Reconstruction, 1901 – 1905)* (1976) 202 - 203.

2. His Majesty's pardon is hereby granted to all persons who during the said war were inhabitants of this Colony (inclusive of the Province of Zululand) for all acts which were committed during the said war, and were done in pursuance thereof or arose out of the same; and such persons shall be for ever exempted from prosecution for any such acts as aforesaid.
3. His Majesty's pardon is hereby granted to all persons who, not being Burghers of the late South African Republic, were inhabitants of the territories formerly belonging to the said Republic, and which were recently annexed to Natal, in terms of Act No. 1,1903, under the title of the Northern Districts, for all acts which were committed during the said war and were done in pursuance thereof or arose out of the same; and such persons shall be forever exempted from prosecution for any such acts as aforesaid.
4. This Proclamation applies to crimes, offences and acts cognizable by the Courts of Law of Natal and to no others.

God Save the King!

Given under my hand and the public seal of the Colony at Government House, Pietermaritzburg, Natal, this 12th day of March, 1903.

CHARLES J. SMYTHE,
Colonial Secretary.

APPENDIX B

AGREEMENT FOR GRANTING TEMPORARY IMMUNITY

FOR ARMED CONFLICT RELATED CRIMES

IN

BURUNDI

Preamble

Noting the strong desires of Burundians who want to live in peace and social harmony; to exercise their civil and political rights to freedom and participate in development activities of their nation;

Noting the concern; concerted efforts and commitment by the Regional Initiative on Burundi to restore Peace, Security and Stability in Burundi;

Deeply concerned that the impact of war has seriously torn the Burundian society for decades;

Convinced that the urgent need to restore peace in Burundi requires the spirit of reconciliation as the way forward;

Aware that the current legal system in Burundi has limitations in effecting and promoting the spirit of reconciliation and confidence building;

Taking into cognizance the need to provide for the immunity for armed conflicts related crimes;

Taking note that the Bill relating to Temporary Immunity from legal proceedings for political exiles is under consideration by the National Assembly;

In conformity to the spirit of the Ceasefire Agreement of 2nd December 2002 especially in Article 2 paragraph 1.9.4 of Annex 1; the Declaration of Cessation of Hostilities signed by both belligerent parties in Pretoria on 27th January, 2003 as well as the spirit of the Arusha Peace Agreement;

And in reaffirming the commitment of the parties to the conflicts in Burundi, to achieve lasting peace and reconciliation in Burundi.

THE TRANSITIONAL GOVERNMENT OF BURUNDI

And

THE MOVEMENT NATIONAL COUNCIL FOR THE DEFENSE OF DEMOCRACY-FORCES, (CNDD-FDD)

hereby agree as follows:-

Article 1: A Temporary Immunity shall be granted to all Burundians for the following armed conflict related crimes committed between 1st July, 1962 (21st October, 1993) and the entry into force of the Permanent Ceasefire Agreement:

- (i) actual participation in combat in the armed conflict
- (ii) collaborating with combatants in the armed conflict
- (iii) commission of any other crime in furtherance of the armed conflict
- (iv) assisting or aiding the conduct of the armed conflict.

Article 2: All members of armed conflict groups and movements and political exiles abroad returning to Burundi shall be granted temporary immunity as stated in Article 1.

Article 3: The Public Prosecutor and Courts in Burundi shall suspend all the judicial actions for all armed conflict crimes referred to under Article (1).

Article 4: All judgments passed on charges related to the armed conflict crimes during the said period shall be suspended and such convicts shall be released after their identification by the Temporary Immunity Judicial Commission.

Article 5: The crimes of genocide and crimes against humanity will be determined in accordance with regulation of the International Criminal Tribunal and are excluded under this Agreement.

Article 6: The existing immunities and other privileges as duly recognized by the laws of Burundi and enjoyed in the exercise of the duty by those entitled shall remain in force.

Article 7: **The Temporary Immunity Judicial Commission (TIJC)** shall be established 21 days after the signing of this Agreement.

Article 8: The Temporary Immunity Judicial Commission shall be composed of 9 members. Its composition will be as follows:-

- Chairperson who shall be a Judge or someone qualified to be a Judge to be appointed by the UN
- 2 members to be nominated by the Religions Leaders
- 2 members to be nominated by the Civil Society
- 2 members to be nominated by the Women's Group
- 1 member from the African Union Mission to Burundi
- The Commission shall have a Secretary appointed by the AU

Article 9: The functions of the Temporary Immunity Judicial Commission shall include:

- (i) To identify and codify the lists of persons accused of crimes of war and politically motivated crimes;
- (ii) To order the release of persons detained or imprisoned who are charged or convicted of armed conflict related crimes;
- (iii) To receive and analyze any complaints related to any Judicial process in pursuit of any charges of armed conflict related crimes;
- (iv) To undertake a programme of sensitization of the general public on the Temporary Immunity Agreement;
- (v) To consider and promote an appropriate reconciliation mechanism and process in the society.
- (vi) To promote the culture of dialogue and reconciliation amongst the people in the spirit of this Agreement;
- (vii) To perform any other related functions associated with the execution of this Agreement;
- (viii) To prepare and submit a quarterly report of its work to

the Political Organ of the African Mission to Burundi.

Article 10: This Agreement will remain in force for a period not exceeding two years.

Article 11: Before the expiration of the two years:

The Government of Burundi shall request the United Nations to establish the International Criminal Tribunal for Burundi to investigate, try and pass judgement on:

acts of genocide

war crimes

crimes against humanity

committed in Burundi since independence until the signing of the Comprehensive Ceasefire Agreement.

The National Assembly shall promulgate and establish the National Commission for Truth and Reconciliation to:

Investigate violations of human rights

Promote reconciliation

Compensate and grant reparation for claims relating to violations of human rights arising from the Burundi conflicts

Accurately reflect and record the history of Burundi and educate the people of Burundi about its past.

Propose to the President of the Republic, the National Assembly and the Senate, and to the National council for National Unity and Reconciliation measures to promote reconciliation and togetherness.

Done aton

Dar es Salaam, Tanzania

For the Transitional Government of Burundi

Domitien Ndayizeye

President of the Transitional Government of Burundi

For the CNDD-FDD

Mr. Pierre Nkurunziza
Legal Representative of the CNDD-FDD Movement

Guarantors

HE Yoweri Kaguta Museveni
President of the Republic of Uganda
Chairman of the Regional Initiative on Burundi

Witnesses

HE JACOB Zuma
Vice President of the Republic of South Africa
Facilitator of the Burundi Ceasefire Negotiations

HE Benjamin Mkapa
President of the United Republic of Tanzania
Vice Chairman of the Regional Initiative

Ambassador Mamadou Bah
Special Representative of the African Union to Burundi

Ambassador Berhanu Dinka
Special Representative of the United Nations
Secretary General in Burundi

**COALITION PROVISIONAL AUTHORITY
BAGHDAD, IRAQ**

PUBLIC NOTICE

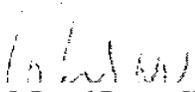
**INCREASED SENTENCES FOR PERSONS
CONVICTED OF CRIMES AFTER RECEIVING AMNESTY**

December 19, 2003

The Administrator of the Coalition Provisional Authority (CPA) hereby advises all citizens, residents of, and visitors to Iraq of the following.

Under Iraqi law, any person who was released from prison pursuant to Revolutionary Command Council Resolution No. 225, dated October 20, 2002, and is thereafter convicted of another crime may be sentenced using rules that allow stiffer punishments based on aggravating circumstances. These rules permit judges to impose significantly longer sentences than are otherwise authorized for the particular offence. For example, if the penalty for a crime is imprisonment for a term of years, a judge may impose a sentence that is greater than the maximum limit, provided that the increase in the sentence does not exceed half the maximum limit (up to 25 year total).

This law allowing harsher punishments continues in force and judges should consider it when sentencing persons who were granted amnesty under Resolution No. 225. Persons who were released under that Resolution should be aware that they will be subject to the severest sentences authorized by law if they commit further crimes.


L Paul Bremer III
Administrator

APPENDIX D

Amnesty Law No. 2 for 2004 Passed by the Iraqi Transitional Government of

Prime Minister, Iyad Allawi on 7 August 2004

Based on the provisions of Article 2, B1, of the Law of Administration for the State of Iraq for the Transitional Period, and the provisions of the second part of its appendix, and in accordance with the approval of the Presidency, the Council of Ministers has decided to issue the following decree:

1. Anyone who committed any of the following crimes but was not arrested and no legal action was taken against him shall not be criminally charged for:

1. The possession of a war weapon, parts of this weapon, or its ammunition as stated in the Weapons Law No. 13 for 1992, or for manufacturing, distributing, or trading with such a weapon in contravention of the law.

2. The possession of incendiary or explosive materials or the tools used in manufacturing or dealing with these materials.

3. The failure to inform the relevant authorities or failure to give information about any person or group planning, financing, or carrying out terrorist operations and acts of violence.

4. The participation with terrorist elements in committing crimes undermining the internal state security or the security and property of citizens.

5. Sheltering or covering up persons sought by justice from among the followers of the former regime or the perpetrators of acts of terrorism and violence.

II. Those covered by this decree shall inform the Interior Ministry, any security service, or the nearest police station about:

1. The weapons and materials mentioned in the first and second clauses of the first paragraph of this decree. They must surrender what they have or inform the authorities about their locations.

2. The actions cited in the third, fourth, and fifth clauses of the first paragraph of this decree and those perpetrating them. This includes conveying information about them.

3. The person covered by this decree shall present a pledge that he will not undertake any action that will lead to or pave the way for the perpetration of the crimes cited in the first clause of this decree.

4. If the person covered by this decree re-commits any of the crimes cited in the first clause, stringent legal measures shall be taken against him.

5. The one who perpetrates any of the crimes cited in the first clause of this decree results in to murder, abduction, usurpation, looting, subversion, arson, explosion, or damage of public or private property shall not be covered by this decree.

6. First: The provisions of this decree shall apply to the crimes committed by the

Iraqis only from 1 May 2003 to the date of this decree.

Second: This decree shall be valid for 30 days as of the date of its issuance. The prime minister can extend this period with the approval of the presidency.

7. This decree shall be published in the official gazette and implemented as of its date of publication.