

DO AMNESTIES PRECLUDE JUSTICE?\*

*¿PRECLUYEN A LA JUSTICIA LAS AMNISTÍAS?*

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PARA CITAR ESTE ARTÍCULO / TO CITE THIS ARTICLE

Camila Uribe, Do amnesties preclude justice?, 21 International Law, Revista Colombiana de Derecho Internacional, 297-359 (2012).

1692-8156(201212)12:21<297:AMPRJU>2.0.TX;2-L

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## ABSTRACT

A common trend among recent peace processes is the use of amnesty agreements as a mechanism to restore the rule of law and bring democracy back to the country. However, the international community is still reluctant to endorse them. Both human rights advocates and international organizations such as the United Nations have vehemently opposed the choice of amnesty. However, for others, amnesty agreements are still a legitimate and plausible way to achieve peace and even justice.

Thus, the purpose of this paper is to examine the “paradoxical question” of whether amnesty agreements require peace at the expense of justice. Specifically, it purports to study whether amnesty agreements can aid or contribute in the achievement of justice, especially when the agreement is coupled by alternative justice mechanisms, such as truth commissions, reparations, and vetting.

Section 1 of this paper will address the definition of amnesty agreements; section 2 will approach the “changing” perception the international community has given to them; section 3 will propose a definition of justice to be used for purposes of this paper; and section 4 will analyze the South African and the East Timor case, as two different examples of how amnesties can be applied in peace processes and to what extent both countries accomplished to bring justice to their people. The cases of South Africa, East Timor were chosen; primarily because of the way they applied amnesty in order to pursue a certain purpose. Though each of these cases shows several caveats, they help to understand how amnesty agreements may be applicable in different contexts and may be implemented in different ways to reach different outcomes, and ultimately justice.

**Key words author:** amnesty agreements, transitional justice, South Africa, East Timor.

**Key words plus:** amnesty, transicional justice, administration of justice.

## RESUMEN

*Una tendencia común entre los procesos de paz recientes es el uso de acuerdos de amnistía como mecanismos para restablecer el imperio de la ley y devolver la democracia al país. Sin embargo, la comunidad internacional sigue siendo renuente a aprobar su uso. Tanto los defensores de los derechos humanos y las organizaciones internacionales se han opuesto vehementemente a la elección de los acuerdos de amnistía, pues son vistos como cortinas de humo que promueven la impunidad. Pero para otros, los acuerdos de amnistía siguen siendo una forma legítima, plausible e incluso aceptada por el Derecho Internacional para lograr la paz e incluso lograr niveles de justicia en sociedades en transición.*

*El propósito de este trabajo es examinar “la cuestión paradójica” sobre si los acuerdos de amnistía exigen la paz a expensas de la justicia. En concreto, se pretende estudiar si los acuerdos de amnistía pueden ayudar o contribuir en el logro de la justicia, especialmente cuando dichos acuerdos se complementan con mecanismos alternativos de justicia tales como comisiones de la verdad, reparaciones y reformas institucionales.*

*El primer acápite de este artículo abordará la definición de los acuerdos de amnistía, el segundo mostrará el percepción cambiante que la comunidad internacional les ha dado; el tercer acápite propone una definición de justicia que se utilizará para fines de este documento; y el acápite final analizará el caso de Sudáfrica y el caso de Timor Oriental como dos ejemplos diferentes de cómo se puede aplicar la amnistía en los procesos de paz. Lo anterior, con el fin de determinar hasta qué punto ambos países lograron, a pesar de los acuerdos de amnistía, brindarles justicia a sus ciudadanos.*

**Palabras clave autor:** *acuerdos de amnistía, justicia transicional, Sud África, Timor del Este.*

**Palabras clave descriptor:** *amnistía, justicia transicional, administración de justicia.*

Traditionally, transitional justice has long favored the notion that States must prosecute perpetrators of massive violations of human rights in order to provide justice and redress for victims. For better or for worse, the concept of justice is constantly understood as a process of truth-finding, which is inevitably tied to criminal judicial adjudication. As a result, the international community is critical of States that opt not to pursue them. Though it is undeniable that prosecution ought to play a crucial role in a country's peace making process, it must also be understood that criminal adjudication is not the only option to pursue. On the contrary, past experiences have shown that States no longer face a binary question between impunity and justice, but there is a wide array of alternatives to choose from (reparations, truth and reconciliation and vetting).<sup>1</sup> Recent transitional justice processes have demonstrated that the concept of justice cannot be solely understood as equivalent to prosecution but, on the contrary, that peace may be more long lasting if a holistic approach is adopted.

A common trend among recent peace processes is the use of amnesty agreements as a mechanism to catalyze such goal, restore the rule of law and bring democracy back to the country. However, the international community is still reluctant to endorse them. Both human rights advocates and international organizations such as the United Nations have vehemently opposed the choice of amnesty, especially when they foreclose effective legal remedies for crimes such as genocide, war crimes and crimes against humanity. However, for others, amnesty agreements are still a legitimate and plausible way to achieve peace and even justice. For them, amnesty is often tied to alternative accountability mechanisms such as "monetary reparations to the victims and their families, establishing truth commissions to document abuses (and sometimes identify perpetrators by

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1 Freeman, Mark. *Necessary Evils: Amnesties and the Search for Justice*. First Edition. (2009). At pg. 6

name), and the institution of employment bans and purges that keep such perpetrators from positions of public trust.”<sup>2</sup>

With that context in mind, the purpose of this paper is to examine the “paradoxical question” of whether amnesty agreements require peace at the expense of justice.<sup>3</sup> Specifically, it purports to study whether amnesty agreements can aid or contribute in the achievement of justice, especially when it is coupled by alternative justice mechanisms.

Section 1 of this paper will address the definition of amnesty agreements; section 2 will approach the “changing” perception the international community has given to them; section 3 will propose a definition of justice to be used for purposes of this paper; and section 4 will analyze the South African and the East Timor case, as two different examples of how amnesties can be applied in peace processes and to what extent both countries accomplished to bring justice to their people. Though there is constant reference to these case studies, this essay does not aim to make a comprehensive analysis of the circumstances and outcomes of each of the peace processes; on the contrary, it will rely on them exclusively to show if amnesties may become detrimental to transitional justice or conversely, if they can also be an “integral element of a transitional justice mechanism.”

## I. WHAT ARE AMNESTY AGREEMENTS?

Amnesty is defined as “an extraordinary legal measure whose primary function is to remove the prospect and consequences of criminal liability for designated individuals or classes of persons in respect of designated types of offenses irrespective of whether the persons concerned have been tried for such offenses in a court of law”.<sup>4</sup> In other words, amnesties can grant immunity

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2 Dugard, John. Dealing with Crimes of a Past Regime. Is Amnesty Still an Option? 12 *Leiden Journal of International Law* 1001-1015. (1999) At pg.592. See also: Roht-Arriaza, Naomi. Impunity and Human Rights. In *International Law and Practice*. Oxford University Press. (1995) At pg. 281- 304

3 *supra note* 1, at pg. 19

4 *Idem*. At pg. 13. For alternative definitions See: Oxford English Dictionary, 2nd ed., 20

from criminal prosecution, civil actions, or both, if such are the conditions agreed upon by the parties.<sup>5</sup> The United Nations has established that unless otherwise qualified: “the word amnesty refers to legal measures that have the effect of: a. Prospectively barring criminal prosecution and, in some cases, civil actions against certain individuals or categories of individuals in respect of specified criminal conduct committed before the amnesty’s adoption; or b. Retroactively nullifying legal liability previously established.”<sup>6</sup>

Roderick O’Brien in his article “Amnesty and international Law”<sup>7</sup> has broadly, though helpfully, delineated the common characteristics of amnesty agreements as follows: a. They are always prospective as they provide immunity from future legal suit; b. They are *ad hoc* and therefore only applicable on a specific factual situation; c. they are meant to be binding<sup>8</sup> and; d. it is a sovereign act made by a State and as such it is subject to recognition from other States.

Though the above characteristics may serve as a roadmap to the meaning of amnesties, due to the fact that there are several nuances in their design and implementation, their success in achieving justice will differ from case to case. Such nuances may include the way in which the amnesty agreement was passed, (through a popular referendum, in the form of a constitutional or regular law, in the form of a presidential decree or even as a treaty) the level of acceptance among the population, the State’s

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vols. (Oxford: Oxford University Press, 1989), B. Garner and H. Black, eds. Black’s Law Dictionary, 8th ed. (St. Paul MN: Thomson/West, 2006), A. O’Shea, Amnesty for Crime in International Law and Practice (The Hague: Kluwer Law International, 2002), 1-2, Parker. R. Fighting the Sirens Song: The Problem of Amnesty in Historical and Contemporary Perspective. 42 Hungarian J. Legal Stud. 69, (2001) at pg. 88-9

5 O’Brien, Roderick. Amnesty and International Law. Nordic Journal of International Law 74: (2005) at pg. 263

6 Office of the United Nations High Commissioner for Human Rights. Rule of Law Tools for Post Conflict States. Amnesties. United Nations, New York and Geneva, HR/PUB/09/1/UNITED NATIONS PUBLICATION (2009). See also: Orentlicher, Diane F. Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime. Yale Law Journal, Vol. 100, No. 8 (1991), at pg. 2537

7 *supra note 5*

8 Though blanket amnesties have been considered void under international law and therefore not binding to third parties, conditioned amnesties are *prima facie* binding to the parties involved.

institutional capacity and its will to prosecute those perpetrators who were not granted immunity.<sup>9</sup>

In determining the difference between amnesty and pardon it has been stated that they are different in character and have different purposes. The first one overlooks offense and the latter remits punishment. “The first is usually addressed to crimes against the sovereignty of the State to political offences, forgiveness being deemed more expedient for the public welfare than prosecution and punishment. The second condones infractions of peace of the State. Amnesty is usually general, addressed to classes or even communities [...]. Pardon applies only to the individual, releases him from the punishment fixed by law for his specific offence, but does not affect the criminality of the same or similar acts when performed by other persons or repeated by the same person.”<sup>10</sup>

In that same vein, the Colombian Constitutional Court, in its judgment deciding on the validity of the amnesty agreement set in Law 975/2005, established the difference between amnesty and pardons in the following manner:

“An amnesty:

- i. Establishes the extinction of the criminal action;
- ii. By its means, the State disregards the crime;
- iii. Its application is the responsibility of judges or an empowered entity;
- iv. Brings cases that have begun but have not concluded in a sentence to a close;
- v. In cases where a sentence has been handed down, the adjudication of the case is not observed, and the execution of the penalty Ceases;”<sup>11</sup>

9 Laplante, Lisa J. *Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes*. *Virginia Journal of International Law*, Vol. 50, Issue 1, at pg. 915. *See also*: Roht-Arriaza, Naomi. *Truth Commissions and Amnesties in Latin America: The Second Generation- 92 Am. SOC'Y INT'L L. PROC.* (1998) at pg. 313, 313–15

10 Takamaa, Kari; Koskeniemi, Marti. *The Finnish Yearbook of International Law*. Volume IX. Martinus Nijhoff Publishers (1998) at pg. 322

11 Colombian Constitutional Court Sentence C-370 of 2006

Whilst pardons imply the following:

- i. Exonerates the criminal penalty;
- ii. The State does not disregard the crime, but absolves the person from punishment;
- iii. It is granted by the Executive Power; and
- iv. It does not void criminal prosecution, but, when a sentence is issued, it stays its execution<sup>12</sup>.

Legal and political implications of the abovementioned concepts are widely different, which is why they cannot be used loosely and it is important to a clear line between them.

It must be said that governments primarily turn to amnesties not only to achieve nation-building and reconciliation objectives, but also to maintain tranquility and reestablish democracy within a clean slate context.<sup>13</sup> Most commonly, newly installed regimes consider the amnesty alternative when prosecutions are impractical due to restrictions in economic resources, or because they have a fragile judiciary, either because they have little experience with judicial oversight or because peace negotiations can more easily be developed if such element is placed on the table. Thus, “amnesty allows newly created regimes to build judicial and political structures without the strain of prosecution.”<sup>14</sup> “When this is the case, insisting on criminal prosecution can prolong the conflict, resulting in more death, destruction and human suffering.”<sup>15</sup> As such, some may argue that amnesty may be a necessary bargaining chip to induce human rights violators

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12 Idem

13 Uprimny, Rodrigo y Saffon, María Paula. Justicia Transicional y Justicia Restaurativa. Tensiones y complementariedades. Available in: [http://www.justicia.org/interna.php?id\\_tipo\\_publicacion=2&id\\_publicacion=81](http://www.justicia.org/interna.php?id_tipo_publicacion=2&id_publicacion=81) (Last visited: April 2012) at pg. 5

14 *supra note* 10, at pg. 435, See also: Dugard, John. Retrospective Justice: International Law and the South African Model. In *Transitional Justice and the Rule of law in New Democracies* (A. James McAdams ed., 1997) at pg. 509

15 Dugard, John. Retrospective Justice: international law and the South African Model, in *Transitional Justice and the Rule of law in New Democracies* (A. James McAdams ed., 1997) at pg. 509



to agree to peace and relinquish power; while some others argue that it is the easiest and clearest form of impunity.<sup>16</sup>

During the past several years countries like Argentina, Cambodia, Chile, El Salvador, Guatemala, Sierra Leone, South Africa and most recently Sudan, have each granted amnesty to members of the former regime or rebel groups that committed diverse types of crimes. Though each of these amnesties responds to different factual situations and purposes, it is clear that amnesty agreements are still as recurrent among States that wish to break terms with their tumultuous past. Amnesty clauses are frequently found in peace treaties and generally “signify the will of the parties to apply the principle of *tabula rasa* to past offences [...]. As a sovereign act of oblivion, amnesty may be granted to all persons guilty of such offences or only to certain categories of offenders.”<sup>17</sup>

Pursuant to the international principle of sovereignty, any government who lawfully represents a State<sup>18</sup> may decide to grant amnesty to rebel groups or even ex-governmental officials in the framework of a peace process. This capacity has been understood as an expression of self-determination and sovereignty of States and no international actor can question or intervene in it. However, as international organizations have multiplied in number and their influence within States has grown exponentially, what was once considered domestic matters are now scrutinized by the international community.

## II. INTERNATIONAL PERCEPTION OF AMNESTY AGREEMENTS

The purpose of this section is twofold: a. to contextualize how the international community perceives amnesty agreements; and b.

<sup>16</sup> *Idem*

<sup>17</sup> Bernhardt (ed) *Encyclopedia of Public International Law*, (North-Holland, Amsterdam, London, New York, Tokyo 1992) Volume I at pg. 148. Cited in: *Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others* [1996] ZACC 16; 1996 (4) SA 671 (CC); 1996 (8) BCLR 1015 (CC) (AZAPO) at pg. 31

<sup>18</sup> See: *Decision on Constitutionality and Lack of Jurisdiction*. Special Court for Sierra Leone (2004) at paragraph 72.

to highlight the legal issues arising from the application of amnesty. I will first show what has been the general discourse of the United Nations (hereinafter UN) towards amnesty agreements, to later show how regional organizations as well as international courts have addressed the same issue.

### *A. The United Nations*

Though the UN's position does not purport the universal perception of amnesty agreements, it does however, play an essential role in the international community. Being a quasi-universal international organization, the statements and declarations it makes regarding any aspect will hold great weight in the international realm and will definitely shape both the international and domestic policies of States. The fact that the UN endorses an amnesty agreement will grant such agreement with a higher level of legitimacy and third States will be much more willing to recognize it.

The debate of whether amnesty agreements are legitimate under international law has fallen under different contours and responds to several factors such as the specific political climate at the time and the establishment of international Tribunals, such as the International Criminal Court (hereinafter ICC) in 1998.

Throughout the twentieth century the UN has had a varied approach towards amnesties. On the one hand the UN has been actively involved in negotiations to end conflict, especially internal ones, and some of them like the South African one, have involved the use of amnesties.<sup>19</sup> However, the UN is currently espousing the view that amnesty agreements are not lawful under international law when they foreclose both prosecutions and the existence of an effective legal remedy for victims for crimes such as genocide, war crimes and crimes against humanity.

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19 C. Sthan. *United Nations Peace-Building, Amnesties and Alternative Justice: A Change in Practice?* 845, *International Review of the Red Cross* (2002) at pg. 193-19. Cited in: *supra note 5* at pg. 270

With respect to the early approaches of the UN, one can see that in the “Mexico Agreements” of 27 April 1991 the Secretary General aided in the appointment of the members of the truth commission that was set up to investigate acts of violence committed in El Salvador during 1980 and 1991. After the report was handed in 1993, an amnesty law was passed by the Assembly of El Salvador that immunized from prosecution those persons mentioned by the Commission.<sup>20</sup> UN Secretary General Boutros Boutros Ghali tacitly accepted the legitimacy of the amnesty, noting **only that** “it would have been preferable if the amnesty had been promulgated after creating a broad degree of national consensus in its favor.”<sup>21</sup>

Additionally in 1996, the UN assisted in the conclusion of the Guatemalan Peace Accords, “which granted amnesty to persons who committed political crimes against the State, the institutional order, and certain common crimes, but not crimes of genocide, torture, and forced disappearances.”<sup>22</sup> The UN Mission to Guatemala did not object this agreement and “publicly stated that a determination as to the appropriate scope of the amnesty should be made “exclusively [by] the Guatemalan people.””<sup>23</sup>

In 1998, after the adoption of the Rome Statute, the UN Secretary General, Kofi Annan visited South Africa, which at the time was implementing its own amnesty agreement through the establishment of a Truth and Reconciliation Commission.<sup>24</sup> In that opportunity, the Secretary General publicly supported the South African effort to come to terms with apartheid by stating: “it is unconceivable that, in such case, the [ICC] would seek to

20 United Nations General Assembly Report of the Secretary General on All Aspects of ONUSAL’s Operations’ (1993) UN Doc. S/25812 Addendum 3, annex, at 2. Cited in: Brockman-Hawe. At pg. 15

21 *Idem*

22 Cassel, Douglas. Lessons from the Americas Guidelines for International Response to Amnesties for Atrocities. 59 *LAW & CONTEMP. PROBS.* 197, 198 (1996). Cited in: Benjamin E. Hawe. Amnesty at the ICTY; an analysis of the Karadzic Immunity Decision. *International Comparative Law Quarterly* (2009) at pg. 15 Available at: <http://works.bepress.com/benbh/3> (Last visited: May, 2012)

23 *Idem*

24 *supra note 1*, at pg. 88

substitute its judgment for that of a whole nation which is seeking the best way to put a traumatic past behind it and build a better future.”<sup>25</sup> The UN’s posture at this time did not seem to oppose amnesty agreements. On the contrary, the Secretary General’s recognition of South Africa’s transitional process gave a strong message to the international community.

However, this position did not last long; in 1999, three years before the International Criminal Court entered into force, the Office of the UN Secretary General issued a confidential cable to all UN representatives named: “Guidelines for United Nations Representatives on Certain Aspects of Negotiations for Conflict Resolution,” calling for all representatives not to support amnesty agreements for war crimes, crimes against humanity or genocide.<sup>26</sup> This position later on acquired public and official status when the Secretary General issued its report on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies<sup>27</sup> which specifically requested the Security Council to “reject any endorsement of amnesty for genocide, war crimes or crimes against humanity.”<sup>28</sup>

Later, the UN made its position much more expressly, by stating that amnesties will be considered a violation of international law and will not be endorsed by the UN if they: a. Prevented prosecution of individuals who may be criminally responsible for war crimes, genocide, crimes against humanity or gross violations of human rights, including gender-specific violations; b. Interfere with victims’ right to an effective legal remedy; or c. Restrict victims’ and societies’ right to know the truth about violations of human rights and humanitarian law.<sup>29</sup>

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25 Villa-Vicencio, C and E.Doxtader, (eds). *Pieces of the Puzzle: Keywords on Reconciliation and Transitional Justice*. Cape Town: Institute for Justice and Reconciliation (2004), at pg. 91. Cited in *supra note 1*, at pg. 88-89

26 *supra note 1*, at pg. 89

27 Report of the Secretary-General on the Rule of law and Transitional Justice in Conflict and Post-Conflict Societies. UN Doc. S/2004/616 (2004). Cited in *supra note 1*, at pg. 91

28 *Idem* at paragraph 64(c)

29 See: *Princeton Principles on Universal Jurisdiction* (2001) Available at: <http://www.umn.wsu/humanrts/instreet/princeton.html>. Cited in: Stahn, Carsten. *Complementarity, Amnesties and Alternative forms of Justice: Some Interpretative Guidelines for the International Criminal Court*. At pg. 701 Available at: <http://jicj.oxfordjournals.org/>

Along the same lines, the UN General Assembly adopted Resolution 60/147 of 16 December 2005<sup>30</sup>, which established the “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law”, which specified: that in cases of gross violations of human rights, States have the duty to investigate and to prosecute persons that allegedly are responsible for those violations.<sup>31</sup> Moreover, principle 24(a) of the UN Commission on Human Rights’ Principles For The Protection And Promotion Of Human Rights Through Action To Combat Impunity’ provides: “Even when intended to establish conditions conducive to a peace agreement or to foster national reconciliation, amnesty and other measures of clemency shall always prosecute perpetrators.”<sup>32</sup>

In brief, and as Freeman has framed it, what we have seen with respect to amnesties is that “we have gone from a time when amnesties were treated above all as a political issue, fully within the exclusive and sovereign domain of States to a time when they are treated above all as a legal issue that extends beyond the prerogative of any State.”<sup>33</sup> Issues such as the creation of the ICC and the augmentation of transitional justice processes reflected a change in whatever endorsement or support amnesty agreements could have had from the UN or the international community. It is clear today, that the notion of justice in the international community is directly related to investigation and prosecutions of human rights perpetrators and State’s margin of

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30 General Assembly Resolution A/60/147 (2005). Basic Principles And Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. December 16, 2005

31 *Idem* at art. 4

32 Principle 25. United Nations. Economic and Social. Commission on Human Rights. Sub-Commission on Prevention of Discrimination and Protection of Minorities. Dist. General E/CN.4/Sub.2/1997/20/Rev.1. October 1997

33 *supra* note 1, at pg. 91

appreciation of whether or not to apply an amnesty agreement is no longer as wide as before.<sup>34</sup>

### *B. Other actors*

International regional organizations as well as international courts such as the International Criminal Tribunal for the Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) espouse the view that States must initiate criminal proceedings for violations of human rights. On the other side of the spectrum, academics and domestic courts that embrace amnesty agreements still resist the position that amnesty agreements are a violation of customary international law. Thus, this section will focus on the main arguments that actors on both sides of the scale defend.

Relating to regional organizations, the Inter-American Court of Human Rights has followed the view of the UN and has additionally established that under the eyes of international law, States have a duty to prosecute any individual who commits any of the following crimes: genocide, crimes against humanity and war crimes.

Legal support for an existing norm in international law that obliges States to prosecute perpetrators of human rights is found in numerous decisions of the Inter-American Court and Commission of Human Rights. For example, the Court has consistently established that “[...] amnesties granted by Argentina and Uruguay are incompatible with the American Convention on Human Rights.”<sup>35</sup> Moreover, In the *Velasquez Rodriguez* case,<sup>36</sup> it held that the Honduras government was under the obligation

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34 *supra* note 2, at pg. 1

35 *Idem*, at pg. 12

36 Case No. 1988 IACHR (Ser.C) No. 4 para. 165. See also: Interamerican Court of Human Rights, *Velasquez v. Honduras*, Judgment of 29 July 1988, Ser C. No. 4 (1988), Section 174; *Barrios Altos* case, Judgment of 14 March 2001. Series C, No. 75 Section 41-44 and 53; Human Rights Committee, General Comment No. 20 (article 7) of April 1992, UN DOC. CCPR/C21/Rev.1/Add.3 Section 15; Concluding observations of the Human Rights Committee: Chile, 65th Ses. CCPR/C/79/Add.104, 30 march 1999, at pg. 7

to investigate and prosecute perpetrators of gross human rights violations.

The Inter-American Court, in its ruling on whether Peru's amnesty laws violated the obligation to respect rights (Art. 1) and the requirement to make available domestic legal relief (Art. 2), determined that "all amnesty provisions, are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations[...]"<sup>37</sup> Following the Inter-American Commission's analysis of the case, the Court considered that amnesty agreements prevented victims of Human Rights abuses from enjoying effective legal relief and deprived them of the opportunity of being heard. The Court found it to be inconsistent with the requirements of the Inter-American Convention of Human Rights. The same reasoning has thus been followed by subsequent decisions of the Court.<sup>38</sup> The Court's position is of a great significance for the international community, and most specifically to its member States, who have historically reached out to amnesty in order to more easily propel a transitional justice process.

International Courts, such as the ICTY have agreed with such posture. The ICTY in its *Furundzija* Judgment discussed the validity of amnesties and concluded that "an individual could be prosecuted for torture before an international tribunal, by a foreign State and under a subsequent regime even if the conduct in question had been the subject of an amnesty."<sup>39</sup> The Tribunal then stated that customary international law will render invalid

37 Barrios Altos Case, Judgment of May 14, 2001, Inter-Am CT.H.R. (Series. C) No. 75 (2001). See also: Almonacid Arellano et al v. Chile Case, Judgment of September 26, 2006, Inter-Am CT.H.R. at para. 105 and following.

38 See also: Almonacid Arellano et al v. Chile Case, Judgment of September 26, 2006, Inter-Am CT.H.R. at paras. 105 and subsequent paragraphs

39 Benjamin E. Hawe. Amnesty at the ICTY; an analysis of the Karadzic Immunity Decision. *International Comparative Law Quarterly* (2009) at pg. 15 Available at: <http://works.bepress.com/benbh/3> (Last visited: May, 2012) See also: Kenya National Commission on Human Rights: KNCHR Position on Amnesty for Alleged Perpetrators of Post-Election Violence. At pg. 3 Available at: <http://www.docstoc.com/docs/67836127/KNCHR-POSITION-ON-AMNESTY-FOR-ALLEGED-PERPETRATORS-OF-POST> (Last visited: May, 2012)



any agreement that grants immunity from prosecution. This was then followed by the ICTY again, in the *Karadzic* Immunity Decision<sup>40</sup> when the Tribunal decided that Radovan Karadzic (former Bosnian Serb politician, accused of war crimes committed against Bosnian Muslims and Bosnian Croats during the Siege of Sarajevo, as well as ordering the Srebrenica massacre) could not be covered by the amnesty agreement it had signed with the United States.<sup>41</sup>

On the other hand, many scholars acknowledge that for an amnesty to be legitimate, it must not only conform with legal norms but has to be conditioned, as opposed to the so called “blanket amnesties.”<sup>42</sup> “This requirement has created a standard of “qualified amnesties” with customary and treaty law prohibiting bars to prosecution for war crimes, genocide, and crimes against humanity. Yet, this discourse suggests that it is still possible for nations to resort to amnesties for other serious human rights violations.”<sup>43</sup>

Despite the above, several academics still feel skeptical on whether there is a real rule of customary international law that obliges states in every case to prosecute gross violations of human rights. State practice among States still seems to be contested as some of them, such as Colombia and its Peace and Justice Law, keep recurring to a conditioned type of amnesty in order to pave the steps towards peace. “The agonies of a nation seeking to reconcile tensions between justice for those wronged during conflict, on the one hand, and the consolidation of the transition to a nascent democracy, on the other, has also been

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40 Trial Chamber Decision on the Accused’s Second Motion for Inspection and Disclosure: Immunity Issue, ICTY-2008-IT-95-5/18-PT (17 December 2008) Available at: <http://www.icty.org/x/cases/karadzic/dec/en/081217.pdf> (Last visited; May, 2012)

41 *supra* note 46, at pg. 7

42 See: Orentlicher, Diane. Amicus Curiae Brief Concerning the Amnesty Provided by the Lomé Accord in the Case of the Prosecutor v. Morris Kallon, SCSL-2003-07 (2003). Cited in: Bell, Christine. Transitional Justice, Interdisciplinarity and the State of the Field or Non-Field. *The International Journal of Transitional Justice*, Vol. 3, (2009), at pg. 16. Available at: <http://ijtj.oxfordjournals.org/content/3/1/5.full.pdf+html> (Last visited: May 2012)

43 *supra* note 9, at pg. 918



appreciated by other international commentators”.<sup>44</sup> At the same time, by not requiring governments to risk provoking or maintaining a civil war and by recognizing the importance of other objectives such as reconciliation, international law is able, through the mechanism of principled and limited amnesties, to accommodate the transitional process.<sup>45</sup>

Professor Cassese, former President of the ICTY and the Special Tribunal for Lebanon conceptualized the status of international practice by establishing:

*Amnesties are not illegal, and there is not yet any obligation for States to refrain from amnesty laws on these crimes, [that is crimes against humanity]. Consequently, if a State passes any such law, it does not breach a customary rule. Nonetheless if a court of another State having in custody persons accused of international crimes decide to prosecute them although in their national State they would benefit from an amnesty law, such court would not thereby act contrary to general international law, in particular to the principle of respect for the sovereignty of other States*<sup>46</sup>.

Additionally, the fact that States are still selectively prosecuting either the “gun mans” or the organizations leaders shows that there is still no *opinio juris* that can aid in the formation of a rule of customary international law. “It is however, doubtful whether international law has reached this stage. State practice hardly supports such a rule as modern history is full of cases in which successor regimes have granted amnesty to officials of previous regime guilty of torture and crimes against humanity, rather than prosecute them.”<sup>47</sup> Moreover, domestic Courts such

44 Orentlicher, Diane. Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime. 100 Yale L.J 2537 (1991) at pg. 2544. Cited in: *Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others* [1996] ZACC 16; 1996 (4) SA 671 (CC); 1996 (8) BCLR 1015 (CC) (AZAPO) at pg. 30

45 Idem, at pg. 2537; See also: Ruti, Teitel. Transitional jurisprudence: The role of law in political transformation. Yale Law Journal, Vol. 106. No. 7, 1997, at pg. 2037; R. Cryer, *Prosecuting International Crimes* (Cambridge 2005) at pg. 36-51; Arbour L. The International Tribunals for Serious Violations of International Humanitarian Law in the Former Yugoslavia and Rwanda. 46 McGill Law Journal (2000), at pg.195-201.

46 Cassese, Antonio. International Criminal Law (Oxford, 2003) 315. In Prosecutor against Morris Kallon and Brima Bazzy Kamara, judgment of 13 March, 2004. Special Court for Sierra Leone (Case No. SCSL-2004-16AR72 (E) at 1264

47 *supra* note 19, at pg. 1003

as the Constitutional Court South African<sup>48</sup> have recognized the validity under international law of the use of amnesties.<sup>49</sup>

Even if the existence of the International Criminal Court has resulted in a much stricter policy regarding the duty of States to prosecute crimes in their own territory, the Court itself has allowed States to have some degree of deference. In fact, article 53 of the Rome Statute has provided the Prosecutor with the capacity to determine whether or not a situation needs to be investigated. It allows the Prosecutor to decline prosecution when “[t]aking into account the gravity of the crime and the interests of the victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.”<sup>50</sup> In this regard, it can be said that while ambiguous, the ICC does not explicitly remove amnesty as a bargaining chip available to States in order to end an international or internal conflict.<sup>51</sup>

As seen above, the validity of amnesties in the international community has been a highly contested issue, and the matter still occupies the main discussions among academics in the transitional justice field. Despite the strong positions from both sides of the debate, it is clear there is still much to be discussed. The case of amnesties is one of the clearest examples of how the sovereign power of States is subject to international recognition and scrutiny.<sup>52</sup> In that sense, it is not far-fetched to say that the “streams of international human rights law and international criminal law together helped cause a paradigmatic shift”. Today,

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48 *Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others* [1996] ZACC 16; 1996 (4) SA 671 (CC); 1996 (8) BCLR 1015 (CC) (AZAPO)

49 In *Azapo* the South African Constitutional Court found that international law imposes no such duty to prosecute. See further: J. Dugard. *Is the Truth and Reconciliation Process compatible with international law? An unanswered question*, 13 *South African Journal on Human Rights* (1997) at pg. 258

50 Article 53. Rome Statute of the International Criminal Court. U.N. Doc. A/CONF.183/9 (1998)

51 Scharf, Michael P. *The Amnesty Exception to the Jurisdiction of the International Criminal Court*. 32 *Cornell Int'l L.J.* (1999) at pg. 508. See also: Scharf, Michael P. *From the Exile Files: An Essay on Trading Justice for Peace*. 63 *WASH. & LEE L. REV.* (2006) at pg. 339, 367

52 *supra* note 5, at pg. 262

amnesties are no longer assumed to be unconditionally lawful within an international legal framework.”<sup>53</sup>

### III. DEFINITION OF JUSTICE

José Zalaquett<sup>54</sup> has established that successful and long-lasting transitional justice processes share several traits. Such aspects can be best characterized as: the ethical principles involved, the political opportunities that can be gained from the process and the challenges that the government as well as the population will have to face in the aftermath of such situation. Thus, accepting that every transitional process will have to deal with several constraints and challenges, the notion of justice becomes a concept that departs away from idealism and becomes a more realistic and practical one.

Up to date there is no standard and consensual definition of justice. The Inter-American Court of Human Rights<sup>55</sup> has in several occasions expounded on the obligations that States must comply with when a grave violation of human rights has occurred. However, the absolute and non-negotiable framing that the Inter-American Court gives to such definition is arguably unattainable in practice. When obligations such as prosecutions are framed in a manner that cannot accept any deference from States and there is no margin of appreciation from a case-to-case basis, States in the outset of a civil war will not likely be able to accomplish or fully comply with them.

In that sense, the definition of justice for the purpose of this paper will be a more flexible one. It will adopt similar elements to those established by the Inter-American Court of Human Rights, but each of them will be granted a different weight in

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53 *supra* note 9, at pg. 918

54 Zalaquett, José. Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights violations. 43 *Hastings L.J.* Vol 43 1425 (1991-1992) at pg. 1430

55 Velasquez Rodriguez case, 4 *Inter-Am. Ct. H.R.* (Ser. C) (1988)

the assessment of whether the amnesty agreement did or did not preclude justice.

Thus, for States to achieve justice they will be bound to fulfill the following elements:

- a. Conduct investigations that identify perpetrators of human rights violations and prosecute such perpetrators.
- b. Establish mechanisms that allow victims to know the truth of the events occurred during the conflict
- c. Provide reparation or compensation to the victims
- d. As a preventive mechanism the State must engage in vetting and institutional reform.
- e. Accomplish the purpose justifying the implementation of the amnesty agreement.

The weight given to each of these elements will be determined by taking into account **two** criteria: a. the general interest of victims and; b. possible constraints that States face when in a transitional justice process.

In view of the foregoing, each of the above-mentioned elements will be measured as follows:

#### *A. Investigations and prosecutions*

Criminal Prosecution has long been seen as the main objective to achieve in a transitional justice framework.<sup>56</sup> Mostly because it is understood that justice will be better served if the perpetrators are convicted. However, in more cases than few, even if the State wishes indeed to prosecute grave violations of human rights, the institutional framework, may not be sufficiently equipped to do so.

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<sup>56</sup> See: Landsman, Stephan. Alternative Responses to Serious Human Rights abuses: Of Prosecution and Truth Commissions, 59. *Law and Contempt. Probs.* 81,84 (1996) Cited in: Aukerman, Miriam J. Extraordinary Evil, Ordinary Crime: A framework for Understanding Transitional Justice. *Harvard Human Rights Journal.* Vol. 15. 2002. At pg. 41

When initiating trials for massive violations of human rights, most of the investigations and judgments are held by a criminal justice system that is often inoperative or too weak. The fact is that for prosecutions to comply with due process, for it to be the least selective as possible and to be fully comprehensive, there is a great need for economic resources and human capital. In some cases, the government may be willing to grant such resources to the competent institutions, however in some other cases, (the great majority) the government will be unable to allocate the amount of resources needed in order to investigate the majority of human rights violations.

Although States that opt for a prosecutorial approach may eventually ensure that there is a punishment for those who interrupted the rule of law, it is also true that prosecution has become a selective mechanism that alone may not ensure for a long lasting peace process. Prosecution will pass muster if the State aims to attain a certain degree of accountability, (even if the degree attained is generally much lower than expected), but if left alone it will fall short to achieve other objectives equally important in transitional justice.

As such, prosecutions generally convey several difficulties that cannot be easily overcome.<sup>57</sup> For its part, victims play a very limited role in prosecutions. Though they may participate as witnesses, the Prosecutor generally handles the case and victims will not always have the opportunity to submit evidence or even contest evidence presented.

Given the above, prosecution as one of the elements of our definition of justice will weigh an equivalent of 10%.

This criterion will be fulfilled if the State that implements the amnesty agreement carries on with alternative accountability mechanisms for those individuals who were not covered by the amnesty.

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57 Uprimny, Rodrigo and Lasso, Luis Manuel. *Verdad, Reparación y Justicia para Colombia: Algunas Reflexiones y Recomendaciones*. Cited in: *Conflicto y Seguridad democrática en Colombia. Temas críticos y Propuestas*. Fundación Social-Fesco-Embajada de la República Federal Alemana en Colombia, Bogotá D.C., (2004) at pg. 101-188

*B. Truth for Victims*

In many cases, transitional processes grant more importance to aspects such as prosecutions or rebuilding democratic institutions and ignore the importance of victims. Thus, if one wishes to have a much more lasting peace, victims should not only play an important role in defining the strategies and public policies that are applicable, but should also be part the governments' main concerns.

Primarily victims have the right to receive reparations for the injuries suffered as well as to know the truth about their disappeared relatives. While it is clear that victims may welcome justice and applaud efforts made by the State to prosecute perpetrators, their priorities do not always lie in this aspect.

Therefore, in materializing victims' right to the truth, "truth seeking initiatives can play a powerful role in documenting and acknowledging human rights violations. Memory initiatives also contribute to public understanding of past abuses.<sup>58</sup> Truth seeking then contributes to the creation of a historical record that prevents any kind of manipulation of the previous regime and will allow victims to find closure by learning from first-hand about the events.<sup>59</sup> In order to fulfill the above, the establishment of Truth Commissions has proved to be an innovative and efficient manner to allow victims to tell their story, but to equally establish the truth of what happened.

Additionally, when the government embarks in an effort to ensure that victims know the truth, this effort means that the victims will not only play the role of witnesses in criminal proceedings, but will become essential pieces to reconstruct the events that were part of the conflict.

Taking into account the benefits that the right to truth provides victims, this element will be determinant in the achievement of justice.

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58 Truth and Memory. International Center for Transitional Justice. Available at: <http://ictj.org/our-work/transitional-justice-issues/truth-and-memory> (Last visited: May, 2012)

59 Idem

This criterion will thus weigh an equivalent of 40% in the overall concept of justice. This 40% will be fulfilled if the State, by whatever mechanism it decides to adopt, provides victims an appropriate space to describe and testify their experiences and allows perpetrators to factually disclose their committed crimes.

### *C. Reparations*

After a conflict, whatever its nature, victims are the most affected. They generally endure social, psychological, and economic damage. International law has recognized the importance for governments to provide satisfaction to victims, and has emphasized that the State is obliged to deliver reparations for the injury caused, irrespective of whether the State had any involvement.

While the basic design of civil tort claims derive from the idea that the victims must be returned to their *status quo*, in the occurrence of massive violations of human rights this is almost impossible. In most cases, victims have suffered irreparable damages.

However, the State must alleviate the harm that has been made, not only as a means to comply with their international obligations, but because reparations to victims will serve to some extent as a preventive mechanism for victims to abstain themselves to seek any type of revenge.<sup>60</sup> In that sense, “It is generally understood that the right to reparation has a dual dimension under international law: (a) a substantive dimension to be translated into the duty to provide redress for harm suffered in the form of restitution, compensation, rehabilitation, satisfaction and, as the case may be, guarantees of non-repetition; and (b) a procedural dimension as instrumental in securing this substantive redress.”<sup>61</sup>

Reparations as such, do not only allow victims to be recognized as such, but also aim to provide a certain type of symbolic

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<sup>60</sup> *Idem*

<sup>61</sup> Rule of Law Tools for Post Conflict States. Reparations Programmes. Office of the United Nations High Commissioner for Human Rights. United Nations, (2008) at pg. 5

restoration. Although reparations are generally associated with economic benefits for victims, it is equally possible and legitimate for the State to establish symbolic acts that evidence that the State has fully recognized if not its responsibility, at least the occurrence of the events.

Despite the above, one must also acknowledge that reparations as well as prosecutions are in a certain way selective and a comprehensive reparations program is not always achievable. Any State will find it difficult to grant reparations for each and every victim. This may respond to a lack of sufficient information, lack of budget, lack of outreach efforts, and lack of accessibility to the mechanisms that provide reparations amongst others.<sup>62</sup>

Notwithstanding the challenges a State must surpass, every State shall seek the most appropriate mechanism to grant victims with the resources to meet their most basic needs.

Thus, this criterion, will weigh a 20% in the overall concept of justice, and will be achieved if the State establishes a well-organized reparations program that not only has the capacity and resources to grant victims with economic and symbolical reparations but that in fact delivers them.

#### *D. Vetting*

It is quite common for governments embarked in transitional justice processes to try to strengthen and reform government institutions. Weak institutions generally allow or are not able to respond to violations of the rule of law. Therefore if the new government wants to gain the confidence of its citizens and gain legitimacy, it is prone to start an institutional reform that covers not only the way the institution is internally governed, but also the labor force in it. Reforming public institutions is a core task in countries that experience a transition from authoritarianism

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62 Idem.



to democracy.<sup>63</sup> For that purpose, vetting is the usual mechanism that governments apply in order to exclude or suspend abusive or corrupt employees.

Vetting has been defined by the International Center for Transitional Justice as “the processes of assessing the integrity of individuals—including adherence to relevant human rights standards—to determine their suitability for public employment. Countries undergoing transitions to democracy and peace frequently use such processes to exclude abusive or incompetent public employees from public service.”<sup>64</sup> Applying such a mechanism will be the first step for a government to comply with the “reform” obligation it must undergo if it pursues a long lasting peace.

In that sense, taking into account that non-repetition shall be considered one of the greatest aims in a government dealing with transitional justice, the process of vetting will be granted a 10% weight in the concept of justice. The vetting criteria will pass muster if the State implements programs directed to reform governmental institutions involved in the conflict and remove persons that in some way or another contributed to the conflict.

### *E. Objectives*

The vast majority of amnesty agreements serve a specific purpose. Whether it is making the transition to a democratic society more peaceful or provide a mechanism for reconciliation, the government in power must always provide a justification on why those who irrupted and broke the rule of law today enjoy a special shielding.

As we have seen before, amnesty agreements are frowned upon in the international community; for most international lawyers and human rights advocates it is believed that they foster

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<sup>63</sup> *supra* note 30

<sup>64</sup> Alexander Mayer-Rieckh and Pablo de Greiff. Justice as Prevention: Vetting Public Employees in Transitional Societies. Social Science Research Council, 2007. Available at: [http://www.ssrc.org/workspace/images/crm/new\\_publication\\_3/%7B57efec93-284a-de11-afac-001cc477ec70%7D.pdf](http://www.ssrc.org/workspace/images/crm/new_publication_3/%7B57efec93-284a-de11-afac-001cc477ec70%7D.pdf)

impunity allowing the most egregious crimes in international law to pass unpunished. Governments will then be cautious enough to provide a good justification for the enactment of an amnesty agreement. States will therefore have a greater margin of deference when arguing that an amnesty agreement is enacted to achieve a particular aim that will benefit the great majority of the society. Once implemented, if the purpose for which it was created is not met, the opportunity cost made both by victims and the society as such in accepting perpetrators to be expunged of all criminal and civil actions would have been in vain.

A great weight will be given to the fact that the State has the ability to transform his promises into actions, and that least in the short term the amnesty agreement can lead the country to achieve the ultimate goal proposed. I acknowledge that presenting a balance of any specific transitional justice process must be done in the long run; however, it is possible to see in the short term if the amnesty agreement and the public policies that coupled the agreement contributed to the ultimate goal.

Thus, the weight for this element will bear a 20% in the definition of justice. It will be achieved if the objective set in its constitutive instrument is met or at least has contributed in a great extent to the achievement of such objective.

In sum, justice will be measured by the following elements and criteria:

<b>Elements</b>	<b>Indicators</b>	<b>Weight within the definition of justice</b>
1. Prosecutions	a. Alternative accountability mechanisms	10 %
2. Truth	a. Extent to which the truth was revealed	40 %
3. Reparation	a. Existence of an integral reparation program b. Degree of implementation of the program	20 %

Elements	Indicators	Weight within the definition of justice
4. Vetting	a. Changes made in institutional authorities involved in the conflict b. Removal or personnel involved in the conflict or a specific crime	10 %
5. Objectives	a. Did it contribute to the accomplishment of the objective set	20 %

Understanding that it is possible that the elements that have been outlined above are only partially accomplished by the State, a numerical value will be granted to each of the elements depending on the degree of fulfillment. A case will therefore pass muster if it at least attains a 65% sum of the overall elements.

#### IV. CASES

##### *A. Why these cases?*

The cases of South Africa, East Timor were chosen; primarily because of the way they applied amnesty in order to pursue a certain purpose. Though each of these cases shows several caveats, they help to understand how amnesty agreements may be applicable in different contexts and may be implemented in different ways to reach different outcomes.

The aforesaid cases have different historical roots and respond to different contexts; however they all in one way or another turned to amnesty agreements in order to either facilitate a transition to a democratic government, or attempt to reduce the levels of conflict.

When looking at the ways in which the agreements were implemented, it is possible to say that South Africa was the case which relied the most in the amnesty agreement in order to help the transition. The agreement signed between the ANC and the government allowed many of the crimes committed by both parties during the apartheid to be sheltered by the amnesty by

extinguishing civil and criminal claims. The amnesty agreement often spared serious human rights violations.

In East Timor on the contrary, the agreement of amnesty was applied more narrowly. The government decided that while it was necessary to end the conflict and catalyze the transition, it flatly refused to grant amnesty for serious crimes. Instead, it was decided that individuals who committed less serious crimes, could pursue an amnesty agreement, so long as they told the truth about their offenses, and repay the society with community service. This was mainly used in order to create and alternative mechanism of accountability and also to achieve national reconciliation.

Due to the variety of contexts, situations, and challenges presented by each of the above cases, they allow us to determine whether amnesty agreements may be a tool in the achievement of justice or if instead, they are an obstacle.

### *B. South Africa*

From 1960 to 1994, thousands of black South Africans were persecuted and killed due to the racial segregation supported by the apartheid system. “The origins of the conflict in South Africa reach back to the arrival of the first European settlers in 1652. The gradual expansion of colonial territory brought the colonial powers and local settlers into conflict with numerous African communities over the next two centuries [...] Ongoing tensions over political exclusion, land expropriation, taxes and other oppressive policies resulted in numerous military confrontations and protests.”<sup>65</sup>

In May 1994, an interim Constitution was adopted for the purpose of “the promotion of national unity and the restructuring and continued governance of South Africa while an elected

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65 Van der Merwe, Hugo and Lamb, Guy. *Transitional Justice and DDR: The Case of South Africa*. Research Unit International Center for Transitional Justice. (2009) at pg. 4 Available at: <http://ictj.org/publication/transitional-justice-and-ddr-case-south-africa-case-study> (Last visited: April 2012)

Constitutional Assembly draws up a final Constitution.”<sup>66</sup> Under its National Unity and Reconciliation chapter the Constitution provided that “in order to advance (...) reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offenses associated with political objectives and committed in the course of the conflicts of the past.”<sup>67</sup>

When negotiations of peace between the National Party regime and the African National Congress initiated, the new government in order to promote a more peaceful transition, agreed to sign an amnesty agreement to those individuals who had committed crimes under the apartheid regime.<sup>68</sup> In 1995, the South African parliament enacted the “*Promotion of National Unity and Reconciliation Act*”<sup>69</sup> which not only materialized the amnesty agreement but created the Truth and Reconciliation Commission (TRC).

The TRC was composed of three different committees:<sup>70</sup> a Committee on Human Rights Violations,<sup>71</sup> a Committee on Amnesty and a Committee on Reparation and Rehabilitation.<sup>72</sup>

Specifically, the Amnesty Committee would be in charge of receiving and granting amnesty to those individuals who personally applied and who complied with the requirements set forth in the agreement, i.e. those who presented their application before the cut-off deadline, those who committed crimes that fell under the category of “political offences.”<sup>73</sup>, and those who

66 *South Africa – Interim Constitution*, Preamble, 27 April 1994, Available at: [http://www.servat.unibe.ch/icl/sf10000\\_.html](http://www.servat.unibe.ch/icl/sf10000_.html) (Last visited, April, 2012)

67 *idem*. Chapter 16. Cited in Research Brief: Country case studies on the use of pardons. International Center for Transitional Justice (2008). Available at: <http://ictj.org/publication/research-brief-country-case-studies-use-pardons-0> (Last visited, April, 2012)

68 Martha Minow. *Between Vengeance and Forgiveness*. Beacon Press (1998) at pg. 52

69 The National Unity and Reconciliation Act, Act No. 34, 1995, Republic of South Africa, Government Gazette, vol. 361, No. 16579 (Cape Town, July 26, 1995)

70 *Idem*

71 Its main tasks were to enquire into systematic patterns of abuse, to attempt to identify motives and perspectives and to establish the identity of individual and institutional perpetrators.

72 Based on the statements and applications provided by the Human Rights Violations Committee and the Amnesty Committee, the Committee had to formulate recommendations in order to compensate the victims. Available at: [http://casl.elis.ugent.be/avrug/trc/04\\_10.htm](http://casl.elis.ugent.be/avrug/trc/04_10.htm) (Last visited, March, 2012)

73 Defined as a crime committed on behalf of, or in support of the state, a liberation move-

fully disclosed the truth of their crimes committed during March 1<sup>st</sup>, 1960 and May 10<sup>th</sup>, 1995.<sup>74</sup> The amnesty agreement would be applicable to those individuals who had been previously convicted and those whose trials were still pending. The legal effects of such amnesty derived in the foreclosure of criminal and civil liability for the successful applicant. “This process fundamentally differed from the concept of a blanket amnesty. Especially innovative and contrasting with the Latin American models of amnesty laws was the integration of the system for amnesty as one of the pillars of a truth and reconciliation process.”<sup>75</sup>

When the deadline for receiving applications came to its term, it was clear that the number of applications received by the TRC vastly exceeded the expectations. “More than 7,000 perpetrators of crimes applied for amnesty [...] by 1998, when the TRC had completed its work, except for ongoing amnesty investigations, the TRC had rejected more than 4,500 of these applications while it had granted around 125 amnesties.”<sup>76</sup> In sum, 88% of the applications received and approved by the TRC were from political offenders, 49% of which were ANC members.<sup>77</sup> “Many applications were rejected because the applicants failed to make full disclosure or because the political nature of the offense was unclear.”<sup>78</sup>

In result, “after conducting 140 public hearings and considering 20,000 written and oral submissions, the South African Truth Commission published a report of its findings on October 29, 1998.”<sup>79</sup> The report aimed at purporting different testimonies of victims as well as to establish the truth about what had

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ment, or any other political organization. Section 20(2) a-g- Act. *supra* note 76

74 Article 20(c), *supra* note 76

75 *supra* note 75, at pg. 12

76 *Idem*, at pg. 12. See also: “Background and Introduction”, Traces of Truth – Documents relating to the South African Truth and Reconciliation Commission. University of the Witwatersrand. Available at: <http://truth.wwl.wits.ac.za/about.php> (Last visited: May, 2012)

77 Mallinder, Louise. Amnesties, the TRC and the False promise of Prosecutions in South Africa. Amnesties, Immunities and Prosecutions Conference. Belfast, 22 June 2009

78 Van Zyl, Paul. Unfinished Business: The Truth and Reconciliation Commission’s Contribution to Justice in Post- Apartheid South Africa. In M. Cherif Bassiouni, ed., *Post Conflict Justice* (New York: Transnational Publishers (2002) at pg. 753

79 South African Truth Commission’s Report. Cited in: *supra* note 59, at pg. 3

happened in South Africa during the apartheid regime as well as to provide the new South African government with several recommendations directed to matters such as reparations.

Taking into account such context, the four criteria established above will be analyzed in accordance to the South African model in order to determine if the application of the amnesty agreement did in fact preclude justice from being accomplished.

### 1. Prosecutions

The South African TRC was in charge of granting amnesty to individual perpetrators of human rights following a “carrot and stick” approach; perpetrators who fully disclosed the truth about their “political” crimes were thus entitled to receive amnesty for civil and criminal claims.<sup>80</sup> Offenders who did not apply for amnesty or were denied amnesty could be subjected to criminal investigations.

In order to facilitate future investigations or prosecutions the TRC<sup>81</sup> provided the South African government with a list of names that had been obtained through the hearings of both offenders and victims.<sup>82</sup> “Where it was possible to do so, the TRC attributed direct criminal responsibility for human rights abuse to a limited number of individuals.”<sup>83</sup> “By 1998, when the TRC issued its report, the government of South Africa again asserted, [...] that those who had not applied for amnesty would

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<sup>80</sup> *supra* note 76, section 20

<sup>81</sup> TRC Report. Volume I. Chapter 4. Para. 152 The Act required the publication of the names of those who received amnesty in the Government Gazette. These individuals had already identified themselves as perpetrators by applying for amnesty. The Commission had therefore, to resolve which of the other perpetrators identified in the course of its work should be named in accordance with its mandate - to enquire into “the identity of all persons, authorities, institutions and organizations” involved in gross human rights violations, as well as the “accountability, political or otherwise, for any such violation” (section 4(a)(iii), (v), the Act).

<sup>82</sup> *supra* note 85

<sup>83</sup> *Idem*

be prosecuted.”<sup>84</sup> In doing so, the TRC transferred more than 800 cases for further investigation and possible prosecution.<sup>85</sup>

In 1999 in an attempt of the South African government to follow the TRC’s recommendation it created the Special Prosecutions Unit, best known as Priority Crimes and Litigation Unit (PCLU).<sup>86</sup> By 2003, the PCLU had reviewed 300 TRC cases and deemed that five of them could be potentially prosecuted and 10 should be further investigated.<sup>87</sup> Up to date only four cases have been pursued in open court and only two of these cases have been concluded, one resulting in a conviction.<sup>88</sup> “Since the TRC completed its task, however, the government has largely failed to prosecute these perpetrators and has attempted a second round of amnesty via prosecution guidelines and pardons.”<sup>89</sup>

Despite the fact that South Africa’s truth and reconciliation approach has been regarded as the model to follow in transitional justice societies, the South African government has clearly failed in providing alternative means of accountability to those perpetrators who did not comply with the requirements set forth in the agreement for them to be granted amnesty.

Though investigations and prosecutions are understood as a “best-effort obligation” by international bodies such as the Inter-American Court of Human Rights, the lack of serious investigations, and lack of governmental will, coupled with a weak judicial body resulted in the absence of prosecutions. In

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84 *supra* note 74, at pg. 13. See also: TRC Category - 5. Aftermath”, Traces of Truth – Documents relating to the South African Truth and Reconciliation Commission, University of the Witwatersrand, Available at [http://truth.wvl.wits.ac.za/cat\\_descr.php?cat=5](http://truth.wvl.wits.ac.za/cat_descr.php?cat=5) (Last visited April, 2012)

85 *Idem.* at 13

86 The PCLU was created by Presidential proclamation on 23 March 2003. Its mandate determined that it had direct investigations related to: criminal prosecutions arising from the Rome Statute; crimes against the State, matters emanating from the Truth and Reconciliation Report as well as contraventions of The Regulation of Foreign Military Assistance Act, the Non-Proliferation of Weapons of Mass Destruction Act, amongst others.

87 *supra* note 84

88 *Idem.*

89 Justice Denied: Amnesty, Pardons, and Prosecutions in Post-Apartheid South Africa. Brown Bag Lunch. Series: International Security Brown Bag Seminar. February 11, 2010. Available at: [http://belfercenter.ksg.harvard.edu/events/4250/justice\\_denied.html](http://belfercenter.ksg.harvard.edu/events/4250/justice_denied.html) (Last visited: April, 2012)



some cases, the intention of the government to revive certain investigations have additionally encountered several problems, “limited resources and obstacles to recovering evidence will restrict its ability to prosecute many cases. In addition national political priorities have become more focused in the last few years on the effective combating of high levels of criminal violence in the country.”<sup>90</sup>

Now, the question one has to ask is if the lack of criminal investigations and prosecutions conducted by the South African government were directly related or caused by the fact that an amnesty agreement was signed. The answer to this question has to be “no”. When revising the reasons why the South African government failed to provide accountability mechanisms to perpetrators of massive violations of Human Rights (specifically those who were not granted amnesty), the reasons are manifold, but none of them have a direct relationship with the amnesty agreement. Indeed, the lack of resources, the burden of having to investigate crimes that occurred several years ago, the lack of political will, amongst other factors mainly explain why prosecutions are still pending and why did the South African government intended to extend amnesty agreements through presidential pardons.<sup>91</sup>

When South Africa adopted its Truth and Reconciliation model, and the newly established Constitutional Court upheld the legality of the amnesty agreement, South Africa did not embrace a blanket amnesty, but applied a conditioned amnesty subject to specific requirements, and opened the possibility for the State to equally investigate and prosecute those who had not satisfied the requirements of the amnesty agreement. In that sense, one cannot talk that the South African approach on its face does not promote impunity for human rights crimes but upholds the possibility of alternative mechanisms of accountability.

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90 Truth and Justice: Unfinished Business in South Africa. Human Rights Watch Report. (2003) Available at: <http://www.amnesty.org/en/library/info/AFR53/001/2003> (Last visited: May, 2012)

91 *supra* note 74, at pg. 15

While those who oppose amnesty agreements and may argue that the “TRC served to reduce national and international pressure to prosecute perpetrators [...]”<sup>92</sup> it can also be argued that the TRC served as a previous fact-finding mechanism that facilitated prosecution for the government in a significant number of cases. As seen in the report presented by the TRC, there was a wide range of information that could have been capitalized by the South African government in order to initiate investigations against perpetrators.

When assessing if the South African case passed muster in relation to the prosecution criteria, one must conclude that up to now there is no clear evidence that can determine that it did; however one must also acknowledge that this flaw does not relate to the amnesty agreement *per se* or even the TRC’s work, whose information could have been used effectively by the government. Therefore the overall score for this aspect will be 0%

## 2. Truth

The task of the 17 conforming members of TRC was to establish through public hearings and investigations a complete picture of the gross violations of human rights committed between 1960 and 1993, it pertained to give:

*Attention to the question of the restoration of the human and civil dignity of (individual) victims of past gross human rights violations. It did so by creating opportunities for victims “to relate their own accounts” of the violations they had suffered by giving testimony at public hearings across the length and breadth of South Africa between April 1996 and June 1997. Section 3 of the Act requires the Commission to promote national unity and reconciliation [...] by [...] establishing and making known the fate or whereabouts of victims and by restoring the human and civil dignity of such victims by granting them an opportunity to relate their own accounts of the violations of which they are the victims, and by recommending reparation measures in respect of them<sup>93</sup>.*

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<sup>92</sup> *supra* not 85, at pg. 751

<sup>93</sup> Report of the Truth and Reconciliation Commission of South Africa. 5 Vols. Volume 1, Chapter 4: The Mandate (1998) at para. 34

The highly publicized hearings were coupled with an extensive statement-taking drive, investigations, and research. In order to comply with its mandate the TRC was vested with powers of investigation, which included the capability of conducting search and seizures, as well as the power to subpoena persons to appear before them.<sup>94</sup>

Under the South African approach truth was given the highest priority. The government upheld the importance of truth and reconciliation before any type of accountability model. Consequently, in the South African minds, amnesty was used in conjunction with restorative justice as a means to make perpetrators participate in truth telling and allowing victims to come before their society and tell their experiences.<sup>95</sup>

As such the TRC made two important contributions: a. identified perpetrators and gathered evidence and information regarding the crimes committed by them and; b. gave the opportunity for victims to tell their story.

As for the first contribution, the TRC was able to collect information through the hearings or evidence that perpetrators provided as part of the requirements to benefit from the amnesty agreement. As a consequence of these mechanisms, the Commission could have a clear picture about the reasons, motives and circumstances in which the crimes occurred. This mechanism, in which each of the criminals could address the Amnesty Committee created a “domino effect” that further potentialized Commission’s ability to determine who the criminals were and who could potentially be prosecuted in case the individual did not apply for amnesty. The “domino effect” showed that when perpetrators addressed the TRC and identified people who were involved in crimes, those people who had been named as co-authors or participants were forced to equally reach out to the Amnesty Committee and apply for amnesty; otherwise they

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94 *Idem*

95 Mallinder, Louise. Can Amnesties and International Justice be Reconciled? *The International Journal of Transitional Justice*, Vol. 1, 2007, 208–230, doi:10.1093/ijtj/ijm020 Advance Access publication: 10 August 2007 at pg. 220 and 221

could face the risk of prosecution. “The controversial truth for amnesty aspect of the TRC’s work was an extremely effective mechanism in identifying responsibility for human rights abuse. The fact that over 7500 persons applied for amnesty is partly attributable to the fact that the disclosures contained in each batch of amnesty applications created a “prisoners dilemma” for prospective applicants.”<sup>96</sup>

Due to the diversity and quantity of information received, the Commission was could directly attribute responsibility for events to specific individuals or groups as such. “Where it was possible it also ascribed responsibility to institutions or structures, such as the government or the cabinet. For example, after finding evidence of widespread and systematic torture of persons held in custody, the TRC made the following finding: the commission concludes that the use of torture was condoned by the South African government as official practice.”<sup>97</sup>

For its part, the Commission also served as a recipient of testimony from victims. According to the final reports submitted by the Commission, it received approximately 24,000 testimonies from victims who had the opportunity to equally disclose their own particular view of the conflict and the experiences that entitled them as victims. Likewise, the victim had the opportunity to present their testimonies at public hearings, which were heard or seen by the majority of the community. “The widespread awareness of the TRC’s work contributed towards the establishment of a social truth regarding the nature of Victimization and the impact of human rights abuse on individuals and their families.”<sup>98</sup>

As a result, “the nature and extent of abuses by all sides in the conflict were documented by the TRC. The TRC relied mainly on its database of victim statements, which covered 33,713 gross human rights violations (based on 21,296 statements) [...] The Commission found that the State perpetrated the following

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96 *supra* note 85, at pg. 752

97 *Idem*, at pg. 751

98 *Idem*, at pg. 748

types of gross violations: “torture; abduction; severe ill treatment, including sexual assault; unjustified use of deadly force in situations where lesser measures would have been adequate; the deliberate manipulation of social divisions in society, resulting at times in violent clashes.”<sup>99</sup>

The amnesty agreement in this case was a catalyst for truth. It was thanks to the agreement that perpetrators felt compelled to reach out to the Commission. Without this carrot and stick approach, offenders most likely would not have felt obliged to come forward and confess their offenses. One can then conclude that amnesty was a main ingredient in South Africa’s achievement of truth.

When looking at the indicator by which we measure whether truth has been attained or not, one cannot deny that the TRCs work did in fact accomplished to present a comprehensive work that provides the society with a historical reconstruction of the apartheid period, sufficiently enough to prevent anybody to deny that such crimes did in fact take place in South Africa. Therefore, the overall score for this element will be 40%

### 3. Reparations

The Preamble to the Reconciliation Act provides that the TRC should work in the “taking of measures aimed at the granting of reparations to, and the rehabilitation and restoration of the human and civil dignity of, victims of violations of human rights.” As an integral part of the Commission’s work the Reparation and Rehabilitation Committee was required to make a set of recommendations to the President in regards to: (I) the policy the government should follow or measures which should be taken with regard to the granting reparation to victims [...].<sup>100</sup>

99 Truth and Reconciliation Commission, *Findings and Recommendations*, vol. 5, *Truth and Reconciliation Commission of South Africa Report* (London: Macmillan, 1998), 223. Cited in: Van der Merwe, Hugo and Lamb, Guy. *Transitional Justice and DDR: The Case of South Africa*. Research Unit International Center for Transitional Justice. June 2009 at pg. 4

100 *supra* note 75 at Section 25 and 26 of the Act.

As such, the TRC announced its policy on reparations in October 1997 and formally presented it to the President as part of its final report in October 1998.<sup>101</sup> In its report the TRC recommended that final reparations to victims involve an amount of money, called an individual reparation grant, to be made available to each victim who applied for reparation or its relatives, if the victim was dead. The TRC estimated an approximate number of 22,000 victims, and calculated that the total cost for reparations would be U.S. \$588,837,490 over six years.<sup>102</sup> In addition, the TRC also recommended symbolic reparations to be made as a means not only to providing redress to victims but also to construct historic memory.

In practice, President Mandela established what is known as the President's Fund (1998) in order to handle reparations for victims. At the beginning urgent interim reparations were made to some victims. However, even if R300 million (U.S. \$61.7 million at the December 1997 rate) were allocated for this process, only R48.37 million (U.S. \$4.72 million at the November 2001 rate) had been paid out under this scheme by November 2001, in grants of between mostly two and three thousand rands each to 17,100 applicants (from a total of 20,563).<sup>103</sup>

In sum, the government has delayed the implementation of a program of monetary reparations for the victims, and though there has been progress regarding the government's implementation of non-monetary reparations, compensations are still largely outstanding. Even those victims who received reparations have stated "the amounts involved made little material difference in their lives [...] some victims reported that many of those who did not receive UIR—because they were not considered urgent cases—"became jealous or mad", and sometimes threatened violence'. Similarly, almost all those who did receive UIR reported increases in family and community conflicts".<sup>104</sup>

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101 *supra* note 106. See Volume Five, Chapter Five.

102 *supra* note 97

103 *Idem*

104 Crawford-Pinnerup, Ana. An Assessment of the Impact of Urgent Interim Reparations. In Brandon Hamber, Thloki Mofokeng, and Graeme Simpson, 'Evaluating the Role and

Although there was willingness on the part of government institutions to provide government for victims with some type of compensation for the events, implement the program and its implementation had no substantial effect on South African society. While monetary reparations were made, their effect did not have much impact on the lives of victims and therefore the effect that was aimed was not fully achieved.

When asked if the amnesty agreement had an impact on this outcome, it is obvious that *prima facie* an amnesty agreement does not permit victims to seek for civil redress directly from the perpetrator and therefore the possibility for them to receive economical indemnifications is eliminated. However, under international law States independently of having signed and amnesty agreement or not have the obligation to provide reparations for human rights violations that occurred within their territory. Consequently, though the agreement does restrict the victim's rights in a certain measure, it is up to the government to comply with international law and provide the sufficient reparations. In this case, the reparations effort fell short of the impact it pertained to have and until now there has been no sufficient resources and prioritization by the State in order to grant them.

In that sense the overall score for this element will be 10%.

#### 4. Vetting

Vetting in South Africa was not such a clear option for the government to pursue. Despite the fact that the TRC emphasized in the importance of institutional change and the guarantee of non-repetition, the South African model adopted a much more lax approach in relation to a substantial change in the South African institutions.

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Function of Civil Society in a Changing South Africa' (paper presented at The Role of Southern Civil Organizations in the Promotion of Peace Seminar, London, 1997), 3. Cited by: De Greiff, Pablo. *The Handbook of Reparations*. Published to Oxford Scholarship online (2006) at pg. 189 Available at: <http://www.oxfordscholarship.com/view/10.1093/0199291926.001.0001/acprof-9780199291922-chapter-6#acprof-9780199291922-note-395> (Last Visited: April, 2012)



In Klaaren's study of the South African institutional reform he concluded that even if the government pledged to its own citizens that a regime such as the apartheid would not replicate itself, there was no formal process of vetting. "The public service sector was transformed during this time by processes of rationalization and demographic change. Political parties did not undergo any vetting of their membership either, but were rather influenced directly by the changed political currents".<sup>105</sup>

In regards to the public service, Klaaren establishes that there was no specific vetting legislation in South Africa applicable to the public service, nor any real experience related to this prevention mechanisms. Despite the absence of a formal vetting process, institutional reform in the police and military forces was made. The public service was subjected to different processes of transformation through rationalization and affirmative action.<sup>106</sup> It was changed from a system that prioritized white persons in senior rank posts to one "that began to reflect the demographics of the South African nation."<sup>107</sup> In addition, various programs and policies were introduced in order to promote good governance practices. "This included rights training, civil accountability, community-police forums, parliamentary oversight mechanisms, separate investigative units to examine cases of abuse and the development of policies and skills for public order policing."<sup>108</sup>

On the other hand, the judiciary became much more conscious of the importance of selection in order to strengthen both the governmental institutions as well as the personnel working in them. Something similar occurred with South Africa's political parties. At the interior of the major political parties there was no formal implementation of a vetting process. Persons who

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105 Klaaren, Jonathan. Institutional Transformation and the Choice Against Vetting in South Africa's Transition. at pg. 150. In: Justice as Prevention. Vetting Public Employees in Transitional societies. Edited by: Alexander Mayer-Rieckh & Pablo de Greiff. International Center for Transitional Justice. Advancing Transitional Justice Series, New York. (2007)

106 Idem, at pg. 151

107 Idem

108 *supra* note 72, at pg. 23



were alleged to have been involved in human rights abuses were equally appointed positions in political parties.

Some have argued that the lack of a clear reform process in the South African society responded to the signature of the amnesty agreement, as it “eliminated” the possibility that the former workers of the regime could be scrutinized in a vetting process. This argument is not plausible. While it is clear that the agreement would not allow the victims to have criminal and civil actions against the perpetrators, it did not preclude the possibility that the government could remove those connected to the apartheid regime from their jobs. It is also evident that in this case that the amnesty agreement did not bar a vetting process in South Africa, but also did not contribute to it.

Though South Africa enjoys a successful transitional process and up to date there is no evidence that a similar regime such as the apartheid could gain power and be successful in its endeavor, this still does not mean that a meaningful vetting process should not be pursued.

Thus, the overall score of this element is 4 %

## 5. Objectives

The preamble of the South African Reconciliation Act<sup>109</sup> clearly establishes that in the pursuit of national unity, the well-being of all South African citizens and the attainment of peace and reconciliation, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives committed in the course of the conflicts. This Preamble highlights specifically two aspects: peace and reconciliation as the ultimate goals to be achieved.

The amnesty agreement was therefore seen as a means to achieve both of those ends. On its part, the South African Constitutional Court clearly mentioned in its jurisprudence<sup>110</sup> that

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109 *supra* note 76

110 Langa CJ in *Du Toit v. Minister for Safety and Security and Another* (2009) ZACC 22;2009 (6) SA 128 (CC);2009 (12) BCLR 1171 (CC) at para 29. Cited in: Constitutional Court of

the amnesty agreement was not a step taken by the parties in the conflict to promote impunity for the grave violations of human rights, but on the contrary:

*The objectives that the special dispensation sought to achieve were national unity and national reconciliation. These objectives were to be achieved through the application of the principles and values which underpin the Constitution', including the principles, criteria and spirit that inspired and underpinned the process of the Truth and Reconciliation Commission, especially as they relate to the amnesty process'. But what are the principles, criteria and spirit that inspired and underpinned the amnesty process? These emerge from the fundamental philosophy of our negotiated transition to a new democratic order. It was recognized early on, during the negotiation process, that the task of building a new democratic society would be very difficult because of our history, and that this could not be achieved without a firm and generous commitment to reconciliation and national unity<sup>111</sup>.*

Moreover,

*What the epilogue seeks to achieve through amnesty is the facilitation of reconciliation and reconstruction by the creation of mechanisms and procedures which make it possible for the truth about our past to be uncovered. Amnesty was dependent upon truth-telling fundamentally for the purpose of making healing possible and for the advancement of a core national imperative of unity, reconciliation and reconstruction<sup>112</sup>.*

In that sense, one might conclude that the as for the first objective (peace and democracy), the amnesty agreement accomplished the transitional process to be carried out with more ease. Once the agreement was signed and peace was achieved, South Africa entered into the process of how to implement the agreement and establish a new democratic government. In 1994, Nelson Mandela was positioned as the first democrati-

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South Africa. *The Citizen and Others v. Robert John McBride*. Case CCT 23/10 (2011) ZACC11 at para 51, 54

111 *Albutt v Centre for the Study of Violence and Reconciliation, and Others* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC) (*Albutt*) at paras 53-4: See also: *Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others* [1996] ZACC 16; 1996 (4) SA 671 (CC); 1996 (8) BCLR 1015 (CC) (*AZAPO*) at para 2.

112 *Idem*, at para. 213

cally elected president in South Africa after apartheid Period. After continued democratic elections in South Africa, “a full assessment of the process of trading “truth for amnesty” indicates that “the truth for amnesty formula of the South African approach was innovative, and it has been credited with assisting that country through its successful transition.”<sup>113</sup>

As for the achievement of reconciliation, one must take into account to different sub elements. The first of which is truth and the second one is unity. As established before the South African case has proved to be successful in terms of the community and the victims to know what happened during the apartheid period. Victims had the opportunity to participate in each of the hearings, and perpetrators in turn were forced to confess the totality of their crimes. The TRC who’s mandate was to promote reconciliation proved to do a good job in those terms. As for the second element, which was to restore the unity of the South African society, it is clear that things in a post-conflict scenario may never return to their *status quo*, victims and perpetrators have managed to live side by side, in a peaceful environment.

While it is clear that there are certain shortcomings in relation to the implementation of complementary policies ancillary to the amnesty agreement and the South African government could have achieved a higher level of reconciliation if reparations or lustration was made, up to now one can concluded that the general objectives were met. Only time will tell if South Africa did achieve true peace and reconciliation.

Thus, the overall score for this element is 15 %

In sum, when assessing the overall transitional process of South Africa, it can be said that though the Truth element, which bears a greater importance in the definition of justice was fully accomplished, the other elements were partially achieved and therefore the South African case barely achieved justice, having a total score of 69%.

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113 International Center for Transitional Justice (ICTJ). Research Brief: Country Case Studies on the Use of Pardons. November, 2008, at pg. 15

The intention is not to criticize the implementation of the different policies that were put in place when seeking to bring peace to South Africa, but to determine if the mishaps that prevented South Africa in achieving a complete sense of justice were influenced or determined by the application of an amnesty agreement. In that sense, one may conclude that the elements that influenced the most, were strictly related to either a lack of economic resources, differences in government's priorities, and lack of a clear public policy and not the existence of an amnesty agreement.

One must concede that when applying an amnesty agreement it is obvious that the element of prosecution will be always understood as the "cost of opportunity" the society has to pay in order to achieve peace or at least propel it, and that the State may find within the achievement of peace a perfect excuse not to prosecute those who were not granted amnesty. Generally, after the enthusiasm of peace has passed the State will be confronted to other problems and challenges and will not find a strong incentive to continue on prosecuting. In that sense, amnesty agreements may play both ways, they can provide the State with the impulse to continue prosecuting or not.

In regards to the remaining elements such as truth, reparations, vetting and achievement of objectives, one can see that as for the latter and truth the amnesty agreement played an important role and contributed to their achievement. As for reparations and vetting, we see that the amnesty played a less important role. In the case of reparations though the amnesty forecloses the possibility for victims to claim for reparations, the State without prejudice of this still must compensate and grant reparations to victims as part of the obligations that stem from international law. Finally, in the case of vetting was neither negatively nor positively impacted by the amnesty, but responded more to external factors.

As such, one cannot conclude that the amnesty agreement implemented in South Africa played in the detriment of justice. Conversely, in some aspects the South African amnesty agreement boosted or promoted the implementation of the latter elements.

*C. East Timor*

During a period of 500 years, East Timor was a Portuguese colony. When Portugal claimed power over it (1960), the UN rejected the claim and placed East Timor on the list of non-self-governing territories. Political parties in East Timor could not reach any consensus on whether they wanted full independence or wished to achieve integration with its neighboring country, Indonesia.<sup>114</sup>

Indonesia, who had special interest in conquering East Timor, soon took advantage of the political unrest and invaded East Timor. This occupation “[...] was the beginning of almost a quarter-century of immense atrocities and human rights abuses, during which almost one-third of the population of East Timor, some 200,000 people, lost their lives.”<sup>115</sup> Indonesian armed forces conducted a series of military offenses against the Armed Liberation Forces of East Timor, in which there was an estimate of 100,000 casualties including civilians. Human Rights violations caused by the Indonesian invasion ranged from torture, disappearances, land confiscation rapes and civilian intimidation.<sup>116</sup>

In late 1998, due to the economic crisis in Southeast Asia and the fall of Indonesia’s President Soeharto, the Timorese saw the opportunity to attempt once again to achieve self-determination. The new Indonesian President Habibie agreed in 1999 to hold a popular consultation of whether the Timorese people wanted to be fully independent or if they wished to continue under the Indonesian control. When consultations took place, the Timorese in an overwhelming majority voted for independence. As a result, “the Indonesian military began a campaign of vengeance against those who supported independence. “As almost 80 percent of the population had rejected autonomy within Indonesia, few were

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114 Reiger, Catlin and Marieke Wierda. *The serious Crimes Process in East Timor*; In *Retrospect*. International Center for Transitional Justice. *Prosecution’s Case Studies Series*. (2006) at pg. 4-5

115 *Idem*, at pg. 10

116 *Idem*, at pg. 11. See also: Iem Soei Liong, *The War against East Timor*, London: Zed Books, 1984; James Dunn, *Timor: A People Betrayed*, Sydney: ABC Books, 1983; Jill Jolliffe, *East Timor: Nationalism and Colonialism*, St. Lucia, Queensland, 1978.

exempted.”<sup>117</sup> More than 50% of the population was displaced, many of whom fled to Indonesian West Timor. After the Indonesian revenge the territory was left devastated.

The UN, in a late response to the atrocities that occurred, placed the country under the control of the UN transitional Administration for East Timor (UNTAET) with the objective of preparing them for independence.<sup>118</sup> The transitional justice process of the Timorese people had different layers both in terms of prosecution, truth and reconciliation matters. The Timorese felt compelled to initiate prosecutions for those perpetrators of massive violations of human rights, an amnesty agreement was accepted for minor crimes.

### 1. Investigations

The prosecution strategy in East Timor was twofold: a. prosecute serious crimes; and b. implement accountability mechanisms for those who committed less serious crimes. As opposed to the South African case, the Timorese approach gave the prosecution element a greater weight and did not concede an amnesty agreement for gross violations of human rights.

On the first hand, in the year 2000 the UN established Special Panel of the Dili District Court in order to prosecute Serious Crimes, which would be in charged roughly to investigate and prosecute gross violations of Human Rights that occurred in 1999.<sup>119</sup> They were composed of one national and two international judges.<sup>120</sup> Despite its purpose, the Special Panel did not

117 *Idem*, at pg.12. See also: Report on the Joint Mission to East Timor by the Special Rapporteur of the Commission on Human Rights on Extrajudicial, Summary, or arbitrary Executions, the Special Rapporteur of the Commission on the Question of Torture, and the Special Rapporteur of the Commission on Violence Against women, its causes and consequences” A/54/660, Dec. 10, 1999, at paras. 20,38, and 71

118 UNTAET was created by Security Council Resolution 1272, UN Doc. S/RES/1272, Oct. 25, 1999. See also: UN OCHR “Report of the international Commission of Inquiry on East Timor to the Secretary General” A/54/726/, S/2000/59, January 2000, at para. 136.

119 United Nations Transitional Administration in East Timor (UNTAET), Regulation 2000/15, On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences (June 6, 2000), Sections. 1 and 2.

120 Regulation on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, June 6, 2000, UNTAET/REG/2000/15

have overwhelming success in prosecuting individuals for human rights violations. According to the Justice System Monitoring Programme Report<sup>121</sup> which focused on monitoring the cases heard at the Dili District Court concluded that: “from the 17 cases observed most of the matters involved domestic violence. For example, there were 7 cases of domestic violence, whereby 2 cases involved serious maltreatment against a spouse and the other 5 cases involved domestic violence or ordinary maltreatment. The other cases comprised 1 case of murder, 1 case of aggravated theft [...]” Most of these cases fell outside the jurisdiction of the Court.

In parallel, when the Special Panels were created the UNTAET also established a Public Prosecution Service that also intended to prosecute serious crimes, which was named the Serious Crimes Unit (SCU). “By the conclusion of its work in May 2005 the SCU had indicted 391 persons, and the serious crimes process had resulted in 84 convictions and three acquittals.”<sup>122</sup>

Despite the fact that the Timorese government upheld the importance of prosecuting perpetrators, the prosecutorial approach adopted by the SCU underwent several criticisms. “The creation of the Special Panels and what became the SCU was not an integrated process based on any prior planning; it was a series of ad hoc responses to a crisis situation. The two developed separately and never functioned as a single institution.”<sup>123</sup>

Firstly, the SCU has been criticized due to its underequipped capabilities in order to carry on serious investigations. More specifically, it lacked basic facilities, and translations and tran-

121 Summary of cases of cases heard at the Dili District Court. January 2012. Available at: <http://easttimorlegal.blogspot.com/2012/03/summary-of-cases-heard-at-dili-district.html> (Last visited, April, 2012)

122 DeFaria, Carl. ET’s Quest for Justice—The Serious Crimes File. Paper presented at UNMISSET International Symposium on UN Peacekeeping Operations in Post-conflict East Timor: Accomplishments and Lessons Learned, April 28, 2005. In: Hirst. Too Much Friendship, Too Little Truth. Monitoring Report on the Commission of Truth and Friendship in Indonesia and East Timor. International Center for Transitional Justice. January 2008 at pg. 14

123 Reiger Caitlin, and Wierda, Marieke. The Serious Crimes Process in Timor-Lest: In Retrospect. International Center for Transitional Justice. March, 2006 at pg. 13. Available at: <http://ictj.org/publication/serious-crimes-process-timor-leste-retrospect> (Last visited: April, 2012)



scriptions of evidence was not always available. In other terms, this meant that the fact-finding capacity of the SCU as such was highly undermined and did not allow it to build a strong case against perpetrators.

Additionally, one of the biggest challenges it encountered was the fact that a number of high ranked level perpetrators could not be found as they remained in Indonesia or territories where the SCU had no jurisdiction.<sup>124</sup> In practice, the SCU could only prosecute those perpetrators who were already in custody of the authorities, as they did not really have the real capacity to capture someone. “In the context of limited resources, an embryonic criminal justice system, political sensitivities, and a gamut of competing humanitarian and development priorities, it was evident that wholesale, or even widespread criminal prosecutions for these violations was not a realistic option. Nevertheless, it was imperative that there remain a commitment to secure the principle of accountability and some measure of justice for these violations was retained.”<sup>125</sup>

A much greater problem involving the SCU prosecution strategy involved the lack of human resources (judges, prosecutors, defense lawyers and Court staff). Most of the ancient judiciary in East Timor comprised Indonesians who in the conflict fled the country.<sup>126</sup> Additionally and even if the SCU had power to subpoena there was a lack of ability to gain custody over perpetrators who had fled to Indonesia.

As a consequence of the above failures, no individual has been judged for war crimes, crimes against humanity or genocide, rather it indicted persons for lesser crimes, as prosecutors were either unable or reluctant to gather sufficient evidence to even demonstrate that certain people had committed serious crimes.<sup>127</sup>

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124 *Idem*, at pg. 7

125 United Nations Development Program (UNDP). *The Community Reconciliation Process of the Commission for Reception Truth and Reconciliation*. April 2004 at pg. 15

126 Reiger, Catlin and Marieke Wierda. *The serious Crimes Process in East Timor; In Retrospect*. Prosecutions Case studies series. March (2006) at pg. 111

127 Megan, Hirst and Howard Varney. *Justice Abandoned? An Assessment of the Serious*



In sum, though the Timorese government showed good intentions in prosecuting perpetrators of human rights, the quest to achieve accountability was not backed up with the institutional framework needed to achieve the task.<sup>128</sup> When there is such a need and eagerness to prosecute perpetrators of human rights, but the necessary resources to carry on with the endeavor do not suffice, problems such as noncompliance with due process rules, and the existence of a fair trial may arise.

In parallel, in June 2000, the National Council for Timorese Resistance (CNRT) announced that it was going to develop a Commission for Reception and National Reconciliation. The Timorese adopted a combined approach between amnesty, prosecutions and reconciliation, which focused itself more on local reconstruction of the social ties of the community. This process, unlike the SCU was targeted at bringing accountability for less serious crimes such as: assault, theft and property damage.<sup>129</sup>

The level of responsibility that this process entailed was not directly related to criminal or civil liability, but the responsibility that offenders had towards their own communities and the “social penances” they had to endure in order to be part of the society again. In other words, “the process sought to secure the reception of ‘deponents’ with individual victims and the community at large by means of a Community Reconciliation Agreement (CRA) that was brokered by a Community Panel. [...] Reconciliation hearings could only proceed if the Office of the General Prosecutor (OGP) agreed that the matters under consideration were ‘less serious,’”<sup>130</sup> and therefore needed not to be investigated or prosecuted.

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Crimes Process in East Timor. (2005) Written for the International Center for Transitional Justice at pg. 7

128 *Idem*

129 Schedule 1 of UNTAET Regulation No. 2001/10 provided: “Criteria for determining whether (an) offence (was) appropriately dealt with in a Community Reconciliation Process.” The Schedule was clear that “in no circumstance shall a serious criminal offence be dealt with in a Community Reconciliation Process.” In: East Timor Regulations promulgated by the United Nations Transitional Administration in East Timor (UNTAET). UNTAET/REG/2001/10, July 13, 2001. On the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor.

130 *supra* note 132, at pg. 6

Additionally, and in order to bring much more cohesion to the process of prosecuting human rights violations in East Timor, it was agreed that if the crimes that were to be pardoned were to be considered grave and needed to be prosecuted, the Commission for Reception, Truth and Reconciliation (CAVR) had to stop the proceedings and refer the matter back to the Office of the Prosecutor. If the crime was found not to be serious, the offender would confess its crimes and it would have to engage in either of the following options: a. community service; b. reparation, c. public apology; and /or d. other act of contrition.”<sup>131</sup> Once the offender fulfilled its penance, he could no longer be held criminally or civilly liable for the acts that he disclosed during the process.<sup>132</sup>

This process had a positive effect in the Timorese society. It did not only bring a sense of accountability to small offenders, but gave the chance to the community to participate in a process that had as an aim reconstruct the social tissues that were broken by the conflict. As a result, several of Timorese people who were involved in the conflict and that fled to Indonesia felt capable of returning to their home towns and reintegrating themselves in the community. This alternative “prosecutorial/amnesty” mechanism allowed a much greater cohesion within the community.

Taking into account the aforementioned aspects, the Timorese’s transitional justice process unlike the South Africa one, focused on the importance of investigating and prosecuting those responsible for human rights violations during the period of the Indonesian occupation and its aftermath. The Timorese government did not present an amnesty for truth model as the South Africans did, and therefore decided to limit the scope of the amnesty for minor crimes only.

Despite the initial enthusiasm, the East Timor case is one of the many examples that demonstrate how even if prosecutions

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131 *supra* note 136 ,at Section 27.8

132 *supra* note 132, at pg. 18

are considered to be the main path to follow in a transitional justice process there are several constraints that have to overcome in order for prosecutions to actually provide justice to victims. In this case external factors such as the lack of domestic institutional capacities undermined the intention to prosecute. As a consequence and due to the flaws that each of the prosecutorial bodies experienced, the perpetrators for serious crimes, de facto enjoyed a silent amnesty agreement, that vested them with a veil of impunity without even experiencing any type of alternative accountability mechanisms nor the need to even come forward and disclose the truth for their crimes.

By contrast, under the scheme established to punish less serious crimes, represents an alternative accountability mechanism that can more easily be applied and have equally or more positive effects in society than prosecutions. Through what was understood as a conditional amnesty for less serious crimes, the Timorese achieved encounter a mechanism that allowed for accountability, social reintegration and social reconstruction of the communities that were affected. In this case, the implementation of the de facto amnesty agreement, unlike the agreement in South Africa was not primarily driven by a Commission in charge of granting it, but had direct participation of the population, aspect made it much more legitimate.

In this case the application of a conditioned amnesty for less serious crimes, proved to be much more effective than a straightforward prosecution strategy. The application of a conditioned amnesty not only allowed Indonesians to return to their communities, but allowed truth to be disclosed and obliged offenders to accept responsibility for their crimes. In this specific case, the amnesty agreement proved to be much more effective in the attainment of justice than prosecutions.

Taking into account both the successes and the failures of the strategy adopted, the overall score for this element will be 5%

## 2. Truth

In order to uncover the truth of the events that succeeded the Indonesian invasion, both Indonesia and a newly independent East Timor established the Commission of Truth and Friendship (CTF), who's mandate consisted amongst others in: a. revealing the nature, causes and extent of reported human rights violations in East Timor in 1999; b. establish the truth concerning reported human rights violations; c. publish a report on these matters as well as recommend measures to "heal the wounds of the past, to rehabilitate and restore human dignity."<sup>133</sup>

Particularly, the CTF was in charge of reviewing previous findings of the Indonesian National Commission of Inquiry on Human Rights Violations (KPP-HAM) in East Timor in 1999, as well as the findings of the Special Panels for Serious Crimes and the Commission for reception, Truth and Reconciliation (CAVR).<sup>134</sup> The CTF began collecting testimonies, and holding public hearings as well as conducting interviews in order to have a bigger picture of what the events of 1999 had been and comparing such data with the information that the "Indonesian National Commission of Inquiry on Human Rights Violations in East Timor" and other bodies had provided. However, "unlike many truth and reconciliation commissions that typically conduct an open process of documenting thousands of testimonies, the CTF only interviewed or took statements from 85 people in addition to 62 witnesses who gave evidence in open or closed hearings."<sup>135</sup>

When the moment came to analyze the few statements that were collected, the CTF lacked experience and skills in order to

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133 Article 12. Terms of Reference for the Commission of Truth and Friendship. Established by the Republic of Indonesia and the Democratic Republic of Timor-Lest. March 10, 2005. Available at: <http://www.etan.org/et2005/march/06/10tor.htm> (Last visited: April, 2012)

134 *Idem*. Art.14 (a)(i)

135 Hirst, Megan. *An Unfinished Truth: An analysis of the Commission of Truth and Friendship's Final Report on the 1999 Atrocities in East Timor*. International Center for Transitional Justice. March 2009 at pg. 13

use those statements to fill gaps in the previous reports presented by other bodies relating the same matters.”<sup>136</sup> As a result, much of the information gleaned through “fact-finding” was unhelpful or inconclusive.”<sup>137</sup> However, it managed to corroborate the findings already made by the KPP-HAM and the CAVR reporting that crimes against humanity were committed in East Timor in 1999 by Indonesian military, police and civilian officials.<sup>138</sup> “The report brings together the weight of four different sources, providing a massive amount of evidence that the militias, TNI, Indonesian police and government officials were responsible for the mass violations committed in 1999. This large body of evidence from multiple sources serves as a comprehensive answer to claims that Indonesia was not responsible for crimes committed by pro-autonomy militias.”<sup>139</sup>

Additionally, it made important contributions towards in the field of accountability and criminal justice that could have been better used by the Prosecution in East Timor in order to initiate investigations. “While the report focuses on institutional responsibility, its findings and the evidence provided are also relevant to questions of individual criminal liability, including command responsibility at the highest levels. The evidence in the report is sufficient not only to prove that Indonesian officials participated in committing crimes against humanity, but also that senior officials should have known about this, thus providing the basis for command responsibility liability.”<sup>140</sup>

If the South African TRC characterized itself for providing the opportunity to victims to reach out to the TRC and tell their story the CTF “provided little opportunity for community involvement or public scrutiny.” Though victims could reach to the CTF and provide them with statements, people were not as aware of the existence of the CTF and therefore not much of the victims actually recurred to the CTF as a means for catharsis.

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136 *Idem*, at pg. 14

137 *Idem*

138 *Idem*, at pg. 6

139 *Idem*, at pg. 17

140 *Idem*

Moreover, the CTF had the possibility to recommend amnesty irrespective of the types of crimes the person was accused of, if the perpetrator provided full cooperation and disclosure of its crimes. However, perhaps due to UN's pressure the CTF did not risk recommending anybody as suitable for amnesty. "The CTF [...] recognized that the alleged perpetrators who appeared in the hearings had not provided "full cooperation" reflecting the commission's view that these witnesses had either failed to "testify truthfully, or had not shown any remorse."<sup>141</sup>

This argument of the CTF might have had certain justification to it. As seen before the threat of prosecutions in East Timor was not high and therefore even if therefore no real incentive was provided in order for prosecutors to come forward and disclose the truth of their crimes.<sup>142</sup> As an example of the above, "several of the CTF's witnesses had been formally acquitted of charges brought in the ad hoc trials in Jakarta [...] Others, who have never been indicted in Indonesia, are aware of the lack of political will for prosecutions, and they know that—except in the event of a seismic political shift—they are unlikely ever to be charged in Indonesia for crimes committed in East Timor."<sup>143</sup>

For its part, the community level approach for reconciliation, additionally aided at the disclosure of truth. Though it is clear that these mechanisms did not purport to be a truth seeking instrument, this approach allowed victims of minor offenses to know the causes and the reasons by which the offenses were committed.

There is no denying that the CTF work helped confirm the existence of certain crimes which had been documented previously, and helped establish the truth about the causes and triggers into the conflict. However, you cannot even after submitting its final report potholes there are certain about the conflict that are not yet known and were not approached by the CTF. This

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141 Hirst, Megan. *Too Much Friendship, Too Little Truth*. Monitoring Report on the Commission of Truth and Friendship in Indonesia and Timor-Lest. Written for the International Center for Transitional Justice. (2008) at pg. 27

142 *Idem*

143 *Idem*

is compounded by the fact that the victims were not heavily involved in the process of collecting information. While they had the opportunity to speak to the CTF, in practical terms this did not occur, which resulted in a gap in your report.

In discussing the implications of the amnesty agreement was adopted for less serious crimes can conclude that there was no impact on the work of the CTF. While this could recommend amnesty never did. As to the mechanism adopted at the local level, we can say that the amnesty propelled the fact that people had an incentive to tell the truth about their crimes.

Taking into account the aforementioned, the overall score for this element will be 30%

### 3. Reparations

Both the CTF and the CAVR were appointed to make recommendations regarding the reparations that the Timorese government had to provide for victims. The CTF when rendering its final report the Commission did not establish any specific measure to be implemented, but instead aimed at focusing on measures that could be seen as to have a “reparative value” and non-repetition. These were as follows:<sup>144</sup>

- a. Create a documentation and conflict resolution center that could aid in survivor healing programs. e.g. therapeutic programs for victims.
- b. Establishing a commission for disappeared persons to investigate if they were still alive and therefore provide further information to their families.
- c. Education programs for victims

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<sup>144</sup> The CTF states that its recommendations “will take the form of collective reparations, which will require material and other forms of support from the relevant government and institutions” (p. 295). Cited in: Hirst, Megan. *An unfinished Truth: An analysis of the Commission of Truth and Friendship’s Final Report on the 1999 Atrocities in East Timor*. International Center for Transitional Justice. March 2009 at pg.29

- d. Joint declaration from the Presidents of Indonesia and East Timor acknowledging the responsibility for the events and apologizing publicly to people.

It has been argued that one of the reasons why the CTF did not specify in its recommendation a specific reparations program was probably because it sought to avoid individual monetary payments and believed more in a much more general approach.<sup>145</sup> However the report in certain aspects “fail to detail to detail the steps necessary to achieve this outcome this is likely due to the commission’s process for developing its recommendations, which focused on input from official institutions and neglected input from victims themselves.”<sup>146</sup>

On the other hand the recommendations made by the CAVR were much more detailed. Taking into account the situation of the victims and the limited economic resources at hand, the CAVR established a list of prioritized victims that had to be granted reparations. Among the factors that were taken into account in order to prioritize victims were: a. sexual violence; and b. severe and continued suffering. “Primary beneficiaries of the program were survivors of gross human rights violations (rape, imprisonment, and torture) as well as those who suffered indirectly from the disappearance or murder of family members. District Teams were to identify 10-15 persons from each sub-district who best met the criteria as beneficiaries. Victim Support staff conducted home visits to victims who were identified as potential beneficiaries by the statement-taking team.”<sup>147</sup> As such, the CAVR managed to establish certain criteria to help govern-

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145 Idem

146 Idem

147 Wandita Galuh, Campbell Karen, Leong Manuela. Gender and Reparations in East Timor. Written for the International Center for Transitional Justice. at pg. 3. Available at: [http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CEsQFjAA&url=http%3A%2F%2Fwww.idrc.ca%2Fuploads%2Fuser-S%2F11501298791TimorLesteExecSum.pdf&ei=4AjIT8CyB-iu6AH7q50x&usg=AFQjCNH3vzlr3w\\_mViY8IhhbcttRJixUg&sig2=\\_kjIi3q3UI3a-Jk1ZDorRSQ](http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CEsQFjAA&url=http%3A%2F%2Fwww.idrc.ca%2Fuploads%2Fuser-S%2F11501298791TimorLesteExecSum.pdf&ei=4AjIT8CyB-iu6AH7q50x&usg=AFQjCNH3vzlr3w_mViY8IhhbcttRJixUg&sig2=_kjIi3q3UI3a-Jk1ZDorRSQ) (Last visited: April, 2012) See also: Leigh-Ashley Lipscom. Beyond the Truth: Can Reparations Move Peace and Justice Forward in East Timor? East- West Center. Asian Pacific Issue. No. 93. March 2010.



mental institutions to identify those victims who were most in need. Beneficiaries were identified from among those who gave statements to the Commission.

As to the reparations itself, the Urgent Reparation program established by the CAVR, did provide certain monetary reparations to victims. Approximately US\$160,000 was allocated to the program.<sup>148</sup> Monetary compensation was the same for all victims without regard for number of dependents or the severity of the harm suffered. Most beneficiaries used the monetary compensation to pay for medical expenses, including the purchase of medicine and transport costs. “By the end of its operations, the CAVR had provided urgent reparations in the form of cash grants to 516 men (73%) and 196 women (23%); 322 of these men (77%) and 95 of these women (23%) also received home visits and care by local NGOs. 156 victims –82 women (52%) and 74 men (47%)—also participated in a total of six healing workshops.”<sup>149</sup>

The CAVR in its Final Report presented a reparations program for East Timor, which was presented by the President to Parliament in 2005. This Report urged the Timorese parliament to protect victims were affected by the conflict regardless of their political affiliations. Additionally, the CAVR also proposed guidelines in order to conduct and implement a future reparations program and urged the Parliament “to repair, as far as possible, the damage to their [victims’] lives caused by the violations, through the delivery of social services to vulnerable victims and symbolic and collective measures to acknowledge and honor victims of past violations.”<sup>150</sup>

The Parliament in 2006, postponed the debate of two bills implementing key recommendations established by both the CAVR and the CTF. These two bills proposed the creation of a national reparations program and the creation of an “Institute for Memory” to oversee the recommendations made.<sup>151</sup>

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148 *Idem*, at pg. 4-5

149 *Idem*

150 *Idem*

151 Timor-Leste: Parliament Denies Justice victims again. Press Releases, International Center for Transitional Justice. February 17, 2011 Available at: <http://ictj.org/news/timor->

Up to date the Timorese government has not implemented a well-founded reparations program for victims. This is partially explained by a lack of political will, which always rounds up into the same argument and is the lack of economic resources. Consequently, even if small reparations were made by the CAVR the transitional justice process still lacks at least the establishment of a reparations program.

As for any symbolical reparation, in 2008 President Susilo Bambang declined to issue an apology to the victims of the 1999 violence, but did express his 'regret' for what happened."<sup>152</sup>

Although both the CTF and CAVR in their recommendations emphasized the importance of providing victims with reparations, the Timorese government has not fully complied with them. Efforts have been made in these aspects, but they have not been enough, and still the government has not showed clear intentions to provide victims with a satisfactory compensation mechanism or program.

In this specific case, no amnesty was applied for gross violations of human rights, and therefore victims may seek reparations through civil courts. However, it seems that this mechanism has not yet been fruitful.

Moreover, one cannot conclude that the amnesty catapulted victims to receive reparations, nor that it has played to the detriment of victims' rights.

As such, this element will be scored with an overall 7%

#### 4. Vetting

The CTF was also appointed to focus on institutional responsibility and to recommend possible vetting strategies both to the Indonesian and the Timorese government. At the core of

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leste-parliament-denies-victims-justice-again (Last visited: April, 2012)

152 Regret but no apology yet from SBY over Timor violence, AAP. July 15, 2008. Available at: <http://news.smh.com.au/world/timor-violence-regret-but-no-apology-20080715-3fhp.html> (Last visited: April, 2012) Cited in: Unfulfilled Expectations Victims' perceptions of justice and reparations in Timor-Leste. International Center for Transitional Justice, February 2010 at pg. 11

the recommendations one can see that there is a central focus on the transformation of the military institutions. Additionally, the report establishes that both governments should create programs to increase human rights awareness amongst the society as a whole.<sup>153</sup> However, in practice no organized vetting process has been conducted for the armed forces. A small attempt was made in 2006, where there was a small lustering process of the Forças de Defesa de Timor-Leste (F-FDTL) under the aid of the United Nations Police (UNPOL).<sup>154</sup> “UNPOL’s process took 16 months to register every police officer, ending on 1st December 2007. This registration process was primarily a vetting tool to identify police officers who had taken part in criminal acts or had disciplinary problems in relation to the 2006 crisis, but was expanded to include a more complete review of each officer.”<sup>155</sup> Despite this, no officers were ever excluded from service even when there were indicia of their relation with certain crimes.<sup>156</sup>

The vetting process in East Timor as the South African one has not been successful. Though the degree of civil unrest experienced during the Indonesian occupation is not comparable to today’s situation, today’s institutions do not enjoy a high level of legitimacy.

Though this mechanism does not bear for better or worse any relation as to the application of amnesty agreements, this mechanism becomes much more important when an amnesty agreement is signed. Therefore, though the amnesty agreement did not relate to the weaknesses in the process, the government

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153 *supra* note 142, at pg. 10

154 Country Case Study: Timor-Leste. Security Sector Reform in Timor-Leste. IFP Security Cluster. International Center for Transitional Justice. June 2009. At pg. 15. Available at: <http://ebookbrowse.com/ictj-ifp-timorleste-security-reform-2009-english-pdf-d303020310> (Last visited: April, 2012)

155 *Idem*.

156 International Center for Transitional Justice. Interviews with UN Officials and International Advisers, Dili, November 2008. Two officers determined to be ‘unsuitable for certification’ were nominated for senior positions within the PnTI. Despite UnMiT’s complaints to the government about this, no action has been taken and these officers remain in the PnTI. Letter dated 27th March 2007 from SRSR Atul Khare to Minister Estanislau da Silva. Cited in *Idem*, at pg. 15

should have place a greater importance in its design and application.

Despite an initial intention for vetting no visible results were achieved, therefore the final score for this element will be 2%

## 5. Objectives

As discussed before, CAVR was mandated not only to allow truth to be disclosed, but also to promote reconciliation within East Timor. The CAVR had the power to recommend amnesty for gross violations of human rights, however a seen before, it did not endorse nor recommended any type of amnesty within the transitional process.

Despite the above, it adopted a different approach in regards to lesser offenses. In order to pursue the objectives set in its mandate, it engaged in a community-based reconciliation process, which promoted the disclosure of truth and reconciliation. The results were highly positive.

On the first hand, it allowed full disclosure of the offenses committed, obliged offenders to perform a public apology to the community and serve community works as recommended by the Panel in order to compensate for the harmed caused. "It is fair to argue that the process was not only a Community-based Reconciliation Process, but it was indeed a Community-based Justice and Reconciliation Process - a process that is just according to the community, different to the formal justice process as applied by the court of law."<sup>157</sup>

Although it is acknowledged that the Community-based Reconciliation Process should not be considered as an alternative to the formal justice system, it is important to understand that it made an invaluable contribution to the reconciliation process,

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157 Ximenes, Fausto Belo. The Unique Contribution Of The Community-Based Reconciliation Process In East Timor. 28 May 2004. Available at: [http://www.google.com/url?sa=t&rc=j&q=&esrc=s&source=web&cd=1&ved=0CCsQFjAA&url=http%3A%2F%2Fwww.cavrtimorleste.org%2FAnalysis%2FThe%2520unique%2520contribution%2520of%2520the%2520CRP\\_Fausto%2520Belo.PDF&ei=5HuMT\\_efHM600AGV3cXVCQ&usg=AFQjCNEu2S1uuE3ooieGaVDpJGbyUraMxw](http://www.google.com/url?sa=t&rc=j&q=&esrc=s&source=web&cd=1&ved=0CCsQFjAA&url=http%3A%2F%2Fwww.cavrtimorleste.org%2FAnalysis%2FThe%2520unique%2520contribution%2520of%2520the%2520CRP_Fausto%2520Belo.PDF&ei=5HuMT_efHM600AGV3cXVCQ&usg=AFQjCNEu2S1uuE3ooieGaVDpJGbyUraMxw) (Last visited April, 2012)

and filled the void that the traditional justice system has opened with its inability to prosecute perpetrators of gross violations human rights.

In that sense, and even if no formal amnesty agreement was signed, the community based reconciliation provided with a conditioned amnesty that did in fact accomplish its objective. Therefore, the total score for this element is 15%

When assessing the overall transitional justice of East Timor one can conclude that even when the amnesty agreement signed only covered a small portion of the process and did not play a central role as in the South African case, the lack of institutional resources that came into play in each of the stages prevented East Timor to achieve justice, scoring in total a 59%

Interestingly, in the case of East Timor, shows how despite the fact that a State may adopt a more rigid approach regarding investigation and prosecutions, one may still encounter that there are large holes in the achievement of justice. As mentioned above, this is one of the examples which show that despite a country prioritize focus on its duty to investigate and punish, it is to translate or help to achieve a of the implementation of an amnesty agreement or not, the task of investigating and punishing the perpetrators depends on a number of variables that make the task much more difficult.

## CONCLUSION

As seen from the examples set above, one can see that amnesty has been constantly used as an instrument by States in order to trigger peace. Despite the fact that the international criminal system expands and international law imposes a more stringent obligation upon States to prosecute and avoid impunity for gross violations of human rights, States continue to turn to amnesties as a bargaining element to catalyze peace and a democratic transition.<sup>158</sup>

The three examples explained above, show that the use of amnesty agreements may not be understood as a mechanism that on its face promotes impunity. The three case studies exemplify how amnesty agreements in several cases promote justice instead of becoming a deterrent of justice. I agree with the fact that amnesty agreements who are left alone, and are not coupled by alternative mechanisms of justice may in fact allow impunity to follow. Which is why strategies such as, the creation of Truth Commissions, Reparation Programs and Vetting prove to be essential for the achievement of justice.

In that sense, even if the case studies have shown that justice was barely achieved in the South African case and that East Timor failed to achieve it, it is clear that the type of amnesty agreements that were implemented was not a determinant factors that detracted the achievement of justice. What can clearly be show is that justice can no longer be understood as equivalent to prosecutions, as even a prosecutorial strategy may in some cases promote impunity much more that what an amnesty agreement can. When amnesty agreements are paired with well-designed alternative mechanisms these may provide a greater sense of justice to the society itself. Supporting this idea, the Transitional Justice Data base has shown that “specific combinations of mechanisms – (1) trials and amnesties, and (2) trials,

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158 R. Slye. *The legitimacy of Amnesties under International Law and General Principles of Anglo-American Law: Is a legitimate amnesty possible?* (2002) 43 *Va. J. Int'l L.*, 173 at pg. 179

amnesties and truth commissions – improve human rights and democracy. These findings suggest a ‘justice balance’ approach to transitional justice – in which trials provide accountability and amnesties provide stability. Truth commissions alone have a negative impact on human rights and democracy, but contribute positively when combined with trials and amnesties.”<sup>159</sup>

Finally, even if each process will be palpably different to one another, due to the fact that they will respond to a particular historical and political context, and some societies may grant a greater deference to peace or accountability, amnesty agreements are still a viable and legitimate mechanism to deal with post-conflict situations. The fact is that even incomplete forms of justice or accountability are necessary in order to more probably achieve peace.

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159 Olsen, Tricia D, Leigh A. Pane, and Andrew G. Rieter. *The Justice Balance: When Transitional Justice Improves Human Rights and Democracy*. *Human Rights Quarterly*. Volume 32, Number 4, November 2010. Available at: <http://www.gsdrc.org/go/display&type=Document&id=4165&source=rss> (Last visited: April, 2012)