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NATIONAL RECONCILIATION UNDER THE NORMS OF INTERNATIONAL LAW FOR THE NEW MILLENNIUM

Johan D. van der Vyver*

On June 15 through July 17, 1998, the United Nations Diplomatic Conference of Plenipotentiaries was held in Rome, Italy, with a view to "finalizing and adopting a convention on the establishment of an international criminal court." The Rome Conference was preceded by deliberations in New York of an Ad Hoc Committee (1995) and a Preparatory Committee (1996-1998), operating under a mandate of the General Assembly of the United Nations to refine a Draft Statute for an International Criminal Court that had been prepared by the International Law Commission (ILC). The Rome Conference culminated in the approval, by majority vote, of the text of the Statute of the International Criminal Court. The Statute will enter into force following its ratification by 60 states. At the closing date (December 31, 2000), 139 countries have signed the ICC Statute, and as of date 27 states have deposited their instruments of ratification with the Secretary-General of the United Nations.

Chapter Two of the ICC Statute dealing with "Jurisdiction, Admissibility and Applicable Law" became the focus in New York and in Rome of the most profound controversies that attended the establishment of an International Criminal Court (ICC). This applied in different degrees to all four components of the concept of jurisdiction: subject-matter jurisdiction, jurisdiction in terms of time, jurisdiction in regard to the person, and jurisdiction pertaining to the locality of a crime.

In terms of a preambular paragraph in the ILC's Draft Statute, the jurisdiction of the ICC was to be complementary to that of national courts. In thrashing out the exact meaning and implications of this directive, participants in the Ad Hoc Committee and PrepCom added a new word to the English language: "complementarity." The word "complementarity" has been common usage in Roman Catholic doctrine to denote a certain

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3 Webster's New World Dictionary of the American Language defines "complementarity" as "the state or fact of being complementary; necessary interrelationship or correspondence."
symbiosis in the relationship between the sexes.\textsuperscript{4} Within the meaning of ICC usage, "complementarity" denotes a secondary role — not in importance but in the sequence of events: national courts have the first right and obligation to prosecute perpetrators of international crimes that come within the subject-matter jurisdiction of the ICC (genocide, crimes against humanity, and war crimes, as defined in the Statute), and ICC jurisdiction, being complementary to that of national courts, can only be invoked if the national court is unwilling or unable to prosecute.\textsuperscript{5}

Under the rubric of complementarity, the ICC must thus establish whether the national court is "unwilling" or "unable" to bring the perpetrator of a crime within the jurisdiction of the ICC to justice. While inability to prosecute can be established on a factual (objective) basis, "unwillingness" requires the ICC to pass judgment on the merits of the criminal justice system of a national state. This evidently implicates the sovereignty of states.

This article focuses on the concept of "unwillingness", and, in particular, on the question of whether truth commissions and amnesty-attending political transitions could be seen as constituting "unwillingness" within the meaning of the ICC Statute.

I. UNWILLINGNESS TO PROSECUTE

Article 17(2) of the ICC Statute describes "unwillingness" as a precondition for setting ICC jurisdiction in motion:

In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of

\textsuperscript{4} The Cathechism of the Roman Catholic Church, par 372 proclaims that man and woman are "equal as persons ... and complementary as masculine and feminine." Based on this premiss, it further states (in par. 2333): "Everyone, man and woman, should acknowledge and accept the sexual identity. Physical, moral, and spiritual difference and complementarity are oriented toward the goods of marriage and the flourishing of family life. The harmony of the couple and of society depends in part on the way in which the complementarity, needs, and mutual support between the sexes are lived out." The Roman Catholic Church consequently condemns homosexuality because it does not "proceed from a genuine affective and sexual complementarity" (par. 2357).

\textsuperscript{5} It might be noted that the International Criminal Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda proceeded on the contrary assumption, namely, that their jurisdiction enjoys precedence over that of national courts. Statute of the Tribunal for the Former Yugoslavia, 32 I.L.M. 1192 (1993), art. 9(2); Statute of the Tribunal for Rwanda, 33 I.L.M. 1602 (1994), art. 8(2); and see also Prosecutor v. Tadic (Jurisdiction) (Trial Chamber), 105 I.L.R. 420, par. 41-4 (at 440-01); Prosecutor v Tadic (Jurisdiction) (Appeals Chamber), 105 I.L.R. 453, par. 50-64 (at 476-85).
due process recognised by international law, whether one or more of the following exist, as applicable:

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court . . . ;

A. There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

B. The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

Unwillingness also has a bearing on the principle of *ne bis in idem* as defined in the ICC Statute. The rule against double jeopardy reiterates that the trial of a particular person in a national court will not preclude the ICC from prosecuting the person for conduct that constituted the basis of that trial if (i) the purpose of the proceedings in the national court was to shield the person concerned from prosecution in the ICC for a crime within the jurisdiction of the Court, or (ii) those proceedings were not conducted "independently or impartially in accordance with the norms of due process recognised by international law" and it is furthermore demonstrated that the proceedings were "inconsistent with an intent to bring the person concerned to justice."  

**A. Impunity-for-Peace Agreements**

International law as a general rule condemns the granting of amnesty by national governments for conduct that constitutes crimes under customary international law. Blanket amnesty for criminal conduct prohibited by customary international law as a matter of *ius cogens*, and consequently

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6 It might be noted that the international norm depicting the rule against double jeopardy differs from the American perception of that rule: in the United States double jeopardy only excludes a second trial for the same crime (a person convicted or acquitted in a state court can again be tried for the same act in a federal court, or vice versa), whereas the international standard of *ne bis in idem* excludes a second trial for the same conduct.

7 ICC Statute, art. 20(3).
subject to universal jurisdiction, is a contradiction in terms and cannot possible be lawful under the rules of contemporary international law. Jo Pasqualucci argues that self-amnesties "have no juridical validity." Stephen Landsman maintains that certain violations of human rights, notably genocide, should never be excused.

There is indeed a body of opinion holding that contemporary international law compels the successor government to punish members of a previous regime for atrocities that constitute crimes under customary international law. Juliana Kokott thus argues that "the concept of state responsibility [to punish serious violations of human rights] applies to states not to governments" and that "[e]ven a drastic change in government does not exonerate a state from its international responsibility." The duty under international law to punish serious violations of human rights, according to her, implies "a prohibition of amnesties even in the case of transition from a military dictatorship to a democratic regime." Cherif Bassiouni likewise proclaimed:

Peoples of the world ... reject the practice of governments to barter away justice in exchange for political settlements; instead, they expect accountability, whose mechanisms include international criminal prosecution.


13 Id., at 159.

14 M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 513 (1999).
NATIONAL RECONCILIATION

As it stands, this statement is too simplistic. Restorative justice—reparation, rehabilitation, and reconciliation ought to be the primary concern of authorities charged with the reconstruction of society after a period of mass atrocities, and circumstances might prevail in which this form of justice cannot be achieved while, or if, criminal retribution is the primary goal. Political objectives to be pursued by communities in transition—the creation of new governmental structures and fostering a climate conducive to human rights protection—have little chance of success while the pursuit of restorative justice remains in abeyance.

John Dugard has argued that "state practice at this time is too unsettled to support a rule of customary international law obliging a successor regime to prosecute those alleged to have committed crimes against humanity in all circumstances," and that it is unlikely that international law will develop "sufficiently" to support such a rule. Michael Scharf also noted a few years ago that "the practice of states does not yet support the present existence of an obligation under customary international law to refrain from conferring amnesty for . . . crimes [against humanity]." He goes on to point out: "That the United Nations, itself, has felt free of legal constraints in endorsing recent amnesty for peace deals underscores this conclusion." One could even go further and assert that international law is actually supportive of amnesties that constitute "a necessary and . . . justified bargaining chip to induce human rights violators to agree to peace and to relinquish power."

Truth commissions attended by impunity-for-peace arrangements have seemingly become a strategy for national reconciliation that will not simply go away. Nor ought they to be discouraged. Protocol II Additional to the

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15 See MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS 22-23 (1998).
16 Dugard, supra note 8, at 306.
17 Id., at 308.
19 Id., at 61; and see also Dugard, supra note 8, at 284-85.
22 Priscilla Hayner has identified fifteen truth commissions that were established in the period of twenty years (1974-1994), including one established in 1993 by the United Nations for El Salvador. Priscilla B. Hayner, Fifteen Truth Commissions—1974 to 1994: A Comparative Study, 16
Third World Legal Studies—2000-2003

Geneva Conventions of 12 August 1949 indeed encourages "the broadest possible amnesty" at the end of hostilities in cases of armed conflict not of an international character. The significance of this provision speaks for itself, but it must not be overstated: it applies only if political change has been preceded by (i) armed conflict (ii) not of an international character; and it must not be taken to authorize blanket amnesty. In terms of Protocol II, the granting of amnesty under this provision only applies to "the prosecution and punishment of criminal offences related to the armed conflict"; and a preambular directive emphasizes "the need to ensure a better protection for the victims of those armed conflicts." In their analysis of legal challenges to the granting of amnesty in different countries, Naomi Roht-Arriaza & Lauren Gibson therefore argues that blanket amnesty which also deprives victims of access to the courts for redress would be unacceptable.

Within the United Nations system, amnesty as a condition of peace in situations of political transition has received a sympathetic ear. In a preliminary report of Special Rapporteur Joinet of the Commission on Human Rights' Sub-Commission on the Prevention of Discrimination and the Protection of Minorities on The Question of the Impunity of Perpetrators of Human Rights Violations, the following paragraph appears:

From the origins of mankind until the present day, the history of impunity is one of perpetual conflict and strange paradox: conflict between the oppressed and the oppressor, civil society and the State, the human conscience and barbarism; the paradox of the oppressed who, released from their shackles, in turn take over the responsibility of the state and find themselves caught in the mechanism of national


24 Id., art. 6(1).

25 Roht-Arriaza & Gibson, supra note 22, at 844.
reconciliation, which moderates their initial commitment against impunity.26

In an Afterword to the Sub-Commission's final report published in 1997, the Special Rapporteur responded as follows to concerns that implementation of the principles enunciated in the Report might stifle efforts at national reconciliation:

To those who might be tempted to regard the set of principles proposed here as an obstacle to national reconciliation, I would answer this: these principles are not legal standards in the strict sense, but guiding principles intended not to thwart reconciliation but to avoid distortions in policies so that, once beyond the first stage, which is more 'conciliation' than reconciliation, the foundations of a 'just and lasting reconciliation' may be laid.27

The Security Council of the United Nations has also endorsed amnesties that attended national reconciliation in strife-torn communities. One of the more recent impunity-for-peace pacts that illustrates the point is the one concluded on Governors Island, New York to bring an end to the military rule in Haiti of General Raoul Cédras and Brigadier General Philippe Biamby following their assumption of power in a coup in 1990.28 The Governors Island Agreement of July 3, 1993 between President Jean-Bertrand Aristide and General Cédras contained an express amnesty decree,29 and compliance with its provisions was insisted upon by the Security Council.30

28 See Scharf, supra note 20, at 180-81.
The sanctioning of amnesties as a condition of peace is not unconditional. On the regional level, certain opinions of the Inter-American Commission on Human Rights are instructive in this regard.\textsuperscript{31}

The Commission came out in full support of a truth commission established in Chile by democratically-elected President Aylwin, after the reign of terror of General Augusto Pinochet (1973-1990), with a view to establishing “the most complete picture possible of the most serious human rights violations committed between September 11, 1973 and March 11, 1990, whether in Chile or abroad, when the acts committed abroad have to do with the Chilean State or with Chilean political life.”\textsuperscript{32} The Commission did not express an opinion on the granting of general amnesty by the military regime or the bill on a pardon before the Chamber of Deputies at the time. It noted, though, that the truth commission would not assume judicial functions that are within the purview of a court of law or interfere in cases pending before the courts; and although the proceedings of the truth commission were to be conducted in private, the truth commission was mandated to submit to the President a public report.

A case involving Uruguay\textsuperscript{33} invited less favorable comments. Here general amnesty was granted for crimes committed by military and police personnel with political motives, in the performance of their functions, or on orders from commanding officers. Military judges were to decide amnesty applications, and there was indeed no truth commission. In its Annual Report of 1985-1986, the Commission emphasized the right of access to the truth of family members of victims of human rights violations, and freedom of speech which is presupposed by that right. It noted that victims and their next-of-kin are now denied their “right to legal redress, to an impartial and exhaustive judicial investigation that clarifies the facts, ascertains those responsible and imposes the corresponding criminal punishment.”\textsuperscript{34} This violates the obligation of States Parties to the American Convention on Human Rights, by virtue of their commitment “to ensure ... the free and full exercise


\textsuperscript{34} Referred to in id., at par. 37.
of those rights and freedoms" recognized in the Convention\textsuperscript{35} to "prevent, investigate and punish any violation of the rights recognized in the Convention."\textsuperscript{36}

In yet another matter, one involving El Salvador,\textsuperscript{37} general and absolute amnesty for "political crimes or common crimes linked to political crimes or common crimes in which the number of persons involved is no less than twenty" was granted following the publication of a truth and reconciliation report. The amnesty also precluded civil trials in which victims could seek redress. The Commission emphasized the principle that the rights of victims should be protected, and the need for human rights violations committed prior to the establishment of a democratic government to be investigated. Amnesty was therefore granted in disregard of the legitimate right of the victim's next-of-kin to reparation.\textsuperscript{38}

Juliana Kokott concluded from jurisprudence of the Inter-American Commission on Human Rights "an affirmative duty to investigate grave human rights violations, to identify those responsible, to impose the appropriate punishment and to ensure the victims adequate compensation," adding that this even includes a duty to punish private persons or groups of persons.\textsuperscript{39} She was, however, not prepared to rule out amnesties under all circumstances, and presumably regarded the right of victims and of society "to find out the truth about human rights violations committed under previous dictatorial regimes" to be a valid consideration in this regard.\textsuperscript{40}

\section*{B. Legitimacy of Truth Commissions and Amnesties}

Several analysts have proposed international standards to be satisfied by truth commissions and in the granting of amnesty. Truth commissions and amnesty must in general serve the demands of restorative justice.


\textsuperscript{36} Id., at par. 50.


\textsuperscript{38} See also Cases No. 10.147, 10.181, 10.240, 10.262, 10.309 and 10.311, INTER-AM. C.H.R. 1, OEU/ser. L/V./II.82, doc. 5 (1993) (the Argentina Report) (concerning amnesty for soldiers claiming to have acted pursuant to superior orders).

\textsuperscript{39} Kokott, supra note 12, at 159.

\textsuperscript{40} Id.
Martha Minow vividly outlined some of the strategies of restorative justice:

Potential responses to collective violence include not only prosecutions and amnesties, but also commissions of inquiry into the facts; opening access to secret police files; removing prior political and military officials and civil servants from their posts and from the rolls for public benefits; publicizing names of offenders and names of victims; securing reparations and apologies for victims; devising and making available appropriate therapeutic services for any affected by the horrors; devising art and memorials to mark what happened, to honor victims, and to communicate the aspiration of "never again"; and advancing public education programs to convey what happened and to strengthen participatory democracy and human rights.

Elsewhere, she enumerated twelve goals, alongside truth-seeking and justice, that ought to determine societal responses to collective violence:

1. overcome communal and official denial of the atrocity and gain public acknowledgment;

2. obtain the facts in an account as full as possible in order to meet victims' need to know, to build a record for history, and to ensure minimal accountability and visibility of perpetrators;

3. end and prevent violence; transform human activity from violence—and violent responses to violence—into words and instrumental practices of equal respect and dignity;

4. forge the basis for a domestic democratic order that respects and enforces human rights;

5. support the legitimacy and stability of the new regime proceeding after the atrocity;

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41 MINOW, supra note 15, at 23.
42 Id., at 87-88.
6. promote reconciliation across social divisions; reconstruct the moral and social systems devastated by violence;

7. promote psychological healing for individuals, groups, victims, bystanders, and offenders;

8. restore dignity to victims;

9. punish, exclude, shame, and diminish offenders for their offences;

10. express and seek to achieve the aspiration that "never again" shall such collective violence occur;

11. build an international order to try to prevent and also to respond to aggression, torture, and atrocities;

12. accomplish each of these goals in ways that are compatible with the other goals.

According to Jo Pasqualucci, who has also considered the question of amnesty for gross violations of human rights, amnesty would be acceptable if it is endorsed by an international organization, such as the United Nations or the Organization of American States, as a condition for returning to a state of democratic governance, or as a condition for peace provided the amnesty applies to perpetrators of international crimes on all sides of the conflict. Pasqualucci was also satisfied with amnesties granted to the security forces of a prior (repressive) regime by a democratically-elected successor government. However, he also endorsed the principle that amnesty laws must not contravene a state's international obligations under any human rights treaty, and must not render reparation to victims of the atrocities obsolete.43 Victims' interests may be served by an investigation into the human rights abuses, public dissemination of the facts, rehabilitation of the victims' reputation, and financial compensation.44

Within the United Nations System, a Report on the Human Rights of Detainees, submitted in 1996 to the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, also emphasized the right of

43 Pasqualucci, supra note 9, at 349, 354-356.
44 Id., at 355.
victims of human rights violations to know, to justice, and to reparation.\textsuperscript{45} The Report thus proclaims that “[a]mnesty cannot be accorded to perpetrators before the victims have obtained justice by means of an effective remedy;”\textsuperscript{46} In a more elaborate exposition of the principle pertaining to “Restrictions on the Practice of Amnesty”, the Report thus proclaims that (i) amnesty should not be granted for serious crimes under international law, unless the victims of such crimes have been able to avail themselves of an effective remedy and obtain a fair and effective decision; (ii) individuals should always be prosecuted and sentenced for criminal acts connected with the peaceful exercise of the right to freedom of opinion and expression; and (iii) persons should have the right to refuse amnesty in order to have their involvement in criminal conduct established in a fair hearing.\textsuperscript{47}

Contributions of legal scholars to the standards that ought to inform the establishment and functioning of truth commissions and the granting of amnesty range from fairly general directives\textsuperscript{48} to the quite specific.\textsuperscript{49}

Robert Weiner included in his list of guideline proposals for truth commissions and amnesty an impressive list of “minimum requirements”: truth commissions should include an affirmative inquiry into the facts by the appropriate authorities, an opportunity for victims to tell their stories, and adjudication of sorts aimed at a finding of facts and determination of the

\textsuperscript{46} Id., at 256.
\textsuperscript{47} Id., at 273.
\textsuperscript{48} See, for example, Kritz, \textit{supra} note 8, at 142 (noting that truth commissions should facilitate a degree of national consensus, provide the basis for practical and symbolic measures to deal with abuses of the past, and execute their mandate in a limited period of time); Landsman, \textit{supra} note 10, at 89-90 (the establishment of a truth commission should enjoy majoritarian support, its operation must entail full and effective investigations into past atrocities, and its purposes should include the identification and compensation of victims); Michael P. Scharf, \textit{The Case for a Permanent International Truth Commission}, 7 DUKE J. COMP. & INT’L L. 375, 379 (1997) (identifying as purposes of a truth commission (i) to establish an historical record; (ii) to obtain justice for the victims; (iii) to facilitate national reconciliation; and (iv) to deter further violence and abuses); Michael Scharf, \textit{supra} note 20, at 189.
\textsuperscript{49} Douglas Cassel listed ten guidelines for truth commissions and amnesty: the democratic adoption thereof; full investigations into the facts; naming names; securing victim participation; affording compensation to victims; excluding crimes against humanity from amnesty arrangements; disqualifying for amnesty persons guilty of perjury and the obstruction of justice; excluding treaty crimes such as torture and violations of women; compelling the state to acknowledge its responsibility; and excluding from amnesty serious violations of human rights. Cassel, \textit{supra} note 11, at 228-29; and see also Dugard, \textit{supra} note 8, at 289-90.
relevant law.\textsuperscript{50} In order to comply with the demands of international law, the granting of amnesty must likewise be subjected to certain conditions:

amnesty must not preclude an individual investigation and adjudication of the facts in each case; amnesty must not preclude the right of victims to seek and to obtain reparation from the state, even if it does foreclose civil liability of the individual perpetrators of criminal acts;

amnesty must not preclude public acknowledgment and publication of the relevant facts, including the identities of perpetrators of criminal conduct;

amnesty should not be available to persons who declined to submit to the personal jurisdiction of the relevant authorities;

persons seeking amnesty must affirmatively petition for amnesty, and participate in the investigation by making a full disclosure of their role in the acts and omissions for which amnesty is sought.\textsuperscript{51}

Other "important conditions" identified by Weiner will require that applications for amnesty be decided by the regularly constituted judicial system; that discretion in applying the guidelines for amnesty be limited by legislation that governs the requirements to be satisfied and the procedures to be followed for amnesty applications; that the entire process should be carried out within the parameters of the state's constitutional framework; that the proceedings be conducted in public and the findings be made public, but with due regard to confidentiality concerns applying to victims and other witnesses; and that particular sanctions, such as removal from or disqualification for public office, not be waived as part of a grant of amnesty. According to Weiner, the South African Truth and Reconciliation Commission (TRC) approximated the model based on these guidelines.\textsuperscript{52}

C. The South African Truth and Reconciliation Commission (The TRC)

The TRC has clearly set a standard that could be applied by the ICC to interrogate the notion of "unwillingness." It operated through three distinct committees:

\textsuperscript{50} Weiner, \textit{supra} note 31, at 870.
\textsuperscript{51} Id., at 871.
\textsuperscript{52} Id., at 872-74.
the Committee on Human Rights Violations, which provided a platform for victims and perpetrators of atrocities committed during a defined period of the apartheid era to testify as to their suffering or wrongdoing;

the Committee on Amnesty, a judicial body that considered the amnesty applications of offenders on all sides of the political divide under rules laying down the conditions for amnesty; and

the Committee on Reparation and Rehabilitation, which has been entrusted with powers to award to victims reparations, in a variety of forms and to facilitate their rehabilitation from the consequences of criminal conduct and repression.

With these components of the TRC in mind, Martha Minow observed:

The South African Truth and Reconciliation Commission illustrates an innovative and promising effort to combine an investigation into what happened, a forum for victim perpetrators who honestly tell of their role in politically motivated violence.53

It is important to note that amnesty afforded to perpetrators of atrocities committed as part of the crime of apartheid did not exclude retribution in one form or the other. It has been rightly pointed out that the TRC did not only uncovered atrocities committed during the apartheid era but also affected the lives of almost all South Africans in general:

One only has to imagine where South Africa would be today but for the Truth and Reconciliation Commission in order to appreciate what it has achieved. Few South Africans have been untouched by it. All sectors of its society have been forced to look at their own participation in apartheid—the business community, the legal, medical, and university communities. A substantial number of white South Africans, all of whom willingly or unwillingly benefited from the evil system, have experienced regret or shame or embarrassment.54

John Dugard is of the opinion that the current state of international law does not bar the granting of conditional amnesty for international crimes in

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53 MINOW, supra note 15, at 3.
circumstances of the kind that prevailed in South Africa. The standards established by the South African precedent, include the following special attributes:\textsuperscript{55}

1. The TRC resulted from a compact between parties on all sides of the political spectrum;

2. Establishment of the TRC was formally authorized by a negotiated Constitution\textsuperscript{56} and the essence of its composition, functions and powers was enacted by a democratically elected legislature.\textsuperscript{57}

\textsuperscript{55} Dugard, \textit{supra} note 8 at at 307.
\textsuperscript{56} The Postscript of the Republic of South Africa Constitution Act, Act 200 of 1993, contained the following powerful statement on \textit{National Unity and Reconciliation}:

\begin{quote}
This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.

The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the restructuring of society.

The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge.

These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation.

In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.

With this Constitution and these commitments we, the people of South Africa, open a new chapter in the history of our country.

\textit{Nkosi sikelel' iAfrika. God seën Suid-Afrika.}

Morena boloka sechaba sa heso. May God bless our country.
3. The TRC in all its committees was broadly representative of all the peoples of South Africa;

4. The TRC, including its Amnesty Committee, acted independent of the Government;

5. The TRC was sufficiently funded and provided with adequate resources to enable it to conduct a thorough investigation into the crimes of the past, and in its Amnesty Committee to fully establish the circumstances and motivations that prompted the atrocities for which amnesty was sought.

6. The Committee on Human Rights Violations was given a wide mandate to investigate "the gross violations of human rights" over a period of thirty-four years and to receive testimony at public hearings from the victims of such violations.

7. Transparency essentially attended all the activities of the TRC;

8. The perpetrators of the violations of human rights could be named, but adequate safeguards were provided to ensure that their procedural rights were protected.5

9. The TRC was required, through its Third Committee, to recommend the payment of compensation to victims or other forms of redress;

10. The granting of amnesty was not unconditional: no person was afforded a reprieve unless he or she applied for amnesty, made a full disclosure of the crimes for which they sought amnesty, and established that they acted for a

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Mudzimu fhatutshedza Afrika. Hosi katekisa Afrika.

57 See the (South African) Promotion of National Unity Act 34 of 1995. Its constitutionality was confirmed in AZAPO & OTHERS v. PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA, 1996 (4) SA 671 (CC).

58 See DU PREEZ & ANOTHER v. TRUTH AND RECONCILIATION COMMISSION, 1997 (3) SA 204 (A) (holding that the TRC and its Committee on Human Rights Violations are under a duty to act fairly toward persons implicated to their detriment by evidence or information coming before the Committee in the course of its investigations and/or hearings, and this includes affording to the person implicated the opportunity to submit representations or give evidence before the Commission: audi alteram partem). See also NIEUWOUDT v. TRUTH AND RECONCILIATION COMMISSION, 1997 (2) SA 70 (SE) (holding that the TRC is not compelled to give prior notice to a person that might be implicated, even if the Commission does have prior notice of such implication). In terms of s. 31(3) of the Promotion of National Unity and Reconciliation Act 34 of 1995, incriminating testimony given before the Committee on Human Rights Violations is not admissible in evidence against the persons who have incriminated themselves in any criminal case against those persons, except on charges of perjury and giving of false evidence.
known political organization and committed the criminal act with a political objective.

11. The Committee on Human Rights Violations had to submit its final report within a reasonable time — less than three years.

Persons applying for amnesty did not have to show remorse for their wrongdoing. Remorse can easily be faked and the fact that amnesty was not dependent on remorse at least had this much to its credit: persons who did express their regrets at the public sessions of the Committee on Human Rights Violations were most likely sincere.

There was a cut-off date for applications for amnesty which had a positive effect. Wrongdoers who failed to apply for amnesty, or whose application for amnesty was rejected, could be prosecuted. While many perpetrators of politically inspired crimes initially wagered that their involvement in dirty play would go undetected, a considerable number did come forward as the closing date for amnesty applications approached.

II. THE FUTURE OF TRUTH COMMISSIONS AND AMNESTIES UNDER THE ICC REGIME

Truth Commissions, according to Martha Minow, are not a second-best alternative to prosecutions but are indeed better suited to meet many of the goals of restorative justice.\(^5\)\(^9\) Truth commissions and amnesty, according to another analyst, "require prudential judgment and high statesmanship."\(^6\)\(^0\) This raises the question how the ICC ought to respond to the granting of amnesties attending a peace settlement in communities in transition.

Two trends of thought prevail in this regard. On the one hand are those who believe that amnesty for crimes within the jurisdiction of the ICC ought never to exclude a finding of “unwillingness” for purposes of inviting the exercise of jurisdiction by the Court. On the other hand are those who maintain that special circumstances attending a community in political distress should preclude prosecution in the ICC of members of a prior regime for atrocities committed in the preceding era of repression. These two trends highlight the tension between retributive justice and restorative

\(^5\)\(^9\) Minow, supra note 15, at 88.
\(^6\)\(^0\) Ruth Wedgwood, The International Criminal Court. \&t America View, 10 EUR. J. INT’L L. 93, 95-97 (1999).
justice. They invoke the search for "a solution which balances the duty of prosecution with the fact that peace is not always available by such means."61

The Draft Statute for the International Criminal Court that was forwarded to Rome by the Preparatory Committee contained an Article, originally proposed by Portugal and Belgium, which provided that the jurisdiction of the ICC would not be excluded in cases where national authorities have taken "a manifestly unfounded decision" to suspend the enforcement of a sentence, or to grant a pardon, parole, or the commutation of a sentence imposed by the national court in respect of a crime within the jurisdiction of the ICC and where such a decision would "exclude the application of any appropriate form of sentence."62 The provision was extremely controversial. Some delegations expressed the opinion that the ICC ought not to interfere with administrative decisions of the criminal justice authorities of national states (parole) or with political decisions of government officials (pardons and amnesties). Others believed that the provision was not necessary because the provisions on admissibility afforded to the ICC adequate scope to act upon pardons and amnesties made in bad faith.63 Turkey submitted a formal proposal in Rome that the provision be deleted,64 which was accepted. This supports a demand for respect by the ICC for suspension of sentences, pardons, parole and commutation of sentences decided upon by the appropriate authorities of the national state. It is more likely however that the Article was deleted because the prospect of achieving consensus for the provision was grim, in any event, these matters can indeed be resolved by the ICC under the norms pertaining to "unwillingness" and ne bis in idem.

There are, on the one hand, clear indications that establishment of the ICC was intended to rule out (unconditional) amnesties for any of the core crimes of customary international law. The Preamble to the ICC statute thus bears testimony of the founders' determination "to put an end to impunity for the perpetrators of ... [the most serious crimes of concern to the

international community] and thus to the prevention of such crimes” and
recalls that “it is the duty of every State to exercise its criminal jurisdiction
over those responsible for international crimes.”65 The Secretary-General of
the United Nations, in his 1998 report on the work of the Organization,
testified that the aim of the ICC was “to put an end to the global culture of
impunity — the culture in which it has been easier to bring someone to
justice for killing one person than for killing 100,000.”66 The norm against
impunity does of course not rule out the salience of truth commissions per se.

It is submitted, though, that the ICC ought to be sensitive to bona fide
attempts of countries in transition to come to terms with their past and to
seek reconciliation through strategies of restorative justice. The matter was
indeed raised in the Preparatory Committee that preceded the Rome
Conference, but the legitimacy of amnesties in special circumstances was
presumably deliberately left in abeyance. The Chair of the Committee of the
Whole at the Rome Conference, Philippe Kirsch, described the provisions of
the ICC statute that might have a bearing on truth commissions and amnesty
as reflecting “creative ambiguity.”67 It has been noted that the absence of
clear provisions in the ICC Statute dealing with pardons represents
potentially, though not insurmountably, the greatest weakness of the
complementarity regime: “The lacunae may permit a State to investigate,
prosecute, convict and sentence a person, and then pardon or parole the
person soon thereafter.”68 However, if such pardons or parole are
considered to result from unwillingness on the part of the national
authorities to bring the perpetrator to justice, the jurisdiction of the ICC in
the matter will not be excluded.

It is reasonable to assume that the ICC will consider the merits of truth
commissions under the rubric of “unwillingness” and the directives of ne bis
in idem: if a truth commission has been established “for the purpose of
shielding the person concerned from criminal responsibility for crimes
within the jurisdiction of the Court,”69 or if the proceedings of the truth
commission “were not . . . conducted independently or impartially, and they
were . . . conducted in a manner which, in the circumstances, is inconsistent

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65 ICC Statute, supra note 2, Fifth and Sixths preambular paragraph.
66 Report of the Secretary-General on the Work of the Organization, par. 180 (at 24), 53 U.N.
67 Scharf, supra note 20, at 186.
68 Holmes, supra note 63, at 76.
69 ICC Statute, supra note 2, arts. 17(2)(a) and 20 (3)(a).
with an intent to bring the person concerned to justice," then amnesty will be of no avail to the accused.

Michael Scharf has stated that amnesties "should be the last resort reserved for the most compelling situations." He considered several provisions of the ICC statute under which amnesties might be permitted as exceptions to the exercise of jurisdiction by the ICC:

Security Council deferral of an investigation or prosecution for a (renewable) period of 12 months pursuant to a decision of the Council adopted under Chapter VII of the U.N. Charter.

The purpose of the provision in the ICC Statute is to protect the Security Council's interests and jurisdiction to decide whether a particular situation. It constitutes a threat to the peace, a breach of the peace or an act of aggression, and to mandate action to deal with such a situation. It therefore seems highly inappropriate for the Security Council to use this power in order to uphold the granting of amnesties—except if the Security Council could certify that not honoring an impunity-for-peace agreement would constitute a threat to international peace and security.

The ICC itself can decide that the case against a person who reaped the benefit of an impunity-for-peace deal is admissible on the basis (i) that the case has been investigated by the State which granted the amnesty, and (ii) that the decision not to proceed with a prosecution in the national courts of that State was not taken for the purpose of shielding the person concerned from criminal responsibility for any of the crimes within the jurisdiction of the ICC.

Several conditions will have to be satisfied before a finding of admissibility would be warranted under this rubric: First, the state officials deciding upon amnesties and the granting of amnesty in the particular instance must have responsibly applied their minds to the matter. Secondly, the truth commission-cum-amnesty arrangement must serve a purpose other than a resolve to shield the person concerned from criminal responsibility. Thirdly, it would perhaps be important to show that the granting of amnesty did not exclude retributive consequences for the culprits, such as public

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70 Id., art. 17(2)(c); and see also id., art. 20(3)(b). See Danesh Sarooshi, The Statute of the International Criminal Court, 48 INT'L & COMP. L. Q. 387, 393 (1999).
71 Scharf, supra note 20, at 182.
72 ICC Statute, supra note 2, art. 16.
73 Id., art. 17(1)(b), read with art. 17(2)(a).
exposure and disgrace, the loss of employment and employment opportunities, and/or personal and material sacrifices.

The ICC Statute upholds the principle of *ne bis in idem*, and since the granting of amnesty amounts, legally, to a finding of not guilty, the question might be posed whether the beneficiary of amnesty could not enter a plea of *autrefois acquit* when brought before the ICC.

It might be noted in this regard that the ICC should be seen as an extension of the national courts with primacy of jurisdiction in a matter within the subject-matter jurisdiction of the ICC. Depicting the jurisdiction of the ICC as "complementary to" that of the national court should make this clear. However, constructing the relationship between the ICC and national courts as being a matter of extended or, alternatively, of original jurisdiction would make no difference in the present context because the principle of *ne bis in idem* as contemplated in the ICC Statute excludes double jeopardy "with respect to the same conduct"74 (and not for "the same crime").

There are other complicating issues though. For example, State A cannot grant amnesty for a crime committed in State B,75 and although persons cannot be prosecuted in the state that granted them amnesty, they can still be brought to trial for the same act in the country where the crime was committed.76 Since the crimes within the jurisdiction of the ICC are subject to universal jurisdiction, the question arises whether the same principle can be applied to such crimes if committed in the country that granted amnesty to the perpetrator thereof. It seems logical that the answer to this question should be affirmative.

However, the ICC Statute makes its rule against double jeopardy conditional upon a trial in "another court" and it is highly unlikely that the ICC will regard amnesty hearings or truth commissions as proceedings of "another court."

74 Id., art. 21(3).
75 Stephen Landsman maintains that amnesty ought never to be granted for crimes committed against the citizens of a foreign state. Landsman, supra note 10, at 90-91.
76 It appeared from testimony in the South African Truth and Reconciliation Commission that agents of the apartheid regime had committed criminal acts, including damage to property, murder and attempted murder, in for example London, Paris and Maputo, and the amnesty granted to perpetrators of those crimes will not preclude their prosecution in England, France, or Mozambique. President Mandela stated that South Africa is prepared to honor its international commitment—where applicable—to extradite persons that have been granted amnesty in South Africa to stand trial in countries where an extraditable offence has been committed.
A decision taken by the Prosecutor not to initiate an investigation because, taking into consideration the gravity of the crime(s) committed by the person(s) who has/have been granted immunity and the interests of victims of those crimes, "there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice."\footnote{ICC Statute, \textit{supra} note 2, at art. 53(1)(c).}

This seems to be the most plausible avenue for upholding amnesties granted as part of a political compromise. The grounds specified for a decision not to proceed with an investigation will ensure that the standards outlined above have been complied with by the Truth Commission and its amnesty committee—particularly that the interests of victims have been served. The decision of the Prosecutor not to proceed with an investigation for the reason stated is furthermore subject to review by the Pre-Trial Chamber of the ICC.

III. CONCLUSION

One of the most outstanding (positive) features of the ICC Statute is its concern for the interests of victims of any of the crimes within the jurisdiction of the ICC. Provision is made in the Statute for court orders granting reparation to victims, involving restitution, reparation and rehabilitation; a Trust Fund is to be established for the benefit of victims and their families, as well as a Victims and Witnesses Unit to provide protection measures and security arrangements, counseling and other appropriate assistance for witnesses and victims who appear before the Court, as well as other persons who might be at risk for providing testimony to the ICC. The ICC is instructed to take appropriate precautions for the protection of the safety, physical and psychological well-being, dignity and privacy of victims and of witnesses, taking into account factors such as age, gender, and health of the person to be protected and the nature of the crime (with special emphasis on crimes involving sexual and gender violence or violence against children). Victims may be granted the right to have their views and concerns voiced (personally or through legal representation) at all stages of the proceedings that might affect their personal interests, and, as already noted, a decision of the Prosecutor to discontinue an investigation in the interests of justice must be informed by, among other things, the interests of victims.

Under the ICC regime, amnesties attending the institution of truth commissions will therefore only withstand "unwillingness" scrutiny if they include, as a minimum requirement, appropriate measures for
accommodating the interests of the victims of crimes within the jurisdiction of the ICC.