JURISPRUDENCE OF GOOD HOPE? THE SOUTH AFRICAN TRUTH AND RECONCILIATION COMMISSION AND THE CASE AGAINST AMNESTY FOR CRIMES AGAINST HUMANITY

Dr. PLO - Lumumba, Ph.D*

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 rounded 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.[1]

I. INTRODUCTION

The question of redressing violations of human rights often attracts a variety of possible solutions aimed at breaking the cycle of impunity. These solutions include indictments, prosecutions, the formation of truth and reconciliation commissions, lustration, etc. For instance, the arrest of former Liberian President Charles Taylor, as well as his subsequent arraignment in the Sierra Leonean Special Court on charges of crimes against humanity, was a momentous event in Africa. It set the stage for punishment of leaders convicted of human rights abuse(s). Africa has had many such leaders[2], but a number of them have gone unpunished.

---

* Dr. Lumumba is an Advocate of the High Courts of Kenya and Tanzania and is also a Law Lecturer at the Faculty of Law, University of Nairobi, Kenya. This article was initially conceived together with Professor Phenyo Keiseng Rakate of the Max-Planck Institute, Heidelberg, Germany while we attended an International Committee of the Red Cross (ICRC) Course on Humanitarian Law in Geneva, Switzerland in 2002. The writer is also grateful to Mr. Collins Odongo, LL.B. (Hons), University of Nairobi, Kenya for the research assistance provided.

1 The final clause of the South African Interim Constitution.

2 Examples include the indictment of Hissen Habre, the former Chadian leader in Senegal for human rights violations, the conviction and jailing of Jean Pierre Akayesu and Jean Kambanda, former Mayor and Prime Minister, respectively in Rwanda. These developments have provided hope to survivors of human rights abuses in the world.

South Africa is a good example of the pursuit of the option of establishing a truth and reconciliation commission[3]. This was in response to Apartheid[4]. Any attempt to write the history of South Africa would be incomplete without an exposition of the historical and notorious elements of discrimination against the Black majority. Apartheid was the worst form of social engineering of the 20th Century. When the National Party government took power in 1948, it began the process of institutionalised racial discrimination against the Black majority in South Africa. In the early 1960s, the United Nations condemned the policies of the National Party government and through the General Assembly passed several resolutions condemning the policies of apartheid as inconsistent with the UN Charter and a threat to international peace and security. In November 1973, the General Assembly adopted Resolution 3068 in which it expressly declared apartheid a crime against humanity. However, the International Convention on the Suppression and Punishment of the Crimes of Apartheid only came into force in 1976.[5]

It is noteworthy that in 1974, the UN General Assembly had refused to receive the credentials of the South African diplomatic delegation on the ground that the latter had been expelled from the United Nations and its other agencies. For the next sixteen (16) years, South Africa was to be isolated from the international community and effectively become a pariah state.

---

3 On truth and reconciliation commissions generally, see, Henry J. Steiner and Philip Alston, International Human Rights in Context: Law, Politics and Morals, Oxford University Press, 2nd. Edition. Where the primary goals of a country emerging from turmoil are to achieve peace and harmony and at the same time guarantee reparation and reconciliation, truth and justice are often resorted to as he main vehicles through which such objectives are met. At page 1217, the writers define a 'truth commission' as a type of governmental organ that is intended to construct a record of tragic history. They offer one among many ways of responding to years of barbarism and horrific human rights violations that occurred while countries were caught up in racial, ethnic, class, and ideological conflict over justice and power. They may be alternative or complementary to other national responses, including the poles of amnesty and criminal prosecution.

4 Professor Steiner and Philip Alston (*Ibid.* p. 1235) describe the character of apartheid as systemic and all-pervading. In the authors' own words, "the system itself was evil, inhumane and degrading for the many millions who became its second and third class citizens. Amongst its many crimes, perhaps the greatest was its power to humiliate, to denigrate and to remove the self-confidence, self-esteem and dignity of its millions of victims. Mtutuzeli Matshoba expressed it thus: *'For neither am I a man in the eyes of the law, Nor am I a man in the eyes of my fellow man'."*

5 Article 1 of the Convention provides as follows:-
"The State Parties to the Present Convention declare that Apartheid is a crime against humanity and that inhuman acts resulting from the policies and practices of apartheid and similar policies and practices of race segregation and discrimination as defined in Article II of the Convention are crimes violating the principles of the Charter of the United Nations and constituting a serious threat to international peace and security."

What the United Nations considered crimes against humanity included, for example, the Group Areas Act (1950) which empowered the Government to separate races in residential areas; the Bantu Authorities Act (1951) which provided for the creation of separate homelands called "Bantustans" where Africans were to live according to their tribal identity, the Population Registration Act (1950) which allowed the government to classify people according to race on a national register.

In 1985, the United Nations Human Rights Commission appointed an *ad hoc* Committee of Experts to investigate the possibilities of implementing the Apartheid Convention, which provided, as stated earlier, that apartheid was a crime against humanity, and was punishable under international criminal law. The *ad hoc* Committee proposed the establishment of an international criminal court. This however did not materialize largely owing to pragmatic factors linked to the conflagration of the cold war.[6]

The South African Truth and Reconciliation Commission (TRC) in its 1998 final Report made a plea to the international community to recognize its amnesty process.[7] Some scholars have supported the recommendation that the South African amnesty process be recognized by third world countries.[8]

We disagree. The question sought to be examined in this essay is that if apartheid is a crime against humanity as declared in the International Convention on the Suppression and Punishment of crimes of Apartheid, and the Rome Statute of the International Criminal Court[9] (ICC), how does a nation, forgive perpetrators of such heinous crimes? Does amnesty serve the course of justice? This article argues that despite the justifications given for the "South African exceptionalism" that the amnesty granted is not blanket but conditional amnesty, crimes against humanity are not subject to a statute of limitation

---

6 Commission on Human Rights. Thirty-Seventh Session. UN Doc. E/CN.4/426, 19 January 1985.

7 *Truth and Reconciliation Commission of South Africa Report*, October 1998. Vol. 5. para 114 *Infra*. Professor Steiner *et al* (Supra Note 2) note that in general., *amnesties* foreclose prosecutions for stated crimes (often by reference to crimes or conduct that took place before a stated date), whereas *pardons* release convcted offenders from serving their vsentences (or the remainders thereof if they are prisoners at the time of pardon). Nonetheless, usage often views these terms as interchangeable, so that persons not yet tried are 'pardoned' and prisoners serving sentences are granted an 'amnesty'.

8 See, for example, John Dugard. "South Africa's Truth and Reconciliation Process and International Humanitarian Law" 2 *Yearbook of International Humanitarian Law* (1999) 254, See also Charles Villa-Vicenio, "Why Perpetrators Should not Always be Prosecuted. Where the International Criminal Court and Truth Commissions Meet" 49 *Emory Law Journal* (2009) 205.

9 UN. Doc. A/CONF 183/9 (17 July 1998) (Adopted 17 July 1998 at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court).

under international law. We contend that failure to prosecute perpetrators of crimes of apartheid is against international norms and fails to mirror the practice of the civilised community of nations, in particular the United Nations including its agencies. The recent decision by the Chilean High Court to withhold the amnesty granted to former Chilean dictator, Augusto Pinochet is one such example.

II. "SOUTH AFRICAN EXCEPTIONALISM" AND THE BASIS FOR THE ESTABLISHMENT OF THE TRUTH AND RECONCILIATION COMMISSION

The South African Truth and Reconciliation Commission (TRC) came about as a result of a compromise between domestic political actors. Amnesty was one of the difficult issues that faced negotiators after the demise of apartheid. Prosecution of those individuals responsible for gross human rights violations threatened a peaceful transition to democratic rule. Prosecution was also impossible given the fact that there was no victor from either side of the negotiating table. A balance had to be struck between the international demand for prosecution of perpetrators of gross human rights violations and the national appeal for peaceful transition, reconciliation and justice. Although amnesty was a price to be paid for a peaceful transition, a line had to be drawn between blanket and conditional amnesty.

The compromise arrived at was conditional amnesty on an application by any such perpetrator of gross human rights violations. This was given effect through legislation in terms of the 1993 Interim Constitution[10] (hereinafter 'IC'), the New Constitution[11] and the National Unity and Reconciliation Act.[12] The National Unity and Reconciliation Act established a Commission, whose task was to give a complete picture about past atrocities, facilitate the amnesty process and bring about national reconciliation among the people of South Africa.

The initial draft of the Interim Constitution did not contain a provision on amnesty.[13] After the drafters had completed the arduous task of drafting the Constitution and the draft text was availed and disseminated to the public, senior members of the security forces threatened to disrupt the elections if the question of amnesty was not settled in the Constitution. The threat of civil war was real and serious, considering the influence of senior members of the security forces such as General Constand Viljoen, who was highly respected

---

10 Act 200 of 1993.

11 Act 108 of 1996.

12 Act 35 of 1995.

13 See John Dugard, "Retrospective Justice: International Law and the South African Mode," In James McAdams (ed.), *Transitional Justice and the Rule of Law in New Democracies* (1977) 269.

within the security forces and amongst some right-wing organizations, political leaders of the African National Congress (ANC) and the National Party (NP) convened an urgent meeting to address the question of amnesty. They agreed that a provision dealing with amnesty be written into the Interim Constitution, binding the new government to pass an amnesty law.[14]

When the Interim Constitution came into operation, a postamble appeared at the end of the Constitution headed, *National Unity and Reconciliation.* It read thus:

> This Constitution provides a historic bridge between the past of a deeply divided society characterized 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 (...)

---

14 After the banning of liberation movements in 1990, the question of indemnity or amnesty became a highly controversial and politicized issue. There were several attempts by both the ANC and the National Party government to deal with the question of past human rights violations but with little success. In 1990, the Nationalist government passed the Indemnity Act 35 of 1990 which granted the State President wide discretionary powers regarding whether or not to grant indemnity. In order to cover the loopholes of the1990 Indemnity Act, the government passed the Indemnity Act 151 of 1992. The latter/Further Indemnity Act created the Indemnity Council to consider indemnity applications and its proceedings were held *in camera* and its record confidential. Legal representation was not allowed before the committee and disclosure of evidence was punishable with a sentence of twelve months seen by many as a charter of self-impunity by a government anticipating prosecution for its agents under a majority government. Despite the criticism of the apartheid government, the ANC's record of human rights was not clean. Even before it was unbanned the ANC had instituted several internal inquiries regarding allegations of human rights violations among those in exile (see for example, *Commission of Inquiry into Recent Development in the Peoples' Republic of Angola, Stuart Commission, 14 March, 1984);* Report of the Commission of Inquiry set up in November, 1989 by the National Working Committee of the *African National Congress to Investigate Circumstances Leading to the Death of Mzwake Ngwenya (Jobodwana Commission).* These investigations came as a result of media reports on how the ANC ill-treated political prisoners and cadres and violated their human rights. In response to these allegations, the ANC instituted several internal commissions of inquiry. In March 1992, ANC President Nelson Mandela instituted a commission of inquiry to investigate complaints by former ANC prisoners and detainees in Angola, Tanzania and Zambia. The Commission implicated senior ANC members for gross human rights and recommended further investigation into the matter (*Report of a Commission of Inquiry into Complaints by Former ANC Prisoners and Detainees (Skweyiya Commission, 1992).* In January 1993, the President of ANC acting in response to the recommendations of the Skweyiya Commission, appointed yet another commission of inquiry to inquire into complaints by former ANC prisoners and detainees whether indeed *prima facie* evidence existed that certain members of the ANC had committed cruel and inhuman acts towards such prisoners and detainees. The Commission found that through the action or inaction of some senior ANC members, serious breaches of human rights had been committed. The Commission recommended that an apology be issued by the organization to such persons involved or their next of kin and that an appropriate form or compensation be made *(See Report of Inquiry into Certain Allegations of Cruel and Human Rights Abuses against Prisoners and Detainees by ANC members, August, 1993).*

> *(...) In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedure, including tribunals if any, through which such amnesty shall be dealt with at any time after the law has been passed.*[15]

In terms of Section 232 (4) of the Interim Constitution, under the heading *Transitional Arrangement*, provision was made that the aforegoing postamble-

> *Shall not... have lesser status than any other provision of this Constitution... and such provision shall for all purposes be deemed to form part of the substance of the Constitution.*[16]

Section 22 of the new Constitution, also dealing with Transitional Arrangements, provides that:-

> *Notwithstanding the other provisions of the new Constitution and despite the repeal of the previous Constitution, all the provisions relating to amnesty contained in the previous Constitution under the heading 'National Unity and Reconciliation' are deemed to be part of the new Constitution for the purposes of the Promotion of the National Unity and Reconciliation Act, 1995 (Act 34 of 1995) as amended, including for the purposes of its validity.*[17]

The póstamble of the Interim Constitution was the basis for the creation of the Truth and Reconciliation Commission. The postamble sparked a debate on how a Truth and Reconciliation Commission should deal with the legacy of apartheid as a form of historical injustice.[18] Those opposed to amnesty predicted that any legislation granting amnesty to perpetrators of gross human rights violations would not pass constitutional muster when challenged before the Constitutional Court. The right-wing political parties were opposed to the

---

15 Emphasis added.

16 Emphasis added.

17 It is important to note that in the First Certificate, one of the reasons for the Constitutional Court not to certify the draft text of May 1996 submitted before it by the Constitutional Assembly was that the Promotion of National Unity and Reconciliation Act, 34 of 1995 (as amended) was immunized from constitutional review. See *Ex parte Chairperson of the Constitution Assembly: In re-certification of the Constitution of the Republic of South Africa. 1996 (10) BCLR 1253 para 150.*

18 Graeme Simpson "Proposed Legislation on Amnesty Indemnity and the Establishment of a Truth and Reconciliation Commission, Submission to the Minister of Justice Dullar Omar, Centre for Study of Violence and Reconciliation, dated June 1994 (on file with the author).

establishment of the Truth and Reconciliation Commission and perceived it as an instrument of 'witch-hunt' against the white community.[19] In June 1995 after a heated debate by political parties, the Truth and Reconciliation Bill was adopted by the South African Parliament.

III. OBJECTIVES OF THE TRUTH AND RECONCILIATION COMMISSION (HEREINAFTER, THE 'TRC')

The objectives of the TRC as set out in the enabling statute (the Promotion of National Unity and Reconciliation Act 1995) was to *promote national unity* and to bring *reconciliation* to all the people of South Africa, to facilitate the granting of *amnesty* and to make recommendations regarding *measures to be taken* in *respect of victims* of human rights violations and ways to prevent future recurrences of such or other human rights violations.[20]

The Commission was expected to give *'as complete a picture'* as possible of the *causes, nature and extent* of human rights violations from 1 March 1960 as the base year.[21] The Commission comprised of three Committees: the Committee on Human Rights Violations, the Committee on Rehabilitation and Reparation and the Amnesty Committee.[22] The Committee on Human Rights Violations was responsible for gathering information on human rights violations between 1 March 1960 until 10 May 1994 while the Committee on Rehabilitation and Reparation was to seek and advise on the best ways of rehabilitating and compensating the victims of violations.[23]

Perpetrators and the Amnesty Procedure

A person seeking amnesty had to make an application to the Amnesty Committee. The applicant had to prove that an act for which amnesty was sought was committed during the period within the mandate of the Commission and that the act was *politically motivated* or was committed in order to carry out the objectives of a particular political organization or institution.[24]

---

19 Gerhard Werle, "Without Truth No Reconciliation - The South African *Rechtsstaat* and the Apartheid Past." 1 *Law and Politics in Africa, Asia and Latin America* (1996) 59 at 61.

20 Sections 3 (l)-(4). Emphasis added.

21 *Ibid.* The 1 March 1960 was the day of the massacre in Sharpville, in which unarmed and defenceless marchers were killed by the South African police. This was followed by banning of anti-apartheid movements, and resulted in the adoption of an armed struggle. Regarding a historical background on the development of racial discrimination in South Africa. See generally Davenport *TRH South Africa: A Modern History* (1991).

22 See Chapter 3 of the Act.

23 Section 14.

24 Section 20 (2). What constitutes an "act associated with a political objective" is defined as "including, the motive of the person who committed the act; the context of the act, the

More importantly, the applicant had to make a *full disclosure* of the acts committed.[25] The granting of amnesty extinguished criminal and civil liability.[26] An applicant who failed to comply with any of the stipulated conditions was denied amnesty by the Committee. The Amnesty Committee was a quasi-judicial body and any person aggrieved by its decision could apply for judicial review in terms of the Constitution.[27] Where application for amnesty had been refused, the information disclosed by an applicant could not be used in a pending or subsequent trial.[28]

One of the criticisms levelled against the Promotion of National Unity and Reconciliation Act is that it granted amnesty to perpetrators of apartheid crimes, torture and disappearances committed by the apartheid state and its agencies. In essence, the Act did not make a distinction between ordinary common law crimes and crimes against humanity for purposes of granting amnesty.

When the Promotion of National Unity and Reconciliation Bill was passed by the South African Parliament, Amnesty International, one of the renowned global human rights watchdogs, objected to any form of amnesty granted in respect of apartheid-related offences including torture, murder, abductions and enforced disappearances.[29] This explains why the amnesty process became such a controversial issue and was challenged before the High Courts in South Africa[30] and finally before the South African Constitutional Court.[31]

The Report of the South African Truth and Reconciliation Commission

---

legal and factual nature of the act, including its gravity; the target of the act whether it was directed against private or public institutions, private individuals or political opponents; the ordering or approval of the act by the state or a political body; and the proportionality between the act and its goal". The language in this provision is similar to that in extradition treaties (political exception provision). Nevertheless, although no distinction is made between crimes against humanity and common law crimes for purposes of granting amnesty, apartheid will not qualify as a political offence.

25 Section 20 (a) - (b).

26 Section 20 (7) (a).

27 See *Gerber v Kommmissie vir Waarheid en Versoening*1998 (2) SA 559 (T).

28 Section 20 (7).

29 *Memorandum to the Select Committee on Justice, Comments and Recommendations by Amnesty International on Promotion of National Unity and Reconciliation Bill, London, Amnesty International London, 13 January 1995 (on file with the author).*

30 See for example, *Nieuwoundt v the Truth Reconciliation Commission* 1997 (2) SA 70; *Truth and Reconciliation Commission v Du Press & Another* 1996 and *Williamson v Schoon* 1997 (3) Sa 1053.

31 *Azanian People's Organization (AZAPO) & Others v President of the Republic of South Africa & Others* 1996 (4) SA 562 (CC).

On 29th October 1998, the Chairperson of the Truth and Reconciliation Commission[32] submitted a final report[33] to the then President[34]. The five-volume report details the nature and extent of gross human rights violations that South Africa suffered from 1960 until 1994.

The Commission investigated the role played by the apartheid government through a plethora of laws aimed at sustaining and entrenching the policy of apartheid. Although the Commission found that Liberation Movements such as the ANC, United Democratic Front (UDF), Inkatha Freedom Party (IFP) and the Pan African Congress (PAC) were also responsible for gross human rights violations, it nevertheless concluded that the *preponderance of responsibility rested with the apartheid government and its agencies.*[35]

The Commission not only held political parties responsible for their actions, but also apportioned blame to the health, labour and business sectors, the media, the judiciary and faith communities for allowing the apartheid system to flourish and prosper.[36] These bodies were censured for their seeming apathy and omissions. The Commission acknowledged that there was a need to transform institutions such as the judiciary, the health sector and the security forces in order to create a culture of observance of human rights. On the economic front, the public and private sectors needed to be transformed in order to alleviate economic disparity through the establishment of special funds, and affirmative action was considered as a mechanism for improving the lives of the disadvantaged communities.[37]

The Commission did not recommend lustration, purification or purging, a procedure which was adopted by some European countries such as Germany and the Czech Republic to bar people implicated in human rights violations from holding public office because of their involvement in the criticized conduct of the prior regime. The Commission concluded that such measures would be inappropriate in the South African situation, but did not explain why they felt so.[38] Nevertheless, with regard to the perpetrators who refused to apply for amnesty, the Commission recommended that the country's National Director of Public Prosecution should investigate and prosecute them.[39]

---

32 Archbishop Desmond Tutu.

33 *Truth and Reconciliation Commission of South Africa Report*, October 1998. The Amnesty Committee of the TRC continues to hear amnesty applications of perpetrators of gross human rights violations. The Committee will attach a codicil to the TRC report once it has completed its work.

34 President Nelson Mandela.

35 *Supra* Note 33, Vol. 6 Ch. 6 paras. 130-150.

36 *Ibid.* Vol. 5, Ch. 6, paras. 51-58.

37 *Ibid.* Vol. 5, Ch. 8.

38 *Ibid.* Vol. 5, Ch. 8, paras. 17-19.

39 See the National Prosecution Act 3 of 1998.

The Commission further stated that "in order to avoid a culture of impunity and to entrench the rule of law, the granting of general amnesty in whatever guise should be resisted" in future.[40] Prosecution would indeed create serious difficulties, since political leaders who had been held politically responsible for gross human rights violations had not applied for amnesty. Any attempt to prosecute them may have resulted in a cycle of impunity, violence and therefore killings. Purging was also not an appropriate alternative because such leaders commanded support within their respective constituencies.

C. Amnesty for Gross Human Rights Violations and the Practice of the United Nations

There are several treaty-based and domestic laws which prohibit statutory limitations to war crimes and crimes against humanity. One good example is the UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, which came into force on 11 November 1970.[41] The Convention imposes a duty on member states to take appropriate steps to enforce the Convention and "... all necessary domestic measures, legislative or otherwise..," with a view to enforcing the Convention. State practice shows that a number of countries have provisions in their national Constitutions which prohibit statutory limitations on crimes against humanity such as Ethiopia[42] and Greece.[43]

For the last decade the United Nations, through its organs consistently rejected amnesty laws for serious violations of human rights. In December 1992, the General Assembly adopted the Declaration on the Protection of a person from enforced disappearance.[44] Article 18 (1) of the Declaration provides that "persons who have or are alleged to have committed offences referred to ... shall not benefit from any special amnesty or similar measures that might have

---

40 *Supra.* Note 33, Vol. 5, Ch. 8, *para 14, Emphasis added.*

41 UN G/A Res. 2391 (XXIII), 26 November, 1969.

42 Section 28 of the Ethiopian Constitution provides:-

(1) Criminal liability of persons who commit crimes against humanity, so defined by international agreements ratified by Ethiopian and by other laws of Ethiopia, such as genocide, summary executions, forcible disappearances or torture shall not be barred by statute of limitation. Such offences may not be commuted by amnesty or pardon of the legislature or any other state organ, (2) (...).

43 Section 47 of the Greek Constitution provides, in part, that:

(3) Amnesty may be granted only for political crimes, by statute passed by the Plenum of the Parliament with a majority of three-fifths of the total number of members.

(4) Amnesty for common crimes may not be granted even by law.

44 UN Doc. A/47/49 (1992)

the effect of exempting them from any criminal proceedings or sanction." The Special Rapporteur of the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities[45] in his final report on the question of impunity of perpetrators of human rights violations (infringement of civil and political rights) said: "amnesty cannot be accorded to perpetrators before victims have obtained justice by means of an effective remedy."[46]

The International Commission in its Draft Code of Crimes Against the Peace and Security of Mankind established in terms of Article 9 that "each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in Articles 17 (genocide), Article 18 (crimes against humanity) and Article 20 (war crimes), irrespective of where or by whom those crimes were committed.[47] The Committee against torture in its 1996 Annual Report emphasized the incompatibility of amnesty laws with the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. In particular, the Committee condemned the amnesty law in Senegal as inadequate to ensure the implementation of the Convention.[48] Similarly, the UN Commission on Human Rights resolution 1999/32 called on "all governments to abrogate legislation leading to impunity for those responsible for grave violations of human rights..."[49] In another resolution, the Commission emphasized that "accountability of perpetrators of grave human rights violations is one of the central elements of any effective remedy for victims of human rights violations and a key factor in ensuring a fair and equitable justice system and ultimately of reconciliation and stability within a State.[50]

The UN Security Presidential Statements agitated that "all persons who commit or authorize the commission of serious violations of international humanitarian law are individually responsible for those violations and should be brought to justice."[51] This consistency by the United Nations has been maintained in recent conflicts in Sierra Leone, Cambodia and East Timor in which the Secretary General rejected any form of amnesty in respect of crimes committed during the aforementioned conflicts.

In the ***Furundja case***[52], the International Criminal Tribunal for the Former Yugoslavia (ICTY) indicted and charged Anto Furundja, the commander of concentration cells in Bosnia-Herzegovina for crimes against humanity,

---

45 Mr. Louis Joinet.

46 E/CN. Sub.2/1997/20 para.32.

47 Yearbook of the International Law Commission 1996, Vol. II. (2).

48 Annual Report of the Committee against Torture to the General Assembly, 09/07/1996. A/5/51/44 para 117.

49 UN Doc. Res 1999/32 2 & 4

50 UN. Doc. Res 1999/34 para. 6.

51 S/PRST/1999/6 of 12 February, 1999

52 Case No. IT-95-17/1-A.

including torture. The Trial Chamber held that torture was prohibited by a series of treaty provisions and under no circumstances will national amnesty prevent the prosecution of alleged perpetrators. In this regard, the Tribunal said:-

> ... proceedings could be initiated by political victims if they had *locus standi* before a competent international or national judicial body with a view to asking it to hold the national measure to be internationally unlawful or the victims could bring a civil suit for damages in a foreign court which would therefore be asked, *inter alia,* to disregard the legal value of the national authorizing act.

In that context, the ICTY has set the tone that amnesties for crimes against humanity are generally against international norms and standards and contemporary world thought.

III. CONCLUSION

Despite the justifications and rationalizations that this article has put forward in favour of the ***'South African exceptionalism'***, that is, the grant of conditional amnesty for the perpetrators of serious human rights violations and crimes against humanity in particular, the centre-thread of the article has essentially hinged against any consideration of amnesty for such crimes.