NATIONAL TRANSITIONAL JUSTICE WORKING GROUP ZIMBABWE

Hard Choices on Zimbabwe: Do amnesties work for or against peace?

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1. Introduction

Zimbabwe has commenced a critical transitional justice journey after years of colonialism, dictatorship, oppression, and political violence. In 2013, the country adopted a new Constitution and in pursuant of Section 251 of same, a National Peace and Reconciliation Commission (NPRC), established on 18 December 2015. The decision to establish the NPRC was a significant milestone to address legacies of serious past human rights violations, creating healing and peaceful co-existence. In 2018, the country held its first post-Mugabe elections, generating hope for accountability and social cohesion. But the challenges of accountability and peacebuilding still linger while Zimbabwe tries to design a system to enrich the country's human rights and democratic culture,

Much of Zimbabwe's history has been characterized by years of violence, beginning with the resistance by the black majority of the oppression and deprivation of land by British colonialists. This culminated into fifteen years of struggle for independence that was subsequently gained in April 1980, with Robert Mugabe emerging as Prime Minister.

Before and after the new government was put in place, several amnesties were taken,[1] in particular the 1975 Indemnity and Compensation Act granted amnesty to the police force, civil service and Central Intelligence Organization (CIO) members for offences committed in the past and for those anticipated.

In 1979 and 1980, the transitional government granted Amnesty Ordinances.

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[1] MandikwazaEdnowledge (16.06.2016), "The place for Amnesty in Zimbabwe's Transitional Justice Process", available at: https://accord.org.za/conflict-trends/place-amnesty-zimbabwes-transitional-justice-process/

However, the violence continued after Mugabe ascended the premiership. In January 1883, he sent the 5th Brigade to Matabeleland South, Matabeleland North and Midlands provinces to raid communities supporting the opposition party Zimbabwe African People's Union (ZAPU) According to a report from the Zimbabwean Catholic Commission for Justice and Peace (CCJP) and the Legal Resources Foundation published in 1997,[2] these raids referred to as Gukurahundi, resulted in the "killings of thousands of civilians, the beatings of entire villages and the rape and torture of many innocent individuals [which] were carried out as part of a planned strategy". Approximately 20,000 deaths have been related to the Gukurahundi.[3]

In 1988, with ZAPU demoralized and no longer perceived to be a threat, a General Notice (GN) 257/A/1988 was published granting amnesty to perceived "dissidents", collaborators and members of ZAPU. In 1990, the 1988 amnesty was renewed, but this time including the state's uniformed forces that had been responsible for Gukurahundi.

Human rights violations continued under Mugabe's government, including imprisonment, enforced disappearance, murder, torture and rape. Targets were mainly primarily political opponents and aid workers. Several amnesties followed in 1993, 1996 and 2000. The latter benefited ZANU-PF supporters who were implicated in politically motivated violence against opposition supporters.[4]

By 2000 Mugabe lost the support of the West, which sought to punish him for his human rights records, as such sanctions against him weakened his economy. The sanctions led to hyperinflation of almost 231 million percent[5], leaving 80% of the population unemployed and crashing the national health system.

In 2008, the campaign for presidential elections was marked by state-sponsored violence against supporters of the opposition Movement for a Democratic Change (MDC). The security services and ZANU-PF militia perpetrated human right violations such as arbitrary arrests and detentions and enforced disappearances.

To stabilize a deteriorating situation, in September 2008, President Mugabe and both heads of the MDC factions, Morgan Tsvangirai and Arthur Mutambara signed the Global Political Agreement (GPA) which came into effect in February 2009 and established a unity government in which Mugabe remained as President and Tsvangirai became Prime Minister.

Mugabe remained in power until he was forced to step down by his party in 2017. Subsequently, his deputy Emmerson Mnangagwa` was sworn in and he retained the position after the 2018.

This paper seeks to examine the question of amnesty and whether it is pragmatic to effect it as a healing and reconciliation mechanism within the context of Zimbabwe. This is mirrored against the background of more than three decades of massive human rights violations, the existing socio-political sensitivities and the need for the country to heal and confidently face the future. The paper critically examines case studies of countries that have gone through similar transitions and uses the lessons learnt from them to provide pragmatic, country specific and actionable recommendations for Zimbabwe.

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[2] Cited in Scarnecchia, Timothy. *Op. Cit.*
[3] MandikwazaEdnowledge, *Op. Cit*.
[4] MandikwazaEdnowledge, *Op. Cit*.
[5] International Coalition for the Responsibility to Protect, Crisis in Zimbabwe, available at: http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-zimbabwe

2. Conceptualizing Amnesty Provisions and Frameworks

Amnesty is not explicitly defined in international law and there is no treaty or international instrument on amnesty. It is nevertheless commonly acknowledged as a legal measure that preempts the prosecution of identified crimes. An Office of the High Commissioner for Human Rights (OHCHR) document provides the following definition:[6]
"Legal measures that have the effect of:

(a) Prospectively barring criminal prosecution and, in some cases, actions against certain individuals or categories of individuals in respect of specific criminal conduct committed before the amnesty's adoption; or
(b) Retroactively nullifying legal liability previously established."

In that respect, an amnesty cannot prevent legal liability for conduct that has not taken place yet because this would be an invitation to violate the law.

Even though no international treaty requires or forbids amnesty, there is an international obligation for States to prosecute certain serious international crimes.[7] International legal norms generally require prosecution of at least those who bear primary responsibility for most important international crimes such as the core war crimes, genocide, and torture.

The principle is laid down, for example, in the context of international armed conflict for grave breaches under the 1949 four Geneva Conventions. In addition, the Convention on the Prevention and Punishment of the Crime of Genocide and the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, respectively entail an obligation for state parties to prosecute crimes of torture and genocide. The Statute of the International Criminal Court also creates an obligation for States to investigate and prosecute core international crimes, and the Court itself can intervene if States do not respect this obligation.[8]

It is to be noted that Zimbabwe is currently a member of the Geneva Conventions I-IV, Additional Protocols (ratified 1992), the Genocide Convention (1991) and the Rome Statute of the ICC (1998).

In addition, key human rights instruments such as the International Covenant on Civil and Political Rights obligate States to "ensure" the rights they protect and to provide an "effective remedy" to persons whose rights and freedoms have been violated under the respective treaties.

Moreover, most observers agree on the existence of a growing and shared belief by States, thus reflecting an *opinio juris*, that amnesties for war crimes, crimes against humanity and genocide as well as certain grave violations of human rights are impermissible under customary law.

To be considered to meet the customary international law threshold, states must also significantly follow a practice. Although several States have adopted amnesty laws, which prevent the identification of a general and consistent practice by States, there is a gradual evolution in State's practice that reveals a customary prohibition of amnesty for core international crimes. An illustration of the practice is the development of international criminal law with the creation of the ICC and several international and hybrid courts to promote the fight against impunity.

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[6] OHCHR, Rule-of-Law Tools for Post-Conflict States, Amnesties, HR/PUB/09/1 (2009), p. 41.
[7] Sometimes, this obligation is framed as an alternative: to "extradite or prosecute" (*autdedereautjudicare*). The principle of *autdedereautjudicare*entails a duty for states to prosecute a person having committed a crime under international law, or to extradite that person for prosecution elsewhere.
[8] According to its preamble: "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes."

There is also a growing body of jurisprudence by regional human rights courts ruling that amnesties violate a state's obligation to ensure an effective remedy for serious violations of human rights. With the 2000 *Barrios Altos* case, the Inter-American Court of Human Rights (IACHR) invalidated national amnesty laws on the grounds that they violated international law: in its March 2001 judgment *Barrios Altos v. Peru* (or *Barrios Altos* case), the IACHR ruled that the two amnesty laws violated the victims' right of access to justice, which Peru has a duty to respect, ensure, and give effect to, as a right protected by Articles 1(1) and 2 of the American Convention on Human Rights.[9] In that same decision, the Court ruled that these two laws "lack legal effect", due to their manifest incompatibility with the aims and spirit of the American Convention. Finally, the Court ruled that its interpretation, according to which Peru's amnesty laws lack legal effect, is not only valid for the Barrios Altos case but must receive a general application.[10]

In the African legal system, Article 7 (1) is protecting the victim's right to judicial protection and to have their cause heard.

At a national level, in a case "Simon", the Argentina Supreme Court stated that amnesties law for crimes against humanity were unconstitutional.[11] This case shows that national courts have also taken the initiative to invalidate amnesty laws and revoke specific amnesties.

In conclusion, therefore, international human rights law prevents states from passing law impeding investigations of the facts about gross human rights violations and the establishment of responsibilities. These provisions do not absolutely exclude amnesty. Often, states fear that prosecution would destabilize the new government and that the military would remain a potent force within the society likely to overthrow this new government. Some argue that amnesties are necessary for the sake of peace and reconciliation between social categories. Be that as it may, states must find the balance between the necessity to fight impunity, especially for core international crimes, and the necessity to restore peace, putting amnesties on the negotiation table.

However, states that have undergone situations requiring political transition may not have the means to prosecute every crime and offence. They could then focus on some prosecutions such as those reflecting the commission of systematic violations or emblematic crimes.[12] This leads to the conclusion that if the exigencies of justice can be considered met, amnesty will not necessarily be contrary to international law.

A balance should then be found for amnesty to serve a sustainable peace. Due respect of international law is the first step to prevent an amnesty from going against stability and reconciliation in the long run. But experiences in other countries showed that for an amnesty to be legitimate, other conditions and principles must be followed.

3. Experience from Elsewhere: amnesty for grave crimes- a comparative analysis

[9] IACHR, *Barrios Altos v. Peru*, Judgment of March 14, 2001, Ser. C, No. 75, par. 43, cited in Cassel, D. Chapter 6, "The Inter-American Court of Human Rights", in *Victims Unsilenced, The Inter-American Human Rights System and Transitional Justice in Latin America*, July 2007, Due Process of Law Foundation, 2007, pg.155, at http://www.dplf.org/uploads/1190403828.pdf

[10] IACHR, *Barrios Altos* Case, Interpretation of the Judgment on the Merits (Art. 67, American Convention on Human Rights), Judgment of September 3, 2001, Ser. C, No. 83, second operative paragraph cited in *Ibid*, pg.155

[11] Supreme Court of Argentina. Simon, Julio Héctor y otros s/ privacionillegitima de la libertad, etc. Case 17.768, june 14, 2005.

[12] The United Nations in general and its Secretary-General in particular agreed with this position in respect to the explicit limitation of the jurisdiction of the Special Court of Sierra Leone: limiting it to the most responsible perpetrators.

Experiences showed that amnesties hardly resist time, and often fail to ensure a long-lasting peace.

Amnesties in Sierra Leone

After more than a decade of violent civil war, the Lomé Peace Agreement was signed by the Government of Sierra Leone (GoSL) and the rebel group Revolutionary United Front (RUF) and the renegade of the military, the Armed Forces Revolutionary Council (AFRC). The agreement provided for a blanket amnesty, citing "the imperative need to meet the desire of the people of Sierra Leone for a definitive settlement of the fratricidal war in their country and for genuine national unity and reconciliation" and stating the parties' "[d]etermin[ation] to establish sustainable peace and security; to pledge forthwith, to settle all past, present and future differences and grievances by peaceful means",[13] in its Article 9(1) and (2) provides for "absolute and free pardon" to RUF and AFRC. The same amnesty was extended to members of the Sierra Leone Army and the Civil Defence Forces for the period covering the beginning of the war in March 1991, up to the time of the signing of the present Agreement."[14] The GoSL was obliged to ensure no official or judicial action is taken against any member of these groups and their collaborators in respect of anything done by them in pursuit of their objectives, up to the time of the signing of the present Agreement".

For many, this amnesty law was absolutely necessary and a "prerequisite for any meaningful negotiation".[15] It was used as a tool by the government to push the RUF, in particular, to associate itself to the Sierra Leone peace process. Amnesty was used to end the war by the government; ready to do what it "could do to produce that result".[16]

The Agreement consequently provided a blanket amnesty for all crimes, and therefore included war crimes, acts of torture, crimes against humanity, genocide, and other serious violations of human rights,[17] committed within the context of the Sierra Leonean civil war. But it is noteworthy that the UN representative at the scribbled an exemption that was annexed to the peace accord indicating that such serious crimes are not amnestiable under international law.

- ***Effects on the peace process***

Even after the Lomé Peace Agreement was signed, gross violations of Human Rights were still committed, especially against humanitarian workers[18]. With the exception of the political arrangement that has to do with power sharing, the RUF reneged on almost every aspects of the peace agreement.[19] The RUF failed to disarm and demobilize, and therefore, fighting ensued between them and the government forces. The civil war officially ended in January 2002 after the parties signed a second cease-fire agreement in Abuja in May 2001.

- ***Lessons learned***

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[13] *Ibid*, Preamble of the Agreement
[14] *Ibid*, Art.9(3)
[15] Hayner, P. "Negotiating peace in Sierra Leone: Confronting the justice challenge", December 2007 Report, Centre for Humanitarian Dialogue and International Center for Transitional Justice; Hayner quoting sources pg.13; at http://www.ictj.org/static/Africa/SierraLeone/HaynerSL1207.eng.pdf
[16] Berewa quoted and explained in *Ibid*, pg.13
[17] Rakate, P. K. "Is the Sierra Leonean Amnesty Law compatible with International law?", in *MenschenRechtsMagazin - online*, University of Potsdam, Issue 3, 2000, at http://www.uni-potsdam.de/u/mrz/mrm/mrm13-1.htm#Anm.%20X
[18] "Sierra Leone: A Call for Justice" – "Recent violations of the Lomé Peace Accord", Human Rights Watch, January 2000, at http://www.hrw.org/campaigns/sleone/violations.htm#top
[19] "The situation in Sierra Leone", Statement by H. E. Ambassador Gelson Fonseca Junior, Permanent Representative of Brazil to the United Nations, New York, 10 December 1999, available at: http://www.un.int/brazil/speech/99d-gfj-csnu-sierra-leone.htm

According to some international observers, the breach of the peace agreement is partly caused by this amnesty law. Granting perpetrators high positions in government inevitably encourage impunity.[20] The balance was not found and the necessity occurred to try perpetrators of core international crimes, thus explaining the creation of a special international Court for Sierra Leone in 2002 under a joint agreement signed between the government of Sierra Leone and the United Nations, "mandated to try those bearing the greatest responsibility for war crimes and crimes against humanity committed within the territory of Sierra Leone since 30 November 1996".[21]

Amnesties in Democratic Republic of Congo (DRC)

After years of violence, in March 2009, the government signed an agreement with the *Congrés National pour la Défense du Peuple* (CNDP), led by General Laurent Nkunda. The agreement called for amnesty and an amnesty law was signed and promulgated by President Kabila in May 2009.[22]The law applies to Congolese living in the DRC or abroad and covers acts of war and insurrection committed in the eastern provinces of North and South Kivu from June 2003 to the date of promulgation. The amnesty is of limited temporal and geographic scope, and explicitly excludes genocide, war crimes, and crimes against humanity from its reach.

According to the International Center for Transitional Justice (ICTJ), it is in practice a blanket amnesty, which established an unrestricted guarantee that many serious crimes will not be prosecuted.[23] Any Congolese anywhere is amnestied for acts of war and insurrection in the Kivus, prospectively and retroactively for the time period delineated, but there are no procedures, no conditions and a very loose definition of these crimes. Analysts suggested that "Anyone in jail can wave this as a get-out-of-jail free card, the prosecuting authorities are not even going to think of prosecuting belligerents, let alone FARDC and PNC for crimes they have been committed over the years".[24]

- ***Effects on the peace process***

Eastern Congo remains a theater of military operations with disastrous humanitarian consequences. Fighting continued in the country from January to March 2009, especially between Armed Forces – assisted by Rwandan and Ugandan armed forces – on the one hand, and FDLR (Democratic Liberation Forces of Rwanda) and LRA (Lord's Resistance Army), both rebel groups on the other hand. Today, violent armed groups are still present, considerably undermining the peace process in the country. A UN peacekeeping force, MONUSCO is also present in the region, helping national armed forces against these groups.[25]The Congolese government has placed alleged war criminals in command positions of the FARDC, including Bosco Ntaganda, today prosecuted before the International Criminal Court.

- ***Lessons learned***

The Amnesty Law strengthened patterns of rewarding violence and crimes perpetrated by rebel groups, Congolese armed forces (FARDC), militias and police. As a consequence, the Congolese population lost confidence in its institutions. Criminal prosecutions at the national and international

[20] See Hayner, P. "Negotiating peace in Sierra Leone: Confronting the justice challenge", December 2007 Report, Centre for Humanitarian Dialogue and International Center for Transitional Justice; pp.23 and 24.
[21] Official website of the SCSL, About, at http://www.sc-sl.org/about.html

[23] ICTJ Discussion paper: FOCUS: 2009 DRC AMNESTY LAW AMNESTY MUST NOT EQUAL IMPUNITY

[24] ICTJ Discussion paper: FOCUS: 2009 DRC AMNESTY LAW AMNESTY MUST NOT EQUAL IMPUNITY
[25]The Accountability Landscape in Eastern DRCAnalysis of the National Legislative and Judicial Response to International Crimes (2009–2014), Sofia Candeias, Luc Côté, Elsa Papageorgiou, and Myriam Raymond-Jetté, July 2015, pp.17-20

levels have to be balanced with transitional justice mechanisms, as the former measures alone cannot meet all the needs of the people for accountability and social cohesion.

Amnesties in South Africa

With the end of apartheid in South Africa in 1995, the country's parliament in July the same year passed the National Unity and Reconciliation Act, aiming "to provide for the investigation and the establishment of as complete a picture as possible of the nature, causes and extent of gross violations of human rights committed during the period from 1 March 1960 to the cut-off date contemplated in the Constitution, within or outside the Republic, emanating from the conflicts of the past, and the fate or whereabouts of the victims of such violations".[26] The Act also establishes a Truth and Reconciliation Commission (TRC)[27] "to promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past",[28] mandated to establish "as complete a picture as possible of the causes, nature and extent of the gross violations of human rights" and "[facilitate] the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective and comply with the requirements of this Act".[29]Article 20 (7)(a) of the Act is stated that "No person who has been granted amnesty in respect of an act, omission or offence shall be criminally or civilly liable in respect of such act, omission or offence and nobody or organization or the State shall be liable, and no person shall be vicariously liable, for any such act, omission or offence"[30]. This system was innovative, as amnesty had been integrated as one of the pillars of a truth and reconciliation process.

The Constitution also provides for a Committee on Amnesty of the TRC to deal with amnesty issues[31]. In this system,"[a]ny person who wishe[d] to apply for amnesty in respect of any act, omission or offence on the grounds that it is an act associated with a political objective", had to submit an application to the TRC[32].This was therefore not a blanket amnesty because even a person who had committed the crimes to which the amnesty applies would not automatically qualify. It was a "conditional" amnesty as it "set the creation of conditions or procedures by which individuals must apply for amnesty and in which prosecuting authorities maintain the power to investigate and prosecute crimes"[33].

- ***Effects on the peace process***

The South African Truth and Reconciliation investigated the 40 years of conflict as provided by its mandate. More than 7,000 perpetrators applied for amnesty according to the PNUR Act[34], among which 4,500 were rejected and 125 amnesties granted by the TRC[35]. In 1998, following the submission of the TRC's report, the South African government assured that it would prosecute persons not eligible to amnesty[36].

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[26]Promotion of National Unity and Reconciliation Act, 1995, No.34 of 1995, Preamble, at http://www.doj.gov.za/trc/legal/act9534.htm
[27]*Ibid*, Art.2(1)
[28]*Ibid*, Art.3(1)
[29]*Ibid*, Art.3(1)(b)
[30]*Ibid*. Art. 20 (7)(a)
[31]*Ibid*. art. 3(3)(b)
[32]*Ibid*, Art.18(1)
[33]ICTJ Discussion paper: FOCUS: 2009 DRC AMNESTY LAW AMNESTY MUST NOT EQUAL IMPUNITY
[34]"Background and Introduction", Traces of Truth – Documents relating to the South African Truth and Reconciliation Commission, University of the Witwatersrand, at http://truth.wwl.wits.ac.za/about.php
[35]"TRC: The facts", BBC News, 30 October 1998, at http://news.bbc.co.uk/1/hi/world/africa/142369.stm
[36]"TRC Category - 5.Aftermath", Traces of Truth – Documents relating to the South African Truth and Reconciliation Commission, University of the Witwatersrand, at http://truth.wwl.wits.ac.za/cat_descr.php?cat=5

However, a notable lack of political will has resulted in the absence of prosecution: on the 800 cases for further investigation and possible prosecution to the National Prosecuting Authority (which had established a special unit for this purpose in 2004), only one or two isolated cases were dealt with and sparked controversy.[37]In May 2002, 33 prisoners were "granted a presidential pardon for their role in the South African freedom struggle"; among them, some had seen their application for amnesty rejected by the TRC.[38] This lead to a general impunity and to a de facto blanket amnesty: even perpetrators who did not benefit the amnesty were not tried.

Finally, not all the truth emerged and the objective to achieve national reconciliation was, as a result, seriously undermined.[39]

- ***Lessons learned***

A strong criminal process was necessary to encourage perpetrators to apply for amnesty. Indeed, according to Jonathan Klaaren and Howard Vamey[40], the threat of prosecution would have encouraged perpetrators to speak and expose the truth in exchange for amnesty: most of the perpetrators knowing that there was no real threat to be prosecuted by the judicial system, did not come up with the truth. Moreover, most of those who spoke to the TRC only gave information that was already known by the investigators and prosecutors and did not say anything about facts they were sure the investigators and prosecutors ignored[41].

Finally, the authors found that the PNUR Act contained details permitting leader of organization to escape the process. Indeed, section 20(6) mentions "sufficient information to identify the act, omission or offence in respect of which amnesty has been granted"[42]. Yet, many leaders or organizations did not know about the specific violations committed by their subordinates and so would not speak given that they were not entitled to amnesty. Furthermore, even when they were sufficiently aware of crimes committed under their command, many leaders would not speak because they feared civil claims and criminal prosecutions against them based on elements they knew about but which were not covered by amnesty.

4. Amnesty in Zimbabwe: Can it Work?

In 2013, Zimbabwe adopted a new Constitution, which establishes a National Peace and Reconciliation Commission (NPRC), with it becoming an Act of Parliament on 18 December 2015. The NPRC has only made very limited achievement so far as the country remained divided on political and ethnic lines. However, with the removal of Mugabe as president in 2017, there are opportunities to reconcile the country. The challenges that ensued the elections of 2018 points at the need for immediate action to be taken to set the country on the right track in strengthening its democratic institutions. Such actions should focus on the need for justice, healing, and reconciliation across the country, with all relevant actors fully integrated into the process.

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[37] *Ibid*

[38] Ross, Joanna. "SA amnesty raises storm", BBC News, 19 May 2002, at http://news.bbc.co.uk/1/hi/world/africa/1997262.stm

[39] "A second bite at the amnesty cherry? Constitutional and policy issues around legislation for a second amnesty ", Jonathan Klaaren and Howard Vamey, in South African Law Journal; 117; 572-593; South African law jounral JUTA; 2000

[40] *Ibid.*

[41] *Ibid*.

[42] Promotion of National Unity and Reconciliation Act, 1995, No.34 of 1995, article 20 (6), available at : https://www.gov.za/sites/default/files/Act34of1995.pdf

The fundamental questions here are (i) what become paramount at this material point in time: peace or justice? (ii) Is amnesty the answer to the challenges that Zimbabwe contends with? (iii) Will amnesty be accepted by the public and can it serve as a remedy? (iv)What are the other options or complementary approaches, should be part of the approaches?

Writing on options for transitional justice, Bryan Sims writes, "The demand for criminal justice is not an absolute but must instead be balanced with the need for peace, democracy, equitable development and the restitution of the rule of law."[43]As such, it is usually very helpful to have sets of approaches that complement each other and seek to comprehensively address crimes committed. For amnesty to be helpful to the search for truth, justice and peace and reconciliation in Zimbabwe, key factors need to be taken into consideration.

Firstly, amnesty laws should be limited temporally and in a geographic scope and should identify specific violations for which perpetrators will not be prosecuted. A definition of these specific crimes must be provided and amnesty should not be automatically granted, as each individual must apply for it while prosecuting authorities maintain the power to independently investigate and prosecute crimes. Thus, the "blanket effect" in relation to the crimes and time periods to which amnesty does apply will be avoided. It is essential for these amnesties to be selective and exclude from their scope those who have committed grave international crimes such as war crimes, crimes against humanity and genocide as well as certain grave violations of human rights impermissible under the customary international law.

Amnesty should further be conditional. If an amnesty is given in a way that ignores the past, it may set the scene for future conflict. Amnesty must then be granted only to persons who make full disclosure of all relevant facts the amnesty covers. In case perpetrators refuse to deliver the full truth, a mechanism should be set aside for amnesty to be revoked. The prosecution must then prove that the perpetrator had the knowledge of violations he or she refused to disclose.

Another condition for applicants to be granted amnesty could be to make a public apology for the acts they have committed, thus contributing to the reconciliation process in Zimbabwe.[44]

Conditional amnesties do have its challenges. In South Africa, conditioned amnesties were unsuccessful to reveal the whole truth, undermining the reconciliation process. This is due to the absence of an effective parallel criminal process threatening those who refused to reveal the truth. [45] However, that should not stop Zimbabwe from granting conditional amnesty. But timing remains an important factor: arguments should be raised in a context where they may be accepted. There are contexts where amnesty will not favor reconciliation.

Is the context in Zimbabwe in favor of such amnesties?

More importantly, Zimbabwe is currently facing a social crisis: building trust is crucial for the Nation's future. Many cases of abuse committed remain unaddressed, among them post-independence abuses, elections related violence and mass human rights abuses in diamond mines. These acts of violence have been erased through the granting of amnesty. In these conditions, amnesty is not perceived as a tool for reconciliation but rather as a tool to protect perpetrators of violations. In Afghanistan, the government prioritized the reconciliation with former combatants and left victims

[43]Sims, Bryan (2008) 'The Question of Amnesty in Post Conflict Zimbabwe', Available at: <https://www.academia.edu/2445282/The_question_of_amnesty_in_post_conflict_Zimbabwe

[44]"Negotiating peace in Sierra Leone: Confronting the justice challenge" PriscillaHayner, p.15

[45]"A second bite at the amnesty cherry? Constitutional and policy issues around legislation for a second amnesty ", Jonathan Klaaren and Howard Vamey, in South African Law Journal; 117; 572-593; South African law jounral JUTA; 2000

of violence without the opportunity to seek justice.[46] As a result, the amnesty law was perceived by the population as a way to reward perpetrators of violations and led to a social division of the country.

The amnesty granted to the party in power (ZANU-PF) supporters in 2000 for their implication in political violence perpetuated the culture of violence in Zimbabwe.[47] Several other national declarations of amnesties in the country benefited perpetrators of gross human rights violations and could then encourage future violations. According to Geoff Feltoe, the practice of amnesty in Zimbabwe "has been partisan and has engendered a culture of impunity".[48]As a result, the country is socially divided, and there is a deep mistrust between communities, individuals and State institutions.

In this context, if an amnesty is to be taken today, it will inevitably be seen as a government-sponsored act of violence and not as a way to restore truth and promote national reconciliation. Balance is thus to be found between the necessity to reveal the truth through amnesties and the need of victims to see perpetrators prosecuted for their crimes. An ICTJ report issued in 2008 showed that most victims prioritize prosecutions, especially when physical and sexual violations are at stake.[49]

Furthermore, choices must be made as to the appropriate balance between amnesty, truth-seeking measures, institutional reform initiatives, and reparations programs, as parts of a whole transitional justice system. The government must prove its goodwill and commitment to truth and reconciliation. In order to do so, the government must engage in a meaningful transitional justice process. These other mechanisms, together with criminal prosecution (at least for the most important violations), will aim at remembering and accounting for the past and at the same time responding to the needs of victims. Once this transitional justice process is initiated, amnesty could be part of it: the inter-relationship between the various mechanisms is fundamental.

The 2013 Constitution set up the National Peace and Reconciliation Commission which is mandated to "ensure post-conflict justice, healing and reconciliation, to develop and implement programs to promote national healing, unity and cohesion in Zimbabwe and the peaceful resolution of disputes, to bring about national reconciliation by encouraging people to tell the truth about the past and facilitating the making of amends and the provision of justice".[50] The authority of this institution must be strengthened so that it can effectively fulfill its tasks.

Finally, and most importantly, before seriously considering amnesty as part of the country's transitional justice journey, the population, civil society organizations should be consulted along with community-based and faith-based organizations, student bodies, churches, academia, independent commissions, donor agencies, traditional leadership, political parties to initiate dialogue around the issue.

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[46]To Forgive and Forget: How Reconciliation and Amnesty Legislation in Afghanistan Forgives War Criminals while Forgetting their Victims Sara L. Carlson ISSN: 2168- **Penn State Journal of Law & International Affairs** Volume 1 | Issue 2, November 2012

[47]Human Rights Watch (2002) Zimbabwe: Fast Track Land Reform in Zimbabwe. *Human Rights Watch*, 14(1A).

[48]Feltoe, Geoff (2004) The Onslaught Against Democracy and Rule of Law in Zimbabwe in 2000. In Harold-Barry, David (ed.) *Zimbabwe: The Past is the Future: Rethinking Land, State and Nation in the Context of Crisis*. Harare: Weaver Press.

[49]International Centre for Transitional Justice (ICTJ). 2008. Southern African Regional Assessment Mission Report Zimbabwe. Unknown: ICTJ. http://m.idasa.org/media/uploads/outputs/files/Transitional%20Justice%20in%20Zimbabwe%20Workshop.pdf

[50]Zimbabwe's Constitution of 2013, section 252

5. Conclusion

The fundamental question that has been examined in the sections above, is whether amnesty works for or against peace in countries in transition from violence to peace. It could be concluded that the answer to the question will largely depend on the context, actors, interests and the sensitivities associated with the peace gained. Amnesty does not work automatically for or against peace, it can either work for peace, but at the same time can also strengthen national divides leading to negative peace and a potential relapse into violence. As was the case in some of the countries mentioned above such as Sierra Leone.

In Zimbabwe, amnesty could be used as a political tool to reveal the truth on the atrocities suffered by victims since the war of independence. Since independence, there has never been any genuine effort to seek the truth. Rather, amnesty has been employed as an instrument for excusing atrocities committed by state actors. Such an approach denies the victims of their rights and needs for justice. Thus, regional and ethnic divides persisted and led to constant tension and upheavals in the country. The paper has assessed the need for a departure from business as usual and the need for a clear examination of the logical and just path that Zimbabwe should take if it is to address violations of the past and to also address the historical legacies of tyranny and usurpation.

It is important to note that an amnesty is a tool, and the outcome of its use will depend heavily on the way it is used. For amnesty to promote reconciliation, its utilization must be conditioned. A clear definition of its geographic and temporal scope, and the crimes it covers must be given beforehand. To comply with Zimbabwe's international obligations and national Constitution, amnesty should not be granted for the most important international crimes committed by state actors. Further, amnesty should only be granted when the perpetrator accepts to reveal the full truth about the acts he or she is accused of. Amnesty is thus a way to reach truth, with the aim of fostering national healing and reconciliation. But as part of this global transitional justice process, choices must be made to balance amnesty with other mechanisms such as truth seeking, criminal prosecution, reparation, and institutional reform.