# Justice Deferred, Not Denied: Balancing Peace and Accountability through Amnesty

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**Abstract**

This essay argues that amnesty as a whole cannot be condemned as inappropriate, but that - when considering case complexities – the utilisation of partial amnesties, alongside other accountability measures, poses as a pragmatic tool to balance both peace and justice within transitional justice efforts. The matter at hand will be initially introduced by an examination and definition of various forms of amnesty. Secondly, the international legal framework involving amnesty, as well as theories around amnesty and accountability will be explored. Lastly, an evaluation of three case studies which employed amnesty to varying degrees within their Truth and Reconciliation Commissions (TRC) constitutes the final body of this work. These cases substantiate the notion that amnesty proves effective and stabilising when applied in a limited manner, as cases of both blanket amnesty and partial amnesty will be examined regarding their success and their ability – or lack thereof – to establish long-lasting peace and afford justice to victims. For the sake of coherence, this essay is limited to TRC-related amnesties only, but recognises the significance of conventional amnesties.

## 1.1. Defining Amnesty

Amnesty is a frequently utilised, integral measure of transitional justice (TJ), and lies often at the forefront of international and national post-conflict responses. To contextualise, TJ represents an intergenerational, complex set of 'judicial and non-judicial'[1] mechanisms, with the aim to delegitimise past oppression[2] and human rights abuse. It may facilitate and accelerate peaceful regime changes, institutional reforms, social reconciliation and stabilisation through

[1] Rachel Kerr and Eirin Mobekk, *Peace and Justice* (1st edn, Polity Press 2013), 3.
[2] Ruti Teitel, 'Editorial Note—Transitional Justice Globalized' (2008) 2 *The International Journal of Transitional Justice*, 1.

multi-dimensional initiatives in post-conflict societies.[3] It is 'critical'[4] for recovery from historical and contemporaneous injustice and consists of retributive and restorative justice measures.[5]

The term "amnesty" commonly refers to 'legal measures adopted by states that have the effect of prospectively barring criminal prosecutions against certain individuals'.[6] In their role of 'extinguishing criminal or civil liability for crimes'[7], amnesties are frequently issued alongside other transitional justice efforts, such as institutional reforms, and play an 'integral part of the political and legal measures adopted by state and international bodies'[8] after a violent conflict. Amnesties may materialise as part of domestic legislation (Spain's 1977 Amnesty Law[9]), an executive decree (Chile's 1978 Amnesty Law[10]), or of peace agreements, as was the case in Mozambique.[11] Additionally, amnesties have often been issued alongside TRCs, which will be the focus of this work.

Traditionally, amnesties have been issued as "unconditional", granting absolute immunity for all criminal acts committed during conflict, or within a designated timeframe.[12] They are often employed by regimes that have committed extensive human rights violations,[13] and may be

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[3] Olivera Simic, (ed) An *Introduction to Transitional Justice* (Routledge 2021), 20-21.
[4] Teitel, (n1), 3.
[5] Simic, (n3), 28-29.
[6] Francesca Lessa and Leigh A. Payne, 'Introduction' in Francesca Lessa and Leigh A. Payne (eds), *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives* (CUP 2012), 4.
[7] Kieran McEvoy and Louise Mallinder, 'Amnesties in Transition: Punishment, Restoration, and the Governance of Mercy' (2012) 39(3) *Journal of Law and Society*, 413.
[8] Tom Hadden 'Transitional Justice and Amnesties' in Cheryl Lawther, Luke Moffett and Dov Jacobs (eds), *Research Handbook on Transitional Justice* (Edward Elgar Publishing 2017), 385.
[9] Ley 46/1977, de 15 de octubre, de amnistía, Boletín Oficial del Estado, 16 October 1977, no 252; Paloma Aguilar 'Justice, Politics and Memory in the Spanish Transition' in Alexandra Barahona de Brito, Carmen González Enríquez, and Paloma Aguilar (eds), *The Politics of Memory and Democratization* (Oxford University Press, 2001), p. 92.
[10] Decreto Ley No 2.191, de 19 de abril de 1978, Diario Oficial de la República de Chile, 20 April 1978.
[11] General Peace Agreement between the Government of the Republic of Mozambique and RENAMO (Rome, 4 October 1992).
[12] Hadden, (n8), 359.
[13] Louise Mallinder, 'Amnesties and Transitional Justice' in Cheryl Lawther and Luke Moffett (eds), *Research Handbook on Transitional Justice* (Edward Elgar Publishing 2023), p.6.

considered ‘particularly egregious’.[14] Generally, blanket amnesties are heavily contested due to their frequent incompatibility with modern human rights standards, an issue that will be explored further in Section 1.2.

“Conditional amnesties” on the other hand are limited, and tied to ‘explicit restrictions’[15] regarding both who, and what crimes, may be protected from criminal investigation or prosecution. In the context of transitional justice, these amnesties may impose conditions such as demilitarisation, truth-telling or reparatory measures.[16] Such conditional amnesties are widely regarded as legitimate.[17] Other amnesties such as formal pardons are outside of the scope of this essay.

### 1.2. Contextualising Amnesty Within Law and Theory

As amnesties – in any form - are often used by political and military powers to, figuratively, “wipe the slate clean” after grave misconduct[18], they pose a complex and contentious issue within international criminal law. This debate was initially triggered by evolving expectations toward international accountability – a concept coined the “Justice Cascade”[19] by Kathryn Sikkink.

The Nuremberg Trials marked a pivotal moment for the prosecution of grave human rights violations.[20] In the decades that followed, they contributed to a 'rapid and dramatic shift in the legitimacy of the norms of individual criminal accountability',[21] as responsibility for such violations increasingly extended beyond states to individuals. International advocacy

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[14] Mark Freeman, *Necessary Evils: Amnesties and the Search for Justice* (Cambridge University Press 2010), p. 152.
[15] Mallinder, (n13), 6.
[16] Hadden, (n17), 359.
[17] Ibid, 368-373.
[18] Mallinder (n15), 5.
[19] Ellen Lutz and Kathryn Sikkink, ‘The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America’ (2001) 2(1) *Chicago Journal of International Law*, 3.
[20]Kathryn Sikkink and Hun Joon Kim ‘The Justice Cascade: The Origins and Effectiveness of Prosecutions of Human Rights Violations’ in *Annual Review of Law and Social Science*, 2013, 271.
[21] Ibid, 270.

promoting the legitimacy of human rights, and the principle of individual liability for prosecution of serious human rights violations, was cultivated.[22] Likewise, 'international and regional action to effect compliance with those norms'[23] developed. Since the 1970s, the Justice Cascade has globally steered toward norms of international accountability[24], and a 'trend of a growing entrenchment and institutionalisation of the norms and mechanisms of transitional justice'[25] has been established. Little has signalled the international interest in holding political leaders 'criminally accountable for past human rights violations'[26] more than the establishment of the Rome Statute[27], and subsequently, that of the International Criminal Court (ICC). As they explicitly affirm a state's duty to prosecute human rights violations, and through this, deny impunity[28], both international and domestic justice systems have followed suit, contributing to the growing recognition and institutionalisation of accountability as international customary norm[29] through various legal instruments and international pressure to comply with obligations and human rights standards.

Prompted by the Justice Cascade, the international perception and applications of amnesty within post-conflict societies have shifted[30], from 'broader to more tailored, […] from laws with no reference to international law to those which explicitly try to stay within its strictures'.[31] As human rights gain international priority, their protection has become

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[22] Ibid, 271.
[23] Lutz and Sikkink, (n19), 4.
[24] Jeffrey D Pugh, 'Eroding the Barrier between Peace and Justice: Transitional Justice Mechanisms and Sustainable Peace' (2019) 1 (3) *International Journal of Peace Studies 24*, 3.
[25] Teitel, (n4), 3.
[26] Sikkink and Kim, (n20), 269.
[27] Rome Statute of the International Criminal Court, 17 July 1998, entered into force 1 July 2002.
[28] Francesca Lessa et al, 'Overcoming Impunity: Pathways to Accountability in Latin America' (2014) 8(1) *International Journal of Transitional Justice 75*, 91–92.
[29] Diane F Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' (1991) 100(8) *Yale Law Journal*, 2585.
[30] Naomi Roht-Arriaza, 'The Multiple Prosecutions of Augusto Pinochet' in Ellen L Lutz and Caitlin Reiger (eds), *Prosecuting Heads of State* (Cambridge University Press, 2000) 77- 78.
[31] Naomi Roht-Arriaza and Lauren Gibson, 'The Developing Jurisprudence on Amnesty' (1998) 20(4) *Human Rights Quarterly*, 884.

'increasingly codified'[32] within an international legal framework of treaties and conventions, directly affecting the possibility for amnesty. Most significant in this framework are the ICC, a permanent international tribunal which was established in July 2002[33], and the Rome Statute. The Preamble to the Rome Statute[34] of the ICC unambiguously emphasises that grave human rights violations (e.g. torture, war crimes, crimes against humanity) are international crimes that 'must not go unpunished, and that their effective prosecution must be ensured'.[35] This reflects the desire of emerging customary international law[36] to put an 'end to impunity'[37], and renders amnesty for such crimes illegitimate. While the ICC declares that the relevant state is obligated to act on such crimes, it is the ICC's mandate to both investigate and prosecute individuals if states fail[38] to do so themselves due to inability or refusal.[39] Through its complimentary, rather than primary role, in prosecuting grave human rights offenders, the ICC is often considered as 'the last resort'[40] when a society is confronted with grave international crimes. Alongside the Rome Statute, a multitude of international conventions and authoritative non-governmental organisations do not recognise amnesties that violate the convention's obligations[41], and explicitly impose a duty to investigate, and prosecute human rights abuses.

[32] Simic, (n5), 61.
[33]Joanna R Quinn, 'The Development of Transitional Justice' in Cheryl Lawther, Luke Moffett and Dov Jacobs (eds), *Research Handbook on Transitional Justice* (Edward Elgar 2017), 18.
[34] Rome Statute, (n27), para. 4, 5.
[35] Ibid.
[36] Jessica Gavron, 'Amnesties in the Light of Developments in International Law and the Establishment of the International Criminal Court' (2002) 51 *International and Comparative Law Quarterly* 91-93.
[37] Simic, (n32), 24.
[38] Rome Statute, (n35), arts. 17, 27.
[39] Sikkink and Kim, (n26), 272.
[40] Quinn, (n33), 18.
[41] Michael Scharf, 'The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes' (1996) 59(4) *Law and Contemporary Problems*, 41.

Examples include the Geneva Conventions[42], the American Convention of Human Rights (ACHR)[43] as well as various United Nation Reports[44], Principles[45] and Resolutions.[46]

This international legal framework marks the concept of amnesty, its possibilities, and its limitations, a 'complex and divisive'[47] issue, and leaves its position somewhat contested. On the one hand, many scholars assert that international regulatory bodies and treaties explicitly designate unconditional amnesty for serious human rights violations *prima facie* illegitimate, and that states have a duty to prosecute those most responsible.[48] Meanwhile others argue that, depending on the convention, such obligations in practice 'maintain a measure of flexibility'.[49] Furthermore, scholars note that due to the restricted definition of crimes against humanity and war crimes within the Rome Statute[50], national authorities may 'justify'[51] amnesty for such crimes if they do not meet the specific criteria.[52]

Alongside these aforementioned legal complexities regarding amnesty and its scope, discussions about the 'duty to investigate' and the 'duty to prosecute' are frequent. Legal analysts debate to what extent these duties are anchored within the international law[53], and how

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[42] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31, art 49; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85, art 50; Geneva Convention (III) relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135, art 129; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287, art 146.
[43] *American Convention on Human Rights* (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123, arts. 4, 5, 8, 25.
[44] United Nations Secretary-General, *The rule of law and transitional justice in conflict and post-conflict societies*, UN Doc S/2004/616 (23 August 2004), para. 64 (c), 65.
[45] Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, UN Doc E/CN.4/2005/102/Add 1, Principles 19, 20, 27.
[46] UN Security Council, *Resolution 1580 (2004)*, UN Doc S/RES/1580 (22 January 2004).
[47] Freeman (n14), 1.
[48] Hadden (n16), 370.
[49] Ibid.
[50] Rome Statute, (n38), art 7 (1), 8 (1).
[51] Hadden, (n48), 368.
[52] Ibid, 368-370.
[53] Orentlicher (n29), 2551.

they may affect a state's ability to grant amnesty.[54] Gross violations of human rights, war crimes, and crimes against humanity are explicitly linked to an 'absolute'[55] duty to both investigate and prosecute under the Geneva Conventions[56], the Genocide Convention[57], and the CAT[58]. This undoubtedly renders potential amnesties for such crimes as 'inconsistent with state obligations under numerous ratified treaties and UN policy'.[59] Likewise, court rulings may provide insight into the degree to which investigative duties can be infringed upon by amnesties, as demonstrated by IACtHR[60] and ECtHR rulings[61], which sought to clarify that amnesty laws that obstruct effective investigations violate Article 2 of the European Convention of Human Rights.[62] However, most significantly, some legal instruments, such as the ICCPR[63], leave prosecutorial obligations up to interpretation[64] or great limitation[65], which, in turn, leaves room for the establishment of conditional amnesties regarding certain crimes.[66]

A socio-legal theory that considers the positive potential of amnesty is Louise Mallinder's approach to amnesty as a measure of "mercy".[67] It attempts to reframe[68] amnesty from a denial of justice and a means to simply grant impunity for violators, to a positive tool of peace facilitation. Granting conditional amnesty may allow for stability and serve as a tool to 'prevent

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[54] Ibid.
[55] Scharf, (n41), 44.
[56] GC I (1949) 75 UNTS 31, art 49; GC II (1949) 75 UNTS 85, art 50; GC III (1949) 75 UNTS 135, art 129; GC IV (1949) 75 UNTS 287, art 146.
[57] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 art 4.
[58] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1465 UNTS 85 (entered into force 26 June 1987) art 5,7.
[59] Simic, (n37), 165.
[60] *Velásquez Rodríguez v Honduras* (Inter-American Court of Human Rights, Judgment of 29 July 1988) Series C No 4.
[61] ECtHR, *McCann and Others v United Kingdom* (1995) GC, Application No. 18984/91; ECtHR, *Jordan v United Kingdom* (2001), Application no. 24746/94.
[62] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) ETS 5, art 2.
[63] The International Covenant on Civil and Political Rights (entered into force 23 Mar. 1976): 999 UNTS 171 (hereafter, ICCPR).
[64] Orentlicher, (n53), 2551.
[65] Scharf, (n55), 44-46.
[66] Simic, (n59), 173.
[67] Mallinder, (n18), 5.
[68] Ibid.

harm [and] provide a remedy for victims'.[69] Mallinder asserts that a general dismissal of amnesty and the prioritising of prosecution over peace, regardless of circumstance, may lead to prolonged struggle.[70] However, she clarifies that amnesties must not apply to grave human rights violations, and stresses the importance of balance when applying amnesty in order to not forgo a victim's right to justice.[71] When amnesties are conditional, they may enhance the 'rule of law, strengthen justice norms and assist with broader processes of social and communal' healing.[72] In short, Mallinder's theory does not aim to deny the existence of a crime or abuse, but rather interprets amnesty as a humanitarian measure toward post-conflict peace and stability'.[73]

### 2.1. Unconditional Amnesty

The concept of unconditional amnesty, especially regarding human rights abuse, is deemed illegitimate by international legal instruments, which condemn and deny its application. To contextualise the immediate and lasting impact of blanket amnesty in practice, two cases of initial unconditional amnesty will be examined in this section, Sierra-Leone and El Salvador. Particularly, points of contention, such as its lack of accountability, lack of justice for victims, and its antithetical nature to international law will be evaluated.

In Sierra Leone, a blanket amnesty was issued in 1999 as part of the Lomé Peace Agreement[74] (LPA) and was considered 'highly controversial'[75], as it protected all combatants from criminal prosecution. Due to this lack of accountability for perpetrators, and their immediate reclaim to positions of power, violent military activity did not entirely cease. This suggests that

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[69] Ibid.
[70] Ibid, 16-18.
[71] McEvoy and Mallinder, (n7), 425.
[72] Ibid, 427-428.
[73] Ibid, 414.
[74] P*eace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (Lomé Peace Agreement)* (signed 7 July 1999), art. XI.
[75] Laura Stovel *Long Road Home: Building Reconciliation and Trust in Post-War Sierra Leone* (Intersentia 2010), p. 169.

prioritising immediate peace through blanket amnesty did not necessarily secure durable peace or meaningful accountability. Sierra Leonean 'social structures [remained] unsettled and public faith in the solidity of the peace [was] undermined'.[76] This highlights unconditional amnesty's potential to 'undermine the legitimacy of a new government and breed cynicism toward civilian institutions'[77], as well as foster resentment within victimised communities.[78] Furthermore, the amnesty provision within the LPA drew substantial international criticism[79] and was not recognised by international bodies such as the United Nations[80]. To make the amnesty, and lack of justice, more palatable to the people of Sierra Leone, a TRC[81] was established alongside it[82], aiming to provide some sense of accountability through restorative TJ measures.[83] The Sierra Leone Truth and Reconciliation Commission (SLTRC) initiated forums for victims, promoted traditional reconciliation practices, 'religious cooperation'[84], acceptance, and forgiveness, as well as establishing an extensive record of committed atrocities.[85]

Paradoxically, in El Salvador, impunity was implemented as a result of the establishment of a Truth Commission.[86] During its civil war[87], most 'human rights abuses centred around the violent terror shown toward civilians'[88], enacted through horrific slaughter, such as the El Mozote massacre.[89] The global community was outraged by such grave violations and called

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[76] Simic, (n66), 87.
[77] Orentlicher, (n64), 2543.
[78] Jeff Spinner-Halev, 'From Historical to Enduring Injustice' (2007) 35 *Political Theory*, 574.
[79] Stovel, (75), 37.
[80] Seventh Report of the Secretary-General on the United Nations Observer Mission in Sierra Leone', 30 July 1999, UN Doc S/1999/836 [54].
[81] Truth and Reconciliation Commission Act 2000 (Sierra Leone), Act No 4 of 2000, s. 6 (1).
[82] Stovel, (n79), 188.
[83] Ibid, 45.
[84] Ibid, 59.
[85] Simic, (n76), 87-88.
[86] Quinn, (n40), 24.
[87] 'Digging for Justice; Human Rights in El Salvador' (The Economist, London, vol 418, Economist Intelligence Unit N.A. Inc 2016), 165.
[88] Pugh, (n24), 12.
[89] Cath Collins, 'Grounding Global Justice: International Networks and Domestic Human Rights Accountability in Chile and El Salvador' (2006) 38(4) *Journal of Latin American Studies*, 268.

for an end of conflict.[90] As a result of this international pressure, the UN founded the Commission on the Truth for El Salvador[91] – part of the Chapultepec Peace Accord (1992) – to create a historical record of events, tackle social injustice and ascribe responsibility.[92] The Truth Commission's final report[93] contained explicit information regarding massacres, tortures and other grave human rights violations, naming perpetrators directly[94], and recommending 'the investigation and removal of the military officers responsible'.[95] However, upon these findings, the General Amnesty Law for the Consolidation of Peace[96] was issued, a blanket amnesty that completely undermined the TC, and effectively protected the ruling elite and military from repercussions.[97] This impunity allowed victimisers to 'remain in place'[98] and to re-establish authoritarian measures.[99] Furthermore, the General Amnesty Law was distinctly dismissive of victims[100] and their right to remedy[101], substantiating critic's claims that unconditional amnesty 'silence[s] crimes and protect[s] the perpetrators'[102], perpetuates violence and instability, and is an explicitly harmful[103] rejection of truth and justice.[104]

While impunity hindered the pursuit of justice, public trust and institutional reform[105], both countries' unconditional amnesties were eventually overturned[106] due to international pressure

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[90] Priscilla B Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (2nd edn, Routledge 2010), 91.
[91] *Chapultepec Peace Agreement* (signed 16 January 1992) art 5.
[92] Quinn, (n86), 29; Pugh, (n88), 14.
[93] United Nations, *From Madness to Hope: The 12-Year War in El Salvador: Report of the Commission on the Truth for El Salvador* (United Nations 1993).
[94] The Economist, (n87), 156-66.
[95] Pugh, (92), 12.
[96] *Ley de Amnistía General para la Consolidación de la Paz* (*General Amnesty Law for the Consolidation of Peace)* (No 486, 20 March 1993, published in *Diario Oficial* No 56, Vol 318, 22 March 1993).
[97] The Economist, (n94), 165.
[98] Emily Braid and Naomi Roht-Arriaza, 'De Facto and De Jure Amnesty Laws: The Central American Case', in *Amnesty in the Age of Human Rights Accountability*. Cambridge University Press, 184.
[99] Simic, (n85), 26.
[100] McEvoy and Mallinder, (n73), 430.
[101] Simic, (n99), 165.
[102] Ibid, 159.
[103] Orentlicher, (n77), 2544.
[104] Simic, (n101), 159.
[105] Spinner, (n78), 574.
[106] Sikkink and Kim (n39), 277-278.

and domestic advocacy. These decisions highlight the inevitable failure to achieve a balance of peace and justice under blanket amnesty, as well as its incompatibility with international law.

Within Sierra Leone, the denunciation of its blanket amnesty was facilitated by the Special Court for Sierra Leone (SCSL)[107] in 2002, a cooperation[108] between the UN and the Sierra Leonean government, initiated by Sierra Leone following extensive domestic campaigning for justice.[109] The Statute of the SCSL explicitly rejects the previously granted amnesty under the LPA[110], and aims to 'prosecute those who bear the greatest responsibility for serious violations of international humanitarian law during the war'[111] which it achieved with relative success, limited by administrative and financial issues.[112] The SCSL's most significant achievement was the conviction of Liberian President Charles Taylor for aiding and abetting crimes against humanity and war crimes.[113]

In El Salvador, the General Amnesty Law was eventually overturned in 2016[114], as the Constitutional Chamber of the Supreme Court of Justice declared the law unconstitutional.[115] This was a consequence of the IACHR[116] and IACtHR's[117] verdict that amnesty for serious human rights violations was incompatible with the ACHR[118], an action hastened by the pleas

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[107] *Statute of the Special Court for Sierra Leone* (16 January 2002) 2178 UNTS 145, arts. 2, 4, 10.
[108] *Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone* (signed 16 January 2002, entered into force 12 April 2002) 2178 UNTS 137.
[109] Stovel, (n82), 191.
[110] *Statute of the Special Court for Sierra Leone*, (n107), arts. 2, 4, 10.
[111] Charles C Jalloh, 'Special Court for Sierra Leone; achieving justice?' (2011) 32(3) *Michigan Journal of International Law,* 399.
[112] Simic, (n104), 87.
[113] *Prosecutor v Charles Ghankay Taylor* (SCSL-03-01-T, Trial Judgment, 26 April 2012).
[114] McEvoy and Mallinder, (n100), 165.
[115] *Constitutional Chamber of the Supreme Court of El Salvador*, *Judgment No. 185-2016* (13 July 2016).
[116] IACHR, *Report on the Situation of Human Rights in El Salvador* (2000), OEA/Ser.L/V/II.111 Doc. 3 rev, para 223.
[117] *Massacres of El Mozote and Nearby Places v El Salvador* (Merits, Reparations and Costs) IACtHR Series C No 252 (25 October 2012).
[118] Scharf, (n65), 51.

of victims. This long-awaited annulment 'ultimately led to unprecedented levels of accountability for very high-level officials and officers'.[119]

The blanket amnesties granted in Sierra Leone and El Salvador created a glaring deficit in justice, significant resentment within opposing communities, and deepened socio-economic trauma.[120] Public need for accountability, healing, and institutional reform was great, but the eventual Special Court of Sierra Leone and the annulment of the General Amnesty Law were severely overdue.[121] Momentum for reform and justice had diminished, and many victims prioritised closure and rebuilding over chasing possible justice.[122] Simultaneously, any remaining expectations of accountability were unreasonably high due to both governments prior failures to deliver justice, combat disorder, and facilitate reconciliation, which led to heightened international and domestic pressure on the SCSL, the SLTRC and El Salvador's TC. Therefore, it can be argued that blanket amnesty considerably undermined any subsequent transitional justice measures, whilst also indirectly adding significant pressure on the justice mechanisms once they were eventually established. These issues were further exacerbated by both countries' defunct justice systems, overlapping directives within the SCSL and SLTRC, and underfunding. In both cases blanket amnesty prioritised short-term political stability over justice, significantly eroded public trust in official institutions and amplified socio-economic collapse. Through this, it likely impacted any successive transitional justice mechanisms and their potential success negatively. It is likely that if TJ measures had been more strategically and timely implemented, potential for change, reform and civil engagement would have been greater, as 'hybrid TJ mechanisms tend to work better than either punitive or restorative

[119] Pugh, (n95), 12.
[120] Braid and Roht-Arriaza, (n98), 183.
[121] Stovel, (n82), 241.
[122] Simic, (n112), 88.

mechanisms alone'.[123] In short, while both countries were somewhat successful[124] in maintaining the TJ goal of peace[125], the prevention of impunity is 'crucial to achieving reconciliation, […] ending human rights abuses and providing justice to victims'.[126]

### 3.1. Conditional Amnesty

While impunity for grave human rights violations is legally untenable, conditional amnesties can be both lawful and stabilising after conflict. This section aims to conduct a nuanced evaluation of the potential opportunities and constraints of conditional amnesty by examining the South African TRC. Furthermore, it argues that conditional amnesty – when tied to restorative accountability measures – presents a pragmatic approach to achieving reconciliation, forgiveness and long-lasting peace.

Some scholars[127] claim that the pursuit of full-scale prosecution may intensify conflict in the face of retribution, and 'sustain communal antagonism'.[128] While this theory is contested[129], 'amnesties can in some circumstances contribute positively to peace'.[130] When new regimes are still 'fragile'[131], politically charged trials may be unaffordable, destabilising[132], and could retraumatise victims.[133] Instead, conditional amnesties may encourage initial stability and pacify state security forces, allowing for disarmament[134] and other TJ measures to take effect

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[123] Pugh, (n119), 18.
[124] Yinka Olomojobi, Olajumoke Yacob-Haliso and Bolaji Alabi, 'The Effectiveness of the Special Court for Sierra Leone as a Transitional Justice Mechanism for Post Conflict Stability' (2019) 7(2) *International Journal of Social Science and Humanities Research*, p. 1374.
[125]Nevin T Aiken, *Identity, Reconciliation and Transitional Justice, Overcoming Intractability in Divided Societies* (Routledge, 2013), 18.
[126] Simic, (n122), 28.
[127] Mallinder (n69); McEvoy and Mallinder (n114).
[128] Hadden, (n52), 366
[129] Sikkink and Kim, (n106), 280.
[130] Mallinder, (n127), 4.
[131] Roht-Arriaza and Gibson, (n31), 510.
[132] Orentlicher, (n103), 2569.
[133] Simic, (n126), 82.
[134] Hadden, (n128), 362.

and potentially facilitate justice.[135] Conditions that are 'designed to fulfil victims' rights'[136], such as amnesty for low-level perpetrators only, and in response to publicly acknowledging guilt and attending re-education programs, may present a form of 'alternative punishment'[137] and justice for victims, leading to reconciliation[138] and an end of violence.[139]

One of the most prominent examples of conditional amnesty combined with accountability measures was the South African TRC process, established post-Apartheid through the Promotion of National Unity and Reconciliation Act (1995).[140] Its goal was to paint 'as complete a picture as possible of the causes, nature and extent of the gross violations of human rights which were committed'.[141] The TRC utilised conditional amnesty as an 'essential element'[142] of its process and the creation of a 'common narrative'[143], as it was applicable to all, in exchange for full disclosure of events and political motives.[144] This process was crucial for the healing of both victims and broader society[145], and the conditional amnesty - partnered with its 'humanizing approach to justice and reconciliation'[146] - allowed the TRC 'to obtain more truth than would have been possible without'[147] it, as perpetrators did not fear incrimination.[148] Furthermore, the TRC addressed racial and historical injustice by employing an inclusive[149] set of accountability measures, such as reparations, moral distinctions between

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[135] Geoff Dancy et al., 'Behind Bars and Bargains: New Findings on Transitional Justice in Emerging Democracies' (2019) 63(1) *International Studies Quarterly*, 100-101.
[136] Mallinder, (n130), 20.
[137] Kathleen Daly, 'Revisiting the Relationship between Retributive and Restorative Justice' in H Strang and J Braithwaite (eds), *Restorative Justice: From Philosophy to Practice* (2000), 36.
[138] Orentlicher, (n132), 2550.
[139] Stephen Winter, *Transitional Justice in Established Democracies: A Political Theory* (Macmillan, 2014), 225.
[140] Promotion of National Unity and Reconciliation Act 34 of 1995 (South Africa) section 20.
[141] Ibid, art. 3.1.
[142] Hadden, (n134), 364.
[143] Elazar Barkan, *The Guilt of Nations: Restitution and Negotiating Historical Injustices* (University Press, 2000), 19.
[144] Quinn, (n92), 21.
[145] McEvoy and Mallinder, (n127), 435.
[146] Stovel, (n121), 41.
[147] Mallinder, (n136), 11.
[148] Hadden, (n142), 365.
[149] Simic, (n133), 23; Diane, (n138), 253.

oppressed and oppressor[150], and social reforms, to offset 'the potential "justice deficit" caused by the granting of conditional amnesties to perpetrators'.[151] The TRC demonstrated that successful 'punishment need not [always] take the form of incarceration'[152], but rather that incorporating holistic strategies of both restorative and retributive justice[153]are 'more effective in improving democracy and human rights practices than either amnesty or trials alone'.[154] Thus, an inclusive, multi-layered system of TJ measures, including conditional amnesty, shows the greatest potential for long-lasting stability, as clear distinctions between societies with conditional amnesty compared to those who practiced impunity can be observed.[155] However, conditional amnesty does present room for justice evasion, and should be assessed critically, on a case-by-case basis. Amnesty should always be conditional[156], as a successful restructuring of society toward peace after conflict requires the facilitation of justice to some extent.[157]

**Conclusion**

To conclude, the examination of both the international legal framework and the above case studies reinforces that amnesty cannot generally be condemned or acclaimed, and a nuanced and context-specific approach is necessary. Blanket amnesty toward gross human rights violations is *prima facie* illegitimate and morally problematic, and here, the assessed statement may ring true. However, full-scale prosecutions are neither viable post-conflict nor efficient long-term. Consequently, this essay argues that amnesty, when tied to expectations and limitations, presents as a viable resolution that combines both peace and justice. Within the

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[150] James L Gibson, 'The Contributions of Truth to Reconciliation: Lessons from South Africa' (2006) 50(3) *Journal of Conflict Resolution* 409.
[151] Nevin T Aiken, 'Post-Conflict Peacebuilding and the Politics of Identity: Insights for Restoration and Reconciliation in Transitional Justice' (2008) 40 (2) *Peace Research*, 185.
[152] Roht-Arriaza and Gibson, (n131), 509.
[153]United Nations Secretary-General, *Ninth Report of the Secretary-General on the United Nations Mission in Sierra Leone* (16 March 2001) UN Doc S/2001/228, art. 26..
[154] Pugh, (n123), 5.
[155] Kathryn Sikkink and Carrie Booth Walling, 'The Impact of Human Rights Trials in Latin America' (2007) 44(4) *Journal of Peace Research* 442.
[156] McEvoy and Mallinder, (n145), 22-23.
[157] UN Security Council, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary General, S/2004/616 (23 August 2004).

legal framework, conditional amnesty, in its practice of forgiveness alongside various accountability mechanisms, is a pragmatic tool to achieve such balance.