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Recommended Citation

Mendez, Juan E. and Meintjes, Garth, "Reconciling Amnesties with Universal Jurisdiction - A Reply to Mr. Phenyo Keiseng Rakate" (2001). *Articles in Law Reviews & Other Academic Journals*. 1687.
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Reconciling Amnesties with Universal Jurisdiction – A Reply to Mr. Phenyo Keiseng Rakate

GARTH MEINTJES AND JUAN MÉNDEZ*

Our article published in your previous volume has drawn a critical response from Mr. Rakate for failing to explain why we believe the South African amnesty process satisfies the requirements of international law. The criticism perhaps would be justified if we had made such a claim, however we did not. The criticism is based on a misreading of a single sentence that ignores the context and focus of our argument.

The offending sentence in our article is the claim that “The South African case is a *significant step* in the evolution of domestic *efforts* to deal with the past in a manner that satisfies the requirements of international law.”¹ As indicated by the italicized words, we simply acknowledge that South Africa appears to have done more than most states have done before it in its attempt to deal with the past in an internationally acceptable manner. When read in the context of our brief overview of the various ways in which states have attempted to deal with the past, it is easy to see that South Africa has avoided some of the completely unacceptable responses, such as simply burying the past or granting a blanket amnesty.

The focus of our argument, stated in the section preceding this sentence, is that reconciling amnesties with universal jurisdiction requires a two step process. In the first instance, “We believe the inquiry into whether a state’s treatment of its past satisfies the expectations of the international community should *start* with an examination of the general efforts towards accountability implemented at the national level.”² However we go on immediately to state that, “as illustrated by the Rome Statute’s treatment of the issue of complementarity, *it will also be necessary* to examine the particularities of each individual case to determine whether the international community’s expectations regarding individual accountability have been met.”³

The aim of our article was not to provide a judgement about whether South Africa has in fact satisfied the international community in the way that it dealt with its past, although we did provide a citation reference to a scholar who does. Indeed, as we noted in our description of the general considerations influencing a judgement about the merits of the South African approach, it would be a mistake

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¹ Garth Meintjes and Juan E. Méndez, “Reconciling Amnesties with Universal Jurisdiction”, 2 *International Law FORUM du droit international* 75, 88 (2000) (italicization added).

² *Id.* at 84 (italicization added).

³ *Id.* (italicization added).

to pass any final judgements on the success or failure of the South African approach. Not only would this be premature, since the work of the Commission has not yet ended with the issuing of its report, but it also would be unduly speculative, since much will depend on how the new government will build upon the foundations laid. In particular, the integrity of the process will depend on how firm the new government remains in its commitment to prosecute those who did not apply for amnesty.⁴

Mr. Rakate's criticism also implies that we ignored the fact that apartheid is a crime against humanity. In truth, our analysis of the evolving principles of accountability is directed towards the very opposite result. For example, we commended the South African approach as having held "the promise of being able to uncover the full scope of the widespread and systematic crimes of both the former government and its opponents."⁵ We also noted that "If it had worked as had been hoped, it may well have demonstrated that the apartheid regime not only was filled with criminals, but that it was by its very nature also a criminal regime."⁶ In addition, we clearly expressed the belief that international law requires that any set of amnesty criteria must provide for the exclusion of crimes against humanity from the list of amnestiable offenses.⁷

As for Mr. Rakate's claim that the South African Truth and Reconciliation Commission (TRC) was totally unsatisfactory, we believe that the process deserves a more carefully reasoned evaluation. For example, when compared to other truth commissions elsewhere, the TRC's investigations covered a wider scope of human rights abuses and probed deeper into the causes and circumstances of such events. In fact, no other truth commission has ever had the power to compel the participation of perpetrators through the issuing of subpoenas or the offering of individualized amnesties. For many victims these hearings presented the first real opportunity to face and cross-examine their abusers.

Moreover, when evaluating a country's transitional justice efforts, it is a mistake to view the work of a truth commission in isolation to other accountability measures. For example, while Mr. Rakate is essentially correct in criticizing the inadequacy of the compensation given to victims, it should be recognized that the TRC was only mandated to make recommendations to the President concerning reparations for victims.⁸ Accordingly, the recommendations contained in the TRC's report provide for significant amounts of victim compensation, but await implementation by the

⁴ *Id.* at 92.

⁵ *Id.* at 91.

⁶ *Id.*

⁷ *Id.* at 97.

⁸ Promotion of National Unity and Reconciliation Act 34 of 1995, Section 4(f)(i) (S. Afr.).

government.⁹ It is therefore wrong to criticize the TRC for giving nothing to victims. If there is any blame to be placed in this regard, then it should be laid at the feet of the government.

Finally, to the extent that Mr. Rakate implies that the South African transition is an example of impunity for the past, we strongly disagree. The amnesties that were granted were individualized and conditional, and were not intended to apply to international or foreign crimes. With the exception of Adriaan Vlok, the former minister of law and order, none of the political leadership who may be responsible for the crime of apartheid or other crimes against humanity either applied for or received amnesty. To the extent that evidence of their criminal activities can be uncovered, they should and can – subject to the principle of legality – be prosecuted either domestically or abroad. In short, while they may not yet have been punished, they certainly have not been forgiven. Like Nazi war criminals, they do not enjoy the assurance of a legal oblivion for their criminal pasts.

⁹ See Truth and Reconciliation Commission of South Africa Report, Volume 5 Chapter 5, October 1998.