

## TRUTH AND RECONCILIATION COMMISSIONS

Interview with  
Salomón Lerner\*

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**What does it mean for society when a country realizes that it needs a truth commission?**

The creation of a truth commission in any society implies the existence of a drama and intimate misfortune which deserves, in some measure, to be brought into the open. But first of all, the creation of a truth commission is the start of a realization that in the country there is a living society which is the protagonist of its own history, and that that history is relatively unknown and demands an examination of the past such that the identity of the nation and the foundations of its future development can be assured. A commission is created because there is something

\* The interview was conducted on 10 April 2006 in Lima by Professor Elizabeth Salmón of the Editorial Board of the *International Review of the Red Cross*, and Philippe Gaillard, head of the ICRC delegation in Peru.

that cannot be assimilated by our memory, because in a given society there is a need to investigate that past. I would say, finally, that it is necessary to examine the evidence so that the history that we are used to believing is what was in fact experienced by society and can, therefore, be accepted.

***The effectiveness of a truth commission depends on the existence of a demand for justice, not only by the victims but by society as a whole. To what extent is a commission more effective if there is social consensus on the need to create one?***

It's obvious that the consistency of the work that a truth commission can carry out derives from the need felt by the whole of society, which demands some sort of justice through a reliable recollection of what happened, and not simply by those who were victims. The truth commission is not a complete way of compensating the victims. It is rather a way to start the compensation process, something which aims to re-establish the true historical and social identity of a people that, presumably, has strayed from the straight and narrow. From that perspective, I believe that truth commissions strengthen their legitimacy when they derive from a sense shared by all and are not just a response to demands for truth and justice from those who were direct victims of abuse.

It is difficult to create a truth commission solely as a response to demands from victims. Truth commissions arise from an experience shared by society, when the victims include not only those who were directly affected, when the whole of society has been traumatized and the course of normal life has been significantly altered. It is a duty, therefore, of those who govern the nation and those who have responsibility for the country's progress to accept this demand to examine the past and respond not only to the victims but to the whole of society, which has also been wounded. You cannot say that a society is living normally when one sector of it has had its fundamental rights violated and there has never been any investigation into those events or any relevant conclusions drawn from them.

***Speaking of the concept of truth, does a truth commission discover the truth, demonstrate it or construct it? And does this have anything to do with the phenomenological assertion that it is never possible to arrive objectively at the truth through claims?***

That's an interesting problem from the point of view of philosophy, and also that of actual experience. If we stick to the notion of pure, categorical truth – the idea that has been accepted for more than two thousand years of Western thought – as agreement between what somebody says and the purpose of the person who speaks, a correspondence between something that is believed and that about which we think, I believe we will never fully understand the 'truth' which a 'truth commission' seeks.

It is not a case – and this has been demonstrated very clearly by the Peruvian Truth and Reconciliation Commission – of simply investigating objective, measurable, quantifiable facts that occurred at a given place and can be established as having done so at a given time. There is perhaps a richer sense of

truth, which you described as a phenomenological concept of truth, if that is how we understand a process of discovery, of drawing aside a veil and therefore of exploring the sense, the meanings of human actions. Those are reasoned and voluntary acts which bring into consideration the fields of values and morality.

***How does morality affect the work of truth commissions?***

Truth commissions are created not to confront the brutal acts of nature but acts for which there are motives, decisions and ethical options that place us in the terrain of good and of evil. From that perspective, a truth commission plays its part not only in the field of scientific truths – although these are also essential – but rather in the field of meaningful actions, actions that can only be carried out by men and which consequently have a moral relevance. As I understand it, such a commission is required to have an ethical standpoint that can judge conduct in relation to principles that have been violated and upon which is built not only the destiny of each individual but also the coherence and health of society as a whole. This is the sense, if we want a personification of truth (what the Greeks called *aletheia*) that should be assumed to provide the purpose and reason for the existence of truth commissions and the work they do. At least, that is how the members of Peru's Truth Commission understood the situation.

***To what point is the truth, as you understand it, construed?***

This is a legitimate question. We have spoken of interpretation, and anyone who speaks of interpretation speaks of someone who adds something of his own. I would say that if the interpretation is carried out as a function of certain moral parameters and is also anchored in proven facts, if the truth thus exposed is open and susceptible to later enrichment, if, in fact, we are not making an incontrovertible, dogmatic statement, then we have a version of the truth that I consider satisfactory. It reveals the sense of human actions as a function of behaviour which has to be moral. It starts from an open reading of scientifically established facts and interpretations that can complement this sort of endless search for a truth, which, as we know, will never be complete.

***How does this concept of truth relate to justice?***

The way we experienced it, it is an intimate relationship in that we assumed the truth as I have just described it to be the first step towards justice. In effect, the attempt to make sense of different behaviours, the authenticity with which participants in the process gave their testimony, an understanding also of what the perpetrators' motives could have been and of the injustice of the violations, these were the beginnings of justice for the victims and, I would say, for the perpetrators, because – and Hegel made this point – the perpetrator also has a right to justice, the right to punishment, in the sense that he has an opportunity to redeem himself through just punishment. Thus it is clear to us that without truth no justice is possible, a justice that would be legitimized by an authentic and ethical examination of the facts.

***And in the criminal sense?***

It's only sensible to talk about justice within the scope of criminal law if we understand that it is based on certain moral rules and that these, in the final instance, make it valid. In the criminal ambit, 'near here' is what tells us that actions which were taken consciously and with a purpose, therefore in exercising our freedom, imply responsibility and are deserving of the established punishments.

Actions carried out consciously against inherent human values carry a responsibility that must be assumed by the guilty. Now, in that we live in a society in which there is a certain authority regulating our relations in terms of compliance with justice, it is that authority, the state, which must decide on the corresponding punishment. This, as I said earlier, does not express only the right of society to defend itself, but also the opportunity for a criminal to redeem himself through punishment.

***At the end of the 1980s, a former Minister of Foreign Affairs of Colombia said that the worst defeat for the state was to lose the human rights and international humanitarian law 'battle'. Do you share that opinion?***

Yes. Losing that battle is equivalent to inflicting substantial damage on the legitimacy of the state. The reason the state exists is to organize society in such a way that, within it, each and every individual can be considered a person. If there is even one human being whose dignity, whose right to life and liberty goes unrecognized, then the state which permits such a situation calls itself into question. This creates the possibility that adverse elements may refuse to recognize it and consequently fight against it. It is sometimes difficult for governments to understand this, so they put the whole stability of society at risk. Curiously, there are times when all this seems to be clearly understood by those who fight against the state. Let's take the example of Sendero Luminoso (Shining Path) in Peru. The main objective of Sendero – and its leader Guzman in this sense acted with a malign and perverse intelligence – was that the state should violate human rights because Sendero saw that it would then, from the ethical point of view, jeopardize the moral superiority that legitimized its fight against terror. Documents from Sendero concerning the prison uprising show that the intention was to provoke the state to commit genocide: the state walked into this trap and lost the moral high ground in its fight against the terrorists.

***'Being humanitarian is, above all, being politically and militarily correct.' What do you think of that statement?***

I agree with it. The reason is simple: the ethical dimension and the practical dimension do not contradict each other; correct action is no impediment at all to being effective. The best thing that can be done in favour of democracy and society is precisely to argue for respect for the values on which they are based. The end purpose of the state, as we know, is the human individual. Hence the correct observance of politics within the democratic system and the role assigned to the forces of law and order serving that society – understood as a civilized guarantee of

internal order and the just defence of the nation's interests in the face of threats from third parties – constitute the best way to comply with the constitutional precept that makes human beings the end purpose of organized social life.

***While the Rwandan genocide was going on in April 1994, a leader of the Rwanda Patriotic Front, which is now in power, answered when referring to the massacres: 'That is so, but don't forget that even during and after the Holocaust there were survivors.' How would you interpret that response?***

It disconcerts me. I don't want to think that what the man was saying was that a holocaust was acceptable as long as there were survivors, considering them to be 'better than nothing'. Is that what the man meant? Finally, even though there may be a holocaust, will there always be survivors?

***He may have thought that 'one can capitalize on the deaths of even our own brothers'.***

It sounds horrible, and it seems that this statement goes hand in hand with, and is of the same magnitude as, the atrocities that took place. Because in the final instance the statement is making a judgement on the Holocaust, a tragic event for humanity, or on what happened in Rwanda, from an absolutely mercantile perspective of cost-benefit analysis and of losses that may be acceptable. The loss of even one human life is inadmissible. But here he isn't talking about a human life. Instead he sees life as a commodity, as though 'in the end, if some survive, then what went before is justified, this justifies the deaths of the others'. What an absolutely cynical thing to say. In other words, because we can remember them we have to accept outrages that can be recorded? I think not. It is preferable to have no memory because there is nothing to remember, and to live a peaceful life. It's not because we extol memory as remembrance and compassion that we should pay the price of the dead: it is too high a price. A collective memory can be built up without reference to tragedies.

***Similarly, when the Israeli army bombarded a refugee camp in Lebanon in 1996 and 106 women and children died, 'brothers and sisters' of the dead were supposedly 'happy' because this political and military error had paid them a political dividend.***

There is a well-used phrase coined by one of ex-President Juan Velasco Alvarado's generals, 'El Gaucho' Cisneros, who was then a minister in the second administration of Fernando Belaúnde. He said that if it were necessary to kill twenty civilians in order to eliminate two or three terrorists, then that action was justified. In other words, we are supposed to accept the idea of a marginal human cost (collateral damage), using cost-benefit analysis, applicable to human beings. But they cannot be measured like that: we are talking about qualitative analysis, what is good and what is bad, and not what is effective.

That approach, unfortunately, is part of a worldwide logic that goes beyond conflict. It is the essence of the technological, sophisticated life of the world today, where the idol is effectiveness and the cost, whatever it is, of that

effectiveness has to be paid. We are living in a time of great cynicism where the logic of the market prevails – with the power to discard even human beings themselves. The philosophy of utility and expendability is what applies today, according to which even humans are expendable and can be replaced. This goes against human nature. People who hold that view forget that each person is a world and that the history of each person is universal history.

***In the duality of truth and justice, what role does the concept of reconciliation play?***

So as not to talk in the abstract, I will refer to what occurred within the Peruvian Truth and Reconciliation Commission. In that Commission we gave profound thought to philosophical matters. This enabled us to establish a theoretical framework that would make everything we finally had to say and propose, such as recommendations, compensation and reforms, intelligible and sustainable.

For us the concepts of truth, justice and reconciliation were so closely linked that we could not have one without the others. Let me explain: for us the truth – rooted in morals – needed to be fully asserted in order to lead us to justice in the sense of both punishment for crimes and compensation for damage, and this in turn was a necessary condition for an adequate process of reconciliation.

To speak, therefore, of a reconciled society (which is not the same as a society without conflict, because conflict is a part of social life) implied a justice rooted in the truth despite the task being as yet incomplete. Justice is a necessary condition, but it is not sufficient for reconciliation. It is a necessary condition because without it, in our opinion, the social rifts, traumas and wounds would remain unhealed no matter how often it is said – often with an ulterior motive – that time cures all ills. Time alone is not sufficient, however, because if the conditions that led to the conflict are not changed, then clearly the conflict could re-ignite and the whole painful process of investigating the truth and administering justice will have been for nothing, as the solutions found will not resolve the basic problems that lead to violence.

***In what way did you address the underlying conditions which led to the conflict?***

The reconciliation we proposed consisted of restoring the social agreement in Peru in a new form, a new way in which Peruvians could understand each other and a new way – more just, more inclusive – in which all the inhabitants of our country could be understood by the state that represents them. We also expressed this rebirth in a concept that for us is essential, that of full citizenship. In other words it means recognition, by the state and by society, of the inherent rights of those individuals and Peruvians who have until now been excluded from national life, of those people who, as Father Gustavo Gutiérrez said, are insignificant to a weak and precarious state and to a selfish society which seems to have no other concern than safeguarding its privileges. That is why truth is not enough, punishment for the guilty is not enough, compensation for the victims is not enough, if in the end the

structure and behaviour of the state and society stay the same and we are condemned to undergo the same horrific experiences yet again.

***The report of the Truth and Reconciliation Commission was published in August 2003, but the feeling in Peru is that it has had few repercussions. Does this mean that the Truth Commission was a failure?***

A relative failure, I would say. In an ideal situation, a truth commission should be created for the reasons I have given, that is, in response to a demand from society at large and not because of a demand from a sector of the population. Its final report, if it has worked rigorously and honestly, will become part of the history of the nation and people. In Peru's case, there were sectors of the population which thought that a truth commission was unnecessary even before it was created. Indeed, some people fiercely opposed the creation of the Commission in the belief that the past is dead and that the further behind us it is, the better it will be for wounds to heal and for memories to fade. Given this opposition from the very start, it is hardly surprising that a section of the Peruvian population refuses to accept the contents of the final report. We have found the source of the greatest disillusionment to be in politics, at government level, because that is where there was a lack of interest – if not a virulent rejection – of the Commission's work. In the final instance this just reaffirms the objections held from the outset.

Aside from this, though, it has to be pointed out that many individuals and institutions have been following our work, have witnessed the public hearings and, having heard the recommendations, understand the importance of our efforts and the vital necessity of introducing substantial reforms in our society in view of the diagnosis of the Peruvian situation. This, at the end of the day, is the great lesson of the work we have carried out.

***Everybody was excited when, in 2003, the Commission's final report was handed to the President and therefore to the Peruvian people. How did you feel personally at that time?***

There are situations in which time seems foreshortened. They say that when you're about to die all your life passes through your mind. At this distance, let me say that as I read my speech in the Presidential Palace in front of the highest authorities in the land, nearly two years of work flashed through my mind, especially my experiences during our numerous visits to the interior of the country. I thought of some of the horrifying moments from the public hearings and the stories of those people who had suffered so cruelly. All of this can be summarized in the words of one person spoken in a shaking voice, in barely articulate Spanish, at one of the public hearings: 'Members of the Truth Commission, I hope you can do justice and that one day I'll become a Peruvian.' This sentence is a condensation of all of the country's terrible experiences, which I relived vicariously.

I felt a certain affection, which welled up unwittingly when I said to the President: 'Here, Mr President, are the people who could not speak.' I felt very close to all these people who had suffered so much, which is why I felt as though I could hardly speak on. This wasn't the first time, though, that members of the



Commission had been moved. In the public audiences, although the women gave way to their emotions more easily, standing silently in tears, we men also felt the emotional torment. In my case, and speaking of events in the Presidential Palace, I don't know whether I wanted to transmit an unconscious plea for compassion from the President.

***Did the experience as Chairman of the Truth Commission change your philosophy?***

Completely, and do you know why? Because I have had a marvellous opportunity – an opportunity few philosophers get – to compare the philosophical theories I know, to some extent, with real life. In philosophy we speak of ethics, of Aristotle, Kant, Hegel, Marx, of liberty and justice, truth, knowledge and the value of science; all of this was in some way put to the test in the daily events we had to examine.

The complex and interesting case studies that philosophers and sociologists produce and translate into intellectual essays came to life for us. Dilemmas arose between the ethics of conviction and the ethics of responsibility. How were we to act? Were we to tell the truth about what we found, even though that truth could result in social turmoil, anger and even a lack of confidence in the Commission itself if we found punishable acts committed by the armed forces, the good people, and something laudable in the supposed bad people? Were we to tell the truth at any cost or, following the ethics of responsibility, without hiding the truth at least not display it in all its horror in return for a quiet life? There were arguments on both sides.

***How did you face those dilemmas?***

The ethics of conviction won the day in the Commission and we understood perfectly that our duty was to tell the naked truth, even though it would antagonize the politicians and even a sector of the church. We faced serious problems; for instance, who should be considered victims? Could the terrorists in some cases have been victims? It was clear to us that a proven terrorist who was later seized, tortured and then disappeared, was a victim. But we knew how difficult it would be for people to understand and accept this. So difficult that the Compensation Act, which as yet only exists on paper, does not consider terrorists as victims, even when they died in circumstances other than combat.

The key premises of ethics and anthropology – disciplines which delve into what ultimately gives us dignity as human beings – were what we had to examine and, on the basis of what occurred, what we had to pronounce upon. To some extent we faced all the questions described so heartrendingly by Primo Levi in his book *If This Is a Man*. We asked ourselves all these things. And given my philosophical training, it was especially important for me to do so. Deliberation on such issues was crucial to those philosophers and colleagues of mine with whom I met every Tuesday evening to discuss the implications of the work of the commission. We learned a lot, and we all received a certain dose of reality in our purely theoretical reflection.



***A few days before the capital Kigali fell to the Rwanda Patriotic Front in June 1994, a group of thugs arrived at the ICRC hospital with a young Tutsi woman and said: 'She is sick, she has been with us for all these months. Although she is Tutsi we don't want to kill her because she'll be more use working in your hospital than dead.' Is it possible that at a time of absolute terror, beauty can be more moving than horror?***

Such experiences have been shared by many people in Nazi concentration camps, and there is evidence of it. In those places where all hope had been abandoned, sometimes a phrase, a murmured melody, a person opens the door to peace. The fact is that we humans are capable of the worst acts, but we can also find enjoyment or delight in very little, we can appreciate the beautiful, the good, the valuable things of this world, and marvel at them.

That a human person should be what he or she is, despite all the horror and tragedy that this may entail, is the greatest of all marvels. My mere presence gives the world form and sense. My conscience is a light that illuminates other things but at the same time illuminates itself. It tells me that despite my past, despite the confines of my physical existence, I am a being with possibilities, that I haven't yet uttered my last word and that a future with many pages lies open before me, a future which I can write with my behaviour and thus become the author of my own history.

# The right to the truth in international law: fact or fiction?

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## **Abstract**

*The right to the truth has emerged as a legal concept at the national, regional and international levels, and relates to the obligation of the state to provide information to victims or to their families or even society as a whole about the circumstances surrounding serious violations of human rights. This article unpacks the notion of the right to the truth and tests the normative strength of the concept against the practice of states and international bodies. It also considers some of the practical implications of turning “truth” into a legal right, particularly from the criminal law perspective.*

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“The people have a right to the truth as they have a right to life, liberty and the pursuit of happiness.” Epictetus (55 – 135)

“Peace if possible, but truth at any rate.” Martin Luther (1483 – 1546)

## **Introduction: The significance of “legal truth”**

Criminal processes, whether at the national or international level, are primarily about meting out justice for alleged wrongs committed by individuals. The process entered into, at least from a common law perspective, is not so much about

\* This article is based upon a lecture given at the T.M.C. Asser Instituut in The Hague on 29 March 2006 as part of the supranational criminal law lecture series.

finding the truth as it is offering evidence that proves guilt or innocence — evidence that is contested, put into question or interpreted in different ways — to win a case. The investigative method of civil law systems is arguably more concerned about finding the truth, but the end result is the same: the case is won or lost by convincing or failing to convince a judge or jury of guilt or innocence. The “legal truth” is merely a by-product of a dispute settlement mechanism.

In trials dealing with international crimes, however, the significance of this by-product of legal truth has taken on a new dimension, owing no doubt to the unique objectives that international criminal law is supposed to fulfil and that go way above and beyond merely finding guilt or innocence of particular individuals. They range from such lofty goals as contributing to “the restoration and maintenance of peace”<sup>1</sup> and “the process of national reconciliation”<sup>2</sup> to others, such as fighting against impunity, deterring or preventing future violations, satisfying victims’ needs and upholding their rights, removing dangerous political players from the political scene, re-establishing the rule of law and reaffirming the principle of legality. They include the symbolic and ritualistic effect of the criminal trial on divided communities, as well as the move away from community blame and toward individual responsibility, reconstructing national identities from interpretations of the past through criminal legal analysis and process, and setting down a historical record with a legal imprint.

How does the right to the truth come into play here? It is argued that this legal concept intersects with international criminal processes in various ways, at times strengthening the intended purpose to prosecute persons accused of international crimes and at times overriding the focus on the individual defendant and instead turning the attention of a case to the broader implications of international criminal trials. The desire for truth may even be used to justify non-prosecution of certain alleged offenders in “amnesty-for-truth” or “use immunity” situations. Some of the responses to the sudden termination of the *Milosevic* case before the International Criminal Tribunal for the former Yugoslavia (ICTY) as a result of the death of the former Yugoslav leader will suffice to explain these implications in simple terms. Svetozar Marovic, the President of Serbia-Montenegro, commented: “With his death, history will be deprived of the full truth.”<sup>3</sup> Milan Kucan, former President of Slovenia, put it slightly differently, stating that: “Now history will have to judge Milosevic.”<sup>4</sup> ICTY Prosecutor Carla Del Ponte, on the other hand, while lamenting the loss of justice for victims of the crimes for which Milosevic was accused, was keen to stress that the testimonies of 295 witnesses and some 5,000 exhibits presented to the court

1 SC Res. 808 (1993), 22 February 1993, on the establishment of the International Criminal Tribunal for the former Yugoslavia, preambular para. 9.

2 SC Res. 955 (1994), 8 November 1994, on the establishment of the International Criminal Tribunal for Rwanda, preambular para. 7.

3 See BBC News, “Former Yugoslav President Slobodan Milosevic has died in the detention centre at the Hague tribunal: Reaction to the news”, 12 March 2006, available at: <http://news.bbc.co.uk/2/hi/europe/4796704.stm#world> (last visited on 23 March 2006).

4 Ibid.

during the prosecution case “represent a wealth of evidence that is on the record.”<sup>5</sup> This was presumably to make the point that the lack of a judgment has not deprived the four-year trial from achieving some of its objectives, in particular that of satisfying to some extent the right to the truth or setting down a historical record. The question that remains is whether a legal judgment is necessary to accord such evidence the status of representing “the truth.”<sup>6</sup>

At this point, it is enough to note that a right to the truth, if indeed such a right exists in international law, would intermesh strategically with the broader objectives of international criminal law, arguably including those of restoring and maintaining peace (because by exposing the truth, societies are able to prevent the recurrence of similar events), facilitating reconciliation processes (because knowing the truth has been deemed essential to heal rifts in communities),<sup>7</sup> contributing to the eradication of impunity (because knowing the truth about who was responsible for violations leads to accountability),<sup>8</sup> reconstructing national identities (by unifying countries through dialogue about a shared history)<sup>9</sup> and setting down a historical record (because the “truth” of what happened can be debated openly and vigorously in court, adding credibility to the evidence accepted in a criminal judgment). It could also be contended that the right to the truth underlies the very process of criminal indictment by ensuring proper investigation of crimes and transparency in the form of *habeas corpus* procedures in the detention of individuals by the state, as well as by requiring public access to

5 Press Conference by the ICTY prosecutor, Carla Del Ponte, The Hague, 12 March 2006, available at: <http://www.un.org/icty/latest-e/index.htm> (last visited on 23 March 2006).

6 In the same press conference, the ICTY prosecutor also underscored the Trial Chamber decision of 16 June 2004, which rejected a defence motion to dismiss the charges for lack of evidence, thereby confirming, in accordance with Rule 98bis, that the prosecution case contained sufficient evidence capable of supporting a conviction on all 66 counts. However, this ruling cannot by any means be interpreted as implying that Milošević would have been found guilty. The only possible interpretation is that it “could” have done so. See *Prosecutor v. Slobodan Milošević*, Decision on Motion for Judgment of Acquittal, IT-02-54-T, 16 June 2004, at para. 9.

7 See Supreme Decree No. 355 of the Chile National Commission on Truth and Reconciliation: “Only upon a foundation of truth will it be possible to meet the basic demands of justice and create the necessary conditions for achieving true national reconciliation.”

8 See the “Report of the independent expert to update the Set of Principles to combat impunity”, Diane Orentlicher, Addendum: “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, 8 February 2005 (hereinafter “Updated Principles on Impunity”). Principle 2 declares that “[e]very people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes.” Principle 4 articulates that “[i]rrespective of any legal proceedings, victims and their families have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victims’ fate.” Principle 1 states that it is an obligation of the state “to ensure the inalienable right to know the truth about violations.” The first draft of these principles is contained in Annex II of the revised final report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119, UN Doc. E/CN.4/Sub.2/1997/20/Rev.1.

9 See Act No. 12/2597, 14 May 1992, Germany: Law Creating the Commission of Inquiry on “Working Through the History and the Consequences of the SED Dictatorship”, para. 1: “To work through the history and consequences of the SED [East Germany Communist Party, known as the German Socialist Union Party] dictatorship in Germany is a joint task of all Germans. It is particularly important for the purpose of truly unifying Germany.”

official documents. Where judgments have been made, the satisfaction of the right to the truth may arguably form part of reparations to victims.<sup>10</sup>

It was all these slightly amorphous considerations that led the UN Commission on Human Rights (CHR), in its 61st session, to adopt Resolution 2005/66, which “[r]ecognizes the importance of respecting and ensuring the right to the truth so as to contribute to ending impunity and to promote and protect human rights.” Yet it is one thing to recognize the importance of a right and quite another to set out its contours under international law, and for this reason the resolution goes on to request that the Office of the High Commissioner for Human Rights (OHCHR) prepare a study on the right, “including information on the basis, scope, and content of the right under international law,” which will be taken into consideration at the next (62nd) session. The present article seeks to provide some critical analysis of the conceptual underpinnings of this right — to unpack the notion of a right to the truth — and to examine the legal consequences, if any, of this notion. In other words, an attempt is made to determine whether it is a real right — identifiable, with clear parameters and something that can be implemented — or a piece of legal fiction, a narrative device used to fill the void where our current normative systems leave us wanting.

After first outlining its emergence under international law, the article begins the process of unpacking the meaning of the right to the truth, which necessitates delving into fields beyond international law (i.e., philosophy and to some extent historiography). It then looks at how such notions have found their way into international legal texts and jurisprudence and goes on to explore some of the consequences that turning “truth” into a legal right may entail.

## **Brief overview of the emergence of the right to the truth under international law**

The right to the truth has emerged as a legal concept in various jurisdictions and in many guises. Its origins may be traced to the right under international humanitarian law of families to know the fate of their relatives, recognized by Articles 32 and 33 of the 1977 Additional Protocol I to the Geneva Conventions of 1949, as well as obligations incumbent on parties to armed conflicts to search for persons who have been reported missing. Enforced disappearances of persons and

10 See Principle 11 of the “Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights and serious violations of humanitarian law”, CHR Res. 2005/35, 19 April 2005; ECOSOC Res. 2005/35, 25 July 2005, (hereinafter “Basic principles on remedies and reparation”) which states that “[r]emedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim’s right to ... access ... relevant information concerning violations ...” Principle 22(b) provides that the right to reparation of the victim includes, as a modality of satisfaction, the “[v]erification of the facts and full and public disclosure of the truth.” Principle 24 further provides that: “victims and their representatives should be entitled to seek and obtain information on the causes leading to their victimization and on the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law and to learn the truth in regard to these violations.”

other egregious human rights violations during periods of extreme, state-sponsored mass violence, particularly in various countries of Latin America but also in other parts of the world, prompted a broader interpretation of the notion of the right to be given information about missing persons. It also led to the identification and recognition of a right to the truth by various international organs, in particular, the Inter-American Commission on Human Rights and Court of Human Rights, the UN Working Group on Enforced or Involuntary Disappearances and the UN Human Rights Committee. These bodies progressively drew upon this right in order to uphold and vindicate other fundamental human rights, such as the right of access to justice and to an effective remedy and reparation. They also expanded the right to the truth beyond information about events related to missing or disappeared persons to include details of other serious violations of human rights and the context in which they occurred. Broadly speaking, the right to the truth, therefore, is closely linked at its inception to the notion of a victim of a serious human rights violation. Like procedural rights, it arises after the violation of another human right has taken place, and would appear to be violated when particular information relating to the initial violation is not provided by the authorities, be it by the official disclosure of information, the emergence of such information from a trial or by other truth-seeking mechanisms.

The rationale for such a right would appear to lie in the right of victims or of their families to be informed about the events in question so as to aid the healing process. Among other things, it would offer a sense of closure, enable their dignity to be restored and provide a remedy and reparation for violations of their rights and/or the loss suffered. In addition, the right to the truth has been a safeguard against impunity. For this reason, it has been used to contest the validity of blanket amnesty laws shielding perpetrators of gross violations of human rights under international law, as well as to encourage more transparent and accountable government.

In the aftermath of armed conflict or periods of internal strife, the right to the truth has often been invoked to help societies understand the underlying causes of conflicts or widespread violations of human rights. Many countries have sought to implement this right by establishing truth commissions or commissions of inquiry. Arguably, the right to the truth may also be implemented by other processes, such as public trials, the disclosure of state documents and the proper management of archives, and by ensuring public access to information.

## **The concept of truth**

In order to know what a right to the truth would look like or entail there needs to be some understanding as to what is meant by truth. Philosophers have long grappled with the meaning of truth. A traditional distinction has been drawn between truth as a social and as an intellectual matter. The question of whether there exists a “right” to truth would appear to fall into the former category,

namely that of truth as a social matter, given the legal conception of a right owed by the state to the individual.

A commonly accepted definition of truth is the agreement of the mind with reality. This should be distinguished from probable opinion. For William James, “true ideas are those we can assimilate, validate, corroborate and verify.”<sup>11</sup> In other words, the truth is measured by way of evidence. For Locke, “[t]ruth and falsity belong ... only to propositions” — to affirmations or denials that involve at least two ideas. This suggests a more adversarial schema, akin to “legal truth,” which may be decided by a judge or a jury. Kant summarizes this view neatly: “truth and error ... are only to be found in a judgement,” which explains why “the senses do not err, not because they always judge correctly, but because *they do not judge at all*.”<sup>12</sup> Interestingly, like the German word “*Recht*,” the word for truth in Arabic, “*al-Îaqq*” (al-Haq), also means “right” (i.e., as opposed to “wrong,” but also in the sense of a legal right) as well as “justice” and even “law” (although, like the German word “*Gesetz*,” there is also a separate word for that: *qānūn*). This suggests a conception of truth in line with Kant’s summation, although in Islamic theology “the Truth” is one of the inalienable characteristics of God and therefore has an absolute and “a-human” quality.<sup>13</sup>

In Christian doctrine, by comparison, the truth is seen as something that is “done” by a person, and this action has both redeeming consequences (“the truth will set you free,” John 8:32) and represents an act of God (“he who does truth [or: what is true] comes to the light, that it may be clearly seen that his deeds have been wrought in God,” John 3:21).<sup>14</sup> The metaphysical definition of truth as presented by Thomas Aquinas accepts that judgment needs to be involved in ascertaining the truth, but a judgment is only said to be true when “it conforms to the external reality.”<sup>15</sup> This aligns to some extent with Aristotle’s well-known definition of truth: “To say of what is that it is not, or of what is not that it is, is false, while to say of what is that it is, and of what is not that it is not, is true.”<sup>16</sup> This signifies a moral truth — to say what we mean. It indicates the existence of an obligation for the state to say what happened is what happened.

But here we are in the realm of a statement about what happened. If we accept Jacques Derrida’s point that, “[t]here is nothing outside the text; all is textual play with no connection with original truth,”<sup>17</sup> then suddenly the right to

11 William James, *Essays in Pragmatism*, Hafner Publishing Company, Inc., New York, 1948, p. 160.

12 Immanuel Kant, *Critique of Pure Reason*, ed. and transl. Paul Guyer & Allen W. Wood, Cambridge University Press, Cambridge, 1998 (emphasis added).

13 Matthijs Kronemeijer, “An Arab voice of compromise: Hazem Saghieh’s *In Defence of Peace* (1997)”, MA thesis, Utrecht University, Department of Arabic, Modern Persian and Turkish Languages and Cultures, p. 71.

14 For these points and quotations on Islamic and Christian theology, I am grateful to Matthijs Kronemeijer for his comments and assistance.

15 This is a restatement of the well-known statement: “*Veritas est adaequatio rei et intellectus*” — Truth is the equation of thing and intellect. See Thomas Aquinas, *De Veritate* Q.1, A.1&3; cf. *Summa Theologiae* Q.16.

16 Aristotle, *Metaphysics*, 1011b25.

17 Jacques Derrida, *Prophets of Extremity*, University of California Press, Berkeley, 1985, p. 3.



the truth starts to look more like a right to an official statement about what happened. This may or may not accord with what did actually happen but still requires an obligation on the part of the state to disclose something. In other words, it becomes a matter of the use of language by the state.

Furthermore, if we take Derrida's view about writing not being confined to the Western notion of writing based on a phonetic alphabet or symbolized in a book, but instead encompassing the myriad forms of human expression, then such "statements" by the state need not be in a particular form but could be expressed aurally, visually, musically, pictorially or through sculpture. This could mean that the right to the truth could also be, at least partially, satisfied through such actions by the state as erecting monuments dedicated to victims or works of art or musical compositions that explain what happened. And we do see this type of recognition in some judgments. To give one example, the Human Rights Chamber for Bosnia-Herzegovina in its judgment in the "Srebrenica cases" ordered the Republika Srpska, *inter alia*, to pay a lump sum to the Srebrenica-Potocari Memorial and Cemetery. But from Derrida's point of view, this would merely be one "trace" entering into a play of differences, subject to different interpretations, always disputed and involved with power and violence, which never really yield final truths.<sup>18</sup> But Derrida did not mean that one can simply give any old interpretation to a "trace". He used certain protocols of reading, and in fact his approach to interpretation is similar to what the famous Italian philosopher/historian Benedetto Croce suggested history is: exploring the historical truth of the past out of a present interest.<sup>19</sup>

This notion — that truth is relative to present interest — reappears in various philosophical and historiographical writings. In his *Principles of Psychology*, James argues that not only must our conceptions or theories be "able to account satisfactorily for our sensible experience," but they are also to be weighed for their appeal "to our aesthetic, emotional, and active needs."<sup>20</sup> This idea recalls Walt Whitman's observation that "[w]hatever satisfies the soul is truth."<sup>21</sup>

The relativism of truth is a concept that becomes important in the legal formulation of the right to the truth, because we can work out what information needs to be provided according to the needs of the right-holder. Also, the pragmatic theory of truth looks mainly to extrinsic signs, thus not to some feature of the idea or thought itself, but to its consequences. This theory is clearly represented in some of the implementing mechanisms of the right to the truth, such as truth and reconciliation commissions, which by virtue of their mandate often formulate their inquiries into the "truth" of past events with an eye to how

18 Jacques Derrida, *Of Grammatology*, transl. Gayatri Chakravorty Spivak (1967), Johns Hopkins University Press, Baltimore, 1976, pp. 7–8, 60–62 ff.

19 Benedetto Croce, *History: Its Theory and Practice*, transl. Douglas Ainslie, Harcourt, Brace and Co., New York, 1921, pp. 11–26, reprinted as "History and chronicle" in Hans Meyerhoff (ed.), *The Philosophy of History in Our Time*, Doubleday Anchor, New York, 1959, p. 45.

20 William James, *Principles of Psychology*, 1890, Harvard University Press, Boston, 1983, p. 940.

21 Walt Whitman, Preface to *Leaves of Grass* (1855), Bantam Books, New York, 1983.

the truth-seeking process will contribute to reconciliation. For example, the stated objective of the Commission of Truth and Friendship established by Indonesia and Timor-Leste in March 2005 is “[t]o establish the *conclusive truth* in regard to the events prior to and immediately after the popular consultation in 1999, *with a view to further promoting reconciliation and friendship*, and ensuring the non-recurrence of similar events.”<sup>22</sup>

Going back to postmodernist accounts of truth, it is also worth pondering Michel Foucault’s assertion that “truth isn’t outside power, or lacking in power: ... Truth is a thing of this world: it is produced only by virtue of multiple forms of constraint.”<sup>23</sup> In other words, “truth” is the construct of the political and economic forces that command the majority of power within the societal web. It is to be understood as “a system of ordered procedures for the production, regulation, distribution, circulation and operation of statements.”<sup>24</sup> So where would such a perspective leave the right to the truth, if truth is nothing more than an expression of power through societal structures?

Postmodernists have been criticized for abandoning truth.<sup>25</sup> A more prevalent criticism among the anti-postmodernists is the extreme relativism that, it has been argued, leaves the door open to fascist or racist views of history, with no way of saying these ideas are false. To give an example of this, one of the famous justifications for the Nuremberg trials was to “establish incredible events by credible evidence” in order that future generations could not doubt that such events took place.<sup>26</sup> Yet despite these and other trials, Holocaust denial has occurred and gained momentum since the mid-1970s, and postmodernism has to some extent been blamed for seeming to encourage these differing interpretations of historical truth.<sup>27</sup>

The question of historical truth about the Holocaust came to a head when David Irving brought a lawsuit against Deborah Lipstadt for defamation.<sup>28</sup> In her book, *Denying the Holocaust: The Growing Assault on Truth and Memory* (1993), she recounted how Irving had become a denier in the late 1980s, convinced by “evidence” that it was chemically and physically impossible for the Germans to

22 Terms of Reference for the Commission of Truth and Friendship Established by the Republic of Indonesia and the Democratic Republic of Timor-Leste, 10 March 2005 (emphasis added).

23 Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings 1972–1977*, Colin Gordon (ed.), Harvester Wheatsheaf, London, 1980, p. 114. See also the translation by Meaghan Morris and Paul Patton (eds.), “Truth and Power”, *Michel Foucault: Power, Truth, Strategy*, Feral Publications, Sydney, 1979, pp. 131–132.

24 Foucault goes on to state that “Truth is linked in a circular relation with systems of power which produce and sustain it, and to effects of power which it induces and which extend it. A ‘regime’ of truth.”

25 Joyce Appleby, Lynn Hunt and Margaret Jacob, *Telling the Truth about History*, W.W. Norton, New York, 1994, p. 213.

26 Report on Robert H. Jackson to the President on Atrocities and War Crimes, 7 June 1945, *Department of State Bulletin*, 10 June 1945, p. 1071.

27 For example, Richard J. Evans has argued that the “increase in scope and intensity of the Holocaust deniers’ activities since the mid-1970s” reflects the “postmodernist intellectual climate”, *In Defence of History*, Granta Books, London, 1997, pp. 238–241. See the discussion of his views in Ann Curthoys and John Docker, *Is History Fiction?*, UNSW Press, Sydney, 2006, pp. 209–211.

28 *David John Cadwell Irving v. Penguin Books Limited and Deborah E. Lipstadt*, [2000] EWHC QB 115.

have gassed Jews on a significant scale. While the defence hired expert historians to work on the case, Irving chose to defend himself. The case ended in a verdict against Irving, with the court finding that the defendant's historiographical criticisms of Irving's work were justifiable:<sup>29</sup> "for the most part the falsification of the historical record was deliberate and ... Irving was motivated by a desire to present events in a manner consistent with his own ideological beliefs even if that involved distortion and manipulation of historical evidence."<sup>30</sup>

Of course, this trial was not to determine the truth about the Holocaust but to examine the validity of Lipstadt's claims about Irving's work on the Holocaust. Nonetheless, the judgment was hailed as a "victory for truth," the *Daily Telegraph* for one proclaiming that "[it achieved] for the new century what the Nuremberg Tribunals or the Eichmann trial did for earlier generations."<sup>31</sup> Yet Lipstadt herself, in the book at the centre of the trial, ironically opposed the option of bringing deniers to court, as this may "transform the deniers into martyrs on the altar of freedom of speech" and also raise the problem of the unpredictability of lawsuits.

The example of this trial takes us back to the notion of truth as an idea that is verifiable and corroborated by evidence, but it also raises the question of how far differing interpretations of the truth should be allowed to go. While some may well caution against the permissive atmosphere resulting from the postmodernist bent, which allows scope for deniers of even the best-documented historical "facts,"<sup>32</sup> a postmodernist would argue that manifold interpretations of the truth are essential to guard against absolutist regimes such as the Nazi one.<sup>33</sup>

From the foregoing discussion, the following points about the concept of truth can be adduced:

- Truth is a social matter. It may be generated by social procedures and structures (suggesting something *agreed upon*). An example of this is a 1997 UNESCO-led project entitled "Writing the history of Burundi," which was designed to establish an official, scientific and agreed account of the history of Burundi from its origin until 2000 "so that all Burundians can interpret it in the same way."<sup>34</sup>

29 Ibid., para. 13.141.

30 Ibid., para. 13.163. See also See Richard J. Evans, *Telling Lies about Hitler: The Holocaust, History and the David Irving Trial*, Verso, London, 2002, p. 198.

31 See <http://www.hdot.org/ieindex.html> (last visited on 26 March 2006).

32 Steven Aschheim, *Culture and Catastrophe*, Macmillan, Basingstoke, 1996, pp. 13 and 193.

33 Dan Stone, *Constructing the Holocaust: A Study in Historiography*, Vallentine Mitchell, London and Portland, 2003, p. 16.

34 This idea originated at the 1997 Conference on the History of Burundi convened by UNESCO with the participation of some 30 Burundian experts of different political tendencies. It was conceived in the spirit of the Arusha Agreement. Article 8, Protocol I of the Agreement sets out the principles and measures related to national reconciliation. Para. 1(c) states: "The [National Truth and Reconciliation] Commission shall also be responsible for clarifying the entire history of Burundi, going as far back as possible in order to inform Burundians about their past. The purpose of this clarification exercise shall be to rewrite Burundi's history so that all Burundians can interpret it in the same way." It was divided by periods among some 50 authors, both Burundians and foreigners, experts in history, geography,

- It is something that can be verified or at least corroborated by evidence.<sup>35</sup>
- It may consist of an official statement or judgment about events that occurred.
- Truth implies an obligation to say that what happened did indeed happen (this implies an action of good faith and takes the form of an obligation of means, rather than result, much in the same way as the obligation to properly investigate crimes).<sup>36</sup>
- Such a “statement” may take various forms of expression: visual, aural, artistic, etc.
- “Truth” is relative to present needs and to its consequences.
- There may be different accounts of “truth” or differing “truths” provided these are verifiable (note, for instance, the report of the Truth and Reconciliation Commission of South Africa, which dealt with four differing types of truth: factual and forensic truth; personal and narrative truth; social truth; and healing and restorative truth).

## The right to the truth in international law

As the “right to the truth” is not enshrined in any universal legal instrument *per se*, there are two possible options to characterize it as a source of law: the right to the truth as a right under customary law or the right to the truth as a general principle of law.<sup>37</sup>

### The right to the truth as a customary right

Characterizing the right to the truth as a customary right under international law entails some difficulties. The Statute of the International Court of Justice describes custom “as evidence of a general practice accepted as law.”<sup>38</sup> Professor Meron points out that the “initial inquiry [into a customary human right] must aim at the determination whether, at a minimum, the definition of the core norm claiming customary law status and preferably the contours of the norm have been widely accepted.”<sup>39</sup> The right to the truth would appear to struggle to meet these

linguistics and anthropology. The project’s main objective was to serve as an educational tool in primary and secondary schools and as a history manual for the public at large. See Report of the assessment mission on the establishment of an international judicial commission of inquiry for Burundi, S/2005/158, 11 March 2005.

35 However, if something cannot be verified by positive evidence, this may be a practical problem rather than an existential one. This element should therefore not be applied strictly but only as a guiding principle within the framework of this discussion.

36 See Juan E. Méndez, “The Right to Truth”, in Christopher C. Joyner (ed.), *Reining in Impunity for International Crimes and Serious Violations of Fundamental Human Rights: Proceedings of the Siracusa Conference 17–21 September 1998*, St. Agnes, Erès, 1998, p. 264 (“...the responsible state must comply ... [with the right to truth] to the limit of its possibilities and in good faith”).

37 See the formal sources of international law, listed in Art. 38 of the Statute of the International Court of Justice.

38 See Statute of the International Court of Justice, Art. 38(1)(b).

39 Theodor Meron, *Human Rights and Humanitarian Law as Customary Law*, Clarendon Press, Oxford, 1989, p. 93.

initial requirements. Beyond the clear norm under IHL of providing victims' families with information about the circumstances of a missing person, the definition of a more general "right to the truth" appears uncertain. And yet the right to the truth has been recognized without question both by a number of international organs and by a number of courts at the international and national level, and has been enshrined as a guiding principle in numerous instruments setting up truth and reconciliation commissions, as well as in national legislation. Some legal experts have also identified the right to truth as a customary right.<sup>40</sup> Clearly, there is a need to look a bit more carefully at these sources to see how they have identified such a right and what contours can be discerned.

In the following brief exposition of state practice and *opinio juris*, Professor Meron's preferred indicators for a customary human right provide a useful framework:<sup>41</sup> "first, the degree to which a statement of a particular right in one human rights instrument, especially a human rights treaty, has been repeated in other human rights instruments, and second, the confirmation of the right in national practice, primarily through the incorporation of the right in national laws."<sup>42</sup> There is no explicit statement of this right in a human rights treaty. The closest to this would be Article 24(2) of the draft International Convention for the Protection of All Persons from Enforced Disappearances adopted by the Inter-Sessional Working Group of the UN Commission on Human Rights on 23 September 2005. It provides that: "[e]ach victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person."<sup>43</sup> Apart from this, there is, as already mentioned, Article 32 of Additional Protocol I, which

40 See the meeting cited by L. Despouy, Special Rapporteur on States of Emergency in his 8<sup>th</sup> Annual Report, UN Doc. E/CN.4/Sub.2/1995/29 Corr. 1, according to which the experts concluded that the right to truth has achieved the status of a norm of customary international law. For a different view, see Mendez, above note 36, p. 260, fn. 9.

41 See also The Restatement (Third) of the Foreign Relations Law of the United States of 1987, § 701: "Practice accepted as building customary human rights law includes: virtually universal adherence to the United Nations Charter and its human rights provisions, and virtually universal and frequently reiterated acceptance of the Universal Declaration of Human Rights even if only in principle; virtually universal participation of states in the preparation and adoption of international agreements recognizing human rights principles generally, or particular rights; the adoption of human rights principles generally, or particular rights; the adoption of human rights principles by states in regional organizations in Europe, Latin America, and Africa ... general support by states for United Nations resolutions declaring, recognizing, invoking, and applying international human rights principles as international law; action by states to conform their national law or practice to standards or principles declared by international bodies, and the incorporation of human rights provisions, directly or by reference, in national constitutions and laws; invocation of human rights principles in national policy, in diplomatic practice, in international organization activities and actions; and other diplomatic communications or action by states reflecting the view that certain practices violate international human rights law, including condemnation and other adverse state reactions to violations by other states. The International Court of Justice and the International Law Commission have recognized the existence of customary human rights law.... Some of these practices may also support the conclusion that particular human rights have been absorbed into international law as general principles common to the major state legal systems."

42 Meron, above note 39, p. 94.

43 UN Doc. E/CN.4/2005/WG.22/WP.1/REV.4, Art. 24(2).

codifies the right to know the fate of relatives during an international armed conflict. The analysis of customary international humanitarian law by the International Committee of the Red Cross (ICRC) has confirmed that this is a rule of customary law and is applicable in both international and non-international armed conflicts.<sup>44</sup> In the transference of this right under IHL to a right under human rights law, the wheel has, as it were, turned full circle. In fact, it was numerous resolutions of the UN General Assembly since 1974 on the rights of families of missing persons or those subjected to enforced disappearances that referred to “the desire to know” as a “basic human need” and prompted the elaboration of Article 32 of Protocol I additional to the 1949 Geneva Conventions.<sup>45</sup> This provision was then used by human rights mechanisms — the *ad hoc* Working Group on the Situation of Human Rights in Chile, the UN Working Group on Enforced and Involuntary Disappearances and the Inter-American Commission on Human Rights — as the basis for developing a right to the truth in relation to the crime of enforced disappearances<sup>46</sup> and later to other human rights violations.<sup>47</sup> Apart from these sources, however, human rights treaties do not explicitly codify the obligation of the state to provide information to victims of serious human rights abuses.

Despite this apparent hurdle to customary law status, the right to the truth has been inferred from a number of other rights of human rights treaties. The Human Rights Committee (HRC), the monitoring body of the International Covenant on Civil and Political Rights (ICCPR) of 1966, has recognized the right to know as a way to end or prevent the occurrence of psychological torture (ICCPR, Article 7) of families of victims of enforced disappearances<sup>48</sup> or secret executions.<sup>49</sup> The HRC also found that in order to fulfil its obligation to provide an effective remedy, states party to the ICCPR should provide information about

44 Rule 117 in *Customary International Humanitarian Law, Volume I, Rules*, ICRC, Cambridge University Press, 2005, p. 421.

45 See resolutions of the General Assembly: 3220 (XXIX) of 6 November 1974, 33/173 of 20 December 1978, 35/193 of 15 December 1980, 36/163 of 16 December 1981, 37/180 of 17 December 1982, 38/94 of 16 December 1983, 39/111 of 14 December 1984, 40/147 of 13 December 1985, 41/145 of 4 December 1986, 42/142 of 7 December 1987, 43/159 of 8 December 1988, 44/160 of 15 December 1989, 45/165 of 18 December 1990, 46/125 of 17 December 1991 and 47/132 of 18 December 1992.

46 “First Report of the Working Group on Enforced or Involuntary Disappearances to the Commission on Human Rights”, UN Doc. E/CN.4/1435, 22 January 1981, para. 187, and *Annual Report of the Inter-American Commission of Human Rights, 1985–1986*, OEA/Ser.L/V/II.68, Doc. 8 rev 1, 28 September 1986, p. 205.

47 Inter-American Commission, Report No. 136/99, of 22 December 1999, Case of *Ignacio Ellacuría et al.*, para. 221.

48 See the explanation by Mr Bertil Wennergren, member of the Human Rights Committee, in his *Individual Opinion* in the cases: *R. A. V. N. et al. (Argentina)*, communication Nos. 343, 344 and 345/1988, Decision of inadmissibility of 26 March 1990, UN Doc. CCPR/C/38/D/343/1988 (Appendix); *S. E. (Argentina)*, communication No. 275/1988, Decision of inadmissibility of 26 March 1990, UN Doc. CCPR/C/38/D/275/1988 (Appendix); see also, *inter alia*: Views of 16 July 2003, *Sarma. Sri Lanka* case, Communication No 950/2000, UN Doc. CCPR/C/77/D/887/1999, para. 9.5; “Concluding observations of the Human Rights Committee: Algeria”, UN Doc. CCPR/C/79/Add.95, of 18 August 1998, para. 10; and “Concluding observations of the Human Rights Committee: Uruguay”, UN Doc. CCPR/C/79/Add.90, of 8 April 1998, para. C.

49 Views of 3 April 2003, Case of *Lyashkevich v. Belarus*, Communication No 887/1999, UN Doc. CCPR/C/77/D/950/2000, para. 9.2.



the violation or, in cases of death of a missing person, the location of the burial site.<sup>50</sup> The right to know the truth has also been invoked in relation to protection of the family guaranteed in Article 23 of the ICCPR, as well as the right of the child to preserve his or her identity, including nationality, name and family relations, as contained in Article 8 of the Convention on the Rights of the Child of 1989 (CRC), the right of the child not to be separated from its parents as laid down in Article 9 thereof, and other provisions of that convention.<sup>51</sup>

At the regional level, the European Court of Human Rights has also inferred a right to the truth as part of the right to be free from torture or ill-treatment, the right to an effective remedy, and the right to an effective investigation and to be informed of the results.<sup>52</sup> Similarly, the Court has held that a state's failure to conduct an effective investigation "aimed at clarifying the whereabouts and fate" of "missing persons who disappeared in life-threatening circumstances" constitutes a continuing violation of its procedural obligation to protect the right to life (Article 2 of the European Convention on Human Rights).<sup>53</sup> The African Commission on Human and Peoples' Rights has followed a similar approach to that of the European Court of Human Rights.<sup>54</sup> The Commission's "Principles and guidelines on the right to a fair trial and legal assistance in Africa"<sup>55</sup> infers a right to the truth as a constitutive part of the right to an effective remedy.<sup>56</sup> The Inter-American Commission on Human Rights stands apart as having presented the right to know the truth as a direct remedy in itself, based on Article 9(1) of the Inter-American Convention, which stipulates that "a State party is obligated to guarantee the full and free exercise of the rights recognized by the Convention."<sup>57</sup> Its view is that ensuring rights for the future requires a society to learn from the abuses of the past. For this reason, this right to know the truth entails both an individual right applying to the victim and family members and a general societal right.<sup>58</sup> However, the Inter-American Commission

50 Ibid., para. 11; Views adopted on 30 March 2005, *Khalilova v. Tajikistan* case, Communication No. 973/2001, UN Doc. CCPR/C/83/D/973/2001; and Views adopted on 16 November 2005, *Valichon Aliboev v. Tajikistan* case, Communication No. 985/2001, UN Doc. CCPR/C/85/D/985/2001.

51 UN Doc. E/CN.4/Sub.2/1991/20, Annex I, p. 45.

52 See, *inter alia*, Judgment of 25 May 1998, *Kurt v. Turkey*, Application No. 24276/94; Judgment of 14 November 2000, *Tas v. Turkey*, Application No. 24396/94; and Judgment of 10 May 2001, *Cyprus v. Turkey*, Application No. 25781/94.

53 Judgment of 10 May 2001, *Cyprus v. Turkey*, Application No. 25781/94, para. 136; see also, *inter alia*, Judgment of 18-12-1996, *Aksoy v. Turkey*, Application No. 21987/93; and Judgment of 28 March 2000, *Kaya v. Turkey*, Application No. 22535/93). This also applies where non-state parties may be involved: *Tanrikulu v. Turkey*, 1999-IV Eur. Ct. H.R. 459 (1999).

54 *Amnesty International vs. Sudan* case, Communications No. 48/90, 50/91, 52/91, 89/93 (1999), para. 54. See Art. 19(3) of the African Charter on the Rights and Welfare of the Child.

55 African Union Doc. DOC/OS(XXX)247).

56 Principle C) states that "the right to an effective remedy includes: ... 3. access to the factual information concerning the violations."

57 Inter-American Commission, Report No. 136/99, of 22 December 1999, Case of *Ignacio Ellacría et al. v. El Salvador*, para. 221.

58 See also *Annual Report of the Inter-American Court of Human Rights, 1985–1986*, OEA/Ser.L/V/II.68, Doc. 8 rev 1, of 28 September 1986, p. 205; *Annual Report of the Inter-American Court of Human Rights, 1987–1988*, OEA/Ser.L/V/II. 74, Doc. 10 rev 1, of 16 September 1988, p. 359.



has also linked the right to truth to other obligations contained in the American Convention on Human Rights, such as the prohibitions of torture and extrajudicial executions<sup>59</sup> and the right to simple and prompt recourse for the protection of the rights enshrined in the Convention (Article 25). The latter provision has been used as the basis for inferring the right to the truth both for the relatives of victims and for society as a whole.<sup>60</sup> The Inter-American Court of Human Rights has recognized the right of relatives of the victims of forced disappearance to know their fate and whereabouts.<sup>61</sup> It has also recognized the right of victims and their next of kin to obtain clarification of the facts relating to the violations and the corresponding responsibilities of the competent state organs through investigation and prosecution established in Articles 8 (right to a hearing by a competent, independent and impartial tribunal) and 25 (right to an effective remedy and judicial protection) of the American Convention on Human Rights.<sup>62</sup> The Court has held that the right to the truth is not limited to cases of enforced disappearances but also applies to any kind of gross human rights violation.<sup>63</sup>

Does the repeated inference of a right to information about the circumstances of serious human rights violations as a way to vindicate other codified rights fulfil Meron's requirement of a repeated statement of a particular right in human rights instruments? Or are we dealing with a narrative device used by courts and human rights bodies to merely strengthen and give detail to those rights codified in the conventions? To seek further guidance on whether the right to the truth is a customary source of law, it may be useful to look at other instances of international practice, such as General Assembly and Security Council resolutions. The latter have repeatedly underlined the importance of establishing the truth,<sup>64</sup> whether by truth commissions or by establishing commissions of inquiry that may lead to prosecutions, for the consolidation of peace and reconciliation and to fight impunity.<sup>65</sup> General Assembly resolutions have also noted these crucial links

59 Inter-American Commission, Report No. 136/99, of 22 December 1999, Case of *Ignacio Ellacuría et al. v. El Salvador*, para. 221.

60 *Ibid.*, para. 255; Report 1/99 of 27 January 1999, *Lucio Parada et al. v. El Salvador*, para. 153.

61 Inter-American Court of Human Rights Judgment of 29 July 1988, *Velásquez Rodríguez case*, in *Series C: Decisions and Judgments*, No. 4, para. 181, p. 75; Inter-American Court of Human Rights, Judgment of 20 January 1989, *Godínez Cruz case*, in *Series C: Decisions and Judgments*, No. 5; Judgment of 3 November 1997, *Castillo Páez case*; Judgment of 24 January 1998, *Blake case*; and Judgment of 25 November 2000, *Bamaca case*.

62 Inter-American Court of Human Rights, Judgment of 24 January 1998, *Blake case*, para. 97 and Judgment of 25 November 2000, *Bamaca case*, para. 201.

63 Judgment of 14 March 2000, *Barrios Altos case*, para. 48.

64 See also Madeleine Albright, US Ambassador to the UN, in her statement to the Security Council at the time of the adoption of Resolution 827: "Truth is the cornerstone of the rule of law, and it will point towards individuals, not peoples, as perpetrators of war crimes. And it is only the truth that can cleanse the ethnic and religious hatreds and begin the healing process", Provisional Verbatim Record of the 3217th Meeting, 25 May 1993, SC Doc. S/PV 3217.

65 See e.g. SC Res 1606 (2005) on Burundi, preambular paras. 2 and 7; SC Res. 1593 (2005) on Darfur, Sudan, para. 5; SC Res. 1468 (2003) on the Democratic Republic of Congo, para. 5; SC Res. 1012 (1995)

and have on several instances called for the setup of investigatory bodies to properly investigate serious violations of human rights and to inform victims and society of the results of these investigations.<sup>66</sup> The UN Secretary-General has explicitly referred in public statements to a right to the truth for victims,<sup>67</sup> as has the High Commissioner for Human Rights in relation to the right to truth both for society and for individual victims.<sup>68</sup> Moreover, a number of the reports of the Secretary-General or reports submitted to him by commissions established under his auspices have reiterated the need for the truth to be the basis of reconciliation and peacemaking efforts.<sup>69</sup> The Secretary-General has also recognized the need for the truth in cases where the UN failed to protect persons from serious human rights abuses (e.g. by instituting an independent inquiry into the actions of the UN during the 1994 genocide in Rwanda).<sup>70</sup> The General Assembly also called upon the Secretary-General to provide a comprehensive report on the fall of Srebrenica and the failure of the “safe area policy.”<sup>71</sup> However, the most explicit recognition of a “right to the truth” may be found in the study of the independent expert on impunity appointed by the UN Commission on Human Rights, Mr Louis Joinet, who in his final report of 1997 identified an inalienable right to the truth:

“Every people has the inalienable right to know the truth about past events and about the circumstances and reasons which led, through the consistent pattern of gross violations of human rights, to the perpetration of aberrant

on Burundi, preambular para. 8; SC Res. 935 (1994) on Rwanda; and SC Res. 780 (1992) on the former Yugoslavia.

- 66 See GA Res. 57/105 (2003) on East Timor, para. 12; GA Res. 57/161 (2003) on Guatemala, para. 17; GA Res. 55/118 (2001) on Haiti, para. 7; GA Res. 53/187 (2000) on Haiti, para. 8; GA Res. 48/149 (1993) on El Salvador, para. 4; GA Res. 42/147 (1987) on Chile, para. 10; GA Res. 40/145 (1985) on Chile, para. 6; GA Res. 35/188 (1980) on Chile, paras. 6–8; GA Res. 34/179 (1979) on Chile, GA Res. 33/172 (1978) on Cyprus, para. 1; GA Res. 32/128 (1977) on Cyprus, para. 1; GA Res. 32/118 (1977) on Chile, para. 6; GA Res. 3450 (XXX) on Cyprus, preambular para. 5 and para. 1; GA Res. 3448 (XXX) on Chile, para. 2.
- 67 See Press Release SG/SM/9400, Secretary-General Urges Respect for Ceasefire as Colombia Peace Talks Open, 1 July 2004: “The Secretary-General reiterates his belief that the rights of truth, justice and reparations for victims must be fully respected.”
- 68 Statement by Mary Robinson, United Nations High Commissioner for Human Rights, at the 55<sup>th</sup> Annual DPI/NGO Conference, “Rebuilding Societies Emerging from Conflict: A Shared Responsibility”, 9 September 2002: “[Mechanisms such as TRCs] respects the right of nations to learn the truth about past events. Full and effective exercise of the right to the truth is essential if recurrence of violations is to be avoided.”
- 69 See the “Report of the assessment mission on the establishment of an international judicial commission of inquiry for Burundi”, S/2005/158, 11 March 2005; “Report of the International Commission of Inquiry on Darfur to the Secretary-General”, S/2005/60, 1 February 2005, para. 617; “Report of the International Commission of Inquiry on East Timor to the Secretary-General”, January 2000, UN Doc. A/54/726, S/2000/59, 31 January 2000, para. 146.
- 70 “Report of the Independent Inquiry into the actions of the United Nations during the 1994 genocide in Rwanda”, UN Doc. S/1999/1257, 16 December 1999.
- 71 Report of the Secretary-General pursuant to General Assembly Resolution 53/35, “The fall of Srebrenica”, UN Doc. A/54/549, 15 November 1999. See para. 7: “I hope that the confirmation or clarification of those accounts [of the fall of Srebrenica contained in books, journal articles and press reports] contributes to the historical record on this subject.”

crimes. Full and effective exercise of the right to the truth is essential to avoid any recurrence of such acts in the future.”<sup>72</sup>

According to Joinet, this right applied both to the individual victim and his or her family and was also a collective right. The corollary to the latter is a “duty to remember” on the part of the state: “to be forearmed against the perversions of history that go under the name of revisionism or negationism, for the history of its oppression is part of a people’s national heritage and as such must be preserved.”<sup>73</sup> These principles were recently updated by Professor Diane Orentlicher, appointed for this purpose by the Commission. As well as affirming that “[e]very people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes...”<sup>74</sup> the Updated Principles on Impunity also recognize an imprescriptible right of victims and their families to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victims’ fates.<sup>75</sup> The Updated Principles, therefore, set out differing contours of the right to the truth for victims and victims’ family members and for society in general. For victims and family, the right entails an obligation for the state to provide specific information about the circumstances in which the serious violation of the victim’s human rights occurred, as well the fate of the victim. This information may include the place of burial if the victim was killed. For society in general, the right to the truth imposes an obligation on the state to disclose information about the circumstances and reasons that led to “massive or systematic violations,”<sup>76</sup> and to do so by taking appropriate action, which may include non-judicial measures.<sup>77</sup> Such duality in the contours of the right to the truth is consistent with the two-track evolution of this concept in regard to (1) single violations of human rights that entail individual and case-specific remedies (i.e., for the victim or victim’s family), as reflected in the jurisprudence of human rights courts and monitoring bodies, and (2) mass violations of human rights that necessitate a broader inquiry into the reasons and causes for such violence (i.e., for society in general) as established by the practice of truth commissions or commissions of inquiry and in resolutions of the UN General Assembly and Security Council.

Other special procedures of the CHR have also utilized the legal value of truth in their sets of principles, particularly with regard to the right to a remedy and reparation for victims of gross violations of human rights and IHL.<sup>78</sup> Clearly,

72 “Question of the impunity of perpetrators of human rights violations (civil and political)”, final report prepared by Mr Joinet pursuant to Sub-Commission decision 1996/119, UN Doc. E/CN.4/Sub.2/1997/20/Rev.1., Annex I, Principle 1.

73 Ibid., para. 17.

74 Updated Principles on Impunity, above note 8, Principle 2.

75 Ibid., Principle 4, “The victims’ right to know”.

76 Ibid., Principle 2, “The inalienable right to the truth”.

77 Ibid., Principle 5, “Guarantees to give effect to the right to know”.

78 See “Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law”, CHR Res. 2005/35, Annex, Principle 22.

the weight of general statements of international bodies as evidence of custom cannot be assessed without considering the actual practice of states. At the same time, the community values reflected in such statements generally enjoy strong public support and states are unlikely to face the political consequences of refusing the norm and becoming a persistent objector.<sup>79</sup>

With regard to Meron's second indicator for a customary norm of human rights — confirmation of the right in national practice — a first and obvious instance of national practice is the establishment of truth commissions in more than 30 countries in all regions of the world where serious human rights violations have been perpetrated on a massive scale. However, while this fact may provide evidence of widespread practice, the real question for the purposes of this paper is whether the establishment of these mechanisms flows from a sense of a legal obligation to provide the truth. Most of the constitutive instruments setting them up refer to the need of the victims, their relatives and society to know the truth about what has taken place in order to facilitate the reconciliation process; to contribute to the fight against impunity; to re-install or to strengthen democracy, the rule of law and public confidence in the ruling authority; and to prevent the repetition of such events.<sup>80</sup> But the right to the truth, in its individual or collective dimension, has only been explicitly cited as a legal basis in two of the instruments setting up "truth commissions" or other similar mechanisms.<sup>81</sup> The other constitutive instruments, while underlining the importance of revealing the truth about serious violations of human rights, refer more to the expediency of such an approach to achieve the aforementioned goals, rather than to an obligation for the state to establish the truth.<sup>82</sup> For example, the recently adopted Act to Establish the Truth and Reconciliation Commission of Liberia, enacted on 12 May 2005, refers to the recognition "that introspection, national healing and reconciliation will be greatly enhanced by a process which seeks to establish the truth through a public

79 Meron, above note 39, p. 89.

80 See the Peace Agreement between the government of Sierra Leone and the Revolutionary United Front of Sierra Leone (Art. XXVI) and The Truth and Reconciliation Commission Act 2000 of Sierra Leone (Art. 6); the Chilean Supreme Decree [*Decreto Supremo*] No. 355 of 25 April 1990, establishing the Truth and Reconciliation Commission; El Salvador: Mexico Peace Agreements — Provisions Creating the Commission on Truth, Mexico City, 27 April 1991; German Law No. 12/2597 of 4 May 1992, establishing the Commission of Inquiry on "Working through the History and the Consequences of the SED Dictatorship"; the Terms of Reference for the Commission of Truth and Friendship of Timor-Leste, of 10 March 2005; The National Reconciliation Commission Act of Ghana, 2002; and South Africa's Promotion of National Unity and Reconciliation Act No. 34 of 1995. See also Priscilla Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity*, Routledge, New York, 2001.

81 Peruvian Supreme Decree [*Decreto Supremo*] No. 065-2001-PCM of 2 June 2001, preambular para. 4; Agreement on the establishment of the Commission to clarify past human rights violations and acts of violence that have caused the Guatemalan population to suffer, Oslo, 23 June 1994, preambular para. 2.

82 See Uganda's Legal Notice Creating the Commission of Inquiry into Violations of Human Rights, The Commission of Inquiry Act, Legal Notice No. 5, 16 May 1986, which deems it "expedient" to inquire into the causes of and possible ways to prevent the serious violations of human rights falling under the mandate. The South African Promotion of National Unity and Reconciliation Act 1995, Act 95-34, 26 July 1995, in preambular para. 3, finds that "it is deemed necessary to establish the truth in relation to past events as well as the motives for and circumstances in which gross violations of human rights have occurred, and to make the findings known in order to prevent a repetition of such acts in the future."

dialogue which engages the nation...”<sup>83</sup> In the case of Liberia, the legal obligation to establish a truth-seeking mechanism derived from Article XIII of the Comprehensive Peace Agreement of 18 August 2003.<sup>84</sup> This has also been the case for a number of other states that have instituted truth and reconciliation commissions or similar mechanisms.<sup>85</sup> At the same time, the inclusion of the obligation to set up a truth commission in a peace agreement may itself constitute evidence of state practice acknowledging the right to truth in the aftermath of serious violations. But while the decision to set up a truth commission may be a question to be decided at the national level, there may well be a universal principle requiring states to preserve archives that enable societies to exercise their right to know the truth about past repression, as suggested in the Updated Principles on Impunity.<sup>86</sup>

Assuming that these practices may, by their prolific and widespread use, be considered as evidence of a customary right to truth, it is worth pausing to consider what definition and contours of the right to the truth such evidence affords. First of all, such mechanisms, though they vary greatly in terms of mandate, generally deal with serious violations of humanitarian and human rights law. Secondly, the mandate is generally not limited to specific events but is directed more to periods of armed conflict or serious civil unrest or state repression.<sup>87</sup> It is designed to elucidate the nature, causes and extent of human rights violations, as well as the underlying factors, antecedents and the context that led to such violations, together with identifying those responsible.<sup>88</sup> Third, “the truth” would appear to be owed both to individuals and to society as a whole.

83 Preambular para. 8 of the Act to Establish the Truth and Reconciliation Commission (TRC) of Liberia, enacted by the National Transitional Legislative Assembly on 12 May 2005 and approved by the Chairman of the National Transitional Government of Liberia on 10 June 2005.

84 Art. XIII of the Comprehensive Peace Agreement, City of Accra, Republic of Ghana, 18 August 2003, provides for the establishment of a Truth and Reconciliation Commission to “provide a forum that will address issues of impunity, as well as an opportunity for both victims and perpetrators of human rights violations to share their experiences in order to get a clear picture of the past to facilitate genuine healing and reconciliation.”

85 This was also the case for Sierra Leone (Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (Art. XXVI)); Guatemala (the Historical Clarification Commission (CEH) was established on 23 June 1994 as part of peace agreements between the Guatemalan government and the National Guatemalan Revolutionary Unit (URNG)); and El Salvador (the Commission on the Truth for El Salvador was mandated by the UN-brokered peace agreements of 16 January 1992).

86 See Updated Principles on Impunity, Principle 3, and the Report of the independent expert, para. 19, above note 8.

87 The mandate of the Commission for Reception, Truth and Reconciliation in East Timor, which authorizes the Commission to consider human rights violations over a 25-year period from 1974, provides a good example of this. See section 13.2 Regulation No. 2001/10 on the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor, UNTAET/REG/2001/10, 13 July 2001.

88 See *ibid.*, section 13 entitled “Truth” that identifies six ways in which the Commission should seek to establish the truth, namely by inquiring into: (1) the extent of human rights violations, including those part of a systematic pattern of abuse; (2) the nature, causes and extent of human rights violations, including the antecedents, circumstances, factors, context, motives and perspectives that led to such violations; (3) which persons, authorities, institutions and organisations were involved in the violations; (4) whether the violations were the result of deliberate planning, policy or authorisation on the part of

Fourth, the “truth” to be uncovered by such mechanisms is generally meant to be conducive to reconciliation processes — both the truth-seeking process and the results of the investigations are restorative in character, thus reverting again to the notion that truth is relative to present needs. The reports of these commissions have referred to the truth-telling function, *inter alia*, as “a critical part of the responses of states ... to serious acts of human rights violations,”<sup>89</sup> an “indispensable basis for measures to repair,”<sup>90</sup> the “only way to achieve this objective [of reconciliation]”<sup>91</sup> and a means to give effect to “the inalienable right to truth.”<sup>92</sup> In measuring their actual effect, Michael Ignatieff has famously asserted that “[a]ll that a truth commission can achieve is to reduce the number of lies that can be circulated unchallenged in public discourse.”<sup>93</sup> If that is all it does, it is already a lot for these deeply divided communities, but probably much more is achieved by these mechanisms in the sense of a “collective catharsis” and a “collective conscience” opposed to any repetition of such acts.<sup>94</sup> Moreover, the official public nature of a truth commission transforms the historic truth into official acknowledgement of the harm done to victims — a key value for national reconciliation.<sup>95</sup>

In terms of national legislation, in several countries the right of families to know the fate of their missing relatives has been incorporated in domestic legislation or in military manuals.<sup>96</sup> One country, Colombia, adopted a law in July 2005 recognizing the right to the truth of victims of human rights violations and crimes under international law, and of society in general.<sup>97</sup> Generally speaking, the right to the truth of victims of human rights violations and their relatives has not

any state or any of its organs or of any political organisation, militia group, liberation movement, or other group or individual; (5) the role of both internal and external factors in the conflict; and (6) accountability, political or otherwise, for the violations.

89 National Reconciliation Commission Report of Ghana, 16 May 2005, para. 1.1.2.

90 Report of the Chilean National Commission on Truth and Reconciliation, University of Notre Dame Press, Notre Dame, Indiana, 1993, Vol. I/II, Part 1, Chapter 1.

91 Guatemala: Memory of Silence, Commission for Historical Clarification (CEH), February 1999, Prologue.

92 Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission, Vol. I, 5 October 2004, p. 79.

93 M. Ignatieff, “Articles of Faith”, *Index on Censorship*, Vol. 25, No. 5, 1996, p. 113.

94 The former President of the Inter-American Court of Human Rights, Pedro Nikken, has argued that the discovery of truth fulfils a dual function: “First, it is useful for society to learn, objectively, what happened in its midst, which translates into a sort of collective catharsis. And second, it contributes to creating a collective conscience as to the need to impede the repetition of similar acts...”, quoted in *Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission*, Vol. I, 5 October 2004, p. 79.

95 See Méndez, above note 36, at p. 269, citing Thomas Nagel.

96 See *inter alia*: Customary International Humanitarian Law, Volume II, Practice, Part. 2, ICRC, Cambridge University Press, Cambridge, 2005, pp. 2766–2767; Bosnia and Herzegovina, Law on Missing Persons, 2004 (on file with author).

97 Law No. 975 of 25 July 2005, entitled “Law on justice and peace”. In Article 7 it defines the right to truth as belonging to society. However, this legislation has been criticized by the OHCHR as not leading to the truth because there is no condition of truth-telling for judicial benefits, the time allowed for investigations is limited and there are few incentives for the Attorney-General’s office to search for the truth.



been explicitly recognized in national constitutions. However, the majority of constitutional acts do recognize and protect freedom of information, including the right to seek information. Notably, the United States Freedom of Information Act (FOIA) and South Africa's Promotion of Access to Information Act have been used to disclose the truth about human rights violations committed in El Salvador, Guatemala, Peru and South Africa, and to help the work of truth commissions.<sup>98</sup>

National courts have also issued judgments signalling the importance of a right to the truth in relation to enforced disappearances that is based on the right to mourning (*derecho al duelo*),<sup>99</sup> the right to justice,<sup>100</sup> the need for historical clarification, individual and societal healing, and the prevention of future violations,<sup>101</sup> and as a means to ensure a democratic state based on the rule of law.<sup>102</sup> In the "Srebrenica cases," the Human Rights Chamber of Bosnia and Herzegovina based the right of families to know the truth about the fate and whereabouts of some 7,500 missing men and boys on the rights established in the European Convention on Human Rights. In particular, it looked at the right not to be subjected to torture or ill-treatment (because not knowing the truth about the fate of relatives prevented healing and closure and amounted to an ongoing violation of the Convention's Article 3),<sup>103</sup> the right to family life (because when information exists within the possession or control of the state and the state arbitrarily and without justification refuses to disclose it to the family member, it does not protect this right)<sup>104</sup> and the state's duty to conduct effective investigations,<sup>105</sup> which was also linked to a violation of Article 3. Although the decisions of courts are considered only as a "subsidiary means for the determination of rules," according to Article 38 (1)(d) of the Statute of the

98 UN Doc. E/CN.4/2004/88, para. 20. See also Mexican Federal Act on Access of Information (*Ley Federal de Acceso a la Información*) enacted in 2002 that bars the withholding of documents that describe "grave violations" of human rights, and the Stasi Files Act of Germany of 1991, which facilitates individual access to personal data stored by the State Security Service [Stasi – former East German secret police] in order to clarify what influence the service had on the individual's life and ensures and promotes "the historical, political, and juridical reappraisal of the activities of the State Security Service." Stasi Files Act (Stasi-Unterlagengesetz, StUG), *Federal Law Gazette* I, 1991, p. 2272, as amended.

99 See *inter alia*: Agreement of 1 September 2003 of the National Chamber for Federal Criminal and Correctional Matters (*Cámara Nacional en lo Criminal y Correccional Federal*), case of *Suárez Mason*, Rol. 450; Agreement of 1 September 2003 of the National Chamber for Federal Criminal and Correctional Matters, case of *Escuela Mecánica de la Armada*, Rol. 761; Judgment of 8 December 2004 of the National Chamber for Federal Criminal and Correctional Matters, case of *Maria Elena Amadio*, Rol. 07/04-P; and Judgment of the Oral Tribunal in Criminal Federal Matters No. 3 (Tribunal Oral en lo Criminal Federal), case of *Carlos Aléberto Telleidín and others — homicide (Amia Case)*, Rol. 487-00.

100 Chamber for Federal Criminal and Correctional Matters, Decision of 18 May 1995, case of *Maria Aguiar Lapaó*, Rol. 450.

101 Supreme Court of the Nation (Argentina), Judgment of 14 June 2005, S. 1767. XXXVIII, "*Simón, Julio Héctor y otros s/ privación ilegítima de la libertad*" case, Rol. No. 17.768.

102 *Ibid.*, paras. 15 and 19. See *inter alia* Constitutional Court of Colombia, Judgment of 20 January 2003, Case T-249/03; Judgment C-228 of 3 April 2002; and Judgment C-875 of 15 October 2002.

103 Decision on Admissibility and Merits of 7 March 2003, "*Srebrenica Cases*", case Nos. CH/01/8365 *et al.*, para. 220 (4); see also para. 191.

104 *Ibid.*, paras. 181 and 220(3).

105 Decision on admissibility and merits of 11 January 2001, *Palic v. Republika Srpska*, Case No. CH/99/3196; Decision on admissibility and merits of 9 November 2001, *Unkovic v. Federation of Bosnia and Herzegovina*, Case No. CH/99/2150.



International Court of Justice (ICJ), they “play an increasingly important role in the recognition of various human rights as custom,” and the cumulative weight of this case law, together with that of the human rights bodies and courts, “influences and consolidates the development of customary human rights law.”<sup>106</sup>

Going back to Meron’s indicators of a customary human right, he also notes some countering factors: “the degree to which a particular right is subject to limitations (claw back clauses) and the extent of contrary practice.” With regard to limitations on the right to the truth, it was mentioned earlier that certain countries recognize this type of obligation in the sense of the principle of freedom of information. As is known, the right to freedom of information may be restricted under international law where it is necessary to protect the reputation or rights of others or to protect national security, public order, public health or morals.<sup>107</sup> Could similar restrictions pertain to the right to the truth? It has been argued that the inalienable character of that right, together with its material scope (relating to serious violations of international humanitarian or human rights law) precludes any derogation from it. This argument is bolstered by the judgments of courts at national and regional levels that a failure to inform people of the fate and whereabouts of missing relatives may amount to torture — clearly a *jus cogens* crime. One could also argue that the judicial remedies that protect fundamental rights, such as *habeas corpus* and *amparo*, which may also be used as procedural instruments to implement the right to the truth, have now come to be understood as non-derogable.<sup>108</sup> Furthermore, in a similar way, the right to the truth has also been inferred by courts to form part of the state’s duty to protect and guarantee fundamental human rights.<sup>109</sup> If the right to the truth is necessary to vindicate other essential rights, such as the right to life and the right not to be subjected to torture, it is difficult to justify limitations or derogations to its application.

In practice, however, states are not always so keen to tell the truth about serious human rights violations and do seek ways to limit doing so. The justification of protecting national security has been commonly used by governments in recent years to limit the amount of information accessible to

106 Meron, above note 35, p. 89.

107 See ICCPR, Art. 19(3).

108 See *inter alia*: Human Rights Committee, *General Comment No. 29, States of Emergency*; Inter-American Court of Human Rights, *Advisory Opinion OC-8/87 of 30 January 1987*, and *Advisory Opinion OC-9/87 of 6 October 1987*.

109 European Court on Human Rights (Judgment of 25 May 1998, *Kurt v. Turkey*, Application No. 24276/94; Judgment of 14 November 2000, *Tas v. Turkey*, Application No. 24396/94; and Judgment of 10 May 2001, *Cyprus v. Turkey*, Application No. 25781/94); Inter-American Court of Human Rights (Judgment of 29 July 1988, *Velásquez Rodríguez* case; Judgment of 20 January 1989, *Godínez Cruz* case; Judgment of 3 November 1997, *Castillo Páez* case; Judgment of 24 January 1998, *Blake* case, para. 97; Judgment of 25 November 2000, *Bamaca* case; Judgment of 25 November 2003, *Myrta Mack Chang* case; Judgment of 8 July 2004, Case of the *Gómez-Paquiyaúri brothers v. Peru*; Judgment of 5 July 2004, Case of *19 Merchants v. Colombia*; Judgment of 7 September 2004, Case of *Tibi v. Ecuador*; Judgment *Molina Theissen* case (*Reparations*), Judgment of 15 June 2005, Case of *Moiwana Village v. Suriname*; Judgment of 22 November 2004, Case of *Carpio-Nicollé v. Guatemala*; Judgment of 1 March 2005, Case of *Serrano-Cruz sisters v. El Salvador*; and Judgment of 15 September 2005, Case of the *Massacre of Mapiripán v. Colombia*).

the public, even when this information pertains to serious human rights violations. Such behaviour has been borne out in the “extraordinary rendition” cases relating to terrorist suspects. In the *Maher Arar* case concerning a Canadian citizen abducted from John F. Kennedy airport and taken to Syria where he was secretly detained and subjected to torture for 10 months,<sup>110</sup> the American Civil Liberties Union (ACLU) filed proceedings under the Constitution and the Torture Victim Protection Act.<sup>111</sup> In response, the US asserted immunity and state secret defence. The ACLU also tried to get official confirmation of the extraordinary rendition practice through Freedom of Information procedures. Pursuant to this, in 2004, the court ordered the government to make the relevant documents available. On the basis of national security<sup>112</sup> there has thus far been no CIA cooperation with the court’s order. The real potential value can be discerned here of a right to the truth in customary law, separate from the right to seek information, that any citizen could exercise and that can be easily limited, because if the right to the truth is an inalienable right and is necessary to protect other fundamental human rights, the extent to which governments can invoke “national security” or other justifications to limit the right is likely to be curtailed.

Another area where we see contrary practice to a possible right to the truth is in the use of amnesties. Where amnesties exclude the possibility of bringing to trial the perpetrators of serious violations of human rights, one of the most commonly implemented means of finding out the truth is frustrated. The most recent example is the amnesty passed in Algeria in February 2006, which not only blocks prosecution of those accused of politically motivated human rights violations but also muzzles open debate by criminalizing public discussion about the nation’s decade-long conflict.<sup>113</sup> In fact, amnesties have been ruled by some bodies to be invalid under international law because they prevent the truth from coming out by blocking investigations and preventing those responsible for

110 See Jane Mayer, “Outsourcing torture: The secret history of America’s “extraordinary rendition” program”, *The New Yorker*, 14 February 2005, available at: [http://www.newyorker.com/fact/content/?050214fa\\_fact6](http://www.newyorker.com/fact/content/?050214fa_fact6) (last visited 4 April 2006).

111 In a decision on 16 February 2006, a US District Court dismissed the complaint of Maher Arar, based on lack of standing to bring a claim under the Torture Victim Protection Act. Citing foreign policy and national security concerns, the court rejected the plaintiff’s Bivens claim for substantive due process violations owing to his removal and torture in Syria. Although the court also dismissed the plaintiff’s procedural due process and denial of access to counsel claims based on his detention within the United States, the court granted the alien leave to re-plead these matters. See *Maher Arar v. John Ashcroft and others*, 414 F. Supp. 2d 250; 2006 US Dist. LEXIS 5803, 16 February 2006.

112 See also *Khaled El-Masri v. George Tenet, et al.*, 2006 US Dist. LEXIS 34577, 12 May 2006, in which the plaintiff, a German citizen, claimed to be an innocent victim of the United States’ “extraordinary rendition” program and, through three causes of action, sued defendants, including the former Director of the Central Intelligence Agency (CIA), private corporations and unknown employees of both the CIA and the corporations. The District Court ordered that the government’s claim of the state secrets privilege was valid and granted the motion to dismiss.

113 On 27 February 2006, Algeria’s full cabinet, with President Abdelaziz Bouteflika presiding, approved the “Decree Implementing the Charter for Peace and National Reconciliation”. The amnesty excludes those who “committed, or were accomplices in, or instigators of, acts of collective massacres, rape, or the use of explosives in public places.”

violations from being identified and prosecuted.<sup>114</sup> On the other hand, amnesties tied to obligations to disclose information about violations, such as in South Africa, not only allow the truth to be told, but are facilitative of this process.<sup>115</sup> A certain doctrine seems to be emerging in scholarship that these types of “accountable amnesties”<sup>116</sup> may be considered valid and can be recognized under international law, which adds leverage to the notion that a right to the truth has a legal value, not merely a moral or narrative one. At the same time, a general de-legitimization of any amnesties for international crimes in the international community is slowly closing the window on this limitation to truth-seeking.<sup>117</sup>

Thus, in conclusion to the proposition that the right to the truth is a customary right, it can be argued that although there is no explicit statement of the right in any human rights instrument, save for the Updated Principles on Impunity, there have been repeated inferences of this right in relation to other fundamental human rights by human rights bodies and courts. Cumulatively, the effect of these decisions, taken together with the widespread practice of instituting mechanisms to discover the truth in countries where serious crimes have been committed, as well as some national legislation and the constant reiteration of the importance of knowing the truth by international and national organs, suggests the emergence of something approaching a customary right (though with differing contours). It should also be borne in mind that those rights most crucial to the protection of human dignity and of universally accepted values of

114 See *Garay Hermonsilla et al. v. Chile*, Case 10.843, Report No. 36/96, Inter-Am, CHR, OEA/Ser.L/V/II.95 Doc. 7 rev. at 156 (1997).

115 See *The Azanian Peoples Organization (AZAPO) v. The President of the Republic of South Africa and others*, Case CCT 17/96, (South Africa), 1996 (hereinafter the AZAPO case ), para. 22.

116 The term “accountable amnesty” is borrowed from Professor Ronald C. Slye, “The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?”, *Virginia Journal of International Law*, Vol. 43, p. 173, at p. 245, to refer to an amnesty that provides some accountability and more than minimal relief to victims. According to Prof. Slye, such an amnesty, which could be accorded foreign recognition, must be created according to democratic structures and cannot apply to those most responsible for serious international crimes, among other conditions. See also William W. Burke-White, “Reframing Impunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation”, *Harvard International Law Journal*, Vol. 42, No. 2 (2001), (emphasising the legitimising effect of democratically elected governments enacting amnesties); Michael P. Scharf, “The Amnesty Exception to the Jurisdiction of the International Criminal Court”, *Cornell International Law Journal*, Vol. 32 (1999), (noting the factors the ICC should consider in deciding whether to recognize an amnesty: whether an offence attaches to a duty to prosecute, whether the armed conflict would have ended without the recourse to amnesty and whether the state has instituted a truth mechanism); and John Dugard, “Dealing with Crimes of a Past Regime: Is Amnesty Still an Option?”, *Leiden Journal of International Law*, Vol. 12, No. 4 (1999), p. 1001 (suggesting that amnesties accorded by a Truth and Reconciliation Commission, such as that in South Africa, after investigation “may contribute to the achievement of peace and justice in a society in transition more effectively than mandatory prosecution”).

117 See Principle 7 of the Princeton Principles on Universal Jurisdiction, adopted by a group of international law experts in 2001, which proposed that “Amnesties are generally inconsistent with the obligation on states to provide accountability for serious crimes under international law”, Principle 7, Princeton Principles on Universal Jurisdiction 28 (2001), Princeton University Program in Law and Public Affairs, Princeton University, Princeton, 2001.

humanity require a lesser amount of confirmatory evidence of their customary character.<sup>118</sup>

## The right to the truth as a general principle of law

What about a right to the truth as a general principle of law? Juan Méndez, one of the principal legal experts on the right to truth, has characterized the right as one of the “emerging principles in international law” in view of the fact that “the precept has not been established as a norm clearly and unquestionably validated in an international treaty.”<sup>119</sup> It may be argued that the right to the truth can be discerned as a principle of law deriving from sources at both the international and the national levels. In terms of the former, it may be used as a means of inferring the existence of broad rules from more specific rules by means of inductive reasoning.<sup>120</sup> The jurisprudence of the human rights courts, which seem to identify a broader right to truth in their analysis of specific conventional rights, would appear to provide some evidence for this. In the latter, as a principle derived from sources at the national level, it is able to “fill gaps” when treaties and custom do not provide enough guidance. Many general principles borrowed from national systems are based on “natural justice,” such as principles of good faith, estoppel and proportionality. It could be held that the right to the truth has similar roots, based as it is on human dignity and fairness. It can also be observed that a real transplantation of domestic law principles to the international level is limited to a number of procedural rules, such as the right to a fair hearing, and procedures to address the denial of justice or the exhaustion of domestic remedies. The right to the truth is analogous in a sense to these procedural rules by being tied to the protection of fundamental human rights and by emerging as an expected response by a state to a violation. As is known, general principles of law are particularly useful in “new” areas of international law, and it is clear that the concept of the right to the truth could be instrumental to the complex and emerging field of transitional justice, although it should not only apply in the transitional context.<sup>121</sup> More broadly, general principles of law, particularly those reflecting considerations of humanity, may reveal certain criteria of public policy.<sup>122</sup> In this respect, it is easy to discern the public policy implications of a right to the truth recognized at the international level.

118 Meron, above note 35, pp. 35 and 113. See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Merits, Judgment, ICJ Reports 1986, 14 (1986), pp. 98–108.

119 Méndez, above note 36, p. 255.

120 Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, 7<sup>th</sup> edition, Routledge, London, 1997, p. 48.

121 See Méndez, above note 36, at p. 256 (“...these obligations are of universal application and are fed by experiences that have little to do with the transition to democracy”).

122 See Ian Brownlie, *Principles of Public International Law*, 3rd edition, 1979, p. 29.

## Consequences of a right to the truth: truth and the criminal trial

As noted in the introductory comments to this article, revealing the truth has become strategically important to many of the objectives of the international criminal trial. However, certain commentators have cautioned against this approach. Professor Koskenniemi, for example, has described how in trials seeking to deal with international crimes perpetrated in highly political contexts, “[t]he line between justice, history and manipulation tends to become all but invisible.”<sup>123</sup> He argues that the objective of “‘educating’ people of ‘historical truths’ through law emerges from our contemporary wish to accommodate the Realist insight about the need to take into account of the context, but also from our rejection of the Realists’ conclusion — namely that law cannot be of use here.” In line with Hans Morgenthau’s scepticism about the ability of the international legal process to deal with large events of international politics because of the inevitable distortion that occurs when political contexts are subject to legal process,<sup>124</sup> Koskenniemi points out that “‘individualization’ of international criminal guilt may provide an alibi to a criminal state system (and abiding population),<sup>125</sup> while the very structure of a tribunal designed to try perpetrators for such crimes is implicitly grounded in preconceived notions about the (contested) context in which the crimes were committed, making a “show trial” almost inevitable.<sup>126</sup> Other commentators have also warned about the “moralizing over-simplification” of international criminal law, which “runs the risk of falling into Manichaeian approaches.”<sup>127</sup> In her famous book on the Eichmann trial in Jerusalem, Hannah Arendt also criticized the trial for introducing historical, political and educational objectives into the proceedings:

“The purpose of the trial is to render justice, and nothing else; even the noblest ulterior purposes — ‘the making of a record of the Hitler regime...’ can only detract from the law’s main business: to weigh the charges brought against the accused, to render judgment and to mete out due punishment.”<sup>128</sup>

123 Martti Koskenniemi, “Between impunity and show trials”, 6 *Max Planck UNYB* (2002), p. 34.

124 See the discussion on Morgenthau’s argument as enunciated in “Die internationale Rechtspflege, ihr Wesen und ihre Grenzen”, 1929, pp. 62–72, in Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960*, Cambridge University Press, Cambridge, 2002, pp. 440–445.

125 Koskenniemi, “Between impunity and show trials”, p. 32. See also the criticisms of the individualization of responsibility for acts of genocide committed in Rwanda, which may be oversimplifying the situation and distorting the group element in the perpetration of crimes: Jean Marie Kamatali, “The challenge of linking international criminal justice and national reconciliation: The case of the ICTR”, *Leiden Journal of International Law*, Vol. 16, No. 1, March 2003, p. 124.

126 Thus, Koskenniemi points out that in the case of the Milosevic trial in The Hague, “...because the context is part of the political dispute, the trial of Milosevic can only, from the latter’s perspective, be a show trial participation which will mean the admission of Western victory.” Koskenniemi, *ibid.*, pp. 17–18.

127 Antoine Garapon, “Three Challenges for International Criminal Justice”, *Journal of International Criminal Justice*, Vol. 2, No. 3 (2004), p. 724.

128 Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, Penguin Books, New York, 1994, p. 253.

Because of its overtly didactic purposes, Arendt felt that the *Eichmann* trial had become a show trial staged by the Israeli Prime Minister, David Ben-Gurion, to support political motives linked to justifying and unifying the state of Israel.

Turning to more practical implications for a right to the truth in relation to criminal processes, one of the areas where recognition of such a right may impact upon the functioning of trials is the relationship between truth-seeking processes and judicial processes.<sup>129</sup> In principle, these are supposed to be complementary, but there are also possibilities for conflict, as was shown in the decision of the Special Court for Sierra Leone (SCSL) when it rejected the application for Samuel Norman to appear at the Truth and Reconciliation Commission (TRC) before his trial at the SCSL, on the basis of a lack of procedural safeguards of the accused.<sup>130</sup> The implication was that fair trial rights of the accused would override the truth-seeking function of the TRC. On appeal, Justice Robertson put forward a compromise solution, allowing Norman to give written evidence or to meet with the TRC in private but denying a public hearing.<sup>131</sup> In fact, this never happened, but the resolution of the jurisdictional conflict in favour of the court meant that the potential for a broader investigation of some elements of the conflict in Sierra Leone was lost. One question to consider is whether the decision could have been resolved differently had the “right to the truth” of victims and of Sierra Leonean society been recognized and weighed against the rights of the accused.<sup>132</sup> Taking into account the fact that truth and reconciliation commissions generally consider facts and evidence of a much wider scope than those merely of concern in a criminal trial, and given the crucial importance that has been attributed to ascertaining this “truth” for reconciliation purposes and the prevention of future violence, courts faced with similar situations should perhaps take a more lateral view in their weighing up of competing interests.

The problem of whether the “use immunity for testimony”<sup>133</sup> mechanism can be applied to truth commission procedures also remains unresolved. In other words, should witnesses who give testimony before a truth commission be able to

129 For a discussion of this relationship, see William A. Schabas & Shane Darcy, *Truth Commissions and Courts: The Tension Between Criminal Justice and the Search for Truth*, Kluwer Academic Publishers, Dordrecht, 2004.

130 *Decision on the Request of the Truth and Reconciliation Commission of Sierra Leone to Conduct a Public Hearing with Samuel Hinga Norman* (SCSL-2003-08-PT) [3257-3264], 29 October 2003.

131 *Decision on Appeal by the Truth and Reconciliation Commission of Sierra Leone (“TRC” or “The Commission” and Chief Samuel Hinga Norman JP against the Decision of His Lordship, Mr Justice Bankole Thompson, delivered on 20 October 2003, to Deny the TRC’s Request to Hold a Public Hearing with Chief Hinga Norman JP*, (SCSL-2003-08-PT), 28 November 2003.

132 In this regard, it should be noted that Principle 9 of the Updated Principles on Impunity, above note 8, puts forward some guidelines for safeguarding the rights of persons implicated in the course of investigations by truth-seeking mechanisms.

133 Before the Special Court for Sierra Leone, a witness may request that testimony delivered in proceedings before that Court will not be used in a subsequent prosecution of that witness (Rule 90(E) of the SCSL Rules of Procedure and Evidence). The Rule is derived from Rule 90(E) of the ICTR Rules of Procedure and Evidence, in accordance with Art. 14(1) of the SCSL Statute.



request that such information not be used to prosecute them?<sup>134</sup> If one takes into account a right to truth owed to society or to victims, the arguments for such a principle to be applied to truth commission procedures may well be strengthened.

Another area that merits attention is the use of plea bargaining in trials dealing with international crimes. Despite an initial reluctance to enter into this type of arrangement, given the nature of the crimes covered by their mandates, the *ad hoc* international criminal tribunals have gradually come to accept the use of plea bargaining as a means to make international criminal processes more efficient.<sup>135</sup> This began with sentence bargaining but now includes charge bargaining.<sup>136</sup> On the one hand, a guilty plea is important for establishing the truth because it removes the source of conflict over responsibility and evidence, and it provides an incentive to defendants to provide information that may otherwise remain unknown. The best example of this is the plea agreement of Momir Nikolic before the ICTY. In his Statement of Facts and Acceptance of Responsibility attached to the plea agreement, Nikolic stated that the executions of thousands of Muslim men and boys at Srebrenica were planned and known about at the highest levels in the Bosnian Serb Army (VRS), thereby countering the denials that had been issued regarding responsibility at the individual and state level for the massacre.<sup>137</sup> However, “charge bargaining,” where more serious charges are dropped in return for a defendant’s guilty plea, also has the potential to distort the historical record. In this sense, one could well ask whether charge bargaining is compatible with the right to the truth of society and of victims. In the case of *Plavšić* at the ICTY, the accused also admitted the facts supporting the charge in a five-page document appended to the plea agreement, which may serve to develop a generally accepted historical record. On the other hand, *Plavšić* only had to admit to facts relevant to the remaining charge of persecution so that her involvement in any acts of genocide, the original charge, remains unknown. In fact, many Serbs did not see the plea bargain as an act of truth-telling but as a self-interested compromise in return for judicial benefits.<sup>138</sup>

134 For arguments in this direction, see William A. Schabas, “A Synergic Relationship: The Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone”, in William A. Schabas & Shane Darcy, *Truth Commissions and Courts: The Tension Between Criminal Justice and the Search for Truth*, Kluwer Academic Publishers, Dordrecht, 2004, pp. 30–35.

135 On 12 July 2001, the ICTY added Rule 62ter of the Rules of Procedure and Evidence, which sets forth the procedure for accepting a plea arrangement.

136 Sentencing Judgment, *Plavšić* (IT-00-39&40/1-S), Trial Chamber III, 27 February 2003.

137 As Assistant Commander for Security and Intelligence of the Bratunac Brigade of the VRS, Nikolic was ordered to coordinate and supervise “the transportation of the women and children to Kladanj and the separation and detention of able-bodied Muslim men,” which he did. He was asked to help identify sites for detention where the men and boys were to be held pending their execution. Nikolic passed this information on to his commander and co-accused, Vidoje Blagojevic, who appeared to be “fully informed of the transportation and killing operation”. He also admits his involvement in exhumation of mass graves and reburial — and names those who ordered him to do it. In addition, he relates the intentional destruction of compromising evidence by officers of the VRS Drina Corps, as well as meetings with VRS officers and a visit from the State Security Service to encourage his silence after he was summoned for questioning by the ICTY.

138 Michael P. Scharf, “Trading justice for efficiency”, *Journal of International Criminal Justice*, Vol. 2, No. 4 (2004), pp. 1070–1081, at p. 1080.



Indeed, negotiated justice has been justified on the basis of postmodern philosophical thought which, as mentioned earlier, sees the most appropriate concept of truth as one that defines “truth” as that version of facts acceptable to all concerned.<sup>139</sup> A general principle of a “right to the truth,” therefore, may help courts to attune their use of plea-bargaining and other measures of negotiated justice better to the overriding objectives of international criminal justice. It is a delicate balance to achieve: while agreement and compromise may not be the most reliable path to accurate fact-finding, a defendant may be induced to provide important evidence that may otherwise not come to light.<sup>140</sup>

Finally, the difficult question of whether a truth commission or other non-judicial truth-seeking mechanism should name names of those found responsible for serious human rights violations remains a thorny issue. Clearly, there is a clash here between the individual victim’s and society’s right to truth and the alleged perpetrator’s due process rights, not least the presumption of innocence and the right to defend oneself against criminal charges. The practice of truth commissions has varied on this point.<sup>141</sup> The Updated Principles on Impunity provide some guidelines on the matter,<sup>142</sup> but debate is likely to continue.

## Conclusion

The right to the truth is a notion that seems at once idealistic and obvious to the human condition. Truth is a concept that is notoriously hard to pin down. It implies objective credibility but also requires subjective understanding. It suggests agreement about factual reality but also space for differing interpretations. It takes on value in the public sphere while remaining an intensely private matter for the

139 Mirjan Damaška, “Negotiated Justice in International Criminal Courts”, *Journal of International Criminal Justice*, Vol. 2, No. 4 (2004), pp. 1018–1039, at p. 1029.

140 For its part, the ICC Statute allows “admissions”, which have to follow the strict conditions required for admission statements. They must be supported, *inter alia*, by materials supplementing the prosecution’s charges as well as any other evidence presented by the parties. A judge can request that the prosecution present additional evidence, including the testimony of witnesses (ICC Statute, Art. 65).

141 Truth commissions in El Salvador and South Africa named alleged perpetrators in their final reports. The commission in Guatemala was explicitly prohibited from doing so. Argentina’s National Commission on the Disappeared operated under an ambiguous mandate in this regard, but it did not release the names of those who were said to have committed crimes. Although the mandate of Chile’s National Commission on Truth and Reconciliation did not prohibit the body from naming those alleged to have committed crimes, the commission nonetheless chose not to do so, citing pragmatic concerns about stability and due process questions of evidentiary sufficiency.

142 Principle 9 of the “Updated Principles on Impunity” provides that: “[b]efore a commission identifies perpetrators in its report, the individuals concerned shall be entitled to the following guarantees: (a) The commission must try to corroborate information implicating individuals before they are named publicly; (b) The individuals implicated shall be afforded an opportunity to provide a statement setting forth their version of the facts either at a hearing convened by the commission while conducting its investigation or through submission of a document equivalent to a right of reply for inclusion in the commission’s file.”

individual, and it is honed on the past but may change our perception of the present and teach lessons about what to do with the future.

By way of a tentative conclusion to the question posed in the title of this article, it may be argued that the right to the truth stands somewhere on the threshold of a legal norm and a narrative device. Its clear link to human dignity means that nobody will deny its importance, but lingering doubts about its normative content and parameters leave it somewhere above a good argument and somewhere below a clear legal rule. The truth about the right to the truth is still a matter to be agreed upon.

# Provoking the dragon on the patio Matters of transitional justice: penal repression vs. amnesties

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## Abstract

*This article modestly seeks to address some of the various matters related to transitional justice and focuses on whether penal repression for violations of international humanitarian law and international human rights law must be insisted upon in all situations, or if there are cases where other action, in particular amnesties, would be more appropriate to ensure national reconciliation or the peaceful development of a country. Dilemmas clearly exist in responding to such choices, calling for the ability to maintain a judicious balancing act between competing important interests, including the most basic decision of whether or not to provoke the dragon on the patio.*

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## Introduction

“[Many governments and some individuals] have made the call that to leave the past alone is the best way to avoid upsetting a delicate process of transition

\* The views expressed in this article reflect those of the author and not necessarily those of the ICRC.

or to avoid a return to past dictatorship [and reopening the victims' old wounds]. The attitude is that there is a dragon living on the patio and we had better not provoke it.”<sup>1</sup>

As a political transition unfolds after a period of violence or repression, a society is often confronted with a difficult legacy of abuse. Countries as diverse as Bosnia-Herzegovina, Sierra Leone, Peru and East Timor struggle to come to terms with crimes of the past. In order to promote justice, peace and reconciliation, government officials and non-governmental advocates are likely to consider both judicial and non-judicial responses to violations of international human rights law (IHRL) and international humanitarian law (IHL). These may include prosecuting individual perpetrators, offering reparations to victims of state-sponsored violence, establishing truth-seeking initiatives about past abuse, reforming institutions like the police and the courts and removing perpetrators from positions of power. Increasingly, these approaches are used together in order to achieve a comprehensive and far-reaching sense of justice termed “transitional justice”.<sup>2</sup>

By identifying certain relevant questions, this article modestly seeks to address some of these various matters related to “transitional justice” and focuses on whether penal repression for violations of IHL and IHRL must be insisted upon in all situations, or whether there are cases where other action, in particular amnesties, would be more appropriate to ensure national reconciliation and peaceful development of a country. Interestingly, this article — and the language of restorative justice (versus retributive justice) and forgiveness of the offenders — comes about when international law is developing in the opposite (punitive) direction with the creation of the International Criminal Court, prosecutions brought by the *ad hoc* tribunals for the former Yugoslavia and Rwanda and the employment of universal jurisdiction.

Starting mainly in the 1980s, the dozens of states moving forward to democracy after civil war or the end of a repressive regime popularly had recourse to mechanisms, such as truth commissions, in the hope of achieving a successful transition. The main priority of many of these truth commissions, as in Chile or in Argentina, was to reveal truths about the past and especially to determine the fate of the thousands of disappeared. In contrast, the South African Truth and Reconciliation Commission in the 1990s was much more ambitious. More than any other truth commission before, it sought reconciliation as the basis for nation-building;<sup>3</sup> yet reconciliation was not fully defined in the initial state documents establishing the commission, and its meanings proliferated and were transformed

1 Neil J. Kritz (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, Vol. 1, United States Institute of Peace Press, Washington, 1995, p. 346, citing Tina Rosenberg, in A. Boraine, J. Levy & R. Scheffer (eds.), *Dealing with the Past: Truth and Reconciliation in South Africa*, 1994, p. 66.

2 For a further definition, see the website of the International Center for Transitional Justice, available at <http://www.ictj.org>.

3 Richard A. Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State*, Cambridge University Press, Cambridge, 2001, p. 121.

during the commission's life.<sup>4</sup> Nevertheless, the term "reconciliation" has become an integral part of discussions in search of solutions during transition.

Many people associate "reconciliation" with pardoning and forgetting (i.e., do not "provoke the dragon on the patio"); others hold the opposite view. It remains indisputable, however, that there is no single universal model for reconciliation, owing not only to the varying contexts but also to the diverse understandings of that term. For example, is the goal to reach individual reconciliation, or national or political reconciliation?<sup>5</sup> Either type of reconciliation is a process, not a single event. Of the two, the more realistic goal is that of national or political reconciliation, which can be understood as focusing on long-term support to political, socio-economic and cultural institutions so that they are able to address the root causes of conflicts and establish necessary conditions for peace and stability.<sup>6</sup>

Individual reconciliation is much more complex because it is just that: individual. Each person's needs are different, as is their reaction to forgiveness, healing and reconciliation. The victims are the only ones who can forgive. Neither a government that has oppressed a people nor the individuals who committed the violations can "proclaim" forgiveness; they can only ask for it. The victim(s) must decide to forgive and then reconciliation has the chance to develop.

"Unfortunately, in all too many cases, it is the victim(s) who must start the process of reconciliation. And often times, it ends with the victim(s). All too often, the one(s) who has done oppression is not interested in true reconciliation. In this case, reconciliation becomes a process of the victims coming to terms with themselves, with their families, with their neighbors. For those who have suffered atrocities, reconciliation often means learning how to live in and with their family, community, society in a process of healing, of becoming alive again."<sup>7</sup>

It is suggested that reconciliation as the goal cannot be imposed, and that it must be built. Reconciliation requires knowledge because the person must know what he or she is forgiving and only after atonement may there be reconciliation. Without atonement it is a new and additional unfairness to ask the victims to forgive without any contrition or acknowledgment on the part of the wrongdoer.<sup>8</sup> Thus, truth appears to be a necessary ingredient for reconciliation. If truth is necessary to advance reconciliation,<sup>9</sup> by whom does the truth need to be acknowledged — by both parties, or by the community at large? Which truth is the "truth" sought?

4 Ibid., p. 98.

5 Priscilla B. Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity*, Routledge, London, 2001, p. 155.

6 See generally K. Kumar, *Rebuilding Societies after Civil War*, Lynne Rienner Pub., Boulder, CO, 1997; *Reconciliation After Violent Conflict, a Handbook*, Handbook Series, International Institute for Democracy and Electoral Assistance, Stockholm, 2003.

7 Dave Lindstrom, *National Dialog — A Chance for Reconciliation?*, available at: <http://www.fhrg.org/remhi/reconcil.htm>.

8 Juan E. Méndez, "Accountability for Past Abused", *Human Rights Quarterly*, Vol. 19, 1997, pp. 255, 274.

9 Hayner, above note 5, p. 6.

Furthermore, some believe that truth is always preferable to justice. With reference to the experiences of Chile and South Africa, it has been suggested that truth reports should replace trials.<sup>10</sup> It has even been proposed that the International Criminal Tribunal for the former Yugoslavia should be closed down and replaced with a truth commission like that of El Salvador or Chile.<sup>11</sup> However, Chile and South Africa have also prosecuted successfully.<sup>12</sup> “It is far from proven that a policy of forgiving and forgetting automatically deters future abuses.”<sup>13</sup> Haiti would be an example of amnesties that have not led to the deterrence of future abuses.<sup>14</sup> And the South African Truth and Reconciliation Commission, which spoke more of reconciliation than any truth commission before it, realized that its initial claims of achieving full reconciliation were unrealistic. Archbishop Desmond Tutu began to argue that a more realistic goal for the commission was to “promote” reconciliation.<sup>15</sup>

Truth must be part of the process, but must it be placed in competition with justice? Should truth telling have priority over justice? May not truth be a step in the direction of accountability, not an alternative to it? Must reconciliation and justice always be juxtaposed?

All choices of how to handle these transitional periods involve finding solutions to two key issues: 1) acknowledgment: whether to remember or to forget the abuses; and 2) accountability: whether to impose sanctions on the persons responsible for these abuses.<sup>16</sup> Ultimately, “[t]he issue becomes to determine which elements of truth, justice and clemency measures are compatible with one another, with the construction of democracy and peace, with emerging standards of international law, and with the search for reconciliation.”<sup>17</sup>

## Penal repression — the obligation under international law

The rule of law must stand above political decisions; the essence of the rule of law, a cornerstone of democracy,<sup>18</sup> is that no person is exempt from the law. Trying

10 See Charles Krauthammer, “Truth, not trials: A way for the newly liberated to deal with the crime of the past”, *Washington Post*, 9 September 1994, at A27.

11 Neil A. Lewis, “Nuremberg isn’t repeating itself”, *New York Times*, 19 November 1995, at E5 (quoting Robert Pastor a senior aide to President Jimmy Carter); David Forsythe, “The UN and human rights at fifty: An incremental but incomplete revolution”, *Global Governance* No. 1, 1995, p. 297.

12 Méndez, above note 8, p. 267.

13 *Ibid.*, p. 266.

14 “[E]ach self-amnesty by the military has led to further interruptions of democracy and to further atrocities.” Méndez, above note 8, p. 266, citing Kenneth Roth, “Human rights in the Haitian transition to democracy”, in *Human Rights and Political Transitions: Gettysburg to Bosnia*, Carla Hesse & Robert Post (eds.), 1997.

15 Hayner, above note 5, p. 156.

16 Luc Huyse, “Justice after transition: On the choices successor elites make in dealing with the past”, *Law & Social Inquiry*, Vol. 20, No. 1, Winter 1995, cited in Kritz, above note 1, p. 337.

17 Juan Méndez, “National Reconciliation, Transitional Justice, and the International Criminal Court”, *Ethics and International Affairs*, Vol. 15, 2001, pp. 25, 29.

18 Diane F. Orentlicher, “Settling accounts: The duty to prosecute human rights violations of a prior regime”, *Yale Law Journal*, Vol. 100, 1991, pp. 2537, 2543.

suspected war criminals who are political and military leaders, however, does not always appear the appropriate or easiest policy choice. As mentioned above, some hold that the notion of reconciliation is a *sine qua non* for democracy and insist that criminal prosecution is an obstacle to reconciliation.<sup>19</sup> Conversely, international human rights literature widely considers criminal punishment to be “the most effective insurance against future repression”<sup>20</sup> and stresses the relationships between accountability, reconciliation, peace and democracy.<sup>21</sup>

A discussion on penal repression and amnesty must begin with an understanding of existing obligations under international law, because the obligation under international law to prosecute and punish certain criminal conduct reduces or eliminates the state’s legal options, including the passing of amnesty laws, for those specified violations. If states are required to prosecute offenders, amnesty laws for those crimes are thus proscribed. If a lesser duty of non-criminal accountability exists, however, abusers could be held responsible through civil suits, naming by a truth commission, lustration<sup>22</sup> and other mechanisms without violating a particular international legal obligation. Respect for the rule of law is a crucial factor to be weighed when assessing whether to abandon or complement penal repression with other mechanisms of accountability and/or acknowledgment, even for the desirable aim of achieving national reconciliation or the peaceful development of a country.

### Obligations under international law regarding penal repression of international humanitarian law violations

There is an obligation to suppress all violations of IHL.<sup>23</sup> This obligation does not require states to adopt criminal legislation, but it does leave them to decide

19 *Azanian People’s Organization (AZAPO) and Others v. President of the Republic of South Africa*, 1996(4) SA 671, pp. 684–86 (“If the Constitution kept alive the prospect of continuous retaliation and revenge, the agreement of those threatened by its implementation might never have been forthcoming”); *ibid.*, p. 685; Michael Ignatieff, *The Warrior’s Honor: Ethnic War and the Modern Conscience*, Henry Holt & Company, LLC, New York, 1997, p. 184 (“[I]f trials assist the process of uncovering the truth, it is doubtful whether they assist the process of reconciliation. The purgative function of justice tends to operate on the victims’ side only. While the victims may feel justice has been done, the community from which the perpetrators come may feel that they have been made scapegoats.”).

20 Orentlicher, above note 18, p. 2542. See also Malamud-Goti, “Transitional governments in the breach: Why punish state criminals?”, *Human Rights Quarterly*, Vol. 12, 1990, p. 12.

21 Steven R. Ratner, “New democracies, old atrocities: An inquiry in international law”, *Georgetown Law Journal*, Vol. 87, 1999, pp. 707, 735, citing Méndez, above note 8, pp. 273–75; Larry Rohter, “Huge amnesty is dividing Guatemala as war ends”, *New York Times*, 18 December 1996, at A9 (“There can be no real peace without justice” in the words of Indian leader Genara Lopez); Judith Shklar, *Legalism: Law, Morals, and Political Trials*, Harvard University Press, Cambridge, Massachusetts, 1986, p. 158 (trials replace “private, uncontrolled vengeance with a measured process of fixing guilt in each case, and taking the power to punish out of the hands of those directly injured”).

22 Lustration is an administrative mechanism, defined as “the disqualification and, where in office, the removal of certain categories of officeholders under the prior regime from certain public or private offices under the new regime.” See Herman Schwartz, “Lustration in Eastern Europe”, in Kritz, above note 1, p. 461.

23 “Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches...” Articles 49(3), 50(3), 129(3)



whether to repress violations or to implement appropriate administrative, disciplinary or other measures in order to fulfil their obligation.

Under IHL, specific treaty obligations requiring states to prosecute or extradite violators for prescribed crimes committed anywhere exist only for the grave breaches listed in the four Geneva Conventions<sup>24</sup> of 1949 and Additional Protocol I<sup>25</sup> of 1977. This obligation for states to prosecute or extradite on the basis of universal jurisdiction is clearly stated in these treaties. Various other “IHL treaties”<sup>26</sup> likewise oblige a state party to prosecute or extradite for actions prescribed in them, despite the fact that, generally speaking, explicit treaty obligations to that effect are rare.

Under customary international law, war crimes encompass serious violations committed in international armed conflicts in addition to those listed as grave breaches of the four Geneva Conventions and Additional Protocol I.<sup>27</sup> Today war crimes also encompass serious violations occurring in non-international armed conflict<sup>28</sup>, including serious violations of Article 3 common to the four Geneva Conventions.<sup>29</sup> The extension of war crimes to cover acts in non-international armed conflicts is of great significance, as nowadays most conflicts are internal, and transitional governments or transitional democracies, if associated with armed conflict at all, were usually brought about by non-international armed conflict.

According to customary international law, states are required to investigate war crimes allegedly committed, whether in international or non-international armed conflict, by their nationals or armed forces or on their territory and, if appropriate, to prosecute the suspects. States must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects.<sup>30</sup> This is so despite the existence of some contrary practises, such as the granting of amnesties for violations committed in non-international armed conflicts.<sup>31</sup>

and 146(3) respectively of the four Geneva Conventions. Article 85(1) of Additional Protocol I stipulates that the provisions of the Conventions relating to the repression of breaches and grave breaches shall apply also to the repression of breaches and grave breaches of the Protocol.

24 The grave breaches specified in Arts. 50, 51, 130 and 147 respectively of the four Geneva Conventions when committed during international armed conflict against persons and property protected by the four Geneva Conventions are war crimes.

25 The grave breaches of Additional Protocol I are defined in Articles 11(4), 85(3) and 85(4) and constitute war crimes.

26 The 1954 Hague Convention for the Protection of Cultural Property; the Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property; the 1972 Biological Weapons Convention; the 1976 Environmental Modification Techniques Convention; the Amended Protocol II to the 1980 Conventional Weapons Convention; the 1993 Chemical Weapons Convention; the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction.

27 Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Law*, Vol. I, Cambridge University Press, Cambridge, pp. 574–590.

28 Ibid., pp. 590–603.

29 Ibid., p. 590.

30 Ibid., p. 607.

31 See section entitled Amnesties — their (il)legality; Ibid., pp. 609–610.

Therefore, the legal framework binding states with regard to all war crimes, whether established through treaty or custom, requires states to “exercise criminal jurisdiction which their national legislation confers on their courts, be it limited to territorial and personal jurisdiction, or include universal jurisdiction, which is obligatory for grave breaches.”<sup>32</sup> How these legal boundaries impact on the permissibility of grants of amnesty is discussed after the following section.

### Obligations under international law regarding penal repression of violations of human rights law

As with IHL, certain international human rights treaties oblige a state party to prosecute or extradite persons accused of acts prescribed in the treaty. Their diversity demonstrates the varying forms in which universal jurisdiction is exercised.<sup>33</sup>

Apart from those treaties, most international human rights treaties remain vague in terms of a specific obligation to prosecute violators. International human rights treaties generally require that the state party offer a remedy, in both civil and criminal law, to victims of human rights violations. For example, the International Covenant on Civil and Political Rights contains a less precise obligation than *aut dedere aut judicare*, namely to “respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized [therein]” and to provide “an effective remedy” to them.<sup>34</sup> The European and American Conventions contain similar language.<sup>35</sup> What constitutes an effective or adequate remedy has been subject to interpretation by human rights courts and commissions and, despite the absence of a “black-letter” obligation to prosecute, these bodies have proclaimed such a principle.<sup>36</sup> The Inter-American Court of

32 Ibid., p. 607.

33 The 1930 Convention concerning Forced Labour and the 1948 Convention on the Prevention and Punishment of the Crime of Genocide require states parties to punish individuals for crimes committed on *their* territory. The 1999 International Convention for the Suppression of the Financing of Terrorism requires states parties to punish or extradite individuals for crimes committed on *their* territory or by their nationals. The 1979 International Convention against the Taking of Hostages, the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the 1994 Inter-American Convention on the Forced Disappearance of Persons require states parties to extradite or prosecute offenders for crimes committed *anywhere*. The 1956 Slavery Convention and the 1973 Convention on the Suppression and Punishment of the Crime of *Apartheid* appear the strongest, in that they require state parties *to prosecute*, without the choice of extraditing, for crimes committed anywhere. The 1998 Rome Statute of the International Criminal Court establishes jurisdiction over genocide, war crimes and crimes against humanity, including the crime of apartheid, thereby inferring a duty to prosecute these crimes on the part of states parties who wish to take advantage of the complementary regime; its preamble recalls “the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.”

34 International Covenant on Civil and Political Rights, 19 December 1966, Art. 2, paras. 1 and 3(a).

35 European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, Arts. 1, 5(5) and 13; American Convention on Human Rights, 22 November 1969, Arts. 1(1), 10 and 25.

36 Ratner, above note 21, p. 720. See Naomi Roht-Arriaza, “Sources in international treaties of an obligation to investigate, prosecute, and provide redress”, in Naomi Roht-Arriaza (ed.), *Impunity and Human Rights in International Law and Practice*, Oxford University Press, New York, 1995, pp. 24, 28–32.

Human Rights assumed a duty to prosecute deriving from Article 1 of the American Convention on Human Rights.<sup>37</sup> The European Court held in *Aksoy v. Turkey* that “the notion of an “effective remedy” entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complaint to investigatory procedure.”<sup>38</sup> The UN Committee on Human Rights found a similar duty based on Article 6 of the International Covenant on Civil and Political Rights.<sup>39</sup>

Louis Joinet as Special Rapporteur for the Commission on Human Rights wrote in his report on the “Question of impunity of perpetrators of human rights violations” that impunity is unacceptable not only because it clashes with the sense of justice but also because it runs contrary to respect for the victim’s most fundamental rights.<sup>40</sup>

“Impunity arises from a failure of States to meet their obligations to investigate violations, to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that they are prosecuted, tried and duly punished, to provide victims with effective remedies and reparation for the injuries suffered, and to take steps to prevent any recurrence of such violations. Although the decision to prosecute lies primarily within the competence of the state, supplementary procedural rules should be introduced to enable victims to institute proceedings ... where the authorities fail to do so, particularly as civil plaintiffs.”<sup>41</sup>

He formulated a “right to know,” a “right to justice,” and a “right to reparations” for victims and interpreted these rights as requiring states to adopt a

37 The Inter-American Court of Human Rights interpreted Article 1(1) of the American Convention as imposing on each state party a “legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.” *Velásquez Rodríguez v. Honduras*, Inter-American Court of Human Rights, Judgment of 29 July 1988, Ser. C, No. 4, para. 174. Even so, “the Inter-American Court did not specifically mention prosecution as the exclusive method of punishment and might have left open the door to administrative punishment alone. Subsequent opinions of the Inter-American Commission have, however, pronounced general amnesties incompatible with the American Convention and emphasized prosecutions.” Ratner, above note 21, pp. 721–722 (footnotes omitted). *Velasquez-Rodriguez Case*, Inter-American Court of Human Rights, Judgment of 1988, Series C, No. 4, para. 174, cited in Ratner, *ibid.*, p. 721.

38 Judgment of 18 December 1996, Reports 1996-VI, par. 98.

39 *Ana Rosario Celis Laureano v. Peru*, UN Doc. CCPR/C/56/D/540/1993.

40 “Question of the impunity of perpetrators of human rights violations (civil and political)”, revised final report prepared by Mr. Joinet pursuant to subcommission decision 1996 /119, U.N. Subcommission on Prevention of Discrimination and Protection of Minorities, 49th Session (Joinet Report), U.N. Doc. E/CN.4/Sub.2/1997/20/Rev.1. In 2004, the UN Commission on Human Rights appointed Professor Diane Orentlicher as an independent expert to update the Joinet Principles on combating impunity; the Commission on Human Rights “took note with appreciation ... the updated Set of Principles for the protection and promotion of human rights through action to combat impunity [hereinafter Updated Principles] (E/CN.4/2005/102/Add.1) as a guideline to assist States in developing effective measures for combating impunity.” Human Rights Resolution 2005/81, Impunity, E/CN.4/RES/2005/81, para. 20.

41 *Ibid.*, p. 22, Principle 18.

variety of measures in order to expose the truth, combat impunity and guarantee non-recurrence of violations.<sup>42</sup> The “right to know” is not only a fundamental right for individual victims but is equally a collective right, which “draws upon history to prevent violations from recurring in the future. Its corollary is a “duty to remember”, which the State must assume, in order to guard against the perversions of history that go under the names of revisionism...; the knowledge of the oppression it has lived through is part of a people’s national heritage and as such must be preserved.”<sup>43</sup> The “right to justice” entails each victim’s right to a fair and effective remedy. From this individual right, one could conclude that “[m]ajorities in society do not have a right to tell the victims that their cases will be forgotten for the sake of a higher “good”.”<sup>44</sup> Finally, the “right to reparations” includes individual (e.g., restitution, compensation and rehabilitation) as well as collective measures (e.g., formal recognition by the state of its responsibility or commemorative ceremonies).<sup>45</sup>

## Amnesties — their (il)legality

The term amnesty usually refers to an official act, usually through law, prospectively barring criminal prosecutions of a class of persons for a particular set of actions or events. Amnesty is often contrasted with pardons, which usually refer to the exemption of criminals from serving all or part of their sentences but do not expunge the conviction.<sup>46</sup> Amnesties can be blanket or partial; they may be official, with, for example, the passing of a law, or *de facto*, where a state simply does not prosecute. Those amnesties found to be illegal by treaty-monitoring bodies have all been blanket amnesties.<sup>47</sup> Thus, they are currently more liable to be prohibited than partial amnesties. Among types of amnesties, self-amnesties, those passed by the former regime hoping that the future regime will not examine them,<sup>48</sup> must be regarded with great suspicion<sup>49</sup> as they deny the right of the new

42 Ibid., paras. 16–30.

43 Joinet Report, above note 40, para. 17.

44 Méndez, above note 8, p. 277.

45 Joinet Report, above note 40, paras. 40–42.

46 Amnesties shield from prosecution and are not pardons. These distinctions are inexact; pardons, like amnesties, can be used to foreclose prosecutions, and amnesties sometimes cover persons serving prison terms. See A. Damico, *Democracy and the Case for Amnesty*, University Press of Florida, 1975. The word “amnesty,” like “amnesia,” derives from the Greek “*amnestia*,” which means “forgetfulness” or “oblivion”; an amnesty constitutes a declaration that the government intends to obliterate (and not merely forgive) a crime. See K. Moore, *Pardons: Justice, Mercy and the Public Interest*, 4–5, 1989. Black’s Law Dictionary defines amnesty as “the abolition and forgetfulness of the offense,” while pardon is “forgiveness”.

47 As of yet no case of partial amnesty for serious human rights violations has been brought before such a monitoring body. Ratner, above note 21, p. 744.

48 For examples, see *ibid.*, p. 736, n.147.

49 Amnesties adopted by new regimes after deliberation have the same end result for the victims and perpetrators but are not held in such abomination as self-amnesties. The fact that self-amnesties are considered particularly atrocious is a further indication of an accepted legal duty not to ratify self-amnesties. *Ibid.*, p. 744. See also Robert O. Weiner, “Trying to make ends meet: Reconciling the law and practice of human rights amnesties”, *St. Mary’s Law Journal*, No. 26, 1995, pp. 857, 859 (describing this as “an exercise in power, not legitimacy”).

government to choose its own path toward accountability (and also democracy). Moreover, self-amnesties also violate the general principal of law prohibiting persons from being judges in their own cases: *nemo debet esse judex in propria causa*.<sup>50</sup>

Support for amnesties rests on a resistance to prosecution based upon the fear that prosecution would destabilize the new government or simply prolong the vengefulness exhibited by the former regime. Some also believe that for the sake of moving forward those issues (i.e., violations of the law) should be left in the past, because it is best not to “provoke the dragon on the patio.” In stark contrast, others contend that neither a society nor a country can move forward and heal through impunity; thus, crimes must be prosecuted. These two viewpoints, nevertheless, do appear to coincide on the issue of serious violations of international law:<sup>51</sup> these crimes must always be prosecuted, and a failure to prosecute them perpetuates a culture of impunity. International human rights literature widely considers criminal punishment as necessary to act as a deterrent and to reinforce the rule of law. Yet some advocates of prosecution would concede that amnesty should not be ruled out completely as a means to promote reconciliation, as long as the amnesty law does not include crimes requiring punishment under international law.<sup>52</sup> A state can not extinguish its international obligations by enacting inconsistent domestic law.

The main arguments for granting official amnesties or simply not prosecuting (*de facto* amnesty) — namely that without amnesty hostilities in a conflict would not come to an end and/or trials would be politically charged, thus destabilizing the fragile new government<sup>53</sup> — make peace or reconciliation contingent upon impunity through amnesty. Any claim that prosecutions are impossible should be closely examined to see that it is not being overstated. The argument that amnesty laws are necessary for reconciliation or for mending social divisions may falsely assume that there are no other means to do so.<sup>54</sup> “A critical distinction to be drawn here is between military insubordination and a challenge that poses a genuine and serious threat to national life.”<sup>55</sup> Proposals have been made that amnesties should be granted in exchange for information (e.g., on the

50 Ratner, above note 21, p. 744.

51 “While generally in favor of tolerance in the handling of past abuses, most participants in the debate agree that two exceptions must be made. The first is that self-amnesties are illegitimate. Second, states have the duty to prosecute violations of international law relating to human rights. Such crimes, it is argued, cannot be unilaterally forgiven. ... The idea that crimes against humanity must always be prosecuted is also behind the trial of Paul Touvier, a French collaborator who in 1994 was brought before a criminal court, 50 years after the end of the war.” See *Le Monde* (Special Issue), 17 March 1994; Huyse, above note 16, p. 337, n. 27.

52 Orentlicher, above note 18, p. 2550 and n. 46.

53 *Ibid.*, p. 2444. Particularly in countries where the military may still retain substantial power, prosecuting some of the military’s members may threaten to weaken the civilian government.

54 *Ibid.*, p. 2550. See John Dugard, “Is the truth and reconciliation process compatible with international law? An unanswered question”, *South African Journal on Human Rights*, No. 13. 1997, pp. 258, 267; Carla Edelenbos, “Human rights violations: A duty to prosecute?”, *Leiden Journal of International Law*, No. 7, 1994, pp. 5, 20.

55 Orentlicher, *ibid.*, p. 2548. Méndez, above note 8, p. 257.

fate of missing persons). Prosecutions, and particularly international tribunals, have been criticized as hindering information-gathering, as those with the information do not come forward for fear of prosecution.

It should not be overlooked that the legal obligation to prosecute certain crimes may be of value during negotiations, as by generally requiring prosecutions international law helps assure that governments do not forego trials simply because it is politically expedient to do so.<sup>56</sup> International law, by requiring punishment of atrocious crimes and, more to the point, international pressure for compliance, can provide a counterweight to pressure from groups seeking impunity. Would those same groups mount such strong opposition to prosecution if the issue was understood to be non-negotiable?<sup>57</sup> Also, when the law requires prosecution, such cases will not be so easily perceived as “revenge prosecutions,” nor will justice be perceived as vengeance;<sup>58</sup> the issue, therefore, will not present itself as revenge *versus* reconciliation. Regardless of this impact, the legal obligation *aut dedere aut judicare* applies to certain crimes, thus granting amnesties for them directly violates the rule of law and in effect advocates impunity. Any such decision, therefore, must seriously consider whether an amnesty is truly best for national reconciliation and the peaceful development of a country.

### The (il)legality of amnesty for international humanitarian law violations

As shown above, states are under a legal obligation to suppress general violations of IHL, but they are under no obligation to prosecute such violations. Only the grave breaches provisions require repression, and this requirement has been extended through customary law to include other war crimes. This section will consequently focus on war crimes.

Several states have granted amnesties for war crimes, but these often have been found unlawful by their courts or criticized by the international community.<sup>59</sup> In Sierra Leone, for example, the United Nations never recognized the amnesty granted in the Lomé Accords of July 1999 to the belligerents with regard to crimes against humanity, war crimes and other serious violations of international humanitarian law.<sup>60</sup> The crimes referred to in the Statute of the Special Court for Sierra Leone make clear that the amnesty accord does not bar the court from having jurisdiction over persons within its competence concerning the above-mentioned crimes.<sup>61</sup>

56 Angleika Schlunck, *Amnesty versus accountability: third party intervention dealing with gross human rights violations in internal and international armed conflicts*, Berlin Verlag, Berlin, 2000, p. 13.

57 Orentlicher, above note 18, n. 39.

58 Ibid., p. 2549.

59 Henckaerts, above note 27, pp. 609–610.

60 Antoine J. Bullier, “Souveraineté des Etats africains et justice pénale internationale: une remise en cause?”, *Afrique contemporaine*, No. 198, 2eme trimestre 2001, p. 82.

61 Statute of the Special Court for Sierra Leone, Arts. 2–4. See also Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 16 January 2002, preamble, para. 2 (“WHEREAS ... the Security Council requested the Secretary-General to

IHL does support grants of amnesty for certain actions. Article 6(5) of Additional Protocol II calls for the “broadest possible amnesty” to be granted after a non-international armed conflict.<sup>62</sup> Unfortunately, owing to a mistaken interpretation of this article, it has been used to justify amnesties for violations committed during wars in, for example, Latin America.<sup>63</sup> In reality, the article merely encourages the granting of an amnesty for taking part in hostilities, which otherwise is subject to prosecution as a violation of domestic criminal law.<sup>64</sup> Although IHL understands that granting certain amnesties may help to bring about peace or circumstances conducive to peace, customary international law confirms that amnesty should be given to those persons *not* suspected of having committed war crimes,<sup>65</sup> and most amnesties do exclude persons suspected thereof.<sup>66</sup>

### The (il)legality of amnesty for violations of international human rights law

A prohibition on amnesties is not limited to war crimes. A duty to prosecute exists also for other international crimes considered just as atrocious, including gross human rights violations. The UN Human Rights Committee has condemned amnesties. Originally the committee concerned itself solely with the right not to be subjected to torture: “[a]mnesties are generally incompatible with the duty of States to investigate such acts.”<sup>67</sup> Since then it has extended its concern to blanket amnesties: “amnesty prevents appropriate investigation and punishment of perpetrators of past human rights violations, undermines efforts to establish respect for human rights, contributes to an atmosphere of impunity among perpetrators of human rights violations.”<sup>68</sup> However, “the Committee has not

negotiate an agreement with the Government of Sierra Leone to create an independent special court to prosecute persons who bear the greatest responsibility for the commission of serious violations of international humanitarian law and crimes committed under Sierra Leonean law” (emphasis added)).

62 “The ‘travaux préparatoires’ of Art. 6(5) [of Additional Protocol II] indicate that this provision aims at encouraging amnesty (i.e., a sort of release at the end of hostilities). It does not aim at an amnesty for those having violated international humanitarian law. ... Anyway, States did not accept any rule in Protocol II obliging them to criminalize its violations. In the debate at the Diplomatic Conference elaborating Protocol II, the representative of the Union of Soviet Socialist Republic stated on Art. 10 of Draft Protocol II (which has later become Art. 6 of Protocol II) that his delegation “was convinced that the text elaborated by Committee I could not be construed as enabling war criminals, or those guilty of crimes against peace and humanity, to evade severe punishment in any circumstances whatsoever.”” *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts*, Geneva (1974 – 1977), Berne, 1978, Vol. IX, p. 319.

63 See, e.g., Decision of the Supreme Court of Justice of El Salvador on the Amnesty Law, Proceedings No. 10-93, 20 May 1993, and Douglas Cassel, “Lessons from the Americas: Guidelines for international response to amnesties for atrocities”, *Law and Contemporary Problems: Accountability for International Crimes and Serious Violations of Fundamental Human Rights*, Vol. 59, Autumn 1996, pp. 197, 218 and n.127.

64 Cassel, *ibid.*, p. 218.

65 Henckaerts, above note 27, pp. 611–614.

66 *Ibid.*, pp. 612–613.

67 General Comment 20(44), Art. 7, para. 15, “Report of the Human Rights Committee”, U.N. GAOR, 47th Session, Supplement No. 40, Annex VI, pp. 193, 195, U.N. Doc. A/47/49 (1992). All cited in Ratner, above note 21, p. 721, n. 62.

68 Human Rights Committee, “Preliminary observations on Peru”, para. 9, U.N. Doc. CCPR/C/79/Add.67 (1996). See also Human Rights Committee, “Comments on Argentina”, paras. 153, 158, in “Report of



recommended that states with amnesty laws replace them with prosecutions (perhaps due to concerns about retroactive application of the law), but has instead requested investigations, compensation for victims, and removal of offenders from office.”<sup>69</sup> The UN High Commissioner for Human Rights, the UN Commission on Human Rights<sup>70</sup> and the Sub-Commission on the Promotion and Protection of Human Rights have stressed the importance of fighting impunity and therefore the need to exclude international crimes from amnesties.<sup>71</sup>

Joinet, in his report on the “Question of the impunity of perpetrators of human rights violations,” describes restrictions to certain rules of law designed to combat impunity.<sup>72</sup> These include restrictions relating to amnesty:

“Even when intended to establish conditions conducive to a peace agreement or to foster national reconciliation, amnesty and other measures of clemency shall be kept within the following bounds:

(a) The perpetrators of serious crimes under international law may not benefit from such measures until such time as the State has met the obligations referred to in principle 18 [“Duties of States with regard to the Administration of Justice”];

(b) They shall be without effect with respect to the victims’ right to reparation...”<sup>73</sup>

The Inter-American Commission appears to leave little doubt that it considers amnesties for serious violations of human rights to violate multiple provisions of the Inter-American Convention: “It is now clear that nothing less than judicial investigations designed to identify perpetrators, name names, and punish the guilty will suffice.”<sup>74</sup> The Inter-American Commission recommended changing a self-amnesty law “with a view to identifying the guilty parties, establishing their responsibilities and effectively prosecuting them.”<sup>75</sup> This is in contrast to earlier cases in which the Commission recommended “just compensation” and “measures necessary to clarify the facts and identify those responsible”.<sup>76</sup> Despite these steps, the commission never referred any of the cases to the Inter-American Court for a binding decision.

the Human Rights Committee”, U.N. GAOR, 50th Sess., Supplement No. 40, pp. 31, 32, U.N. Doc. A/50/40 (1995); Human Rights Committee, *Hugo Rodríguez v. Uruguay*, Comm. No. 322/1988, U.N. Doc. CCPR/C/51/D/322/1988 (1994). All cited in Ratner, above note 21, n. 63.

69 Ratner, *ibid.*, citing Human Rights Committee, “Preliminary observations on Peru”, para. 20; “Comments on Argentina”, para. 158.

70 See, in particular, the resolution entitled “Impunity” adopted by the Commission on Human Rights in numerous sessions; the latest resolution, E/CN.4/RES/2005/81, was adopted in 2005.

71 See, e.g., Henckaerts, above note 27, Vol. II, Part 2, pp. 4035–4038.

72 Joinet Report, above note 40, Principles 23–32, pp. 24–26. These principles have been updated, see Updated Principles, above note 40, Principles 22–30, pp. 13–16.

73 Principle 25, *ibid.*, p. 24. See also Updated Principles, above note 40, Principle 24, p. 14.

74 Cassel, above note 63, p. 217.

75 Report No. 36/96 (Chile), 15 October 1996, para. 111, 1996. *Annual Report*, Inter-American Commission on Human Rights, 1997, pp. 156, 183.

76 Report No. 29/92 (Uruguay), 2 October 1992, para. 54, 1992–1993, *Annual Report*, Inter-American Commission on Human Rights, 1993, pp. 154, 165, recommending “just compensation” and “measures

Notwithstanding current rulings and opinions advocating a broad duty of criminal liability, in the last decades the following states, during transitions, chose to pass broad amnesty laws — or honour amnesties of prior regimes — for various government atrocities: Argentina,<sup>77</sup> Uruguay,<sup>78</sup> Chile,<sup>79</sup> Brazil,<sup>80</sup> Peru,<sup>81</sup> Guatemala,<sup>82</sup> El Salvador,<sup>83</sup> Honduras,<sup>84</sup> Nicaragua,<sup>85</sup> Haiti,<sup>86</sup> Ivory Coast,<sup>87</sup> Angola<sup>88</sup> and Togo.<sup>89</sup> In addition, South Africa's Constitutional Court held in *AZAPO v. South Africa* that the country's truth and reconciliation process, including its amnesty procedure, is not incompatible with international law.<sup>90</sup> In 2005, Colombia adopted a partial amnesty law and, more recently, Algeria passed an amnesty law.<sup>91</sup>

“I stress that certain gross violations of human rights and international humanitarian law should not be subject to amnesties. When the United Nations faced the question of signing the Sierra Leone Peace Agreement to end atrocities in that country, the UN specified that the amnesty and pardon provisions in Article IX of the agreement would not apply to international

necessary to clarify the facts and identify those responsible” but not prosecutions. see also Cassel, above note 63, pp. 208–19; Weiner, above note 49, pp. 862–64.

77 Law No. 23492, 23 December 1986, reprinted in Kritz, above note 1, Vol. 3, p. 505.

78 Law No. 15848, 22 December 1986, *ibid.*, p. 598.

79 Decreto Ley No. 2.191, 18 April 1978.

80 Lei No. 6.683, 28 August 1979, Art. 1.

81 Ley No. 26479, 14 June 1995, available at <http://www2.congreso.gob.pe/ccd/leyes/cronos/1995/ley26479.htm>.

82 Ley de Reconciliación Nacional, Decreto No. 145-96, 18 December 1996.

83 Decree No. 486, 20 March 1993, reprinted in Kritz, above note 1, p. 546.

84 Decreto No. 87-91, 23 July 1991, *ibid.*, p. 546.

85 Law No. 81 on General Amnesty and National Reconciliation, 9 May 1990, *ibid.*, p. 591.

86 Loi relative à L'Amnistie, published in *Le Moniteur*, Official Gazette of the Republic of Haiti, 10 October 1994 (Haiti), reprinted and transl. in Michael P. Scharf, “Swapping amnesties for peace: Was there a duty to prosecute international crimes in Haiti?”, *Texas International Law Journal*, No. 31, 1996, pp. 15–16.

87 “Ivory Coast parliament passes amnesty law”, Reuters Library Rep., 29 July 1992, available in LEXIS, World Library, BBCSWB File.

88 “Angola: national assembly approves amnesty law”, BBC Summary of World Broadcasts (Televisao Popular de Angola), 9 May 1996, available in LEXIS, World Library, BBCSWB File.

89 Tchidab Banawe, Togo-Politics: Trying to heal the wounds, Inter Press Service, 2 March 1995, available in LEXIS, News Library, INPRES File.

90 Menno T. Kamminga, “Lessons learned from the exercise of universal jurisdiction in respect of gross human rights offenses”, *Human Rights Quarterly*, No. 23, 2001, pp. 940, 957. Dugard has criticized the judgment for paying insufficient attention to international law considerations. But he accepts that “state practice is too unsettled to support a rule obliging states to prosecute those alleged to have committed crimes against humanity under all circumstances and that the present state of international law does not bar the granting of amnesty in circumstances of the kind prevailing in South Africa.” Dugard, above note 54, p. 267. See also John Dugard, “Dealing with crimes of the past: Is amnesty still an option?”, *Leiden Journal of International Law*, No. 12, 1999, pp. 1001–15.

91 On 20 June 2005, the Senate approved the “Justice and Peace” law, which President Alvaro Uribe Velez signed on 22 June 2005. This law grants the paramilitaries political status, allowing them to potentially benefit from pardons; under the demobilization program, paramilitary commanders are supposed to confess all their crimes in order to benefit from reduced sentences of 4–8 years in prison. On 27 February 2006, Algeria's full cabinet, with President Abdelaziz Bouteflika presiding, approved the “Decree Implementing the Charter for Peace and National Reconciliation,” bypassing a debate in parliament, which was not in session.

crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law. We must be cautious not to send the wrong message regarding amnesties for serious violations of human rights and international humanitarian law, and I believe that the Princeton Principles correctly express the position that certain crimes are too heinous to go unpunished.”<sup>92</sup>

## Deciding between penal repression and amnesty

If a state’s decision-makers choose to deal with alleged perpetrators of war crimes or gross violations of human rights by enacting an amnesty law, they must be fully aware that failure to prosecute or extradite would be a violation of the state’s international legal obligations. The state must also be aware that those granted amnesty would not be immune from prosecution outside that state.<sup>93</sup> When making this choice, the state must consider whether the objective it attempts to achieve by granting amnesty is not ultimately undermined by acting contrary to the rule of law. But what if the decision-makers accurately and justly conclude that the purpose of the law requiring the prosecution of war criminals is not fulfilled by the actual prosecution and that, under those circumstances, it is necessary, in fact, to disregard that law in order to fulfil its original purpose? Again, this remains an extreme position, teetering on the brink of a very slippery slope.

Could decision-makers instead choose a form of amnesty that does not so directly affront the rule of law as blanket amnesty, such as partial amnesty? If so, which criteria should be used to evaluate to whom and for which crimes amnesties will be granted? The need for a competent functioning body to justly apply those criteria must also be borne in mind. Is not the disquiet caused by grants of amnesty perhaps lessened by the knowledge that the alleged violators are not free from prosecution outside the state (at least for war crimes or other crimes for which states have established universal jurisdiction)? Or could it perhaps be agreed

92 Mary Robinson, UN High Commissioner for Human Rights, Foreword, *The Princeton Principles on Universal Jurisdiction*, Princeton Project on Universal Jurisdiction, Stephen Macedo (Project Chair and Editor), Princeton University, Princeton, New Jersey, pp. 17–18. Principle 7 of the Princeton Principles on Universal Jurisdiction: “Amnesties”: “1. Amnesties are generally inconsistent with the obligation of states to provide accountability for serious crimes under international law as specified in Principle 2(1). 2. The exercise of universal jurisdiction with respect to serious crimes under international law as specified in Principle 2(1) shall not be precluded by amnesties which are incompatible with the international legal obligations of the granting state.”

93 It would not be contrary to Article 14(7) of the International Covenant on Civil and Political Rights to bring a defendant who has benefited from an amnesty in the territorial state to justice in another state on the basis of universal jurisdiction. Procedures for awarding amnesties do not amount to “acquittal” within the meaning of Article 14(7). The prohibition against *ne bis in idem* contained in that provision therefore does not apply. Even if it were assumed that the procedures of some truth and reconciliation commissions are sufficiently judicial in character to meet this standard, the Human Rights Committee has held that Article 14(7) does not prohibit trial for the same offence in another state. *A.P. v. Italy*, Comm. No. 204/1986, 2 November 1987, U.N. Doc. A/43/40, at 242. Kamminga, above note 90, pp. 940, 958 and n. 81.

that if a state will not prosecute, at least it will not grant a formal amnesty? However, *de facto* amnesties are no less illegal, and they also promote impunity. Could they nevertheless be considered a preferred compromise in that they do not so blatantly and flagrantly demonstrate acceptance of impunity as does a formal grant of amnesty? In addition, it must be recalled that states must not aid or assist in violations of international law and must exert their influence to bring violations to an end.<sup>94</sup> An amnesty law may be construed as condoning the international crime, whereas merely not prosecuting might be interpreted differently.

If in view of the desired objectives (i.e., national reconciliation and the peaceful development of a country) it is concluded that the rule of law must stand and no amnesties for war crimes or gross violations of human rights are ever permissible, do other options remain? Could a state invoke a derogation or *force majeure*, on grounds, for instance, of the lack of an operative judicial system and/or an overwhelming number of accused awaiting prosecution?<sup>95</sup> Or could a state apply a statute of limitations? With regard to war crimes, such a limitation on the prosecution of grave breaches of the four Geneva Conventions or Additional Protocol I could violate the obligation to prosecute or extradite and would be contrary to the duty to investigate and try other war crimes over which a state exercises normal jurisdiction or is required to pursue under other treaties.<sup>96</sup> At least a statute of limitations does not state that the act was not illegal but simply makes prosecution no longer possible. Nevertheless, the end result is the same: no accountability.

Should a state seek to grant pardons in lieu of amnesties? Pardons generally happen less frequently than amnesties. The party negotiating for the amnesty may not find a pardon satisfactory for the same reason that a pardon may be more acceptable than an amnesty: in contrast to an amnesty, where there is no judicial finding, a pardon is when the government abrogates the punishment after conviction for an offence. At least a pardon leaves the judgment of guilt intact — but still contradicts the rule of law; unless a criminal conviction itself is a satisfactory punishment. But would a criminal conviction alone satisfy the

94 Responsibility of States for Internationally Wrongful Acts, *Official Records of the General Assembly*, Fifty-sixth Session, Supplement No. 10 (A/56/10), Chap. V, Art. 16. See also Henckaerts, above note 27, p. 509–513.

95 The term “*force majeure*” is defined as “an occurrence of an irresistible force or of an unseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.” Responsibility of States for Internationally Wrongful Acts, *ibid.*, Art. 16. Could the situation faced by Rwanda be an example of *force majeure*, owing to the overwhelming number of persons awaiting prosecution? Even with a political will to prosecute, common problems prevent or seriously hinder trials, particularly after periods of armed conflict or other situations of violence: a barely functioning judicial system whether due to lack of human resources (including expertise) or financial resources; police and prosecutors without the requisite skills to investigate and present a strong case, or worse, corrupt or compromised officials; a lack of concrete evidence; the practical or logistical impossibility to prosecute large numbers of accused; absence of the necessary national legislation (implementing international treaty obligations).

96 GA Resolution 95(I) of 11 December 1946 affirming the Nuremberg principles. 1968 UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity and 1974 European Convention on the Non-Applicability of Statutory Limitations to Crimes Against Humanity and War Crimes. See Henckaerts, above note 27, pp. 614–618.

requirements of accountability, acknowledgement and truth referred to by Joinet? Anyway, the punishment for war criminals is left to the discretion of national governments, and the legal obligation specifies only that they must prosecute or extradite. The option of pardon again raises the same questions: what purpose does prosecution or punishment serve? What role does penal repression (i.e., criminal prosecution) play with regard to justice, peace and reconciliation?

So why prosecute? One reason is deterrence.<sup>97</sup> Although the extent to which punishment is preventative may not be absolutely clear, it is clear that impunity, including exemption from punishment through grants of amnesty, makes it more likely that further crimes will be committed. Prosecution is also considered as one of the most effective means of separating collective guilt from individual guilt and thus removing the stigma of historic misdeeds from the innocent members of communities that may otherwise be collectively blamed for the atrocities committed on other communities.<sup>98</sup> Prosecution followed by punishment is also undertaken for the rehabilitation of the offender. Are criminals prosecuted as a form of retribution? Those opposing prosecution often contend that prosecution is only vengeful and vindictive, continuing a cycle of hatred.<sup>99</sup> Or is society simply saying through prosecution that it does not permit the breaking of rules, especially the rules that protect the innocent and defenceless?<sup>100</sup> By prosecution society also demonstrates the importance it assigns to the norms that prohibit torture, rape and murder. However, the “right to justice,”<sup>101</sup> which advocates prosecution, does not mean to prosecute for prosecution’s sake. The judicial guarantees must be in place to ensure fair prosecution.<sup>102</sup>

It must be recognized that even an ideally functioning judicial system is limited in the role it can play in reconciliation and a successful transition to peace or away from a repressive regime. Prosecution handles individual accountability well,<sup>103</sup> but it does not address institutional accountability (i.e., the recognition

97 “The fulcrum of the case for criminal punishment is that it is the most effective insurance against future repression. By laying bare the truth about violations of the past and condemning them, prosecutions can deter potential lawbreakers and inoculate the public against future temptation to be complicit in state-sponsored violence.” Orentlicher, above note 18, p. 2542.

98 Méndez, above note 8, p. 277.

99 “Forgiveness is not opposed to justice, especially if it is not punitive justice but restorative justice, justice that does not seek primarily to punish the perpetrator, to hit out, but looks to heal a breach, to restore a social equilibrium that the atrocity or misdeed has disturbed.” *Are We Ready to Forgive?* Desmond M. Tutu interviewed by Anne A. Simpinkson, 2001, available at [http://www.beliefnet.com/story/88/story\\_8880\\_1.html#cont](http://www.beliefnet.com/story/88/story_8880_1.html#cont).

100 Méndez, above note 8, p. 276. Méndez, above note 17, p. 31.

101 As formulated by L. Joinet, see, above note 40 and accompanying text.

102 “[T]o insist on prosecutions in the presence of an important legal obstacle like a pre-existing amnesty law that has firm legal effects would be irresponsible, because it would subvert the ... rule of law ... and because it would violate the cardinal principle of *nulla poena sine lege* ... Advocating amnesties and pardons to be enacted by democratic authorities is quite a different matter.” Méndez, above note 8, p. 273.

103 The law does a number of things well, such as providing redress, accountability, legal justice and official acknowledgment. “The specific role of the law needs to be clear, so that legal mechanisms will not end up doing a number of things badly.” Naomi Roht-Arriaza, “Combating impunity: Some thoughts on the way forward”, *Law and Contemporary Problems: Accountability for International Crimes and Serious Violations of Fundamental Human Rights*, Vol. 59, Autumn 1996, pp. 103, 125.

that certain institutions and perhaps even the judiciary played a part in the violations), nor does it make proposals for the reform of those institutions. A criminal trial seeks to determine an individual's guilt for or innocence of a certain crime by satisfying a standard of proof; this is not necessarily the same objective as exposing the truth. Of course, truth does emerge during criminal trials,<sup>104</sup> but a court's necessary compliance with rules of evidence often limits the facts — the truth — exposed.<sup>105</sup> A trial is designed neither to research the history of the political and economic structure of a system that permitted the armed conflict or repressive regime to take hold, nor to assess the societal impact of violence committed by the regime or parties to the conflict.<sup>106</sup> Both processes, however, are necessary for institutional reform and to create a collective memory<sup>107</sup> of the past contributing to reconciliation. At such time, prosecution is best complemented by other mechanisms and embedded in a long-term conflict management concept that addresses all aspects of reconciliation of the post-conflict society.<sup>108</sup>

When faced with the impossibility to prosecute a large number of people, should no prosecution then take place instead of prosecuting only some? If it is decided to prosecute only some, which ones should be prosecuted? Only those who ordered the violations (the “big fish”), but not the subordinates who carried out the acts? Is the solution found by the Special Court for Sierra Leone to prosecute those bearing the greatest responsibility perhaps not the best one? It is argued that justice is not served by only prosecuting some and that doing so carries the risk of arbitrariness and threatens equality before the law. Yet in most domestic legal systems not all of the accused are ultimately prosecuted. Prosecutorial discretion allows prosecutors to base their decisions to file charges not only upon the law and the evidence but also on public policy. No one seems to equate this with justice not being done. Trials for past abusers can be limited to the most atrocious crimes.<sup>109</sup>

“To the extent that the purpose of prosecutions is to vindicate the authority of the law and deter repetition of recent crimes, it is not necessary [to] prosecute all who participate in a previous system of violations. These and other objectives ... can be accomplished with exemplary trials, provided the criteria used to select the defendants do not vitiate the justifying aims of prosecutions by, for example, cynically targeting scapegoats.”<sup>110</sup>

104 In Argentina, for example, trials during the mid-1980s of former *junta* members received extensive media coverage, providing testimony from hundreds of victims and witnesses; Hayner, above note 5, p. 100.

105 Ibid., p. 100.

106 The International Criminal Tribunal for the former Yugoslavia (ICTY) may contradict this assessment of prosecution. In Bosnia, the truth commission's mandate remains very limited so as not to interfere with the work of the ICTY. Consequently, no such truth commission could supply the amount of evidence as published in the ICTY's lengthy judgments.

107 Wilson, above note 3, p. 121.

108 Schlunck, above note 56, p. 64.

109 Orentlicher, above note 18, pp. 2542–43.

110 Ibid., p. 2598 (footnotes omitted).

One example of such a selection process can be found in Rwanda. In order to determine which cases to try and where to try each case, either in a Rwandan national court or at the International Criminal Tribunal for Rwanda (ICTR), distinctions between suspects are based on the degree of gravity of their crime. In Rwanda, approximately 120,000 individuals were detained in connection with the 1994 genocide, and it has been estimated that Rwandan national courts and the ICTR would need at least 100 years to try them all.<sup>111</sup> In order to alleviate the situation, the Rwandan government set up the *gacaca*, an alternative system of transitional justice using participatory and proximity justice whereby individuals from the communities act as “people’s judges”. The *gacaca* sticks to the categorization of the accused according to the degree of gravity of their crime.

If a choice is possible between national and international prosecution, national prosecutions should prevail. Besides conserving the principle of the primacy of national jurisdiction, they are generally considered more beneficial to reconciliation because the state, not an outside entity such as an international tribunal, assumes responsibility and clarifies the facts. An external mechanism can be perceived as taking the problem off the government’s hands, thus creating no incentive for the government either to assume responsibility for past crimes or to concentrate on creating or reforming the necessary internal mechanisms. The conclusions and recommendations of an external mechanism are more easily dismissed than those handed down by a national court or even a national truth commission. Of course, the national judiciary must be capable, and the process must provide all minimum judicial guarantees. It must also be respected and trusted or the public will not perceive justice as achieved. The perception of justice may, of course, only come with time once the public sees the mechanism in action and its results.

Perceived justice has a crucial impact on the extent to which the law or the judiciary can play a part in reconciliation. A judicial system may uphold all principles of the rule of law, but if such justice is perceived by society as, for example, simply victor’s justice, prosecutions can have a negative effect. The impact of justice perceived is an additional reason to “prosecute smartly”. If the judiciary took part or was seen as taking part in the victimization caused by the former repressive regime, it would need to be seriously and manifestly rehabilitated in the eyes of society before it could even be considered capable of carrying out justice, regardless of any formal reforms already introduced within it. Otherwise, doubts about the trials would arise for society. Are they sham trials? Or, to take the other extreme, are they only a demonstration of revenge and vindictiveness? The poor perception of the International Criminal Tribunal for the former Yugoslavia in Serbia is a striking example.

111 “Rwanda: Genocide survivors worried about people’s courts”, Agence France-Presse via NewsEDGE, 10 March 2001. Other estimates include 150 years: Abigail Zoppetti, “Crime de guerre. Au Rwanda, retour à la justice coutumière des ‘gacaca’”, *Le Temps*, 19 July 2001; and 200 years: Gabriel Gabiro and Julia Crawford, “Les Rwandais expriment des sentiments partagés sur les ‘gacaca’”, *Arusha International Criminal Tribunal for Rwanda News*, Agence de Presse Hirondelle, 4 May 2001.



## Conclusion

The primary objective of this article was to identify questions relevant to matters of transitional justice, particularly the roles of penal repression and amnesty in the attainment of national reconciliation or the peaceful development of a country. Many of the questions posed have no single clear answer as the answers largely depend on the circumstances. Also, a grasp of a variety of disciplines (most beyond the expertise of this author) is required to reach conclusions with regard to many of them, including philosophy, sociology, psychology, political science and international relations, as well as law. Some of the topics of this article raise questions that may be identified as more philosophical than practical. What is our conception of justice? What purpose is justice intended to serve? Does our conception of justice actually serve this intended purpose? What purpose does a judicial system serve? And prosecution? To provide precise answers to these questions was outside the scope of this article. It must be recognized, however, that any practical decisions made and steps taken in matters of transitional justice, such as impunity, amnesty, repression and especially their connection to reconciliation, ultimately presuppose one's answers to them.

To answer even those questions raised here necessitates a broader understanding of matters of transitional justice. The relationship of amnesties and prosecution to other complementary mechanisms, particularly truth commissions, must be understood for a proper assessment to be made. Rarely can one mechanism meet all the needs for a successful transition after serious violations have taken place. "In the final analysis, punishment is one instrument, but not the sole or even the most important one, for forming the collective moral conscience."<sup>112</sup>

Perhaps the so-called dilemma arising from the dual ambition to prosecute violators while also fostering national reconciliation is in fact a false dilemma, because if the cycle of impunity is never properly addressed, true reconciliation will never occur. While that one may prove to be false, dilemmas do clearly exist in responding to such matters, calling for the ability to maintain a judicious balancing act between competing important interests, including the most basic decision: whether or not to provoke the dragon on the patio.

112 Raúl Alfonsín, Argentina's first elected president after the collapse of the military regime, "'Never again' in Argentina", *Journal of Democracy*, No. 4, January 1993, pp. 15, 19, cited in Huyse, above note 16, pp. 337, 342. See generally, Report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies, S/2004/616, 3 August 2004.

## Truth commissions: a schematic overview

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### **Abstract**

*Numerous truth commissions of different types are being created around the world. The purpose of this schematic overview is to study the variety and to sketch out the differences and similarities between the different truth commissions established since the Truth and Reconciliation Commission of South Africa launched in 1995.*

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Recent years have revealed a remarkable increase in the number and type of truth commissions being created around the world. Since the Truth and Reconciliation Commission of South Africa launched in 1995, the idea of a non-judicial inquiry into past widespread abuses has caught the attention of a host of new governments and civil society groups in numerous countries. Truth commissions — official, temporary bodies established to investigate a pattern of violations over a period of time that conclude with a final report and recommendations for reforms — have been created in more than thirty countries in the past twenty-five to thirty years.

Typically, these bodies are set up for a short period of time — one to three years on average — and may employ hundreds of staff to collect individual statements, organize public hearings and undertake case investigations and thematic research. Some have been given subpoena powers or the right to gain access to official offices and official documents without warning. Others have had to rely on the voluntary cooperation — not only of high-level officials but also of direct perpetrators, sometimes in return for promises of confidentiality. Truth commissions virtually always receive extensive, detailed information from victims, survivors and other witnesses, usually gathering many thousands of detailed statements. Some of these may also be presented in public hearings, thus allowing the public to engage in the process long before the final report is released.

Truth commissions do not have the power to prosecute, but many have recommended that prosecutions take place, and some have shared their archives with prosecuting authorities. Some have also chosen to publicly name persons they concluded were perpetrators of specific violations. This can raise difficult questions of due process. The usual standard is to allow persons to respond to allegations against them — either in writing or in a private meeting — before the commission names them in public.

Where truth commissions have been created (or proposed) in contexts where an international or hybrid tribunal is under way, some difficult procedural questions have been raised. In Sierra Leone, the public initially failed to understand the distinction between (and independence of) the Sierra Leone Truth and Reconciliation Commission and the Special Court. Later, the commission requested access to detainees held by the court and for them to appear in public hearings. This request was ultimately denied. In order to gain the confidence of those who wished to speak to either of the two bodies, they both made it clear from the start that investigative information would not be shared between them. This helped to allay some of the initial concerns. In Bosnia and Herzegovina, an early proposal for a truth commission was at first strongly resisted by the International Criminal Tribunal for the former Yugoslavia (ICTY), which feared that such a commission would complicate its work. The ICTY changed its stance after consideration.

The attached chart provides a summary of the attributes of a number of the more robust truth commissions since the mid-1980s. This is not a comprehensive list, but it is intended to be suggestive of the nature, mandate and breadth of investigation, as well as the size of truth commissions to date. Each is different in important ways. For example, the South African amnesty-for-truth model is very unusual and indeed inappropriate and unworkable in most contexts. After all, the offer of amnesty in exchange for full and public truth-telling is not likely to be taken up unless there is a serious threat of prosecution for those crimes. Each new truth commission must be rooted in the realities and possibilities of its particular environment. While the international community can play a major role in assisting these processes, any successful truth commission process must be a reflection of national will and a national commitment to fully understand and learn from the country's difficult, sometimes very controversial and often quite painful history. A commission must aim to understand the origins of past conflict and the factors that allowed abuses to take place, and to do so in a manner that is both supportive of victims and inclusive of a wide range of perspectives.

# Truth commissions tables<sup>1</sup>

Priscilla B. Hayner<sup>2</sup>

**Table 1:** A select overview of truth commissions

Country	Name of truth commissions	Years of operation	Dates covered	Created by
<b>Argentina</b>	National Commission on the Disappeared (Comisión Nacional sobre la Desaparición de Personas (CONADEP))	Established: 16 December 1983 Report completed: 20 September 1984	1976 – 1983	Decree No. 187 of 15 December 1983 by President Raúl Alfonsín
<b>Uganda</b>	Commission of Inquiry into Violations of Human Rights	Established: May 1986 Report completed: 1995	9 October 1962 – 25 January 1986	Legal Notice No. 5 of 16 May 1986 by President Yoweri Museveni
<b>Chile</b>	National Commission on Truth and Reconciliation (Comisión Nacional para la Verdad y Reconciliación)	Inaugurated: 1990 Report completed: February 1991	11 September 1973 – 11 March 1990	Decree No. 355 of 25 April 1990 by President Patricio Aylwin
<b>Chad</b>	Commission of Inquiry into the Crimes and Misappropriations Committed by Ex-President Habre, His Accomplices and/or Accessories (Commission d'Enquête sur les Crimes et Détournements Commis par l'Ex-Président Habré, ses co-Auteurs et/ou Complices)	Established: December 1990 Report completed: May 1992	1982 – 1990	Decree No. 014/P.CE/CJ/90 of 29 December 1990 by President Idriss Déby
<b>El Salvador</b>	Commission on the Truth for El Salvador (Comisión de la Verdad para El Salvador)	Inaugurated: 13 July 1992 Report completed: 15 March 1993	January 1980 – July 1992	UN-brokered peace agreements of 16 January 1992

<sup>1</sup> The information provided in these tables is from Priscilla B. Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions*, Routledge, 2002, and from subsequent research by the International Center for Transitional Justice. Further information can be found on the ICTJ's website: <<http://www.ictj.org>>. Many primary documents can also be found in the digital library collection of the United States Institute of Peace: <<http://www.usip.org>>.

<sup>2</sup> The author would like to thank Lizzie Goodfriend for her research assistance in updating these tables.

**Table 1:** *(Continued.)*

Country	Name of truth commissions	Years of operation	Dates covered	Created by
<b>Haiti</b>	National Commission for Truth and Justice (Commission Nationale de Vérité et de Justice)	Inaugurated: April 1995 Completed: February 1996	30 September 1991 – 15 October 1994	Executive order of December 1994 by President Jean Bertrand Aristide
<b>South Africa</b>	Truth and Reconciliation Commission <sup>3</sup>	Inaugurated: 1995 Primary reports completed: 1998 (commission continued to operate for several more years to complete amnesty hearings)	1960 – 1994	The Promotion of National Unity and Reconciliation Act No. 34 of 1995 by the South African Parliament
<b>Guatemala</b>	Historical Clarification Commission (Comisión para el Esclarecimiento Histórico (CEH))	Established: 23 June 1994 Report completed: 24 February 1999	Approximately 1958 – 1994 (no specific dates given in mandate)	Peace agreements of 23 June 1994
<b>Nigeria</b>	Human Rights Violations Investigations Commission (aka Oputa Commission)	Inaugurated: 14 June 1999 Report completed: June 2002	31 December 1983 – 29 May 1999	Created through presidential decree, 4 June 1999, by President Olusegun Obasanjo
<b>Sierra Leone</b>	Sierra Leonean Truth and Reconciliation Commission <sup>4</sup>	Established: 2000 Inaugurated: July 2002 Report completed: 5 October 2004	1991 – 2000	Truth and Reconciliation Act, enacted in 2000 by the Sierra Leone Parliament, implementing Art. XXVI of the Lomé Peace Agreement

<sup>3</sup> South African TRC website available at: <<http://www.doj.gov.za/trc/>>.

<sup>4</sup> Sierra Leone TRC website available at: <<http://www.trcsierraleone.org/drwebsite/publish/index.shtml>>.

**Table 1:** *(Continued.)*

Country	Name of truth commissions	Years of operation	Dates covered	Created by
<b>Ghana</b>	National Reconciliation Commission <sup>5</sup>	Inaugurated: 6 May 2002 Report completed: mid-2004	7 March 1957 – 6 January 1993	National Reconciliation Commission Act 611 of 2002 by the Parliament of Ghana
<b>Timor Leste</b>	Commission for Reception, Truth And Reconciliation (Comissão de Acolhimento, Verdade e Reconciliação (CAVR)) <sup>6</sup>	Inaugurated: 21 January 2002 Report completed: 28 August 2003	April 1974 – October 1999	A regulation issued on 13 July 2001, by the UN Transitional Administration in East Timor
<b>Peru</b>	Truth and Reconciliation Commission (Comisión de la Verdad y Reconciliación (CVR)) <sup>7</sup>	Inaugurated: 13 July 2001 Report completed: August 2003	1980 – 2000	Supreme Decree No. 065-2001-PCM of 4 June 2001, amended by Supreme Decree No. 101-2001-PCM of 4 September 2001
<b>Morocco</b>	Equity and Reconciliation Commission (Instance Équité et Réconciliation (IER)) <sup>8</sup>	Inaugurated: January 2004 Report completed: December 2005	1959 – 1999	Created through a Royal Decree of King Mohammed VI
<b>Liberia</b>	Truth and Reconciliation Commission of Liberia	Inaugurated: February 2006 Expected to conclude mid-2008	January 1979 – 14 October 2003	Truth and Reconciliation Act passed in June 2005 by the National Transitional Legislative Assembly, implementing Article XIII of the Comprehensive Peace Agreement of 18 August 2003

5 Ghana NRC website available at: <<http://www.nrcghana.org/corporateprofiles.php>>.6 Timor-Leste CAVR website found at: <<http://www.easttimor-reconciliation.org>>.7 Peru CVR website found at: <<http://www.cverdad.org.pe/ingles/pagina01.php>>.8 Morocco IER website found at: <<http://www.ier.ma/>>.

**Table 2:** Subject of investigations: select examples

Country	Key language in commissions Terms of Reference	Principal acts documented by commissions	Significant violations or acts not investigated
Argentina	"Clarify the acts related to the disappearance of persons" and, if possible, determine the location of their remains.	<ul style="list-style-type: none"> <li>Disappearances (kidnapping with no reappearance of body)</li> </ul>	<ul style="list-style-type: none"> <li>Killings by armed forces in real or staged "armed confrontations"</li> <li>Temporary disappearances, when person was released or body was found and identified</li> <li>Forced exile</li> <li>Detention and torture (survivors were interviewed by the commission and their stories were included as witness accounts, but they were not included in list of victims)</li> <li>Acts of violence by armed opposition</li> <li>Disappearances by government forces before the installation of the military government in 1976</li> </ul>
Uganda	"Mass murders and all acts or omissions resulting in the arbitrary deprivation of human life ... arbitrary imprisonment and abuse of powers of detention; denial of a fair and public trial ... torture, massive displacement of persons ... and discriminatory treatment by virtue of race, tribe, place of origin, political opinion, creed or sex" on the part of public officials.	<ul style="list-style-type: none"> <li>Murder and arbitrary detention of life</li> <li>Arbitrary arrest, detention or imprisonment</li> <li>Torture, cruel and degrading treatment</li> <li>Displacement and expulsion of peoples</li> <li>Discriminatory treatment by public officials</li> <li>Denial of fundamental freedoms, such as freedom to worship, freedom of the press and freedom of association</li> </ul>	<ul style="list-style-type: none"> <li>Abuses by armed opposition groups</li> <li>Abuses by the government after the date the commission was set up (controversial because the commission continued work for nine years and no other government rights body yet existed)</li> </ul>



Table 2: (Continued.)

Country	Key language in commissions Terms of Reference	Principal acts documented by commissions	Significant violations or acts not investigated
Chile	"[D]isappearance after arrest, execution and torture leading to death committed by government agents or people in their service, as well as kidnappings and attempts on the life of persons carried out by private citizens for political reasons."	<ul style="list-style-type: none"> <li>• Disappearances</li> <li>• Torture resulting in death</li> <li>• Executions by government forces</li> <li>• Use of undue force leading to death</li> <li>• Death of combatants and non-combatants in the firefight immediately after coup</li> <li>• Killings "by private citizens for political reasons," particularly the armed Left</li> </ul>	<ul style="list-style-type: none"> <li>• Torture not resulting in death (torture practices were described, but survivors were not listed as victims)</li> <li>• Illegal detention if released and survived</li> <li>• Forced exile</li> </ul>
El Salvador	"[S]erious acts of violence ... whose impact on society urgently demands that the public should know the truth."	<ul style="list-style-type: none"> <li>• Massacres by armed forces</li> <li>• Extrajudicial executions by agents of the state</li> <li>• Assassinations by death squads</li> <li>• Disappearances</li> <li>• Torture by government forces</li> <li>• Killings by armed opposition</li> <li>• Kidnappings by armed opposition</li> </ul>	(No significant acts excluded)

**Table 2:** *(Continued.)*

Country	Key language in commissions Terms of Reference	Principal acts documented by commissions	Significant violations or acts not investigated
South Africa	"[G]ross violations of human rights," defined as "the killing, abduction, torture, or severe ill-treatment of any person," or the "conspiracy, incitement, instigation, or command" of such acts "which emanated from conflicts of the past ... within or outside of the Republic, and the commission of which was advised, planned, directed, commanded or ordered by any person acting with a political motive."	<ul style="list-style-type: none"> <li>• Killings by agents of the state inside and outside the country</li> <li>• Disappearances</li> <li>• Torture and abuse by police and armed forces</li> <li>• Raids into neighbouring countries by armed forces to attack opposition</li> <li>• Killings, primarily by bombs and land mines, by the armed opposition</li> <li>• Abuses in detention camps of the armed opposition outside South Africa's borders</li> <li>• Violence by private individuals for political purposes</li> </ul>	<ul style="list-style-type: none"> <li>• The forced removal and displacement of millions of people based on race</li> <li>• Everyday policies and practices of apartheid that did not result in killings, abduction, torture or severe ill-treatment as defined by the commission</li> </ul>

**Table 2:** *(Continued.)*

Country	Key language in commissions Terms of Reference	Principal acts documented by commissions	Significant violations or acts not investigated
Guatemala	"[C]larify with all objectivity, equity and impartiality the human rights violations and acts of violence that have caused the Guatemalan population to suffer, connected with the armed conflict."	<ul style="list-style-type: none"> <li>• Acts of genocide by government forces against the Mayan population</li> <li>• Massacres and arbitrary killings by government forces and by the armed opposition</li> <li>• Disappearances and kidnappings by state forces and by guerrillas</li> <li>• Acts of violence by the economically powerful (landowners or business people) with the support of state forces</li> <li>• Massive forced displacement and militarized resettlement by the state</li> <li>• Forced recruitment by the guerrillas</li> </ul>	(No significant acts excluded)
Sierra Leone	The commission was authorized to investigate "violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone."	<ul style="list-style-type: none"> <li>• Forced displacement</li> <li>• Arbitrary detentions, abductions and killings, amputations of limbs</li> <li>• Recruitment of children into armed groups</li> <li>• Sexual slavery of girl children</li> </ul>	(No significant acts excluded)

**Table 2:** *(Continued.)*

Country	Key language in commissions Terms of Reference	Principal acts documented by commissions	Significant violations or acts not investigated
<b>Ghana</b>	The commission was to establish an “accurate, complete and historical record of violations and abuses of human rights inflicted on persons by public institutions and holders of public office during periods of unconstitutional government.”	<ul style="list-style-type: none"> <li>• Killings, abductions and disappearances</li> <li>• Detention, torture and ill-treatment</li> <li>• Illegal seizure of properties</li> </ul>	(No significant acts excluded)
<b>Timor-Leste</b>	“Violations of international human rights standards”; “violations of international humanitarian law” and “criminal acts” committed within the context of the political conflicts in Timor-Leste during the period covered by its mandate.	<ul style="list-style-type: none"> <li>• Extrajudicial killings</li> <li>• Murder</li> <li>• Deaths due to deprivation</li> <li>• Disappearances</li> <li>• Displacement</li> <li>• Arbitrary detention, torture and ill-treatment</li> <li>• Sexual violence</li> <li>• Violence against children</li> </ul>	(No significant acts excluded)

Table 2: (Continued.)

Country	Key language in commissions Terms of Reference	Principal acts documented by commissions	Significant violations or acts not investigated
Peru	"The Truth Commission shall focus its work on the following acts, as long as they are imputable to terrorist organizations, state agents or paramilitary groups: a) murders and abductions; b) forced disappearances; c) torture and serious injuries; d) violations of collective rights of the country's Andean and native communities; e) other crimes and serious violations of the rights of individuals."	<ul style="list-style-type: none"> <li>• Assassinations and massacres</li> <li>• Forced disappearances</li> <li>• Arbitrary executions</li> <li>• Torture and cruel, inhuman or degrading treatment</li> <li>• Sexual violence against women</li> <li>• The violation of due process</li> <li>• Abductions and the taking of hostages</li> <li>• Violence against children</li> <li>• The violation of collective rights</li> </ul>	(No significant acts excluded)

**Table 2:** *(Continued.)*

Country	Key language in commissions Terms of Reference	Principal acts documented by commissions	Significant violations or acts not investigated
Morocco	To “assess, research, investigate, arbitrate and make recommendations about the gross human rights violations that occurred between 1956 and the end of 1999. These violations include forced disappearances, arbitrary detention, torture, sexual abuse and deprivation from the right to live, as a result of unrestrained and inadequate use of state force and coerced exile.” <sup>9</sup>	<ul style="list-style-type: none"> <li>• Assassinations and massacres</li> <li>• Arbitrary killings in riots and popular uprisings</li> <li>• Disappearances, torture and cruel, inhuman or degrading treatment perpetrated by the state</li> <li>• Arbitrary detention and long-term imprisonment</li> <li>• The violation of due process</li> <li>• Sexual violence against women</li> <li>• Abductions and the taking of hostages</li> <li>• The violation of collective rights</li> <li>• Violations against minority populations (people of the Rif and from the Western Sahara)</li> </ul>	<ul style="list-style-type: none"> <li>• Insufficient attention to violations against minority populations (people of the Rif and Western Sahara)</li> </ul>

9 “Summary of the Findings of the Final Report of the Moroccan Equity and Reconciliation Commission,” transl. to English by the International Center for Transitional Justice, 5 December 2005, available online: <<http://www.ictj.org/static/MENA/Morocco/IERreport.summary.eng.pdf>>.

**Table 2:** *(Continued.)*

Country	Key language in commissions Terms of Reference	Principal acts documented by commissions	Significant violations or acts not investigated
Liberia	"Investigating gross human rights violations and violations of international humanitarian law as well as abuses that occurred, including massacres, sexual violations, murder, extrajudicial killings and economic crimes, such as the exploitation of natural or public resources to perpetuate armed conflicts."	In process	In process



**Table 3:** Commissioners, staff, number of cases and final report

Country	Commissioners	Staff	Budget	Total # of cases presented	Public Hearings?	Final Report
Argentina	13 members (all national)	60	NA	8,600 cases of disappearance, unspecified number of victims of torture or prolonged detention	No	<i>Nunca Mas: Informe de la Comisión Nacional sobre la Desaparición de Personas</i> (September 1984; English translation published in 1986)
Uganda	6 members (all national)	5 – 10	NA	608 deponents	Yes	<i>The Report of the Commission of Inquiry into Violation of Human Rights: Findings, Conclusions, and Recommendations</i> (October 1994)
Chile	8 members (all national)	60	\$1 million	3,428 disappeared, killed, tortured to death or kidnapped	No	<i>The Report of the Chilean National Commission on Truth and Reconciliation</i> , popularly known as the Rettig Report (February 1991)
Chad	12 – 16 (including secretaries and clerks, all national)	0 (2 secretaries included in the number of commissioners)	NA	3,800 killed, unspecified number of victims of torture or arbitrary detention	No	<i>Les crimes et détournements de l'ex-président Habré et de ses complices: Rapport de la Commission d'enquête nationale, Ministère tchadien de la justice</i> (May 2000)

Table 3: (Continued.)

Country	Commissioners	Staff	Budget	Total # of cases presented	Public Hearings?	Final Report
El Salvador	3 members (all international)	15 – 45	\$2.5 million	22,000 disappeared, killed, tortured or kidnapped	No	<i>From Madness to Hope: the 12-Year War in El Salvador: Report of the Commission on the Truth for El Salvador</i> (15 March 1993 by the United Nations)
Haiti	7 members (4 national and 3 international)	50 – 100	NA	Testimony collected from close to 5,500 witnesses regarding nearly 8,600 victims	No	<i>Rapport de la Commission Nationale de Vérité et de Justice</i> (February 1996)
South Africa	17 members (all national)	300+	\$18 million/year during height of operation	21,000 statements	Yes	<i>Truth and Reconciliation Commission of South Africa Report</i> (March 2003)
Guatemala	3 members (2 national, 1 international)	Up to 200	\$9.5 million	42,275 victims, including those killed, disappeared, tortured and raped	No	<i>Guatemala: Memoria Del Silencio</i> (February 1999)
Nigeria	6 members (all national)	Approximately 12 professional staff, borrowed from other government agencies	In-kind support from government, in addition to \$450,000 from the Ford Foundation		Yes	Final report presented to the president in May 2002, but it was never officially released to the public
Sierra Leone	7 (4 national, 3 international)	28 core, 70 total	Initially \$10 million, reduced to \$6.6 million	Received more than 8,000 statements from victims, witnesses and perpetrators	Yes	<i>Witness to Truth: Final Report of the Truth and Reconciliation Commission of Sierra Leone</i> (2005)

**Table 3:** (Continued.)

Country	Commissioners	Staff	Budget	Total # of cases presented	Public Hearings?	Final Report
<b>Ghana</b>	9 commissioners (all national)	115, later reduced to 80	Initially \$5 million, reduced to \$1.5 million	The NRC received 4,240 statements from victims and heard testimony in public from 1,866 witnesses and 79 alleged perpetrators.	Yes	<i>Final Report of the National Reconciliation Commission</i> submitted to the president in October 2004 and released to the public in April 2005.
<b>Timor-Leste</b>	7 members (all national)	6 regional offices, headed by 25 – 30 regional commissioners	\$5.2 million	Approximately 8,000 statements	Yes	<i>Chega!</i> , released to the public February 2006
<b>Peru</b>	12 members (all national)	Up to 500 staff at peak of operations	\$11 million	15,000 statements	Yes	<i>Informe Final de la Comisión de la Verdad y Reconciliación</i> (August 2003)
<b>Morocco</b>	17 members (all national)	At the height of its activities, the IER employed close to 200 staff working in various capacities	NA	22,000 statements of victims and their families	Yes	<i>Final Report of the Moroccan Equity and Reconciliation Commission</i> , released to the public in December 2005
<b>Liberia</b>	9 members (all national), plus 3 international technical advisors <sup>10</sup>	In process <sup>11</sup>	In process	In process	Expected	Report expected in 2008

10 The International Technical Advisory Committee of Liberia, made up of two Ghanaians and one Nigerian, has the rights and privileges of commissioner members but does not have the right to vote on commission decisions.

11 In early 2006 the Liberian commission was beginning to hire staff and determine its operating procedures.

# Dealing with the past and transitional justice: building peace through accountability

**Yasmin Sooka\***

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## Abstract

*Based on her experience as a member of the South African and the Sierra Leonean truth and reconciliation commissions, the author formulates guiding principles and looks at the circumstances in which a truth and reconciliation commission constitutes an appropriate instrument to deal with transitional justice issues. The author also identifies possible contributions that truth and reconciliation commissions can make during a period of transition.*

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## Introduction

Having been a commissioner on two truth and reconciliation commissions in two post-conflict countries, South Africa and Sierra Leone, and having consulted at a number of others, I find this thematic issue opportune.

\* This article is based on a presentation given at the conference *Dealing with the Past and Transitional Justice, Creating Conditions for Peace, Human Rights and the Rule of Law*, which took place on 24–25 October 2005 in Neuchâtel, Switzerland, and was organized by the Political Affairs Division IV of the Swiss Federal Department of Foreign Affairs, the Center for Peacebuilding (KOFF) — swisspeace, and the International Center for Transitional Justice (ICTJ).

In the short term, are we as practitioners making a difference through the work we do or are we short-changing victims? I vacillate on the answer depending on whether I am lamenting my own government's decision not to proceed to prosecutions expeditiously as they promised, or jubilation because they finally established a unit to deal with disappearances. Likewise, in the context of Sierra Leone, I experience a sense of accomplishment on the publication of a good report and deep disappointment at the weak white paper issued by the government on the recommendations.

In the long term, does transitional justice contribute to building democracy and a culture of respect for human rights? Should we even use the term “transitional justice” as this implies an end in itself?

Transition to what? When does a transition begin and when does it end? Can a commission operate in a country where there has not been a cessation of hostilities?

In examining the question of ownership, the issue of what I call the “space ship” approach must also be explored. What happens if all the political parties are not committed to a peace-building process and to the institution of a truth commission? In countries ravaged by conflict, in which donors' agendas prevail, is this ultimately in the long-term interest of the country? How does this issue impact the truth commission and its ultimate goal of building credibility for its findings and recommendations? Will the report be accepted by all? Has it instilled a sense of ownership with the domestic government sufficient to ensure that its recommendations are implemented? This is an important aspect if there is to be acceptance of the findings of the commission. Ownership of the process is linked to such acceptance, which in turn provides the impetus to implement the commission's recommendations.

A pertinent example is provided by the Democratic Republic of the Congo, where a truth commission has been established against the backdrop of ongoing violent conflict and under pressure from peace brokers. The commission itself has members who are associated with warring parties and, as such, do not qualify as impartial, and it is hampered by the fact that the conflict does not permit it to engage in any meaningful activity. Under these circumstances, can such a commission function with credibility?

In attempting to grapple with these questions, I will formulate a few guiding principles based on my own personal experience.

## **Guiding principles**

At the outset, we need to accept that we are dealing with deeply flawed processes and trade-offs. Given the particular circumstances that exist at the time of the negotiated settlement, it may represent the best possible deal for civil society. The point is that any process should be adapted to the local conditions and context. One size cannot fit all.

In this regard, we should be aware that:

- Transitional justice should incorporate a rights-based developmental approach that provides for:
  - Participation of all parties, particularly civil society
  - Accountability to civil society with an emphasis on the victims of violence, ensuring that both statutory and administrative measures are put in place to achieve the goals set
  - Non-discrimination — all of the parties are treated justly irrespective of the side they come from
  - Empowerment of local actors and civil society
  - Linkages to other democratic initiatives and institutions;
- Transitional justice must take place within the context of a shift to democracy, so as to avoid a recurrence of the causes that gave rise to the initial conflict;
- Transitional justice cannot and should not be considered an end in itself;
- Ownership of process — there should be buy in from all;
- Public participation.

### Transitional justice in the context of a shift to democracy

Transitional justice mechanisms are not established in a vacuum. They are established to deal with human rights abuses emanating from past conflicts. In many countries, while negotiated settlements may give rise to peace, the transition to democracy has the potential to be scuttled by diverse interest groups who remain a threat to peace. Most conflicts, however, are not only about victims and perpetrators; they include the beneficiaries (i.e., those who benefit from the unjust political and economic order prevailing before and during the conflict) as well as other actors.

Many of the transitional arrangements in Africa over the last decade have given rise to a truth recovery process either in the form of a truth commission or, in some instances, to a truth commission operating side by side with a criminal justice mechanism, taking the form of a special “hybrid” court, which has both a domestic and an international character.

Transitional justice in the context of a democratic option cannot be addressed simply by talking about truth recovery mechanisms or criminal justice options. If the opportunity provided by the transition is not squandered the potential exists to begin the process of building the institutions of a democratic state based on the rule of law.

### Exercise of caution in choosing options

Over the past decade truth commissions have become the most common instrument chosen during the negotiated settlement to deal with issues of transitional justice. Yet, we should be careful to ensure that truth commissions do not become the new panacea to address all the ills of the past.

## Ownership of the process

Ownership of a transitional justice process is also a huge factor in countries ravaged by conflicts. In a number of African countries, specific approaches have been accepted because the peace process was influenced by external actors who helped to bring about the cessation of hostilities and who, therefore, were able to influence the instruments and institutions that go into the peace agreement.

This can translate into a latent hostility by those in government who now have to implement the agreement. In these circumstances, the government may be indifferent to whether these institutions are established and properly funded. It may also result in the appointment of commissioners who have deference to the ruling party or faction and who are not committed to the work of the truth commission. This can have devastating consequences for such a commission.

Another phenomenon that is experienced mostly in Africa is what I term the “space ship” parachuting in to rescue the local community without understanding the context or the dynamics in which they are operating. Once the institution has come and gone, local actors are left to deal with the negative consequences. This is not meant to denigrate or diminish the contribution of the international community, but should rather serve as a caution to ensure that national institutions and actors are integrated into any process.

## Public participation

Truth and reconciliation commissions that have been established through wide public participation processes have been effective vehicles for change. Civil society, if involved in the decision-making process from the outset, will have the opportunity to influence the law-making process, including the formulation of the commission’s mandate and the selection of its commissioners, and will be well positioned to hold the commission and government accountable.

Two examples of this are South Africa and Liberia. In South Africa, a powerful network of civil society organizations succeeded in removing “secrecy clauses” that had been inserted by politicians from the major parties into the legislation for the commission. They influenced the public process by which commissioners were selected and monitored the work of the commission, thus holding the commission accountable. The “public” nature of truth commission proceedings, a standard set by the work of the South African Commission, has become a benchmark for the work of all other commissions in Africa.

Liberia, in the past 12 months, has seen a strong group of civil society activists do the same thing with a similar impact. They have driven the law-making process and have conducted intense lobbying and advocacy activities, thus ensuring that the legislation would pass through the interim parliament. The Truth and Reconciliation Commission is the first democratic institution to be established in Liberia since the removal of Charles Taylor’s regime. Although Chairman Bryant appointed commissioners prior to the legislation being enacted, the efforts of civil society have succeeded in ensuring that all of these



commissioners were compelled to undergo a similar vetting and public scrutiny process. In the run-up to the election, all of the political candidates for presidency publicly expressed their support for the truth commission, recognizing its importance for Liberia. This bodes well for ownership and accountability to the nation.

### **Circumstances in which a truth commission is the appropriate instrument to deal with transitional justice issues**

In determining whether a truth commission is the appropriate structure to deal with transitional justice in any country, there are key issues that must be considered:

- Nature of the violence and human rights abuses to be investigated;
- Nature of the political transition;
- Extent of the dominance and power of perpetrators after the transition;
- Focus on justice, healing and reconciliation;
- Public support for a truth commission;
- Contribution to building a culture of respect for human rights, democracy and the rule of law;
- Potential for participation, accountability and empowerment.

#### **Nature of the violence and human rights abuses to be investigated**

In countries in which there have been human rights abuses, it is important to pay attention to the circumstances in which the abuse took place when developing the mandate of a truth commission. In the case of a repressive regime, when the perpetrators are mostly on one side, there is less likelihood of a contestation. In connection with a civil war in which all sides share responsibility for the abuse committed, however, there is always the likelihood that a commission may be compromised by accusations that the crimes committed by the other side(s) have been neglected.

This was certainly true of both South Africa and Sierra Leone, where the side no longer in power and individual perpetrators expressed the view that the commission would be a witch hunt against them. In both instances, it was important for the respective commission to demonstrate publicly that it intended to deal with the violations committed on all sides.

This can be addressed, of course, by ensuring that the legal definitions of “perpetrators” and “victims” are politically neutral. While this can result in the identification of some persons as both perpetrator and victim, it should not be seen as a dilemma, as it is a question of upholding values rather than an adversarial approach that holds one party being right and the other in the wrong.

In articulating mainly a reconciliation agenda, a commission may become embroiled in focusing overly on this issue while not exploring the morality of the

one side's taking up of arms against the other. In the case of South Africa, while the legislation provided for the commission to examine and investigate violations carried out by both sides, the commission's interpretation of its mandate as being "even handed" resulted in many observers and members of the liberation movements feeling that the commission had criminalized the resistance they regarded as a "just struggle" given the situation in South Africa. While the commission sought to draw a distinction between a just war and a just cause, this was not easily understood by ordinary people in South Africa.

A lesson perhaps for any commission is that it should announce, quite early on in its work, its intention to scrutinize the manner in which the conflict was conducted. This will ensure that there is never a potential for a culture of impunity, even if you were ostensibly on the side of those who had "just cause".

In Sierra Leone, the Civil Defence Forces (CDF) were seen in most quarters in the country as the legitimate force that had protected the larger community against the Revolutionary United Front (RUF) and Armed Forces Revolutionary Council (AFRC). This is the reason for the outrage expressed by many when Chief Hinga Norman, the erstwhile Minister of Defence, was indicted for his role in the conflict as the head of the CDF. While many people could identify with the indictment by the Special Court of members of the RUF and AFRC, the indictment of Hinga Norman was widely perceived as unjust.

## Nature of political transition

The manner in which a prolonged violent conflict is brought to an end has a huge impact on the choice of approach to be employed during a transition. A military victory by one side over the other will usually allow for a criminal justice mechanism. A negotiated peace agreement that initiates a transition to democracy on the basis of a voluntary transfer of power will result, in most instances, in a truth commission being established.

## Extent of the dominance and power of perpetrators after a transition

A third crucial factor to consider is the continuing power of perpetrators to influence the transition. In most countries where perpetrators have the potential to create fear and bring about further violence that may destabilize the country, the negotiated settlement will usually result in some form of amnesty. Often the amnesties may have been negotiated or legalized before the old regime left office.

It is important to take into account how this factor will constrain the work of a truth commission. It certainly limits the scope of the investigations particularly in regard to the security institutions such as the military and intelligence structures.

South Africa instituted a conditional amnesty that helped contain the role of the security forces. The legacy of this, however, is that the new government lacks the political will to begin prosecutions, which it pledged to do in respect of those who had not applied for amnesty. This is causing huge anger and bitterness in the

country, particularly among victims who feel the commission benefited perpetrators.

### Focus on justice and healing

In establishing a truth commission, although healing and reconciliation are important, justice for victims should be given priority by ensuring that it is part of its core mandate. Otherwise the success of the commission will be at risk. Justice should include truth recovery, recognition, reparations, as well as the restoration of civic trust and the building of social solidarity or cohesion.

### Public support for a truth commission

Unless there is widespread public support for a truth commission, which includes the broader public, political parties, the political elite and civil society, it is unlikely that the commission will enjoy cooperation or achieve success. Public support is a crucial factor in establishing a truth commission and should not be underestimated.

### **Possible contributions of a truth commission during a period of transition**

Having considered the circumstances under which truth commissions are established, it is useful to frame the positive aspects that they may achieve if properly managed:

- Helping to build democracy;
- Acknowledgment;
- Dealing with the denial of the past;
- Responding to the needs of victims;
- Reparations;
- Reconciliation;
- Building a common narrative of the country's past and thus ensuring a common set of premises from which to build for the future.

### Helping to build democracy

Transitions from oppressive undemocratic regimes to democratically elected governments, if properly managed and monitored, offer a window of opportunity to rebuild the institutional framework necessary to ensure the sustainability of democracy, build a human rights culture, and advance the rights of women, all of which are necessary for sustainable peace.

The processes adopted during the life of a truth commission are vital for the democratic future and should be accountable, transparent, accessible and

participatory. Given its potential to create a cadre of non-partisan individuals committed to human rights and the rule of law, a truth commission can empower nationals to assume roles in democracy-building institutions, such as human rights commissions, electoral bodies and gender commissions after its mandate has ended (this is not an exhaustive list).

In this context, truth and reconciliation commissions are usually tasked with dealing with impunity, establishing accountability through truth-seeking, focusing on the rights of victims and the right to know, designing an appropriate reparation program and recommending institutional reform ultimately leading to reconciliation.

### Acknowledgement and recognition

Truth and reconciliation commissions offer the opportunity for victims to come forward, tell their stories and have the wrongdoing done to them acknowledged by the wider community. The public acknowledgement by an official body contributes to their affirmation and healing. That victims could reclaim lost status through such a process was the opinion argued by Ishmael Mahomed, South Africa's first black chief justice of the Supreme Court, in the Azapo judgment:

“The Truth and Reconciliation Act seeks to address this massive problem by encouraging survivors and dependants of the tortured and the wounded, the maimed, and the dead to unburden their grief publicly, to receive the collective recognition of a new nation that they were wronged, and, crucially, to help them to discover what in truth happened to their loved ones, where and under what circumstances it happened, and who was responsible.”<sup>1</sup>

### Dealing with the denial

Truth commissions are a powerful tool in dealing with the lies and the myths that surround the conflict and violations committed. It is not that the truth of what happened is not known, but rather that those who benefit from the abuse and the privilege often refuse to acknowledge the truth. In South Africa, given the crucial role played by the media during the apartheid years, it is hardly likely that white South Africans did not know that atrocities were happening in the country. Ironically, during the hearings of the commission, when the victims initially started testifying, many white South Africans claimed that the victims were exaggerating. When perpetrators began testifying about the gruesome crimes they had committed, white South

Africans claimed either that they had not known of the atrocities committed or that the state had been involved in the commission of these crimes.

1 *Azanian Peoples Organization (Azapo) and Others v. the President of the Republic of South Africa and Others* 1996 (8), in Butterworth's Constitutional Law Reports/BCLR 1015 (CC), available at <<http://www.constitutionalcourt.org.za/Archimages/2529.pdf>>. OR [www.doj.gov.za/trc/legal/azapo.htm](http://www.doj.gov.za/trc/legal/azapo.htm).

The South African truth commission was thus able to counter widespread disbelief and denial by white South Africa that the state had been involved in the commission of gross human rights violations. In doing so, it dealt conclusively with the denial which most white South Africans had lived with almost all of their lives.

In Sierra Leone, many ordinary people did not understand the full complexity of what the chairperson of the commission called the “chameleonic war”. A widely held belief in the country was that in the main the RUF was responsible for the conflict. The commission was able to establish that the January invasion of Freetown was mainly carried out by members of the AFRC, disaffected soldiers who had adopted characteristics of the rebel forces. Contrary to the belief that amputations had been the main violation carried out, the commission was able to establish that, in fact, rape and sexual violence were the most prevalent crimes. Rape had been the silent crime that most women and girls in Sierra Leone had suffered during the conflict.

The creation of a common narrative is crucial for a country to start rebuilding a new social solidarity. Michael Ignatieff puts it most eloquently: “The past is an argument and the function of truth commissions, like the function of honest historians, is simply to purify the argument, to narrow the range of permissible lies.”<sup>2</sup>

## Responding to the needs of victims

Truth commissions can play an important role in addressing the needs of victims, their families and their communities. Many victims are shunned and suffer great stigma in their communities during the period of the conflict. The rest of the community is often afraid of being associated with the victim. Revealing the truth of their experiences assists the reintegration of victims into their communities and facilitates the opportunity to be restored to the status they held before the conflict.

The public affirmation and acknowledgement of wrongdoing done to the victim in the midst of the community is a powerful tool in effecting healing. Revealing the truth about the fate of loved ones, though painful, allows victims’ families to put their uncertainty to rest. Learning the fate of the disappeared brings closure. Public hearings and the publication of the truth are instruments that can contribute to the achievement of this goal.

## Reparations

The principles of reparation are well established in international law. The work of Professor Theo van Boven has been helpful to those of us who have had to work with this complex issue. Reparation programs in the context of a transition from an unjust regime to a legitimately elected government often pose a challenge. The

2 Michael Ignatieff, “Overview: Articles of Faith”, *Index on Censorship*, Vol. 25, 1996, p. 113.

new government is almost always faced with conflicting demands, as the reconstruction and development needs of all citizens compete with the need for an appropriate reparations program for victims of human rights violations.

The guiding principles of a proper reparations program are meant to acknowledge the wrongdoing done to victims, to improve the quality of their lives, to afford recognition through affirmation and acknowledgment of the harm suffered, and to build civic trust and solidarity. Yet, reparation is often the point at which most countries and governments squander the opportunity to restore civic trust by not acknowledging victims through an appropriate reparations program.

In a paper as yet unpublished at this time,<sup>3</sup> Pablo de Grieff makes a cogent observation when he explores the thesis that the responsibility of a state in designing a program of reparations in this context must satisfy conditions of justice. In addressing this question, he argues that the search for justice in a period of transition will involve efforts to punish perpetrators of the worst human rights abuses, to understand and to clarify the structures of the violence and the fate of victims, to reform institutions in order to neutralize the causes that might have contributed to the violence and finally to repair victims.

Efforts to “repair victims” must therefore be seen as an essential element of a holistic transitional justice package. A powerful argument that he raises is that “a well designed reparations program contributes to justice precisely because reparations constitute a form of recognition — the materialization of the recognition that citizens owe to those whose fundamental rights have been violated.”<sup>4</sup>

Negative experiences where governments and truth commissions have failed on this issue underscore this important point. Truth commissions, which recognize and acknowledge that victims have been treated unjustly, have the most chance of success. Reparation programs that take this factor into account achieve the most social coherence.

Key questions that have not been dealt with are the obligations of illegitimate governments taken over by successor states, the dilemma that in many cases large cross-sections of citizens may constitute victims and the issue of how to measure suffering where large communities of victims exist.

## Reconciliation

In dealing with this issue, there are a few observations that must be made:

- One cannot and should not legislate for reconciliation and especially not for forgiveness. It should be seen as part of a process;
- Reconciliation, like reparations, must be understood in the context of a holistic set of objectives. These include:

3 Pablo de Grieff (unpublished paper), “Reparations Efforts in International Perspective: What Compensation Contributes to the achievement of Imperfect Justice”, p. 34.

4 Ibid., p. 35.

- Justice for victims;
- Accountability of perpetrators;
- Clarification of the truth relating to the causes of the violence and conflict;
- Establishment of democratic institutions and rebuilding of those destroyed through the conflict;
- Dealing conclusively with the factors that gave rise to the conflict;
- Elimination of the fear of living together;
- Rebuilding of trust in government and its institutions;
- Building social solidarity amongst citizens.

All of these objectives together constitute a holistic transitional package that contributes to rebuilding democracy.

## Different levels of reconciliation

There are different levels of reconciliation to which a commission can contribute. At the national level, the cessation of hostilities and the restoration of a peace, which allows citizens to live without fear that they will be the subject of attack or harm, is an important aspect of reconciliation. In countries where living with violence on a daily basis is the norm, the cessation of hostilities and an accompanying peace process have a value in themselves that should not be underestimated.

At the community level, the restoration of one's status and the clarification of the truth relating to the conflict also foster reconciliation. The most significant intervention that can be made, however, is the creation of conditions that enable former enemies to live side by side in the certainty that one side will not be harmed by the other. While people living together do not have to like each other, mutual respect as the basis for future interaction builds social cohesion.

An observation on the work of the truth commission in Sierra Leone serves to illustrate this point. Laura Stovel, who spent six months in that country conducting research on reconciliation in 2003, writes: "In sum, the TRC report contributes to reconciliation in four ways. First, by creating an impartial and detailed historical record it humanizes the conflict, exposes and destroys myths and empowers the population. Second, it affirms values and standards of democracy and human rights. Third, it recognizes that crimes are enabled and interpreted within a social context and cannot be assessed outside that context. The report made recommendations to deal with social structures and laws that enabled violence or hindered reintegration on just terms. Finally, the report made recommendations on reparations, future directions and legal changes that would better protect women and children from violence."<sup>5</sup> While one may disagree with

5 Laura Stovel, "When the Enemy Comes Home: Restoring Justice after Mass Atrocity", Paper prepared for the Restorative Justice Conference in Vancouver, 1-4 June 2003, available at: <<http://www.sfu.ca/cfrj/fulltext/stovel.pdf>>.



the point that “crimes cannot be interpreted outside the context of a particular country” given the universality of a human rights discourse, the contribution is a valuable one to the debate.

In conclusion, we acknowledge that there is, of course, also a very critical view of the discourse on “reconciliation”. Without going into any detail, we quote Horacio Verbitsky, a Chilean journalist, who makes the following point regarding the process of reconciliation in his own country: “Reconciliation by whom? After someone takes away your daughter, tortures her, disappears her, and then denies having ever done it — would you ever want to “reconcile” with those responsible? That word makes no sense here. The political discourse on reconciliation is immoral, because it denies the reality of what people experienced. It is not reasonable to expect people to reconcile after what happened here.”<sup>6</sup>

## Contributions of truth commissions in dealing with issues of gender

There are a number of key issues that a truth commission can address in the area of gender and women’s empowerment:

- Disaggregating data relating to gender component;
- Drawing specific attention to crimes against women, such as rape, sexual enslavement and other gender-based crimes;
- Addressing the consequences of sexual crimes to assist in restoring status, re-integration in society and material support of women victims who suffer ostracism and the stigma of having been associated with perpetrator groupings, especially if they have children as a result of their experiences;
- Empowering women survivors through an affirmative participatory process to deal with the issues listed above;
- Adding a gender component to any dispute resolution, peace negotiation, reconciliation and democracy-building project;
- Dealing with gender-based violence through law reform and the building of a human rights culture;
- Improving demobilization and reintegration programs through a gender focus;
- Ensuring a gender-specific component to a reparation and rehabilitation program;
- Addressing the role of peacekeepers.

Gender-based violence and crimes of sexual violence are a major focus of the recent conflicts in Africa. While gender-based crimes normally increase during periods of armed conflict, it is the low social status that women have in general — even during peace time — that makes them especially vulnerable to sexual violence by almost all of the protagonists in conflict situations. Although women are

6 Horacio Verbitsky in an interview conducted by Priscilla Hayner, quoted in Priscilla Hayner, *Unspeakable Truths — Facing the Challenges of Truth Commissions*, Routledge Press, New York and London, 2002.

perceived as playing a lesser role in armed conflicts, we should also recognize that there are many women who take up arms and engage in conflict in order to survive. Rape has been used as a tool of war indiscriminately by all sides in conflicts.

A truth commission, if it does its work properly, has a huge potential for promoting legal reform with respect to gender-based violence and the advancement of the rights of women during the transitional period. In formulating its recommendations, a truth commission can address a variety of legal issues in this regard, including laws to ensure that sexual violence is prosecuted, that the legal age of marriage for girls is in line with CEDAW standards, that women are treated equally under the law, and that cultural and traditional practices conform to a human rights culture.

### Challenge of integrating women and girls in demobilization programs

In most conflict countries women and girls experience discrimination in the way in which demobilization and reintegration programs are implemented. In addressing these issues, I would like to make the following recommendations:

1. Proper planning for demobilization, re-integration and rehabilitation;
2. Education to deal with the stigma attached to the victims of sexual violence;
3. Skills training appropriate to the girls;
4. Access to economic opportunities;
5. Integration of victims and perpetrators.

### Role of peacekeepers in protecting women and girls

A recently highlighted problem is the violation by peacekeepers and those in charge of displacement camps of young girls under their protection.<sup>7</sup> Although peacekeeping troops on duty in conflict countries remain a key challenge in dealing with the exploitation of women and girls, the rules applicable to troops stationed in Sierra Leone represent advancement in the policy and procedures to prevent such exploitation. These policies and procedures need to be expanded upon and included in the rules for all peacekeeping missions. In addition, those in charge of displacement camps should be properly screened so as to ensure that any person who has been involved in the violation of the rights of women and girls should not be employed in key positions of power over those who are vulnerable.

Action should follow swiftly where violations have been uncovered and punishment should be speedy.

7 A joint report by the UNHCR and Save the Children UK first publicized this abuse in 2002. See UNHCR and Save the Children-UK, *Sexual Violence & Exploitation: The Experience of Refugee Children in Guinea, Liberia and Sierra Leone. Initial Findings and Recommendations from the Assessment Mission 22 October–30 November 2001*, available at: <[http://www.savethechildren.org.uk/scuk\\_cache/scuk/cache/cmsattach/1550\\_unhcr-scuk\\_wafrica\\_report.pdf](http://www.savethechildren.org.uk/scuk_cache/scuk/cache/cmsattach/1550_unhcr-scuk_wafrica_report.pdf)>.

## Crisis of legitimacy for truth commissions

A major issue of concern for transitional justice practitioners must be the failure to have a commission's recommendations implemented.

What is the impact on the legitimacy of a truth commission if its recommendations are not followed through, given that recommendations usually deal with institutional reform and reparation? Over the past five years, a number of truth commissions have had this experience. There has been a failure to implement the recommendations of the commissions in Guatemala, South Africa and Ghana, and Peru and East Timor report that they may face similar problems. In almost all of these countries, reparation programs have experienced difficulties.

The negative consequences attached to the failure to implement are significant particularly in terms of the intended impact of these truth commissions. These negative consequences include the following:

- A failure to address the underlying causes of the conflict by failing to address institutional reforms that are required;
- A failure to implement reparations is a further violation of victims' rights;
- A lack of recognition of victims that may cause further trauma and lead to a sense of re-victimization;
- A feeling of deep betrayal at the behaviour of the political elites who have benefited from the transition;
- The persistence of inequalities;
- The contribution to a new impunity.

Ultimately, the legitimacy of the whole process is called into question. It is certainly not good enough that the commission's work has gone well. If the final aspect of its work is not implemented, it leads to the perception that the process itself must be flawed. This was certainly the view of victims in both South Africa and Guatemala. In post-conflict countries, victims are often told by the successor government that they need to move on. As a consequence, they find themselves left out of the current political dispensation and are out of sync with the new political rhetoric. The problem for most victims, of course, is that they cannot move on, because they are often at the bottom of the pile in society. Their realities have not really changed. Sadly, this is often accompanied by a consolidation of the political elites across the political spectrum.

## Conclusions

In conclusion, transitional justice practitioners and the international community need to consider how we deal with the following issues:

- The deficit between norms, principles and the reality on the ground;
- The disjuncture between conflict resolution, peace building efforts and transitional justice mechanisms. On the one hand, there is a need to deal with

warlords and perpetrators out of a necessity to end the conflict. At the same time, it is expected that the international community will invest quite substantially in disarmament, demobilization and reintegration processes in respect of former combatants. At the international level, however, there is not a similar commitment or investment in victims. It is seen rather as a task of national governments to address concerns related to victims, which, of course, often do not materialize.

Given the above, how can we improve the quality of justice for victims and how do we mainstream a rights-based approach into all these processes? In my view, we need to ensure the following:

- Inclusion of accountability mechanisms in peace agreements;
- Inclusion of references to justice for victims in peace agreements;
- Inclusion of civil society in the peace negotiations;
- Emphasis on gender inclusion and accountability for gender-based violations;
- Respect for the national context;
- Remember that one size does not fit all;
- That reconciliation is not at the expense of justice;
- Linking transitional justice to democracy.

The international community should ensure that donor assistance is used as leverage to hold new governments accountable. There is a need to ensure that they also use this leverage to ensure that the recommendations made by transitional bodies, such as truth commissions, are implemented given that they are usually involved in the oversight of the peace negotiations and the ensuing transition.

I will conclude by quoting Filipino poet J. Cabazeres from a poem describing the challenge that we all must face in connection with reconciliation:

“Talk to us about reconciliation  
Only if you first experience the anger of our dying  
The anger of our dying  
Talk to us of reconciliation  
If your living is not the cause  
Of our dying  
Talk to us about reconciliation  
Only if your words are not the product of your devious scheme  
To silence our struggle for freedom  
Talk to us about reconciliation  
Only if your intention is not to entrench yourself  
More on your throne  
Talk to us about reconciliation  
Only if you cease to appropriate all the symbols and meanings of our struggle.”<sup>8</sup>

8 Cabazares J., “Discovering True Peace through sincere Reconciliation” in “Intentional Conversation about Restorative Justice, Mediation and Practicing of Law”, Penelope Hurley and James Coben, *Journal of Public Law and Policy*, Hamline University School of Law, 2003.

# Reflections on international humanitarian law and transitional justice: lessons to be learnt from the Latin American experience

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## **Abstract**

*Compliance with or violations of international humanitarian law during an armed conflict undoubtedly influence the conduct of the judiciary, the situations of the victims and the correlation of forces in the post-conflict society. This article seeks to determine the influence of international humanitarian law on the transitional justice process. The author examines the specific experience of certain Latin American states that have been deeply affected by serious violations of human rights and international humanitarian law.*

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It is generally known that the scope of application of international humanitarian law (IHL) does not extend to situations existing before or after armed conflict. However, there is unquestionably a close link between the way the parties act during an armed conflict and the chances of achieving peace and reconciliation while restoring the rule of law once the hostilities have ended. Compliance with or

\* The author would like to thank Andrea Díaz Rozas and Jessica Maeda for their helpful research.

violations of IHL will undoubtedly influence the conduct of the judiciary, the situation of the victims and the correlation of forces in the post-conflict society.

The term “transitional justice” has come to be used to refer to the various processes accompanying political transition by societies emerging from a period of violence that aim to deal with the serious human rights violations committed during the conflict and to achieve national reconciliation.<sup>1</sup> This analysis seeks to determine the influence of IHL on such a process.

The possible relationship between IHL and the transition process can be considered with respect to two points in time. The first is the period before the outbreak of the conflict, when the preventive role of IHL comes into play. The state has an obligation to ensure national implementation of IHL,<sup>2</sup> which will contribute to preventing serious violations of its provisions during a conflict, making the transition process after the hostilities have ended much more viable. The second point in time is the period after the conflict has come to an end, that is, the transition phase. During this period, the focus is on the punitive provisions of IHL, which establish the obligation to suppress all violations of IHL and to search for and prosecute those who have committed grave breaches of IHL in international armed conflicts.<sup>3</sup> Arguably, there is also a duty under customary law to prosecute those persons who have committed serious violations of the laws and customs of war in non-international armed conflicts, based upon the criminalization of these acts in international customary law, as recognised in case law and statutes of international tribunals.<sup>4</sup>

This analysis examines the specific experience of certain Latin American states that have been deeply affected by serious violations of human rights and IHL. These Latin American states<sup>5</sup> have basically elected two dissimilar options from those available within the construct of transitional justice, the creation of truth commissions<sup>6</sup> and the passing of amnesty laws,<sup>7</sup> which in many cases have neutralized the effects of each other.

1 For the United Nations, the notion of transitional justice comprises the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reforms, vetting and dismissals, or a combination thereof. See “The rule of law and transitional justice in conflict and post-conflict societies”, UN Security Council, S/2004/616, 3 August 2004, p. 4.

2 Common Art. 1 of the four Geneva Conventions of 1949.

3 Articles 49, 50, 129 and 146 respectively of the four Geneva Conventions of 1949.

4 See ICTY, *Prosecutor v. Dusho Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, para. 134; Art. 4 of the ICTR Statute; Art. 3 of the SCSL Statute and Art. 6(1)(c) and (e) of the East Timor Special Panel Statute.

5 Diego García Sayán, “Amnistías y procesos democráticos”, in María Ángeles Siemens *et al.* (eds.), *Crisis Humanitarias Post-Conflicto y Reconciliación*, Vol. 1, Siglo XXI de España Editores S.A., Madrid, 2004, p. 91 ff.

6 Mark Osiel, “Respuestas estatales a las atrocidades masivas”, in Angelika Rettberg (ed.), *Entre el perdón y el paredón: Preguntas y dilemas de la justicia transicional*, Corcas Editores Ltda., Colombia, 2005, p. 68.

7 Wilder Taylor, “La problemática de la impunidad y su tratamiento en las Naciones Unidas: Notas para la reflexión”, *Revista Instituto Interamericano de Derechos Humanos (IIDH)*, No. 24, 1996, p. 197.

## Implementation and the eminently preventive focus of international humanitarian law

As Marco Sassòli points out, for a branch of law like IHL that applies in a fundamentally anarchic, illegal and often lawless situation such as armed conflict, the focus of implementing mechanisms is, and must always be, on prevention.<sup>8</sup> Implementation,<sup>9</sup> in the sense of adopting national measures to give full domestic effect to the rules of international law, is one of the oldest yet least used mechanisms for enforcing international law.<sup>10</sup> Therefore, implementation may be characterized as being a necessary step towards fulfilment of international obligations.

According to Georges Scelle's theory of role-splitting (*dédoublement fonctionnel*),<sup>11</sup> states are both the creators and subjects of international law. Thus, as Antonio Cassese observes, "most international rules cannot work without the constant help, cooperation and support of national legal systems."<sup>12</sup> The Inter-American Court of Human Rights also affirmed this relationship between implementation and enforcement in the case of *Hilaire v. Trinidad and Tobago*.<sup>13</sup> National implementation must be developed by adopting measures that meet the purpose of the norm in question. In the case of IHL, it is important to remember that implementation serves as a palliative for its institutional weakness and as a means to overcome the difficulties posed by the situations that it is intended to regulate, by, for example, helping to establish the rule of law and respect for human dignity in all circumstances.<sup>14</sup>

The failure to develop national implementation in a particular domestic legal system reduces the likelihood of compliance with the rules of IHL, thus making the post-conflict reconciliation process more difficult. While reconciliation is not a specific objective of IHL, it is an indirect result of effective

8 Marco Sassòli, "State responsibility for violations of international humanitarian law", *International Review of the Red Cross*, Vol. 84, No. 846, 2002, p. 401.

9 According to the *Oxford English Dictionary*, "implement" means to complete, perform, carry into effect; to fulfil.

10 Antonio Cassese, *International Law*, 2nd edition, Oxford University Press, Oxford, 2005, p. 167.

11 Georges Scelle, *Précis de droit des gens (Principes et systématiques)*, CNURS, Paris, 1984, p. 35.

12 Cassese, above note 10, p. 9.

13 Inter-American Court of Human Rights, *Cantos v. Argentine Republic* (merits), Judgment of November 2002, para. 59: "112...the Court has consistently held that the American Convention establishes the general obligation of States Parties to bring their domestic law into compliance with the norms of the Convention, in order to guarantee the rights set out therein. The provisions of domestic law that are adopted must be effective (principle of *effet utile*). That is to say that the State has the obligation to adopt and to integrate into its domestic legal system such measures as are necessary to allow the provisions of the Convention to be effectively complied with and put into actual practice."; *Hilaire, Constantine, Benjamin et al. v. Trinidad and Tobago*, Judgment of 21 June 2002, Series C, No. 94, para. 112. See also "The Last Temptation of Christ" Case (*Olmedo Bustos et al. v. Chile*), Judgment of 5 February 2001, Series C, No. 73, para. 87.

14 Cristina Pellandini, "Retos actuales en materia de adopción de medidas nacionales para la aplicación del Derecho internacional humanitario", in Gabriel Valladares, *Derecho internacional humanitario y temas de áreas vinculadas, Lecciones y Ensayos*, No. 78, Lexis Nexis Abeledo Perrot/ICRC, Buenos Aires, 2003, p. 389.



enforcement. The fact that the parties to a conflict have complied with IHL means that the rules of engagement established by this body of law have been observed and, as a general rule, that no serious human rights violations have been committed, and if they have, there are legislative mechanisms in place to take action against them. This fact alone leads to a situation entirely different from that of a society that has been subjected to a conflict in which breaches of IHL on both sides resulted in numerous violations of human rights, including the right to life, physical integrity and due process, and this difference highlights the full importance and positive effects of national IHL implementation.

The experience of Latin America in this regard is particularly interesting because it is a region wracked by a multiplicity of armed conflicts. Countries such as El Salvador, Nicaragua, Peru, Guatemala and Colombia are examples of societies in which efforts to achieve reconciliation and justice have involved the application of IHL or attempts to apply it. Yet implementation has not been a part of state policy in Latin American countries, although they are all bound by IHL, with the result that the compatibility of their domestic legal systems with the rules of IHL is haphazard. In the case of states that have experienced armed conflict and a post-conflict transition process, it can be seen that IHL implementation was inadequate. The point of this analysis is not to show that the lack of implementation constitutes a breach of IHL, but to establish that when implementation is inadequate there is a lesser likelihood of compliance with IHL, resulting in greater difficulties and wider divisions to be bridged when the conflict is over. Significantly, this inextricably close relationship has been highlighted in the reports issued by various truth commissions in the region, which in their final recommendations stress the need to make the domestic legal system consistent with international norms, particularly the rules of IHL. Specifically, Guatemala's Historical Clarification Commission recommended that the government take the necessary measures "to fully incorporate into national legislation the standards of international humanitarian law and ... regularly provide instruction regarding these norms to the personnel of state institutions, particularly the Army, who are responsible for respecting, and in turn ensuring respect in others for said norms."

### **The punitive role of international humanitarian law: does it limit the chance of reconciliation?**

Following analysis of the preventive role of IHL, it is necessary to examine the implications of incorporating IHL criteria into the transition. This is a very complex process, as the different parties involved often have seemingly irreconcilable interests. For example, the victims have non-negotiable moral and legal demands for the truth about violations and for justice, while the perpetrators are anxious to avoid prosecution.<sup>15</sup>

15 General Pinochet warned Chile's elected president as he handed over power in 1990: "No one is going to touch my people. The day they do, the state of law will come to an end." See *Chile in Transition*,

In the post-conflict period, the obligation to comply with the rules of IHL requiring perpetrators of violations to be punished could be regarded as an obstacle to the transition process, as groups retaining a share of power could see the application of these rules as a reason to make no compromises in the reconciliation process. The response of some Latin American states to this problem has been to pass what have become known as self-amnesty laws, tantamount to granting impunity for violations, and to set up truth commissions which, while clarifying the facts about violations, have not always succeeded in achieving reconciliation and justice. An analysis of these two mechanisms, the most commonly used in post-conflict situations in the region, provides an insight into the relationship between IHL and reconciliation efforts undertaken in these countries, showing, for example, how IHL is used by truth commissions to uncover the facts surrounding the violations they investigate or how the existence of IHL places constraints on amnesties.

## Amnesty laws

The amnesty laws<sup>16</sup> passed in Latin America cancel crimes and thus make acts that were criminal offences no longer punishable, with the result that “a) prosecutors forfeit the right or power to initiate investigations or criminal proceedings; and b) any sentence passed for the crime is obliterated.”<sup>17</sup> As Cassese observes, “...the rationale behind amnesty is that in the aftermath of periods of turmoil and deep rift, such as those following armed conflict, civil strife or revolution, it is best to heal social wounds by forgetting past misdeeds, hence by obliterating all the criminal offences that may have been perpetrated by any side. It is believed that in this way one may more expeditiously bring about cessation of hatred and animosity, thereby attaining national reconciliation...”<sup>18</sup>

An amnesty law may have certain legitimacy if it promotes reconciliation as a firm and lasting basis on which to build a democratic society and does not simply grant impunity to those implicated. “Impunity” is the term used to refer to the impossibility, *de jure* or *de facto*, of bringing the perpetrators of violations to account — whether in criminal, civil, administrative or disciplinary proceedings — since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if convicted, sentenced to appropriate penalties and to make reparations to their victims.<sup>19</sup> Therefore, amnesties should not be used to serve the

Americas Watch, 1989, p. 73, cited by Geoffrey Robertson, *Crimes against Humanity: The Struggle for Global Justice*, The New Press, New York, 1999, p. 281.

16 It is interesting to note that the word amnesty has the same derivation as “amnesia,” namely from the Greek “*amnestia*,” meaning “forgetfulness” or “oblivion”. Antonio Cassese, “Reflections on International Criminal Justice”, *Modern Law Review*, Vol. 61, 1998, p. 3.

17 Antonio Cassese, *International Criminal Law*, Oxford University Press, New York, 2003, p. 312.

18 *Ibid.*, pp. 312–313.

19 “Updated Set of Principles for the protection and promotion of human rights through action to combat impunity” (hereinafter “Updated Set of Principles”). Report of the independent expert to update the set

electoral interests<sup>20</sup> of the implicated agents or as a realpolitik response in which practical concerns and political expediency override ethical considerations.<sup>21</sup>

Amnesty is thus a formula to be applied in a particular context in compliance with certain requirements and without losing sight of the fact that the demands of the new society for justice must be satisfied. Evidently, this involves an element of opportunity (the amnesty is granted in a particular context, either during a post-conflict transition or a transition from dictatorship to democracy) and competence (the amnesty is a society-wide consensus, established on the basis of the work of a truth commission or some other transitional mechanism).<sup>22</sup> Furthermore, the enactment of amnesty laws is no longer considered the exclusive purview of the state, as the requirements established in international human rights law and IHL must also be met, that is, amnesties are only valid when states comply with their obligations owing to all those individuals whose rights have been violated<sup>23</sup> and when they contribute to achieving national reconciliation. The jurisprudence of the Inter-American Court of Human Rights provides a clear example of this constraint on amnesties in Latin America. In the seminal case of *Barrios Altos v. Peru* concerning laws passed by the state of Peru granting amnesty to those involved in crimes against humanity, the court emphatically declared that:

of principles to combat impunity, Diane Orentlicher, E/CN.4/2005/102/Add.1, 8 February 2005. Preserving impunity requires victims to relinquish their rights, without requiring those who violated them to do anything. See Juan Méndez, “Derecho a la verdad frente a las graves violaciones a los derechos humanos”, in Martín Abregú *et al.* (eds.), *La aplicación de los tratados sobre derechos humanos por tribunales locales*, CELS, Buenos Aires, 1997, available at <[http://www.aprodeh.org.pe/sem\\_verdad/documentos/Juan\\_E\\_Mendez.pdf](http://www.aprodeh.org.pe/sem_verdad/documentos/Juan_E_Mendez.pdf)>.

20 A good example of this is the recently proposed amnesty for the members of the Army who fought against *Sendero Luminoso* (Shining Path) rebels and the Túpac Amaru Revolutionary Movement in Peru, an initiative that coincided with the run-up to the elections and the battle for the votes that were granted to the members of the Army for the first time in the presidential elections. Regarding this issue, in his most recent Press Conference, on August 19th 2006 the Ministry of Defence [of the elected government] said that the government hasn’t pronounced yet on granting amnesty to the members of the Army accused of human rights violations. Likewise, he said that rather than vengeance there should be justice avoiding impunity. Nevertheless he pointed out that the Truth Commission report was not legally binding for Peruvian state and that regarding the procedures and that regarding the procedures before our internal courts, rights such as presumption of innocence and right to defense should be preserved. See: [http://www.rpp.com.pe/portada/politica/47129\\_1.php](http://www.rpp.com.pe/portada/politica/47129_1.php).

21 Eduardo González Cueva, “Perspectivas teóricas sobre la justicia transicional”, available at <[http://www.aprodeh.org.pe/sem\\_verdad/documentos/Gonzalez\\_Cueva.pdf](http://www.aprodeh.org.pe/sem_verdad/documentos/Gonzalez_Cueva.pdf)>. OR [www.aprodeh.org.pe/sem\\_verdad/documentos.htm](http://www.aprodeh.org.pe/sem_verdad/documentos.htm).

22 Updated Set of Principles, above note 19. Principle 6 says: “To the greatest extent possible, decisions to establish a truth commission, define its terms of reference and determine its composition should be based upon broad public consultations in which the views of victims and survivors especially are sought.” On the subject of the amnesty law in El Salvador, Boutros Ghali noted that “it would have been better if the amnesty had been taken after a broad degree of national consensus had been created in favor of it.” Secretary-General expresses concern over amnesty law adopted by El Salvador legislative assembly, United Nations Press Release SG/SM 4950, 24 March 1993, cited by Jo M. Pasqualucci in “The whole truth and nothing but the truth: Truth commissions, impunity and the Inter-American human rights system”, *Boston University International Law Journal*, Vol. 12, 1994, p. 345.

23 Santiago Corcuera Cabezut, “Las leyes de amnistía a la luz del derecho internacional de los derechos humanos”, available at <[http://www.aprodeh.org.pe/sem\\_verdad/documentos/Corcuera\\_Cabezut.pdf](http://www.aprodeh.org.pe/sem_verdad/documentos/Corcuera_Cabezut.pdf)>. OR [www.aprodeh.org.pe/sem\\_verdad/documentos.htm](http://www.aprodeh.org.pe/sem_verdad/documentos.htm).

“43. The Court considers that it should be emphasized that, in the light of the general obligations established in Articles 1(1) and 2 of the American Convention, the States Parties are obliged to take all measures to ensure that no-one is deprived of judicial protection and the exercise of the right to a simple and effective recourse ... Consequently, States Parties to the Convention which adopt laws that have the opposite effect, such as self-amnesty laws, violate Articles 8 and 25, in relation to Articles 1(1) and 2 of the Convention. Self-amnesty laws lead to the defenselessness of victims and perpetuate impunity; therefore, they are manifestly incompatible with the aims and spirit of the Convention.

44. Owing to the manifest incompatibility of self-amnesty laws and the American Convention on Human Rights, the said laws lack legal effect and may not continue to obstruct the investigation of the grounds on which this case is based or the identification and punishment of those responsible, nor can they have the same or a similar impact with regard to other cases that have occurred in Peru, where the rights established in the American Convention have been violated.”<sup>24</sup>

Such laws are generally promoted by the regime that committed the violations so as to shield its own members from prosecution. Therefore, they are not the result of negotiation or consensus and are not passed in the context of a post-conflict transition or a transition to democratic government. On the contrary, they are purely *self-amnesty* laws, as the Inter-American Commission on Human Rights so rightly terms them.<sup>25</sup>

24 Inter-American Court of Human Rights, *Barrios Altos Case (Chumbipuma Aguirre et al. v. Peru)*, Judgment of 14 March 2001, available at <[http://www.corteidh.or.cr/seriecpdf\\_ing/seriec\\_75\\_ing.pdf](http://www.corteidh.or.cr/seriecpdf_ing/seriec_75_ing.pdf)>. In the Interpretation of the Judgment on the Merits, the court rules that given the nature of the violation that amnesty laws No. 26,479 and No. 26,492 constitute, the decision made in the judgment on the merits in the *Barrios Altos Case* has generic effects. Judgment of 3 September 2001, operative para. 2, Interpretation of the Judgment on the Merits (Art. 67 of the American Convention on Human Rights), available at <[http://www.corteidh.or.cr/seriecpdf\\_ing/seriec\\_83\\_ing.pdf](http://www.corteidh.or.cr/seriecpdf_ing/seriec_83_ing.pdf)>. Previously, in the *Velásquez Rodríguez Case*, the court ruled: “181. The duty to investigate facts of this type continues as long as there is uncertainty about the fate of the person who has disappeared. Even in the hypothetical case that those individually responsible for crimes of this type cannot be legally punished under certain circumstances, the State is obligated to use the means at its disposal to inform the relatives of the fate of the victims and, if they have been killed, the location of their remains,” Judgment of 29 July 1988, available at <[http://www.corteidh.or.cr/seriecpdf\\_ing/seriec\\_04\\_ing.pdf](http://www.corteidh.or.cr/seriecpdf_ing/seriec_04_ing.pdf)>. In the *Loayza Tamayo Case, Reparations*, Judgment of 27 November 1998, para. 168, the court said: “States ... may not invoke existing provisions of domestic law, such as the amnesty law in this case, to avoid complying with their obligations under international law. In the Court’s judgment, the amnesty law enacted by Peru precludes the obligation to investigate and prevents access to justice. For these reasons, Peru’s argument that it cannot comply with the duty to investigate the facts that gave rise to the present case must be rejected.” Evidently, this type of violation not only arises as a result of the enactment and application of amnesty laws. *De facto* situations resulting from acts of commission or omission by the authorities to secure impunity for their members can have the same effects as an amnesty law that violates international law.

25 See Inter-American Commission on Human Rights, *Annual Report, 1985 – 86*, OEA/Ser.L/V/II.68, doc. 8, p. 193, cited by Pasqualucci, above note 22, p. 145. See also Report 34/96 on cases 11,228, 11,229, 11,231 and 11,282 of 15 October 1996, in which the commission observes: “In the present case, the persons benefiting from the amnesty were not third parties from outside, but the very ones who had taken part in the government plans of the military regime. One thing is to uphold the need to legitimize

Regrettably, this is the model of amnesty law commonly adopted in Latin America, promoting impunity rather than reconciliation.<sup>26</sup> Many of the governments that passed such amnesty laws justified their action by alleging that no rule of international law expressly prohibits the granting of amnesties for international crimes.<sup>27</sup> One such case was Chile, where the Pinochet dictatorship passed Decree 2191 of 19 April 1978 granting a self-amnesty that benefited members of the armed and security forces and enabled the *Junta* and its agents to enjoy total impunity. This amnesty was upheld in 1990 by the Supreme Court of Chile, which ruled that it was valid.<sup>28</sup> Similarly, the Argentine armed forces granted themselves an amnesty in Act 22924 of 22 September 1982. At first, it seemed likely that it would be repealed, but it was eventually reinforced some years later by further legislation, specifically the “Full Stop” Act (*Ley de Punto Final*) of 24 December 1986 and the Due Obedience Act (*Ley de Obediencia Debida*) of 4 June 1987.<sup>29</sup>

In Peru, Congress passed the General Amnesty Act (No. 26479) on 14 June 1995, which granted a “...general amnesty to military, police and civilian personnel, whatever their status ... who face a formal complaint, investigation, criminal charge, trial, or conviction for common or military crimes ... whether under the jurisdiction of the civil or military courts between May 1980 and the date on which this law is promulgated...” Article 6 of the Act eliminates any possibility of carrying out investigations: “...all legal proceedings pending or in progress shall be closed.” When a judge decided not to apply the provisions of the Act, declaring it to be unconstitutional, Congress passed Act 26492 interpreting the General Amnesty Act, which in Article 2 barred judicial review on the grounds that the power to grant amnesty belonged solely to Congress, and in Article 3 stipulated that all judges must apply the General Amnesty Act.

A particularly illustrative case is that of El Salvador. As part of the Central American peace process, the Esquipulas II Accords granted unconditional blanket amnesties. Decree 805, enacted on 28 October 1987, granted amnesty to all those accused of involvement in political crimes or related common crimes perpetrated before 22 October of that year, when the number of perpetrators was no fewer than twenty. This was a sweeping amnesty covering crimes connected in any way with the armed conflict and committed by any person, regardless of what sector they belonged to. In Uruguay, the state passed Act 15848, published in the country’s official gazette on 31 December 1986, which was more of a statute of

the acts celebrated by society as a whole (to avoid falling into chaos), or those stemming from international responsibility, since the obligations assumed in those areas cannot be shirked; but to extend equal treatment to persons who acted in accord with the unlawful government, thereby violating the Constitution and the laws of Chile, is another matter entirely.”

26 Robert Norris, “Leyes de impunidad y los derechos humanos en las Américas: Una respuesta legal”, in *Revista IIDH*, Vol. 15, 1992, p. 47 ff. He observes that impunity laws proliferated after 1978 in Central and South American countries that had suffered long periods of political violence and systematic, state-sponsored human rights violations.

27 Wilder Tayler, above note 7, p. 198.

28 Robert Norris, above note 26, p. 48 ff.

29 *Ibid.*, p. 71 ff.

limitations than an amnesty law. It proclaimed that the power of the state to punish officers of the armed or police forces for political crimes committed on active duty before 1 March 1985 had expired. A motion was presented to have it declared unconstitutional, but was dismissed by the Supreme Court on 2 May 1988. A referendum held on 16 April 1989 showed 57.5% of the population to be in favour of the act, which remains in force today. An amnesty was also granted in Brazil by virtue of Act 6683 of 28 August 1979, covering the period from 2 September 1961 to 15 August 1979. This act granted amnesty to all those who had committed political crimes, politically related common crimes or electoral offences, those whose political rights had been suspended and public-sector employees, employees of government-related foundations, members of the military and trade union officials, and representatives convicted under the Institutional Acts and supplementary laws. This amnesty, which was the result of action taken by the legislature, stemmed from a popular initiative and remains in force to the present day.

It appears, then, that the amnesty laws passed in these Latin American countries do not comply with the requirements of IHL to prosecute those accused of war crimes and international human rights law to ensure the enjoyment of rights guaranteed and to provide an effective remedy in case of violation. Moreover, in most cases, they were amnesties granted by the abusive regime itself to benefit its own members. It should be noted, however, that in recent years a trend reversing this situation has begun to emerge. The most obvious example is Argentina, where the Supreme Court invalidated the two existing amnesty laws by its judgment of 14 June 2005. This ruling upheld the decisions of lower courts, which had declared the laws unconstitutional, and confirmed Act 25779 of 2003, which had declared them null and void. The judgment emphatically stated that the scope of the power of the legislature to grant general amnesties under the National Constitution has been significantly limited by the obligation to guarantee rights contained in the American Convention on Human Rights and the International Covenant on Civil and Political Rights, thereby rendering the amnesties unconstitutional and null and void. This meant that the amnesties could not present any legal obstacle to investigating and prosecuting cases of serious human rights violations. Consequently, the Argentine state cannot invoke the principle of non-retroactivity of criminal law to relieve it of its duty to investigate and prosecute gross human rights violations.<sup>30</sup>

In Chile, there have been a number of trials in recent years to prosecute crimes committed during the period covered by the amnesty. This was not because the law was repealed, however, but because certain crimes were classed as ongoing. One such example is the trial of the former head of the secret police, Manuel Contreras, and four other people connected with the *Miguel Ángel Sandoval*

30 Judgment of 14 June 2005. "Recurso de hecho deducido por la defensa de Julio Héctor Simón en la causa Simón, Julio Héctor y otros s/ privación ilegítima de la libertad, etc., causa N° 17.768", available at <[http://www.derechos.org/nizkor/arg/doc/nulidad.html#N\\_4\\_#N\\_4](http://www.derechos.org/nizkor/arg/doc/nulidad.html#N_4_#N_4)>.

*Rodríguez* case.<sup>31</sup> In the case of Peru, the turnaround was not prompted by a state initiative but by the judgment handed down by the Inter-American Court on 14 March 2001, which declared that amnesty laws 26479 and 26492 were incompatible with the American Convention on Human Rights and therefore lacked legal effect.<sup>32</sup> This judgment led to the reopening of various cases in Peru, *inter alia* against members of the paramilitary group “Colina” who had committed serious violations of human rights and those accused of killing a university professor and twelve students (“*La Cantuta*” case), among others.<sup>33</sup> In countries where such laws have not been repealed and no efforts have been undertaken to expose the truth and administer justice, such as El Salvador, civil society has called for these issues to be addressed. The situation in that country has now changed, increasing the likelihood of the amnesty law being repealed.<sup>34</sup>

In conclusion, many countries in Latin America opted to implement exculpatory mechanisms, which did not always promote national reconciliation. These millstones continue to exist in some states, although new trends emerging in the region and particularly in Argentina signal a move towards combating impunity, a process that has moved forward thanks not only to the efforts of international and regional mechanisms, such as the Inter-American human rights protection system, but also to the mobilization of civil society.

## International humanitarian law and amnesty laws

In IHL, amnesties are regarded as having a useful contribution to make to national reconciliation. It could even be argued that amnesties serve a specific purpose in the case of armed conflict, insofar as “... amnesty is necessary to facilitate the

31 Human Rights Watch. “World Report 2005. Chile”, available at <<http://hrw.org/english/docs/2005/01/13/chile9846.htm>>. This is without prejudice to the need to repeal such laws, as asserted by the Committee Against Torture in its “Conclusions and recommendations on the third periodic report of Chile”, in which it remarks that this type of legislation has entrenched impunity for the perpetrators of serious human rights violations committed during the military dictatorship: “The self-amnesty was a general procedure by which the state refused to prosecute serious crimes. Moreover, because of the way it was applied by the Chilean courts, the decree not only prevented the possibility of prosecuting the authors of the human rights violations, but also ensured that no accusation could be brought, and that the names of the responsible parties would not be known, so that, legally, those persons were considered as if they had never committed any illegal act at all. The amnesty decree-law rendered the crimes legally without effect, and deprived the victims and their families of any legal recourse through which they might identify those responsible for violating their human rights during the military dictatorship, and bring them to justice.” “Conclusions and recommendations of the Committee against Torture: Committee against Torture reviews third periodic report of Chile”, *Anuario de Derechos Humanos 2005*, University of Chile.

32 See above note 24.

33 “...Six years later, in 2001, as a result of the *Barrios Altos* case brought against the state of Peru before the Inter-American Court of Human Rights, the “amnesty laws” were declared to lack legal effect, leading to the reopening of proceedings and investigations relating to the involvement of members of the security forces in violations between 1980 and 1993, Final Report, Truth and Reconciliation Commission, Vol. VI, 1st edition, Lima, November 2003, p. 178.

34 Joaquín Villalobos, in *El Diario de Hoy*, Editorial, 30 March 2005, available at <<http://www.elsalvador.com/noticias/2005/03/30/editorial/edi4.asp>>.



reintegration of combatants in peaceful political life, and the pressure to grant a symmetrical amnesty for the members of the regular armed forces is very strong,” as Méndez observes.<sup>35</sup>

Beyond the question of whether an amnesty should or should not be granted, IHL also determines the material scope of application, namely which crimes the state can amnesty without breaching its obligations under international law. It has been posited that amnesty should cover offences of rebellion or sedition and comparatively minor infractions of the laws of war, such as arbitrary detentions or mild forms of ill-treatment.<sup>36</sup> Therefore, IHL imposes certain limitations, and the amnesties it promotes are not intended to cover war crimes. In fact, the provisions of international human rights law and IHL provide parameters to be taken into account in determining the contours of a legitimate amnesty in transition processes. These parameters can be deduced from the body of international law, of which IHL is a part.<sup>37</sup>

One of the fundamental constraints on amnesties is that states have the obligation to investigate and prosecute those who have committed serious crimes under international law. This obligation is not affected by the official position of the perpetrator or the desire of the victims to seek justice, since it is in the interest of the state to prosecute certain “violations so serious that they are considered punishable by the international community as a whole.”<sup>38</sup> This principle is enshrined in Articles 49, 50, 129 and 146 respectively of the four Geneva Conventions of 1949 and Article 85 of Additional Protocol I, establishing that states have the duty to adopt the measures necessary to search for and prosecute those accused of grave breaches, or otherwise to extradite them to another state that has made out a *prima facie* case. Customary international law, together with Article 8(2)(c) and (e) of the Rome Statute of the International Criminal Court, confirms that there is individual criminal responsibility for war crimes committed in non-international armed conflicts, implying a duty to prosecute those offenders.<sup>39</sup> The fact that post-conflict processes and transitions from dictatorship to democracy normally unfold on a domestic scenario does not mean that these rules do not apply. On the contrary, they are part of customary international humanitarian law and as such also apply in these situations.<sup>40</sup>

35 Méndez, above note 19.

36 Ibid.

37 Catalina Botero Marino, Esteban Restrepo Saldarriaga, “Estándares internacionales y procesos de transición en Colombia”, in Angelika Rettberg (ed.), *Entre el perdón y el paredón: Preguntas y dilemas de la justicia transicional*, Corcas Editores Ltda., Colombia, 2005, p. 20. See also Updated Set of Principles, above note 19: Principle 24 on restrictions and other measures relating to amnesty says that: “the perpetrators of serious crimes under international law may not benefit from such measures.”

38 González Cueva, above note 21.

39 See also the preamble of the Rome Statute, which refers to: “the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.”

40 The determination of the rules of IHL belonging to customary international law is based on a study undertaken by the ICRC at the request of the International Conference of the Red Cross and the Red Crescent: Jean-Marie Henckaerts, “Study on customary international humanitarian law”, in *International Review of the Red Cross*, Vol. 87, No. 857, March 2005, pp. 175–212.



Furthermore, Article 91 of Additional Protocol I stipulates that when a party to the conflict violates the provisions of IHL, it has to pay compensation for the injuries it has caused. Customary international humanitarian law also assigns this obligation to the state, but not solely in relation to international armed conflicts, implying that the state must undertake an investigation to establish the facts and the injuries caused.<sup>41</sup>

Reconciliation, while not expressly laid down as an objective of IHL, is an issue that was not overlooked by those who drafted the treaties, as a reading of Article 6(5) of Additional Protocol II reveals: “At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.” The commentary of the International Committee of the Red Cross states that the purpose of this provision is to “encourage gestures of reconciliation which can contribute to re-establishing normal relations in the life of a nation which has been divided.”<sup>42</sup> A systematic interpretation of this provision in light of the object and purpose of Additional Protocol II, leads to the conclusion that amnesty cannot be granted to individuals suspected, accused or convicted of war crimes.

This interpretation is bolstered by the drafting history of Article 6(5) which indicates that “the provision aims at encouraging amnesty, i.e. a sort of release at the end of hostilities, for those detained or punished for the mere fact of having participated in hostilities. It does not aim at an amnesty for those having violated international law...”<sup>43</sup>

In the same vein, the United Nations Human Rights Committee, on the subject of torture, has stated that: “Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future.”<sup>44</sup> For its part, the Inter-American Commission on Human Rights asserts that it is necessary to:

41 Ibid., p. 211, Rule 150: “A state responsible for violations of international humanitarian law is required to make full reparation for the loss or injury caused.”

42 Sylvie-Stoyanka Junod, “Commentary on Protocol II relative to non-international armed conflicts”, in *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva/Martinus Nijhoff Publishers, Dordrecht, 1987, para. 4618. For Robertson, above note 15, pp. 280–281, the drafting history of the subsections shows that it contemplates an Abraham Lincoln-style amnesty (“to restore the tranquility of the commonwealth”) for combatants who have fought on opposite sides according to the laws of war, “a sort of release at the end of hostilities for those detained or punished for the mere fact of having participated in hostilities. It does not aim at an amnesty for those having violated international law.”

43 This was recounted in a letter of the ICRC Legal Division to the ICTY Prosecutor of 24 November 1995 and to the Department of Law at the University of California of 15 April 1997 (referring to CCDH, Official Records, 1997, Vol. IX, p. 319). See also Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 1974 – 1977, Vol. 9, Berne, 1978, p. 319; Report on the demobilization process in Colombia. OAE/Ser.L/V/II.120. Doc. 60. 13 December 2004, para. 25.

44 UN Human Rights Committee General Comment No. 20, 1992, para. 15.

“...ensure compatibility of recourse to the granting of amnesties or pardons for persons who have risen up in arms against the State with the State’s obligation to clarify, punish, and make reparation for violations of human rights and international humanitarian law...”<sup>45</sup>

The Special Representative of the UN Secretary-General attached a disclaimer to the 1999 Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone stating that: “The United Nations interprets that the amnesty and pardon in article nine of this agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law.” Along similar lines, in the *Furundzija* case, the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia ruled that whenever general rules prohibiting specific international crimes come to acquire the nature of peremptory norms (*jus cogens*), they may be construed as imposing, among other things, the obligation not to cancel by legislative or executive fiat the crimes they proscribe.<sup>46</sup>

In conclusion, granting an amnesty is contrary to a state’s obligations under IHL, which means that only political crimes or related minor common crimes can be amnestied. This is the only kind of amnesty compatible with the

45 Inter-American Commission on Human Rights, “Report on the demobilization process in Colombia”, OEA/Ser.L/V/II.120, Doc. 60, 13 December 2004, para. 11, available at <<http://www.cidh.org/countryrep/Colombia04eng/toc.htm>>. With regard to individual cases, it has reiterated this view in Report No. 25/98 on cases 11505, 11532, 11541, 11546, 11549, 11569, 11572, 11573, 11583, 11585, 11595, 11652, 11657, 11675 and 11705 of 7 April 1998. In this report, it said: “41. The problem of amnesties has been considered by the Commission on various occasions, in claims made against states parties to the American Convention which, seeking mechanisms to foster national peace and reconciliation, have resorted to amnesties. By so doing, they have abandoned an entire group, including many innocent victims of violence, who feel deprived of the right to seek remedy in their rightful claims against those who committed acts of barbarity against them.” It concludes: “45. The denounced acts result, on the one hand, in the non-fulfilment of the obligation assumed by the Chilean state to bring the provisions of its domestic law in line with the precepts of the American Convention, in violation of Articles 1(1) and 2, and, on the other hand, in non-application, leading to the wrongful denial of the right to due legal process for the disappeared persons named in the claims, in violation of Articles 8 and 25 in connection with 1(1).” In Report No. 37/00 on case 11481, *Monsignor Oscar Arnulfo Romero and Galdámez v. El Salvador*, 13 April 2000, the Commission said: “126. The Commission has indicated repeatedly that the application of amnesty laws that impede access to justice in cases of serious human rights violations renders ineffective the obligation of the states parties to the American Convention to respect the rights and freedoms recognized therein, and to guarantee their free and full exercise to all persons subject to their jurisdiction with no discrimination of any kind, as provided in Article 1(1) of the Convention. In effect, the amnesty laws eliminate the most effective measure for the observance of human rights, i.e. the trial and punishment of those responsible for violations of human rights.” See also Report No. 28/92 (2 October 1992), Argentina; Report No. 29/92 (2 October 1992), Uruguay; No. 36/96, Chile; Third Report on Colombia, 1999, para. 345.

46 *Prosecutor v. Anto Furundzija*, Trial Chamber, Judgment of 10 December 1998, at para. 155: “The fact that torture is prohibited by a peremptory norm of international law has other effects at the inter-state and individual levels. At the inter-state level, it serves to internationally delegitimise any legislative, administrative or judicial act authorising torture. It would be senseless to argue, on the one hand, that on account of the *jus cogens* value of the prohibition against torture, treaties or customary rules providing for torture would be null and void *ab initio*, and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law.”

need to establish the truth and administer justice.<sup>47</sup> However, the fact that an amnesty complies with the obligations established in IHL does not automatically mean that it can be considered to be valid and to fulfil the objectives of reconciliation, since other factors also come into play, as seen above. In short, amnesty laws should only be passed when it is clear that this is the only possible way of facilitating the transition process,<sup>48</sup> in other words, when the political and social situation of the nation prevents the authorities from advancing the reconciliation process by other means more consistent with the demands of truth and justice called for by transitional justice.

As Theo Van Boven observes: “it is hard to perceive that a system of justice that cares for the rights of victims can remain at the same time indifferent and inert towards gross misconduct of perpetrators.”<sup>49</sup> Moreover, the pernicious effects of impunity are also felt at the time and place in which it is permitted,<sup>50</sup> because the absence of punishment encourages human rights violators to continue committing such crimes, thereby undermining the rule of law doctrine. In the long run this could have a more destabilizing effect than prosecuting the culprits would.<sup>51</sup> In the opinion of Nino, this failure to investigate and prosecute may even be categorized as a passive abuse of human rights if it places those rights in future peril.<sup>52</sup> Therefore, while amnesty laws may also “contribute to the present assurance of human rights in a particular State, their long term effects on the assurance of human rights is in question. A State’s duty to ensure human rights must be considered from a global, as well as a domestic, perspective.”<sup>53</sup>

While it is true that punishment is not the only means of ensuring reparation, in practice, by dint of dispensation of justice, victims are likely to be more prepared to be reconciled with their erstwhile tormentors because they know that the latter have now paid for their crimes.<sup>54</sup> Moreover, without punishment it would be difficult to ensure other forms of reparation. Both theory and experience would seem to show that the coexistence of impunity and reconciliation is a fallacy. As a United Nations report so rightly observes: “experience in the past decade demonstrated clearly that the consolidation of peace in the immediate post-conflict period, as well as the maintenance of peace in the long term, cannot

47 Ibid.

48 Marino Saldarriaga, above note 37, p. 29.

49 Theo Van Boven, “Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms”, UN Human Rights Committee, UN Doc E/CN.4/Sub.2/1993/152, cited by Pasqualucci, above note 22, p. 348.

50 Pasqualucci, above note 19, pp. 352–353. The practice of systematic disappearance, for instance, which was used so effectively by the Argentine military, had previously been a policy of Nazi Germany during World War II. Several Nazis who escaped punishment after World War II fled to Argentina and Paraguay where some of them are rumoured to have been involved in government. A victim who survived torture at the hands of the Argentine military during the “dirty war” testified that there was a picture of Adolf Hitler in the chamber of the clandestine detention centre where he was tortured.

51 Ibid., p. 9.

52 Carlos Nino, “The duty to punish past abuses of human rights put into context: The case of Argentina”, *Yale Law Journal*, No. 100, 1991, pp. 2619 and 2639.

53 Pasqualucci, above note 22, p. 353.

54 Cassese, above note 17, p. 6.

be achieved unless the population is confident that redress for grievances can be obtained through legitimate structures for the peaceful settlement of disputes and the fair administration of justice.”<sup>55</sup>

## Truth commissions

It is now widely believed that the right to information extends beyond the private right of each direct victim or his or her relatives to know the truth about what happened, and that society as a whole has a “right to truth” or a “right to know” all there is to know about its history. The Inter-American Commission on Human Rights defined it as “a collective right that ensures society access to information that is essential for the workings of democratic systems, and it is also a private right for relatives of the victims, which affords a form of compensation, in particular, in cases where amnesty laws are adopted.”<sup>56</sup> Similarly, the Updated Set of Principles for the protection and promotion of human rights through action to combat impunity, set forth in the report of independent expert Diane Orentlicher, observes that “full and effective exercise of the right to the truth provides a vital safeguard against the recurrence of violations.”<sup>57</sup>

According to Méndez, this coexists with an emerging principle in international law that holds that states have the obligation to investigate, prosecute and punish the perpetrators of violations and to disclose to victims and society everything that can be reliably established about the facts and circumstances surrounding them. This right is not enshrined in international human rights treaties,<sup>58</sup> but it is an “appealingly consistent and peaceful way of interpreting such rules for situations that were not envisaged when they were drafted.”<sup>59</sup> The Inter-American Court of Human Rights echoes this view, finding that it is a “...a right that does not exist in the American Convention, although it may correspond to a

55 “The rule of law and transitional justice in conflict and post-conflict societies”, UN Security Council, S/2004/619, 3 August 2004, p. 3.

56 Inter-American Commission on Human Rights, *Ignacio Ellacuría et al.* case, Report 136/99 of 22 December 1999, para. 224. This right to truth cannot be considered as separate from the “right to justice.” This is also established in international doctrine: “the right to truth is an integral part of the right to justice,” and it is not possible to give effect to one without the other. Available at <<http://eaf.typepad.com/pdf/2002/17RightToTruth.pdf>>. Juan Méndez expresses the same view: “not only is the right to truth an integral part of the right to justice, in certain circumstances, it is through transparent criminal proceedings respecting all fair trial guarantees that it is given fullest and most satisfactory effect.” Méndez, above note 19.

57 Updated Set of Principles, above note 19. Principle 2 says: “Every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes.”

58 In this regard, the Inter-American Commission on Human Rights found that the obligation arises essentially from the provisions of Articles 1(1), 8(1), 25 and 13 of the American Convention on Human Rights in the *Ignacio Ellacuría et al.* case, Report No. 136/99, Case 10488, Ignacio Ellacuría, S.J.; Segundo Montes, S.J.; Armando López, S.J.; Ignacio Martín Baró, S.J.; Joaquín López y López, S.J.; Juan Ramón Moreno, S.J.; Julia Elba Ramos; and Celina Mariceth Ramos, El Salvador, 22 December 1999, para. 221, available at <<http://www.cidh.org/annualrep/99eng/Merits/ElSalvador10.488b.htm>>.

59 Méndez, above note 19.

concept that is being developed in doctrine and case law, which has already been disposed of in this Case through the Court's decision to establish Peru's obligation to investigate the events that produced the violations of the American Convention."<sup>60</sup>

The obligation corresponding to this right is the state's "duty to preserve memory." The Updated Set of Principles to combat impunity says:

"A people's knowledge of the history of its oppression is part of its heritage and, as such, must be ensured by appropriate measures in fulfilment of the State's duty to preserve archives and other evidence concerning violations of human rights and humanitarian law and to facilitate knowledge of those violations. Such measures shall be aimed at preserving the collective memory from extinction and, in particular, at guarding against the development of revisionist and negationist arguments."<sup>61</sup>

The commissions of inquiry set up to give effect to this right must be established with certain guarantees, including:

- independence and impartiality;
- clearly defined terms of reference, expressly excluding acting as substitutes for the courts;
- guarantees for the accused, the victims and the witnesses testifying on their behalf;
- testimony given on a strictly voluntary basis and protection and assistance for those testifying;
- preservation of records and evidence relating to human rights violations;
- dissemination of reports.<sup>62</sup>

Truth commissions are bodies created to investigate a history of violations and to help societies that have suffered political violence or internal conflict to come to terms with the past, with a view to healing the deep rifts and wounds that violence causes and preventing such atrocities from ever happening again.<sup>63</sup> The theory is that the truth will make people aware, and this awareness will ensure human rights in the future by minimizing the possibility that such horror will be repeated.<sup>64</sup> Truth commissions seek to establish the causes of the violence, identify the elements in conflict, investigate the most serious violations of human rights and IHL and sometimes determine legal accountability and reparations.<sup>65</sup> The

60 Inter-American Court of Human Rights, *Castillo Paéz* case, Judgment of 3 November 1997, para. 86.

61 Updated Set of Principles, above note 16, Principle 3. See also Michael Frühling, "Derecho a la verdad, a la justicia y a la reparación integral en casos de graves violaciones a los derechos humanos", available at <<http://www.hchr.org.co/publico/pronunciamientos/ponencias/po0435.pdf>>, p. 3.

62 Ibid.

63 As used in the Updated Set of Principles, the term "truth commissions" refers to "official, temporary, non-judicial fact-finding bodies that investigate a pattern of abuses of human rights or humanitarian law, usually committed over a number of years," above note 19.

64 *Annual Report 1985 – 86*, Inter-American Commission on Human Rights, pp. 192–193; Carlos Nino, above note 51, pp. 237–240, cited by Jo M. Pasqualucci, above note 22, p. 352.

65 In some cases, truth commissions are created as a result of the efforts of human rights organizations and work almost secretly to investigate serious cases of state-sponsored violence. This was the case in Brazil,

work of a truth commission also contributes to identifying the structures of violence, its ramifications in different sectors of society (armed forces, police, judiciary and church) and other relevant factors.

Truth commissions can therefore make a useful contribution in different ways<sup>66</sup> by: a) promoting discovery and official acknowledgement of previously ignored facts (revealing a censured, indifferent and terrorized Latin American people); b) identifying sectors involved in committing human rights violations, a finding which, in the case of El Salvador and Guatemala, helped to reorganize training for police and security forces, often trained to carry out acts prohibited under international human rights laws; c) personalizing and humanizing victims, contributing to the important task of ensuring recognition for victims of violations and restoring their dignity; d) providing a measure of reparation for the injuries suffered, establishing policies to provide redress for victims and their relatives, such as constructing commemorative parks, museums and monuments, launching programmes to provide monetary compensation, etc.; e) implementing measures to prevent the recurrence of human rights violations in the future, such as retraining for police and military forces, educational programmes, use of police report records, etc.; and f) promoting reconciliation through truth and justice.<sup>67</sup> The work of a truth commission can prevent or render superfluous long trials against thousands of alleged perpetrators. This is particularly important when the country has a weak judicial system, incapable of effectively prosecuting those accused of violations. In conclusion, as Cassese observes, these commissions promote “further understanding in lieu of vengeance, reparation in lieu of retaliation, and reconciliation instead of victimization.”<sup>68</sup>

Latin America is no stranger to the phenomenon of truth commissions. In fact, setting up such bodies has become common practice in the region. Some of the truth commissions were created by domestic instruments<sup>69</sup> while others were set up as part of international agreements mediated by the United

where the Sao Paulo Archdiocese, under the direction of Cardinal Evaristo Arns, produced the report entitled *Brasil Nunca Mais* (Brazil Never Again). In Paraguay, the Comité de Iglesias para Ayudas de Emergencias (CIPAE) also published a series of investigations into the Stroessner dictatorship entitled *Paraguay Nunca Más*. Other similar efforts include those of the Servicio de Paz y Justicia in Uruguay, with its report entitled *Uruguay Nunca Más*, and the group of Colombian and foreign organizations that published the valuable report entitled “*El terrorismo de Estado en Colombia*” (state terrorism in Colombia).

66 Esteban Cuya, “El Impacto de las Comisiones de la Verdad en América Latina”, available at <[http://www.aprodeh.org.pe/sem\\_verdad/documentos/Esteban\\_cuya.pdf](http://www.aprodeh.org.pe/sem_verdad/documentos/Esteban_cuya.pdf)>.

67 On this subject, Méndez observes that “true reconciliation cannot be imposed by decree.” He also agrees with the investigative role of truth commissions, provided that their work is not disregarded and that it is not carried out in the belief that the mere fact of gathering information will lead to reconciliation. He remarks that: “The value of the more successful truth commissions is that they are created not with the presumption that there will be no trials, but to constitute a step towards knowing the truth and, ultimately, making justice prevail.” Méndez, above note 19.

68 Cassese, above note 17, p. 10.

69 As in the case of the truth commissions set up in Argentina (Decree No. 187 of 15 December 1983), Chile (Supreme Decree No. 355 of 24 April 1990) and Peru (Supreme Decree No. 065-2001-PCM of 4 June 2001).

Nations.<sup>70</sup> On the whole, these commissions investigated cases of human rights violations, although in some countries, such as Chile, El Salvador and Peru, the application of IHL was also required for a full analysis.<sup>71</sup> In Ecuador and Peru, the truth commissions were set up to investigate crimes committed under democratic governments, while commissions and reports conducted in other Latin American states investigated events that had occurred under dictatorships or during internal armed conflicts. Only the truth commissions of Chile and Peru refer explicitly to reconciliation as one of their goals. The tasks and functions of such truth commissions have undoubtedly increased and become more complex over the past two or three decades, and while there is no standard model, the emerging trend is a shift towards increasingly comprehensive official investigations.

In Argentina, Decree-Law No. 187/83 of 15 December 1983 created the National Commission on the Disappearance of Persons (CONADEP) to investigate forced disappearances in the country. Over a period of nine months, it investigated human rights violations committed under the military dictatorship between 1976 and 1983. The failure of its economic policy, defeat in the Falklands/Malvinas War and international condemnation of its human rights record forced the military dictatorship to hand power over to a civilian government at the end of 1983. A policy of systematic state-sponsored terror in Argentina had resulted in human rights violations against thousands of people; repression was exercised by the armed forces using “technology from hell,” as revealed in the thousands of complaints filed and testimonies given by the victims of such violations. As President Raúl Alfonsín said on one occasion after this period of terrible violence, “...there must be no veil of secrecy. No society can begin a new era by shirking its ethical responsibilities.” One of the first constitutional acts carried out by President Alfonsín on coming to power was therefore to create the CONADEP commission.

After nine months of work, CONADEP had gathered more than 50,000 pages of evidence and complaints, and in November 1984 published its report, “*Nunca Más. Informe de la Comisión Nacional sobre la Desaparición de Personas*” (Never again: Report of the National Commission on Forced Disappearances). It disclosed facts relating to the disappearance of 8,960 people, based on duly documented, corroborated complaints, and reported that 80% of the victims who had suffered at the hands of the Argentine military were aged between 21 and 35. The report stated that there were 340 clandestine detention centres in Argentina, run by top-ranking officers from the armed and security forces, where detainees were held in inhumane conditions and subjected to all manner of humiliating and degrading treatment. CONADEP discovered that senior officers in the armed and police forces had established a “blood pact,” involving them all in human rights

70 As in the case of the El Salvador truth commission, created by the UN-brokered Mexico Agreement of 27 April 1991 between the government of El Salvador and the Farabundo Martí National Liberation Front. Similarly, Guatemala’s Historical Clarification Commission was created by the UN-brokered Oslo Agreement of 23 July 1994 between the government and the guerrillas.

71 In this regard, certain acts of violence against the population (such as the massacre of Mayan people in the conflict in Guatemala) constitute a violation of the principle of distinction under IHL.



violations. The commission presented recommendations to various state authorities “with a view to providing reparation and ensuring that such a curtailment of human rights never reoccurs.” The proposals made by CONADEP included continuing its work with judicial investigations, providing monetary assistance, scholarships and employment for the families of people who had disappeared and passing legislation to make forced disappearance a crime against humanity. It also recommended that human rights should be taught as a compulsory subject at civilian, military and police education establishments of the state, that support should be given to human rights organizations and that all repressive legislation in force in Argentina should be repealed. Many of these recommendations have yet to be implemented.

In Chile, Supreme Decree 355 of 24 April 1990 created the National Truth and Reconciliation Commission. Following the moral and political defeat of Pinochet, the people of Chile elected Patricio Aylwin to the presidency. He set up the commission to establish the truth about the most serious human rights violations committed in recent years and to achieve the reconciliation of all Chilean people. The commission was mandated to: i) provide as complete a picture as possible of the gross human rights violations committed in the country, providing background information and establishing the facts and circumstances surrounding them; ii) gather evidence that would make it possible to identify individual victims by name and determine their fate or whereabouts; iii) recommend measures to provide fair and adequate reparation and vindication for victims and their families; and iv) recommend legal and administrative measures that should be adopted to prevent the recurrence of further human rights abuses in the future. It investigated deaths and disappearances that occurred between 11 September 1973 and 11 March 1990 in Chile and elsewhere. It is worth noting that although this commission did not investigate cases of alleged torture, almost fifteen years later the National Commission on Political Imprisonment and Torture was created as an advisory body to President Ricardo Lagos. Following a year of investigations, it presented its report on 10 November 2004. The commission compiled information on people who had been deprived of their freedom or tortured for political reasons in the period between 11 September 1973 and 10 March 1990 by agents of the state or by people in their service. The report contains the testimonies of 27,255 people acknowledged as victims, an account of how political imprisonment and torture were carried out, and criteria and proposals for providing reparations to recognized victims.<sup>72</sup>

The legal framework used by the commission as a basis for analysing the violations included national and international human rights norms and rules of IHL. On the basis of its thorough investigation into cases of people who had disappeared or been killed at the hands of the security forces, the commission recommended public reparation to restore the dignity of victims, in addition to social welfare benefits, monetary compensation in the form of a lifelong pension,

72 See <<http://www.comisiontortura.cl/index.html>>.



special attention from the state with regard to health care, education and housing, assistance with debts and exemption from compulsory military service for the sons of victims. The commission also presented recommendations on legal and administrative aspects, such as expedited procedures to declare a presumption of death in the case of missing people, making domestic legislation consistent with international human rights law, and ratification of international human rights treaties. It proposed measures aimed at reforming the judiciary and the armed forces and continuing investigations into the fate of missing people. It further recommended that withholding information about the location of illegally buried remains be declared a criminal offence, as there were many families still waiting to claim the remains of their loved ones. In January 1992, the Chilean government passed Act 19123 creating the *Corporación Nacional de Reparación y Reconciliación* (National Reparation and Reconciliation Corporation) to implement the recommendations made by the commission.

The Truth and Justice Commission was set up in Ecuador by Ministerial Decision on 17 September 1996. Its duties and functions included: i) recording complaints relating to human rights violations, particularly forced disappearances, torture and other acts endangering life or physical integrity committed in Ecuador from 1979, whether by agents of the state or individuals; ii) investigating the complaints, using all the means at its disposal; iii) preparing the “Truth and Justice” report over a one-year period to record all the facts, complaints and investigations, in addition to providing background information, conclusions and recommendations.

The creation of this commission was particularly significant, as it was set up to investigate events relating to human rights violations committed under “democratic” governments. Its work involved systemizing the complaints with a view to passing them on to a team of lawyers who would prepare reports to be submitted to the country’s Supreme Court. Many of the complaints referred to the existence of secret burial places in police and military enclosures and remote areas, although it was very difficult to establish the truth of these allegations.<sup>73</sup> Various national and international human rights organizations, therefore, called for the creation of another commission to investigate cases relating to forced disappearances, killings and torture during the period under consideration (1985 – 1989). On 2 December 2004, Ecuador’s President Lucio Gutiérrez announced that he would issue a supreme decree to set up a truth commission to examine human rights violations committed under previous governments, which would be formed by courageous, reputable people.

The Truth Commission set up in El Salvador undertook an eight-month investigation, resulting in a report entitled “*De la locura a la esperanza: La guerra de 12 años en El Salvador*” (From madness to hope: The twelve-year war in El

<sup>73</sup> For information on the process undertaken to create this commission, see Elsa Curbelo, “Comisión Verdad y Justicia del Ecuador: La impunidad en democracia”, paper delivered at the International Seminar on Impunity and its Effects on Democratization Processes, Santiago de Chile, 14 December 1996, available at <<http://www.derechos.org>>.

Salvador). The commission was created as part of the El Salvador peace accords negotiated between the government and the Farabundo Martí National Liberation Front over more than three years (1989 – 1992), during which time they were engaged in hostilities. The negotiations were mediated by the United Nations, with the collaboration of Colombia, Mexico, Spain and Venezuela, and culminated in the signing of the Chapultepec Peace Agreement in Mexico on 16 January 1992. It determined that an eight-month investigation would be carried out into abuses committed during the violence from 1980 onwards. In addition to the powers granted to it in the peace agreement in relation to impunity and the investigation of violations committed during the violence, the commission was also mandated to make recommendations of a “legal, political and administrative nature, including measures to prevent such atrocities from ever happening again and initiatives aimed at achieving national reconciliation.”

The commission defined the legal norms that it would use for its analysis, determining that during the conflict in El Salvador both parties were bound to comply with rules of international law, including provisions contained in international human rights law or IHL or both. The commission also established that during the internal armed conflict, the state of El Salvador had the obligation to implement the measures necessary to ensure that its domestic legislation was consistent with the provisions of international law. Finally, the commission presented a series of recommendations to: i) reform criminal legislation and the judiciary; ii) purge the armed forces, police force and public authorities; iii) bar people involved in violations of human rights and IHL from public office for at least ten years; iv) investigate and disband illegal groups (death squads); and v) provide material and moral reparations to victims of violence and their immediate families.

The Historical Clarification Commission was created in Guatemala by the Oslo Agreement on 23 June 1994 to establish the facts about cases of human rights violations and acts of violence committed during thirty-four years of internal armed conflict waged in the country, and to formulate recommendations to promote peace. The report produced by the commission describes the causes of the armed conflict, the strategies used during the conflict by both sides, human rights violations and acts of violence. It also provides details of the consequences of the hostilities and presents the commission’s final conclusions and recommendations. The commission further recommended that a national reparations programme be launched for victims of human rights violations and acts of violence connected with the armed conflict and for their families. The programme would establish individual and collective measures based on principles of equity, social participation and respect for cultural identity, which would include: i) material reparations to restore the situation as it was before the violation was committed, particularly in the case of land; ii) monetary compensation for the most serious injuries and damages directly caused by violations of human rights and IHL; iii) psycho-social rehabilitation and reparations, including community health care, psychiatric treatment and legal and social services; and iv) restoration of individual dignity and satisfaction, including action to ensure moral and symbolic reparation.

The Truth Commission created in Panama by Executive Decree No. 2 of 18 January 2001 was set up to establish the facts about human rights violations, particularly forced disappearances, committed under the military regime from 1968 and covering two decades. The commission is still in operation, although its effectiveness has been questioned because it lacks a clear mandate from the government and because other institutions interfere with its work. With the passing of time, Panamas collective memory seems to have faded and, in recent times, there have been clashes between the commission and the judiciary. A series of unfortunate incidents, including the falsification of evidence, has tainted the credibility of the work carried out to date. The families of the victims have therefore been forced to take their cases to the Inter-American Court of Human Rights to seek the justice denied to them by the state.<sup>74</sup>

Valentín Paniagua, president of the transitional government in Peru, created the Truth and Reconciliation Commission there by virtue of Supreme Decree 065-2001-PCM of 2 June 2001. The report produced by the commission is the most important and comprehensive document in the history of Peru on the internal armed conflict waged between 1980 and November 2000. The self-proclaimed Communist Party of Peru, Shining Path (*Sendero Luminoso*), started the hostilities in May 1980 and was joined four years later, initially with a different approach, by the Túpac Amaru Revolutionary Movement. The conflict engendered large-scale violence and terror, resulting in a death toll of more than 69,000 (22,507 documented by the commission). There were thousands more cases of forced displacement, torture and forced disappearance, and the destruction of production and transport infrastructures, etc., resulted in material damage amounting to thousands of millions of soles.

This commission differed from those of other Latin American countries in that the mandate given to it by the state focused on analysing the counterinsurgency operations carried out under democratic governments, extending beyond the coup of 5 April 1992 until the then President Alberto Fujimori fell from power. This was the first truth commission to conclude that insurgent groups had committed gross violations of human rights, although it also acknowledged wrongdoing on the part of members of the security and police forces. More specifically, the commission concluded that Shining Path, the Peruvian Communist Party, was to blame for causing more deaths than any other party in the conflict and was primarily responsible for the violence, because it had started the fighting and resorted to terrorist methods from the outset. It also reported that both the insurgent groups and the state armed forces had, at some time, committed widespread and/or systematic violations of human rights. The commission's terms of reference also included naming the individuals who had committed human rights violations. Although the decree issued to create the commission did not refer specifically to IHL, this was considered essential to preparing the report. The commission recommended that individual and

74 For more information on this, see <<http://www.comisiondelaverdad.org.pa>>. OR [www.cverdad.org.pe/comision/enlaces/index.php](http://www.cverdad.org.pe/comision/enlaces/index.php).

collective reparation programmes be implemented, including measures for health care, psychiatric treatment, education, symbolic reparations, and monetary compensation and identity documents. In February 2004, a top-level, multi-sectoral commission, formed by government representatives and human rights organizations, was set up to plan and supervise the implementation of these recommendations.<sup>75</sup>

In September 2004, Bolivian Attorney General César Suárez announced his intention to contact his counterparts in Argentina and Chile with a view to opening the files on Operation Condor to establish the facts surrounding the forced disappearance of a number of Bolivian, Argentine and Chilean citizens between 1971 and 1976 under the dictatorship of General Hugo Bánzer (1971 – 1977).<sup>76</sup> Suárez declared that: “The Ministry of Public Prosecution has opened its doors to help resolve this issue, using documentation provided by the families of missing people.” It was in this context that Act 2640 concerning reparations for victims of political violence was passed. It established the procedures to be implemented to compensate people who had suffered political violence at the hands of the agents of unconstitutional governments who had committed human rights violations and abuses, and had failed to maintain the guarantees enshrined in the state’s Political Constitution and the International Covenant on Civil and Political Rights ratified by the state of Bolivia. Entitlement to compensation was laid down for acts of political violence committed between 4 November 1964 and 10 October 1982, including arbitrary detention and imprisonment; torture; forced exile; documented injuries or incapacity; politically motivated killings in Bolivia or elsewhere; forced disappearances; and persecution of trade union and political activists, as established in implementing regulations.

## Truth commissions and international humanitarian law

All these countries, and particularly Argentina, Chile, El Salvador, Guatemala and Peru, had ratified the four Geneva Conventions of 1949.<sup>77</sup> Since none of the foregoing cases involved an international armed conflict, the provisions that apply in all of them are those of Article 3 common to those conventions. In fact, Article 3 would apply even if those states had not ratified the Geneva Conventions, because it is considered to be part of customary law in that it protects fundamental rights and contains protections relating to *jus cogens* norms, and must therefore be

75 Esteban Cuya, “Las Comisiones de la Verdad en América Latina”, in <<http://www.derechos.org/koaga/iii/1/cuya.html>>.

76 Operation Condor was the code name given to the intelligence and coordination plan implemented by the security services of the Southern Cone military dictatorships (Argentina, Chile, Brazil, Paraguay, Uruguay and Bolivia) in the 1970s.

77 Argentina ratified the four Geneva Conventions on 18 September 1956; Chile on 12 October 1950; El Salvador on 17 June 1953; Guatemala on 14 May 1952; and Peru on 15 February 1956. See <[http://www.icrc.org/IHL.nsf/\(SPF\)/party\\_main\\_treaties/\\$File/IHL\\_and\\_other\\_related\\_Treaties.pdf](http://www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf)> (last visited on 13 November 2005).

respected by *all* states.<sup>78</sup> This is not true, however, of Additional Protocol II, which was ratified by the said states during or after the violence and moreover only applies to some of the conflicts (in El Salvador, for example). The hostilities in the other countries do not fall within the scope of application of the protocol,<sup>79</sup> because they do not meet its definition of armed conflict, that is, fighting between the state's armed forces and dissident armed forces or other organized groups "under responsible command," which "exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations."

Not all of the commissions acknowledged the existence of an armed conflict, which constituted an obstacle to the application of IHL. The mandate given to CONADEP, the earliest of these commissions, was limited solely to investigating cases of people who had been detained, which meant that it only looked into violations committed by the state. Later truth commissions went further by acknowledging the existence of a conflict between insurgent forces and the armed forces of the state and therefore the applicability of IHL.

The Chilean Truth and Reconciliation Commission admitted that violations could be committed by the insurgent forces as well as by the state, thus acknowledging the obligation of all the parties to the conflict to comply with IHL. In Part 1, Chapter II of its report, the commission sets forth the norms, concepts and standards on which it based its deliberations and conclusions, which include the rules of IHL:

"The norms of international humanitarian law do not consider the question of when it is lawful to resort to war or armed rebellion. ... Indeed, whether having recourse to weapons was justified or not, there are clear norms forbidding certain kinds of behavior in the waging of hostilities, both in international and internal armed conflicts. Among these norms are those that prohibit [sic] killing or torturing prisoners and those that establish fair trial standards for those charged with a criminal offence, however exceptional the character of the trial might be ... Such transgressions, however, are never justified..."<sup>80</sup>

The Truth Commission of El Salvador not only acknowledged the existence of an armed conflict and that the rules of IHL were binding on all the parties to the conflict, but also specifically states that common Article 3 and Additional Protocol II apply in this particular case:

78 Elizabeth Salmón, "El reconocimiento del conflicto armado en el Perú", in *Revista Derecho PUC*, Pontifical Catholic University of Peru, MMIV, No. 57, p. 85.

79 Art. 1 of Additional Protocol II provides that it applies only to internal armed conflicts in which governmental authorities are one of the participants. Furthermore, the armed groups must "exercise such control over a part of the territory as to enable them to carry out sustained and concerted military operations" and have a system of "responsible command" and be able to implement the obligations under the protocol.

80 Report of the Truth and Reconciliation Commission of Chile, Part 1, Chapter II, available at <[http://www.usip.org/library/tc/doc/reports/chile/chile\\_1993\\_toc.html](http://www.usip.org/library/tc/doc/reports/chile/chile_1993_toc.html)>.

“The principles of international humanitarian law applicable to the Salvadorian conflict are contained in Article 3 common to the four Geneva Conventions of 1949 and in Additional Protocol II thereto. El Salvador ratified these instruments before 1980.

Although the armed conflict in El Salvador was not an international conflict as defined by the Conventions, it did meet the requirements for the application of common Article 3. That article defines some fundamental humanitarian rules applicable to non-international armed conflicts. The same is true of Additional Protocol II, relating to the protection of victims of non-international armed conflicts. The provisions of common Article 3 and of Additional Protocol II are legally binding on both the Government and the insurgent forces.”<sup>81</sup>

Furthermore, the recommendations made by the Truth Commission of El Salvador to achieve the longed-for reconciliation include measures to protect subordinates who refuse to obey illegal orders.<sup>82</sup> This reform to be implemented in the armed forces, police and intelligence services is clearly anchored in the enforcement of IHL, which foresees no defence of superior orders where orders are manifestly illegal. Despite acknowledging the important role of IHL,<sup>83</sup> Guatemala’s Historical Clarification Commission, unlike the Truth Commission of El Salvador, did not acknowledge the applicability of Additional Protocol II, although this does not mean that the rules of IHL were not applied. On the contrary, the Historical Clarification Commission did investigate violations of IHL, but only in connection with the “minimum protections established under common Article 3.”<sup>84</sup>

Lastly, the Truth and Reconciliation Commission of Peru acknowledged the obligation of both parties to respect IHL and that common Article 3 applies in the case of Peru’s armed conflict, while adding that: “This shall in no way be an obstacle to applying the provisions of Additional Protocol II, where compatible and relevant.” As contended elsewhere,<sup>85</sup> the internal conflict in Peru does not qualify as an armed conflict according to the definition established in Additional Protocol II, in that the insurgent forces do not meet the criteria of exercising

81 “From madness to hope: The 12-year war in El Salvador”, Report of the Commission on the Truth for El Salvador, UN Doc. S/25500, 1993, available at <<http://www.derechos.org/nizkor/salvador/informes/truth.html>>.

82 “Cuadro 5: Recomendaciones de anteriores Comisiones de la Verdad, Lista seleccionada”, available at <[http://www.aprodeh.org/sem\\_verdad/documentos/Hayner\\_cuadros.pdf](http://www.aprodeh.org/sem_verdad/documentos/Hayner_cuadros.pdf)>. OR [www.aprodeh.org.pe/sem\\_verdad/documentos.htm](http://www.aprodeh.org.pe/sem_verdad/documentos.htm).

83 “...[IHL] seeks to ensure compliance with certain minimum standards and respect for certain non-derogable rights. In armed conflict situations, it seeks to civilize the conduct of hostilities by establishing certain principles, such as respect for the civilian population, care of the wounded, humane treatment of prisoners and the protection of property essential to the survival of the population. These norms create a space for neutrality, in that they seek to reduce hostilities, minimize their effects on the civilian population and its property and ensure humane treatment for combatants, the wounded and prisoners.”

84 Jan-Michael Simon, “La Comisión para el Esclarecimiento Histórico, Verdad y Justicia en Guatemala”, paper delivered at the international colloquium “Rule of Law and State Crime in Latin America: Comparative Insights into Transitional Processes”, held on 22–24 February 2002, in Sao Paulo, Brazil, available at: <<http://www.juridicas.unam.mx/publica/librev/rev/boletin/cont/106/art/art6.pdf>>.

85 Elizabeth Salmón, above note 77, pp. 84–85.

control over a part of the state's territory and being capable of carrying out sustained and concerted military operations. Nonetheless, the Truth and Reconciliation Commission rightly cites principles of IHL applicable to all armed conflict.<sup>86</sup>

The effectiveness of truth commissions in terms of their contribution to reconciliation of these societies will be determined in the coming years. According to Geoffrey Robertson, for example, “what the history of “transitional justice” — or the lack of it — in Latin America demonstrates in the long term is that the emergence of any measure of truth is not a basis for reconciliation. Quite the contrary, since revelation of the details of official depravity only makes the demands for retribution by victims and their sympathizers more compelling.”<sup>87</sup> However, the work of the truth commissions in the region has had the irreversible effect of bringing victims of violence into the spotlight and ensuring that their voices are heard. In fact, a shocking truth has emerged from the truth commission reports: governments intentionally used gross and systematic violations to intimidate the populations and thus maintain their control. The reports establish that the human rights abuses perpetrated by certain Latin American governments were not necessarily attacks directed at those who engaged in violence against the state, or even an unfortunate overzealous response to such violence. Rather the reports document a conscious state policy of using human rights violations to achieve governmental objectives.<sup>88</sup>

When commissions did consider IHL, they focused mainly on indicating violations of its provisions, that is, they used it as an additional element, together with international human rights law, to analyse the validity of the acts of violence being investigated. Analysis, in this regard, was therefore limited to acknowledging the existence of an armed conflict and specifying the violations of the provisions of IHL that had been committed. The reports do not, however, provide any examples of compliance with IHL, and it is only possible to infer some such cases from the information given.<sup>89</sup> The commissions therefore concentrated much more closely

86 Final Report of the Truth and Reconciliation Commission of Peru, Vol. I, Ch. 4, p. 211: “...In addition to the above-mentioned norms, there are also certain non-derogable principles of IHL established in the 19th century (Martens clause), which apply to armed conflict of any kind. Protection of the civilian population is guaranteed by the “principles of humanity”, including the principle of distinction between combatants and non-combatants and the principle of proportionality, which requires that incidental harm to civilians not be excessive in relation to the anticipated military advantage.”

87 Robertson, above note 15, p. 288.

88 Pasqualucci, above note 22, pp. 324–325.

89 The *Final Report of the Truth and Reconciliation Commission of Peru*, in Vol.VII, Ch. 2, includes an account of the extrajudicial executions at Ayacucho Hospital (1982), when Shining Path rebels rescued fellow members imprisoned in the jail in Ayacucho, which was the town that suffered the greatest loss of life in the conflict. However, it provides only a brief analysis of the case, simply indicating that there was a violation of Article 3 common to the Geneva Conventions, without citing specific provisions of IHL or acknowledging that Huamanga Prison was considered a military target. On the other hand, the report issued by Guatemala's Historical Clarification Commission contained the encouraging testimony of a commander of the revolutionary armed forces, who stressed the importance of respect for the rules of IHL (see <<http://shr.aas.org/guatemala/ceh/mds/spanish/cap2/vol4/hech.html>>). According to EGP (Guerrilla Army of the Poor) leaders, although humanitarian law was not included in the training it provided for its combatants, there was an awareness of how prisoners of war should be treated and other



on the punitive or sanctioning aspects of IHL than on the rules governing the conduct of hostilities and the protection of the victims of armed conflict.

In any event, truth commissions in Latin America have gradually come to recognize the importance of respecting international humanitarian law in achieving longed-for reconciliation and preventing such atrocities from ever happening again.<sup>90</sup> After an armed conflict, it is obviously easier to achieve reconciliation when the parties to the conflict have complied with the rules of IHL. Reconciliation can therefore be regarded as a non-legal benefit of IHL. In this vein, Marco Sassòli and Antoine Bouvier observe: “Finally, the end of all armed conflict is peace. At the conclusion of an armed conflict there remain territorial, political and economic issues to be solved. However, a return to peace proves much easier if it is not also necessary to overcome the hatred between peoples that violations of IHL invariably create and most certainly exacerbate.”<sup>91</sup>

notions established in these norms: “...as part of the political training, as part of revolutionary thought, there was always an awareness that prisoners must be respected, and much of this is based on the experience of other revolutionary movements. The writings of Commander Ernesto Guevara and what is known about his involvement in the guerrilla movement in Cuba highlight this respect for the enemy, sharing food and what little medicine is available, treating the wounded when necessary and ensuring that prisoners are not ill-treated. We were very much aware of these issues from the outset ... In the recruitment, instruction and training processes, the aim was to promote respect for people in the community ... this was made part of political discipline; there was also military discipline, the core tenet of which was that weapons were to be used for warfare and never for other purposes ... At some point, all this became bound up with the essence of combatant training ... a spirit of respect for certain norms, which we had not seen in black and white, but which became a part of our training based on experience.” Similarly, the Handbook of the Good Combatant (*Manual del Buen Combatiente*), published by the ORPA (Revolutionary Organization of the People in Arms) in 1984, contains a section on this subject, although it focuses on respect for the civilian population and its property: “Guerrillas, as good sons of the people, must always respect, look after and defend the people ... We must ensure absolute respect for the property of our fellow men, their homes, food, crops and livestock.” ORPA, *Manual del Buen Combatiente*, campaign material, 1984, pp. 53 and 58.

90 See also Principle 38 of the “Updated Set of Principles for the protection and promotion of human rights through action to combat impunity” contained in the Report of the independent expert to update the set of principles to combat impunity, Diane Orentlicher, E/CN.4/2005/102/Add.1, 8 February 2005, which supports this view of IHL implementation as a means of guaranteeing non-recurrence. It proposes that during periods of restoration of or transition to democracy and/or peace, noting that Status “should undertake a comprehensive review of legislation and administrative regulations.”

91 Marco Sassòli, Antoine Bouvier, *How Does Law Protect in War?*, Vol. I, ICRC, Geneva, 2003, p. 340.



# The missing and transitional justice: the right to know and the fight against impunity

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## Abstract

*Any body or institution dealing with the missing persons issue will interact in one way or another with transitional justice proceedings, if only to examine the possibility of sharing relevant information gathered. The question becomes even more acute when international tribunals intervene in the national context where transitional justice mechanisms are operating. The authors look at the ways in which transitional justice mechanisms may support the right of families to know the fate of their relatives, and how work to resolve the missing persons issue can be reconciled with an effective fight against impunity.*

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## Definition and link with transitional justice

The missing, as referred to in this article, are all people unaccounted for as a result of an international or non-international armed conflict or internal violence.<sup>1</sup> In almost every one of these situations people disappear and their fate or whereabouts become unknown for a variety of reasons. They may have been arrested, abducted, or killed on capture or during massacres. They could be held

\* The article reflects the views of the authors alone and not necessarily those of the ICRC.

incommunicado or in a secret location for a long period of time, or they could be isolated inadvertently by fighting or intentionally by the warring parties. They may be members of armed forces or armed groups whose fate is unknown (missing in action); refugees or displaced persons without means of communication; children separated from their families while fleeing fighting or through forced recruitment, detention or even adoption; or people who have died and whose identities were not recorded.

Left without any knowledge of their whereabouts or fate, tens of thousands of families face the agony of uncertainty for years after the fighting subsides. In practice, they will desperately search for information until they know for sure whether their relatives are alive or dead. This uncertainty prevents them from achieving closure until they find an answer. Furthermore, the painful effects of their loved ones' absence are often accentuated by the psychological, economic, social and legal problems with which they have to contend and which are frequently disregarded or denied. For instance, many of the missing persons are male, often the sole breadwinners and account or property holders. Their families are thus left without their source of income, a situation that is hardly conducive to appeasement. Not only missing persons should be considered as victims but also all the members of their families understood in their broadest possible sense.<sup>2</sup>

Such a situation is bound to have a direct impact on others as well. It will affect the entire community and its capacity to cope with its past, to end the war or violence in which it stagnates and ensure sustainable peace. As outlined in the South African Truth and Reconciliation Commission's objectives, "establishing and making known the fate and whereabouts of victims" is one of the means of achieving national unity and reconciliation.<sup>3</sup>

A multi-dimensional process of transitional justice aimed at taking stock of a violent past to open the way towards peace, democracy and respect for human rights should appropriately address the issue of missing persons with the community concerned, because violations of international humanitarian law and human rights account for most of such cases. During hostilities and transitional phases, parties unfortunately often exploit that issue. Sometimes information about the missing is withheld or manipulated to exert pressure on the enemy, to leave the enemy population in ignorance and distress, to avoid criticism from the party's own population for losses suffered or to maintain hatred of the other party and its national or ethnic exclusion. Leaders whose power is based on hatred of another community have an incentive to withhold answers indefinitely. Moreover, after the close of hostilities, the very leaders who played a major part in perpetuating the conflict often remain prominent figures in the subsequent

1 A whole issue of the *International Review of the Red Cross* was dedicated to the theme of missing persons. See *International Review of the Red Cross*, Vol. 84, No. 848, December 2002, particularly p. 823.

2 ICRC report: "The missing and their families: Summary of the conclusions arising from the events held prior to the International Conference of Governmental and Non-Governmental Experts (19 – 21 February 2003)", p. 11, available at <<http://www.icrc.org>>.

3 See the South African Promotion of National Unity and Reconciliation Act No. 34 of 1995, s. 3(1)(c).

peace process, a situation that does not facilitate the resolution of missing persons cases.

When societies in transition realize the importance of the missing persons issue, the need to consider how it can best be addressed becomes very clear. In all cases, finding out whether a missing person is dead or alive requires that procedures for gathering relevant information be put in place. Various types of bodies can be set up for that purpose. In some cases, national authorities have preferred to establish mechanisms whose competence is centred on clarifying the fate of missing persons. In recent years, for example, two specific multilateral working groups on missing persons were established to trace such persons connected with the conflicts in Kosovo and Bosnia, and to inform their families accordingly. Those working groups may also address the families' legal and administrative needs. Both mechanisms were set up within the framework of the peace process and include representatives of all parties, which must, in compliance with the relevant provisions of international humanitarian law, take all necessary steps to enable families to exercise their right to know the fate of missing relatives. In particular, they must take all feasible measures to account for missing persons, to identify the dead before their bodies are disposed of, and to notify the appropriate authorities or the families of the identity of deceased persons and the location of their remains. To this end, the departments and services concerned (police, armed forces, etc.) should be instructed to provide all relevant information to the working groups and cooperate with them. The ICRC chairs both working groups in accordance with its mandate and in its capacity as a neutral intermediary accepted by all the parties. It is not part of the working groups' mandate to identify the parties or individuals responsible for the capture, death or disappearance of missing persons or to gather evidence relating thereto. The question of any judicial proceedings must be dealt with entirely separately from the working groups. In Bosnia, the adoption of the Law on Missing Persons<sup>4</sup> was evidence of the authorities' commitment to tackle the various aspects of that issue, including the rights of the families of missing persons. This law, together with other legislation, provides for the establishment of a Missing Persons Institute to oversee the process of clarifying the fate of missing persons.

In other cases the issue of missing persons is addressed from a broader perspective, such as that of truth and reconciliation commissions or national human rights commissions, which also deal with other violations of human rights and international humanitarian law.

Irrespective of the extent of their responsibilities, any body or institution dealing with the missing persons issue will unavoidably interact with transitional justice proceedings, if only to examine the possibility of sharing relevant information each has gathered. The question of such interaction becomes even more acute when international tribunals intervene in the national context where missing persons/transitional justice mechanisms are operating. The next part of

4 Law on Missing Persons, *Official Gazette of Bosnia and Herzegovina*, 21 October 2004.

this short commentary takes a look at the ways in which transitional justice mechanisms may support expectations in terms of the right of families to know the fate of their relatives, and how work to resolve the missing persons issue can be reconciled with an effective fight against impunity.

## International tribunals in support of the right to know

Victims' families can intervene at various stages of criminal proceedings and exercise their right to know the fate of relatives.<sup>5</sup> For instance, the investigation stage could be an appropriate channel for families of the missing to obtain relevant information. Authorities in charge of investigations and inquiries usually benefit from extended powers, including the power of enforcement, with a view to obtaining the necessary information and evidence for the trial phase. Victims' relatives should try to take advantage of this capacity and ensure that their concerns are appropriately dealt with during investigations.<sup>6</sup>

In addition, when international tribunals investigate large-scale killings and initiate mass exhumations and forensic activities, efforts should be made to ensure that such work is conducted in a manner that serves the best interests of the families while also bringing the persons responsible for those crimes to justice. Exhumations can reveal what happened to victims of such killings and give families information about the fate of loved ones. They can also enable the next of kin to honour the dead in conformity with the precepts of their culture and religion.<sup>7</sup> Unfortunately, international tribunals have often lacked the necessary resources to go beyond the identification of patterns to identify the dead. In a number of cases exhumations have led to unfortunate situations in which, although the cause of death was established for criminal purposes, the bodies were re-interred unidentified because the identification process is much more time-consuming and requires different technologies. The families concerned were thus prevented from learning the fate of their relatives or receiving their remains. The work of forensic teams responsible for trying to identify the remains has been made impossible at times.

At the trial stage, when the judicial system so permits, victims' families should seek either to initiate proceedings or intervene as separate parties (known in civil law countries as *parties civiles*), or both, or be co-plaintiffs with the prosecution. In this way they can have greater access to and control over information gathered through judicial mechanisms and be able to find some kind of solace. Even in judicial systems that do not recognize victims as having this active capacity, they should be encouraged to participate, even if merely as witnesses. When they are afraid to testify for reasons linked to their personal safety

5 Additional Protocol I, Art. 32.

6 See in this regard V. Nesiah, "Overcoming tensions between family and judicial procedures", *International Review of the Red Cross*, above note 1, pp. 824–826.

7 See M. Blaauw, "'Denial or silence' or 'acknowledgement and disclosure'", *ibid.*, p. 778.

or that of the rest of their family, or for fear of public shaming, measures should be taken for their protection.

At the international level, the two ad hoc International Criminal Tribunals for Rwanda (ICTR) and the former Yugoslavia (ICTY) have adopted the second approach and offer victims, including relatives of missing persons, only very limited autonomous scope, except for those most likely to serve as witnesses for the prosecution. But a change of paradigm came with the foundation of the International Criminal Court (ICC). More precisely, it provides for victims to present their views and concerns directly at all stages of the proceedings<sup>8</sup> and to seek reparation.<sup>9</sup>

When international tribunals have been involved for many years in a region or a country and intend to phase out their work, such as the ICTR and ICTY, people affected by the disappearance of their relatives should try to take advantage of the legacy of those mechanisms. With regard to the former Yugoslavia, the ICRC has gained access to the information gathered by the ICTY that is not being used for trial purposes or that concerns closed cases. The ICRC will analyse this information and select whatever is useful to clarify the fate of missing persons, in particular indications of the location of remains, lists of persons presumed dead and documentation on alleged grave sites, and will — subject to its rules of confidentiality — share it with the Working Group on Missing Persons in Kosovo and possibly with other mechanisms dealing with the missing in the Balkans. The millions of documents collected are an invaluable means of supporting efforts to clarify the fate of people reported missing in connection with the armed conflicts that have affected that region. Unfortunately, the systematic search through the ICTY's judicial files for additional information on the identity of victims is extremely time-consuming, because the files have been organized mainly for the purpose of criminal prosecution and not to clarify identification.

Yet there are serious limits to the ability of criminal proceedings to comprehensively address the issue of persons unaccounted for as a result of armed conflict and other situations of violence. They are designed to determine the guilt or innocence of the accused, and investigations are tailored to respond to the goals of the prosecution. People are also rarely willing at the national level to prosecute those responsible, owing to fear of reprisals or general distrust of the judiciary. Even in a system such as that devised for the ICC, intervention by the victims' families will have to be linked to a specific situation within the court's jurisdiction. In this respect the recent friction between the judges of the ICC and its prosecutor, with the former adhering to a much wider interpretation of the notion of victims, is informative.<sup>10</sup> Only time will tell whether the "victims' transplant" could work in a system focusing primarily on criminal repression and whether the

8 ICC Statute, Art. 68(3).

9 Ibid., Art. 75.

10 See decision rendered by Pre-trial Chamber I on the request of six persons to be able to participate as victims in the proceedings concerning the Democratic Republic of Congo: *Décision sur les demandes de*

families of those unaccounted for could obtain relevant information in that environment.

It appears clear that information gathered through criminal proceedings, however open these may be to victims, is not enough to satisfy the right of families to know the fate of their loved ones and that something else is required to respond to their needs. Their right to know, however, often collides with measures adopted to ensure an effective fight against impunity.

## **Reconciliation of the work on missing persons with the fight against impunity**

The progress in ending impunity for war crimes with the establishment of international tribunals and a somewhat more active role played by domestic courts should mean an increasing respect for international humanitarian law and, in turn, a reduction in the number of missing persons because many of them are the result of that law being violated. Conversely, because persons having relevant information fear criminal prosecution, the increase in the “threat of The Hague” or more generally the existence of a real judiciary risk has the negative side-effect of a proportional decrease in prospects of obtaining information about the fate of the missing through traditional channels.<sup>11</sup> Thus, a delicate balance needs to be struck between the general recognition of the importance of prosecuting war crimes and the putting into place of effective means to collect and assemble relevant information on missing persons. Such mechanisms would need, in other words, to generate greater incentives for those with information on the fate of the missing to speak out, rather than to remain silent and be an obstacle to the fight against impunity. This is not, however, an easy task. In October 2005, for instance, the ICRC chairperson of the Working Group on Missing Persons in Kosovo observed that the number of missing persons stood at 2,557 compared to 3,000 at the beginning of the year and noted that progress hitherto had come from forensic activities. For the Working Group to work efficiently he considered that “[i]nformation from other sources, notably the determination of the fate of the persons gone missing and the localisation of yet unidentified gravesites” should be provided to the group “to meet the growing expectations of the families.”<sup>12</sup>

participation à la procédure de VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, et VPRS 6, 17 January 2006 (only available in French). Authorization to appeal against the decision was denied to the prosecution on 31 March 2006.

11 Two authors have already mentioned this with regard to the role of the ICRC in the fight against impunity and the need to guarantee confidential handling of information it receives from belligerents if it wants to keep that source: M. Sassòli, M.-L. Tougas, “The ICRC and the missing”, *International Review of the Red Cross*, above note 1, p. 732.

12 See ICRC Press Releases, “Kosovo: Fourth meeting of Working Group on Missing Persons”, 6 October 2005, and “Kosovo: ICRC calls for greater commitment to resolve issues of missing persons”, 31 May 2006.

Practical experience shows that national authorities may adopt various strategies in this regard. In some cases, they have not hesitated to launch public information campaigns about the missing, thus demonstrating their political will to resolve the issue.<sup>13</sup> On a number of occasions the ICRC has published names of missing persons on its website or in catalogues, or books with photographs of personal belongings found with mortal remains, which were subsequently used by authorities in their efforts to clarify the fate of those unaccounted for.<sup>14</sup> In one instance, with the consent of the families concerned, the ICRC gave a truth and reconciliation commission basic information on more than four hundred cases that did not appear in any database.<sup>15</sup>

In other instances, various means of communicating information about missing persons have been provided for, such as telephone lines, web-based applications or walk-in centres. In some situations, anonymous information was accepted so as not to link the person supplying it to any investigation or leave them open to any criminal charges. Even though the accuracy of the information gathered in this way could be questioned, it was estimated in the Croatian national context that 10% of the anonymous information received could be considered relevant and useful in the search for missing persons. In order to promote an environment conducive to information-sharing, the ICRC has on certain occasions agreed, with the parties' consent, to act as the entity receiving the information from the persons concerned. This information was then handled on a confidential basis, which meant that all identifying data was expunged before being transmitted to the authorities.

Authorities may also be inclined to link their efforts to trace the missing with criminal prosecution by considering as a mitigating factor the transmission of relevant information helping to clarify their fate, or by providing for penalties in cases of non-cooperation. The same link could be made with vetting procedures instituted at the national level in which the provision of relevant information on the missing would be considered a positive factor in the assessment process. Finally, some have applied or envisaged granting limited amnesty<sup>16</sup> or prosecutorial immunity, accompanied by alternative forms of justice, even though this approach raises many questions as to its compatibility with the requirements of international humanitarian law. Measures which would be construed in such a way as to enable war criminals to evade punishment would obviously fall short of the necessary threshold. Nor would they be in conformity with the rule obliging states to investigate, prosecute and punish persons suspected of having committed

13 Peru, Chile and Morocco may be cited in this regard.

14 Republic of Serbia, Bosnia and Angola. Liberia, Sierra Leone and Côte d'Ivoire may be mentioned with regard to the search for children separated from their parents/relatives in connection with the respective armed conflict.

15 Peru. The partnership provided for the systematic compilation of the ICRC's experience in the search for individuals and the creation of a single list of disappeared.

16 An amnesty cancels the crimes. More precisely, amnesty law has the effect that a) prosecutors forfeit the right or power to initiate investigations or criminal proceedings, and b) any sentence passed for the crime is obliterated.

war crimes.<sup>17</sup> Furthermore, a national amnesty would not protect the person concerned from the threat of international prosecution. If amnesty is granted in violation of international obligations, it will probably not be accorded international legal recognition and will be ignored by international tribunals.<sup>18</sup> In all of these cases, family associations, if they exist, should be consulted. Not only are they the beneficiaries of the measures taken to clarify the fate of their relatives, but they also have a role to play in ensuring that the responsible entity as a whole and each of its components fulfil their mandate and their respective commitments.

## Conclusion

Clarification of the fate of persons unaccounted for as a result of an armed conflict or other situations of violence is an important issue that needs to be considered in any multi-dimensional and multi-stakeholder efforts to address societies in transition. When peace or other settlements are negotiated, they should receive at least as much attention as other issues, such as refugees and displaced persons, land and property, or human rights and conflict resolution, in the parties' efforts to repair their past. The opening of mass graves, the identification of bodies, establishment of the circumstances that led to their deaths and clarification of the facts are all necessary steps for families to complete their mourning process, for victims to obtain reparation and, in the long term, for peoples and communities to come to terms with their past and move forward in peace.

In order to deal properly with the missing persons issue, the various bodies and institutions involved in transitional justice should endeavour to cooperate in that regard. Ad hoc international tribunals or truth and reconciliation commissions, both with a limited life-span, should give thought from the outset to means and methods of gathering and classifying information and evidence that could make it readily exploitable both for judicial proceedings and for attempts to trace the missing. They should allow for effective and practical means of passing on their legacy once their work has ended, and in particular give families and their representatives access to their archives. Similarly, forensic activities deployed by international tribunals should be carried out with not only the collection of evidence for criminal prosecution in mind, but also the finding of answers for the families of missing persons. Finally, national authorities should be encouraged and supported, through capacity-building initiatives, in their resolve to genuinely address the issue of missing persons and thus comply with the requirements of international humanitarian law. Only then can there be hope that families will finally fulfil their right to know the fate of missing relatives and receive appropriate reparation.

17 Even Art. 6(5) of Additional Protocol II, which refers to amnesty, excludes amnesty for war crimes.

18 ICTY, *Furunzija*, Case No. IT-95-17/1 Judgment, 10 December 1998, para. 155.



# Cooperation between truth commissions and the International Committee of the Red Cross

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## **Abstract**

*Starting with the usual functions of truth and reconciliation commissions, the article outlines the possibilities for and limits of cooperation by the ICRC with the varying types of commissions. The question as to the degree of such cooperation has mostly been resolved on similar lines to the privilege of non-disclosure in international criminal trials. Within the parameters of its principles of neutrality and impartiality and the operative rule of confidentiality established to enable access to victims of armed conflicts and internal violence, the ICRC has, however, cooperated with such commissions. The author explains some criteria determining the appropriate degree of cooperation and shows some forms it can take. He finally discusses the ICRC's policy vis-à-vis the amnesty provisions of truth and reconciliation commissions, which often preclude the prosecution of persons involved in offences committed during periods of violence.*

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In a post-conflict society, truth commissions may serve a vital role in rebuilding shattered social relations by establishing an accurate picture of the causes of a conflict. They also document abuses perpetrated during violent periods, attribute

\* A short version of this article was presented as a conference paper on “Dealing with the past and transitional justice: Creating conditions for peace, human rights and the rule of law,” and published by the Political Affairs Division IV, Federal Department of Foreign Affairs, Switzerland (General Editor Mô Bleeker). This contribution reflects the views of the author alone and not necessarily those of the ICRC.

responsibility, encourage all sides in a conflict to engage in a dialogue about the past and thereby contribute to reconciliation and hopefully restore a peaceful society. In parallel, the International Committee of the Red Cross (ICRC) undertakes a number of tasks in the post-conflict environment that are relevant to its mandate, <http://www.icrc/web/eng/siteeng0.nsf/htmlall/statutes-movement-220506?opendocument> including humanitarian assistance; giving aid to victims by engaging in activities of rehabilitation, <http://www.icrc./web/eng/siteeng0.nsf/htmlall/p0700?opendocument> reconstruction and restitution; visiting persons detained in relation to the conflict; working to release and repatriate captives; tracing missing persons and facilitating family reunification; clarifying the fate of persons whose disappearance has been notified by the adverse party; and prompting states and civil society to take steps to implement the Ottawa treaty on anti-personnel landmines and limit the use and effects of explosive remnants of war.<sup>1</sup>

In terms of its contribution to establishing truth and justice, the role of the ICRC is “essentially legal and technical in nature.”<sup>2</sup> The ICRC firstly supports punitive measures at the domestic or international level, pursuant to obligations under the Geneva Conventions of 1949, Additional Protocol I, other relevant treaties and customary law to prosecute those accused of having committed war crimes. As states have the primary obligation to ensure that violations of humanitarian law are punished, the ICRC may facilitate this task even before the outbreak of hostilities by making recommendations for the adoption of domestic legislation consistent with international humanitarian law (IHL) and exchanging information on each state’s legal experience. It may also provide instruction to judges and court personnel on the rules and procedures of international criminal law. However, the most delicate issue has proved to be whether the ICRC may give testimony with regard to the perpetration of international crimes during armed conflict. It is sometimes in the unique position of being the only humanitarian organization present during some of the worst violence in certain countries. Its extensive access to most parts of the territory affected by armed conflict and its direct contact with victims means that ICRC delegates may themselves witness serious atrocities or their aftermath. However, to provide such testimony in a trial or a truth commission may be in breach of ICRC principles of neutrality and impartiality, which are often implemented in practice by the rule of confidentiality.<sup>3</sup> This is not merely a problem for the credibility of the organization, but has real consequences for the victims of armed violence, as

1 The ICRC’s governing body and the Assembly adopted guidelines on 12 December 2001 on the ICRC’s work in transitional periods (A 136 rev. of 8 April 2003). For a discussion of these, see Marion Harroff-Tavel, “Do wars ever end? The work of the International Committee of the Red Cross when the guns fall silent”, *International Review of the Red Cross*, Vol. 85, No. 851, September 2003, pp. 465–496.

2 Harroff-Tavel, *ibid.*, p. 485.

3 See Jakob Kellenberger, “Speaking out or remaining silent in humanitarian work”, *International Review of the Red Cross*, Vol. 86, No. 855, September 2004, pp. 593–610; Stéphane Jeannet, “Recognition of the ICRC’s long-standing rule of confidentiality”, *International Review of the Red Cross*, Vol. 82, No. 838, June 2000, pp. 403–426; and “Action by the International Committee of the Red Cross in the event of breaches of international humanitarian law or other fundamental rules protecting persons in situations of violence”, *International Review of the Red Cross*, Vol. 87, No. 858, June 2005, pp. 393–400.

ICRC access to areas affected by conflict is always built on a relationship of trust established with the warring parties. If any one of them believes that ICRC delegates will publicly reveal all they have witnessed in a certain area of the conflict, by choice or by subpoena, it is unlikely that access will be granted or that a meaningful dialogue with the parties to the conflict will be possible. This means that victims in that area will be without protection and crucial humanitarian aid and assistance at a time when they need it most.

While the dilemma has largely been resolved in international criminal trials by means of the privilege of non-disclosure, the question of the appropriate degree of cooperation by the ICRC with truth commissions or domestic quasi-judicial mechanisms remains unanswered. The question that arises is: should the ICRC be similarly constrained or testify to a truth commission about its observation of abuses committed in armed conflicts? Furthermore, how does the ICRC balance its need to preserve confidentiality with its role as guardian of the principles of IHL, one of which is that there should be no impunity for war criminals? In the present article, consideration is given to these questions and an attempt is made to identify some criteria relevant to ICRC action in this respect.

## **The ICRC's policy towards transitional justice: a balancing act**

The issues surrounding transitional justice mainly concern the ICRC in terms of implementation of its rule of confidentiality and the principles of neutrality and impartiality, which sometimes clash, or appear to clash, with the various ways in which it protects and assists persons affected by armed conflicts or other violent situations. It thus has to perform a delicate balancing act.

The ICRC's approach to its humanitarian work is determined essentially by one criterion: the interests of the persons its mandate requires it to protect and assist. Its ability to carry out that mandate depends upon the willingness of parties to the conflict to grant access to the persons in need, and such willingness depends in turn upon the ICRC's adherence to the principles of impartiality and neutrality as defined by the Statutes of the International Red Cross and Red Crescent Movement<sup>4</sup> and, in particular, the rule on confidentiality. These principles and this rule can conflict, however, with the duty of the ICRC to succour persons affected by violence. In such cases it must find an operational solution. Providing assistance in the short-term must be weighed against medium- and long-term needs. Action taken in one context must also be assessed in the light of its impact on ICRC operations worldwide.

Problems also arise where the ICRC's role as guardian of international humanitarian law is concerned. As part of its humanitarian mission to protect the lives and dignity of persons affected by armed conflict, the ICRC strives to

4 See Preamble to the Statutes of the International Movement of the Red Cross and Red Crescent, <[http://www.gva.icrc.priv/web/eng/siteeng0.nsf/htmlall/statutes-movement-220506/\\$file/mvt-statutes-english.pdf](http://www.gva.icrc.priv/web/eng/siteeng0.nsf/htmlall/statutes-movement-220506/$file/mvt-statutes-english.pdf)> (visited on 1 July 2006).

promote respect for international humanitarian law. In this context the ICRC Advisory Service helps states set up the structures and adopt the legislation needed to protect such persons more effectively and discourage war crimes (and other IHL violations). If successful, this consultation, analysis and harmonization of legal instruments can help to ensure that no perpetrator goes unpunished. The ICRC's reticence with regard to condemning violations of IHL and its privilege not to testify before tribunals<sup>5</sup> seem to contradict its role as guardian of humanitarian law and its desire to see perpetrators brought to justice. But out of respect for the rule of confidentiality the ICRC does not transmit (confidential) information, either in the form of written reports or as direct testimony.<sup>6</sup>

## Cooperation with domestic or international courts

The Humanitarian Liaison Working Group in June 1995 discussed the subject of “Impunity versus accountability: the role of mechanisms for accountability in resolving humanitarian emergencies.” The ICRC explained its position of not testifying in judicial proceedings before the International Criminal Tribunal for Rwanda and concerning the situation in Burundi. During the meeting the then prosecutor for the ICTY and ICTR, Richard Goldstone, said he could understand the impossibility of the ICRC divulging confidential information to the tribunal but put forward the idea of organizations like the ICRC or UNHCR passing on “secret information,” which the tribunal would not use as evidence during a trial but only to help it find other admissible evidence (Rule 70 of the ICTR Rules of Procedure and Evidence). The question is not, however, of ICRC cooperation being kept confidential, but of whether the ICRC can truthfully claim to its interlocutors that it does not cooperate with such tribunals. In response the ICRC explained unequivocally that it could never transmit information to the tribunal, since to do so would harm its credibility in future conflicts and endanger its ability to gain access to victims.<sup>7</sup>

The ICRC's inability to cooperate with criminal tribunals does not mean that it is hostile or indifferent to their task. The tribunals and complementary mechanisms have in common the objective of ensuring respect for international humanitarian law, and the ICRC naturally supports the existence of mechanisms for the repression of criminal violations of that law. However, since the ICRC is mandated to assist and protect persons affected by violence and cannot risk losing access to them, its role should be seen as distinct from that of the tribunals and

5 Decision of 27 July 1999 of the International Criminal Tribunal for the former Yugoslavia (ICTY) (*Prosecutor v. Simić et al.*, IT-95-P), and Rona Gabor, “The ICRC privilege not to testify: Confidentiality in action”, *International Review of the Red Cross*, Vol. 84, No. 845, March 2002, pp. 207–220.

6 See Anne-Marie La Rosa, “Humanitarian organizations and international criminal tribunals, or trying to square the circle”, *International Review of the Red Cross*, Vol. 88, No. 861, March 2006, pp. 169–186.

7 Document 202 (204), Note of 21 June 1995 concerning the Humanitarian Liaison Working Group Meeting of the 19 June 1995 on the role of war crimes sanction mechanisms in the context of humanitarian crisis (on file with the author).

certainly not as an integral part of witness testimony. The dilemma was resolved before the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Simić* case, in which the trial chamber decided that the ICRC could not be compelled to give testimony before the court.<sup>8</sup> This decision was formally enshrined in Rule 73(4) of the Rules of Procedure and Evidence of the International Criminal Court (ICC).<sup>9</sup> It should be noted, however, that sub-rule 6 of Rule 73 provides for the possibility of consultations between the court and the ICRC with a view to resolving the matter cooperatively should the former consider that information held by the ICRC is of great importance to a particular case and cannot be procured from an alternative source. These consultations must bear in mind “the interests of justice and of victims” as well as “the performance of the Court’s and ICRC’s functions.” If the ICRC does not object in writing to such information being used in a trial after the said consultations, or has otherwise waived its privilege of non-disclosure, then the material may be used.<sup>10</sup> This opens a narrow window of opportunity for ICRC testimony to be used in trials before the ICC. It is not entirely clear whether the “victims” whose interests have to be taken into account in consultations refers to the victims of the crimes being tried (who undoubtedly would want the ICRC’s testimony heard) or victims of armed conflict in general, whose interests the ICRC strives to protect (access to whom may be jeopardized through ICRC disclosure). Undoubtedly, such issues need to be resolved on a case-by-case basis, and, therefore, the balancing of various interests is a context-specific exercise with no absolute solution.

In its role in the post-conflict environment, the ICRC must meet the challenge of striking the proper balance so that its actions do not undermine the objective of protecting victims. This challenge might be considered a minor one, for although bringing perpetrators to justice may be important for the victims and the communities, it can be argued that it is an indirect or secondary consideration compared to that of gaining access to persons in desperate need. However, this argument ignores the fact that impunity creates or at the very least contributes to the creation of those very dangerous situations where the powers wielded by those in authority or in control of a territory and that require ICRC intervention remain unchecked. If impunity is not combated, further abuses are likely to be perpetrated on a large scale, creating a vicious circle in which the ICRC will need access to ever more persons in need of assistance. The question is: what is the correct balance?

## Cooperation with quasi-judicial mechanisms

The *gacaca* process in Rwanda, an alternative system of transitional justice using participatory and proximity justice in which individuals from the local

8 *Prosecutor v. Simić et al.*, Case No. IT-95-9, Trial Chamber of the ICTY, Decision of 27 July 1999.

9 Rules of Procedure and Evidence of the International Criminal Court, ICC-ASP/1/3, adopted on 9 September 2002 [RPE ICC].

10 *Ibid.*, Rule 73(4)(a).

communities act as “peoples’ judges,” is a dramatic example of the ICRC being forced into a precarious balancing act. In Rwanda the ICRC did not pass on information about individual Rwandan detainees to the *gacaca* courts as it did not want to be associated with this “judicial” process. Nevertheless, transmitting such information might have facilitated the release of detainees from conditions that were clearly below minimum standards while helping to end already lengthy periods of detention for which there were no legal hearings in sight. In this situation, the ICRC had to balance its mandate to work for the release of prisoners in the aftermath of conflict against the possibility of losing some credibility by giving information about particular individuals to the *gacaca* courts.

## Cooperation with truth commissions

It could be argued that ICRC testimony would provide a much more objective picture of what happened during a war, particularly in view of the principles of neutrality and impartiality, which mean that the ICRC does not take sides but assists all victims of conflict who are in need of help. Furthermore, unlike criminal trials, truth commissions do not in themselves entail liability, whether civil or criminal. Arguments about preserving the trust of the parties to a conflict in order to maintain access, therefore, lose some force in this context. But is this really true? As is known, truth commissions sometimes hand over evidence they have collected to judicial authorities for subsequent prosecution. This may have significant ramifications for the possibility of ICRC involvement.

The ICRC’s relationship with the Peruvian Truth and Reconciliation Commission is another case in which the ICRC had to strike a balance between its rule on confidentiality and the criterion already mentioned, namely the interests of victims. When that commission began its work in 2001, the ICRC was confronted with the dilemma of deciding whether to provide information that only it possessed to the commission to enable it to solve cases of missing persons. Investigating the fate of missing persons is clearly part of the ICRC’s mandate, in order to respond to the immediate or direct needs of victims (including family members). If the ICRC has relevant information about a missing person but does not have the resources to properly investigate their fate, should it not assist others as far as possible? In this case, it did provide limited information.<sup>11</sup>

In purely operational terms, the issue of missing persons is probably the most important potential area of cooperation between a truth commission and the ICRC.<sup>12</sup> Certain conclusions can be drawn from past ICRC experience. If a

11 With the agreement of the families concerned, the ICRC gave the Truth and Reconciliation Commission basic information on more than 400 cases that did not appear in any database. Its aim was to compile a single list of people unaccounted for.

12 See Monique Crettol and Anne-Marie La Rosa, “The missing and transitional justice: the right to know and the fight against impunity”, *International Review of the Red Cross*, Vol. 88, No. 862, June 2006 (to be published).

commission chooses to seek to clarify the fate of individual missing persons, it should, in particular:

- describe its working methods to the families and witnesses testifying about disappearances, and inform them of its chances of success;
- inform families individually, and before the report is published, about its findings with regard to their relatives;
- whenever it clarifies the fate of a person, it should locate and inform the next of kin;
- if resources are insufficient, priority should be given to clarifying the fate of the persons concerned.

A truth commission that chooses to clarify only the general pattern of human rights abuses and violations of international humanitarian law, rather than individual cases, should:

- inform the families and witnesses testifying about disappearances that it will not try to clarify the fate of individual persons;
- if during its work it nevertheless learns of information that can assist in clarifying the fate of individual persons, it should provide that information to the families concerned or to another body that is willing and able to conduct the requisite enquiries;
- include in its report as many details as possible, thus enabling families of missing persons to understand the reasons for which a relative must be presumed dead or not, and/or the probable fate of each category of missing persons;
- include in its report, subject to the consent of the families concerned, the names of all persons reported missing.

If a multilateral ad hoc mechanism to clarify the fate of missing persons does not exist in a country or cannot be created there,<sup>13</sup> the ICRC stresses the importance of including that task in the terms of reference of a potential truth commission, with a case-by-case approach in order to provide families with answers. It also clearly states, however, that it only provides information to truth commissions under certain conditions. If the ICRC is the sole or primary holder of information on missing persons, it usually underscores the complementary but distinctive character of both mechanisms, that of the truth commission and of its own activities in this field.

The ICRC has an interest in supporting a truth commission where such collaboration has real potential to resolve cases of missing persons. It can give support in the following ways:

- by sharing legal expertise in the field of international humanitarian law;
- by sharing technical expertise on tracing;

13 For instance, the Tripartite Commission that sought to resolve cases of persons unaccounted for since the 1990–1991 Gulf War and in which the ICRC acted as a neutral intermediary between the parties, as well as the working groups established in the former Yugoslavia to address the legal and administrative needs of families of missing persons.



- by sharing expertise on the exhumation of human remains and identification processes;
- by sharing information on cases of people unaccounted for.

Even when confidentiality agreements between the truth commissions and the ICRC have been put in place, there is no absolute guarantee that information provided by the ICRC will not be transmitted to third parties once the material has left its hands. Such an agreement does not necessarily protect the truth commission from being required to turn over that information, as compliance with the agreement depends upon external factors and subsequent orders by the independent judiciary, new legislation or subsequent governments may reverse the commission's previous decision.

The ICRC has to bear in mind that previous truth commissions have passed on files to prosecuting authorities. The records established by truth commissions often serve as a source of evidence for many years to come, not only for domestic trials but also for international prosecutions. There can be no guarantee that testimonies or documents given to the truth commission will not be used later in other proceedings or perhaps made public because in the terms of reference the restriction on releasing this material may be quite vague. The obvious fact is that exposing the truth is the primary role of a truth commission. Moreover, even if a list of names is not made public, the truth commission may interpret its mandate as requiring it to support the judiciary and the prosecuting authorities.

The extent of the information and its sensitivity determine the degree of attention the ICRC will give to the following three main issues:

- the question of whether the truth commission itself will attribute responsibility to individuals;
- the truth commission's relationship with the judiciary/prosecuting authorities;
- its use/publication of information provided.

With respect to these three issues, before contemplating support for a truth commission the following points at least should be taken into consideration:

- whether the terms of reference of a truth commission clearly state that it can or cannot assume judicial functions that are an attribute of courts;
- whether the truth commission will grant or be involved in the process of granting amnesties;
- whether the truth commission will name suspected perpetrators — if so, it must at least apply fair standards of due process, including standards of evidence;
- whether the truth commission will pass on its files, and if so, to whom;
- whether, according to the terms of reference, a final report of the truth commission will be presented to state officials and whether it will be made public (the report's subject matter should also be known);
- what will happen to the remaining archives of the truth commission;
- whether the truth commission will grant or be involved in the process of granting reparations.



## The question of amnesties for truth: the ICRC's perspective

As the guardian of international humanitarian law,<sup>14</sup> the ICRC obviously supports the principle that those who commit atrocities in war should be prosecuted and punished. At the same time, it is a pragmatic and operational organization, sensitive to the complexities of each armed conflict and to the sometimes conflicting needs of individuals and societies in the aftermath of extreme violence. Some governments have chosen to facilitate the peace process or transitional period by passing amnesty laws that preclude the prosecution of persons involved in offences committed during the period of violence.

The granting of amnesties to suspected perpetrators of serious crimes under international law violates the duty of states, under both treaty-based and customary law, to bring to justice and punish offenders.<sup>15</sup> In particular, the obligation of states to repress grave breaches of the 1949 Conventions and Additional Protocol I thereto is undisputed. Protocol II additional to the Geneva Conventions and relative to non-international armed conflicts provides in Article 6.5 that the authorities in power should grant the broadest possible amnesty to persons who have participated in an (internal) armed conflict. It does not, however, suggest impunity for war criminals, and the ICRC has interpreted the provision as simply providing for “combatant immunity” in non-international armed conflicts; the article was not intended to cover persons accused of war crimes.<sup>16</sup> International humanitarian law does not absolutely exclude any amnesty for persons who have committed violations of that law, but the principle that perpetrators of grave breaches thereof must be either prosecuted or extradited should not be voided of its substance.

The ICRC is unlikely to make a pronouncement as to the legality or legitimacy of amnesty measures, but it would certainly not favour a position incompatible with international humanitarian law obligations. It may of course remind a state of its obligations in this regard under IHL or international law. If, for instance, a state's decision makers choose to deal with alleged perpetrators of war crimes (or gross violations of human rights) by means of an amnesty law, they should be made fully aware that failure to prosecute or extradite would be a violation of the state's international legal obligations<sup>17</sup> and possibly also of national laws. The state must also be aware that persons granted amnesty would not be

14 See Yves Sandoz, *The ICRC as guardian of international humanitarian law*, ICRC, Geneva, 1998, available at <<http://www.gva.icrc.priv/web/eng/siteeng0.nsf/htmlall/about-the-icrc-311298?opendocument>> (visited 1 July 2006).

15 See Jelena Pejic, “Accountability for international crimes: From conjuncture to reality”, *International Review of the Red Cross*, Vol. 84, No. 845, March 2002, pp. 28–31.

16 Letter from the ICRC Legal Division to the ICTY Prosecutor of 24 November 1995 and to the Department of Law at the University of California of 15 April 1997. See also the *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Geneva, 1974–1977, Vol. 9, Berne, 1978, p. 319, to which these letters refer.

17 At least for those war crimes for which there is an absolute obligation to prosecute (rather than mandatory universal jurisdiction for non-international armed conflicts).

immune from prosecution in other states or before international courts.<sup>18</sup> When making this choice the state must consider whether its objective in granting amnesty (i.e., securing peace) is not ultimately undermined by acting contrary to the rule of law. Such considerations raise the following questions: what purpose does prosecution or punishment serve? What is the role of penal repression (criminal prosecution) in the search for justice, peace and reconciliation?

The question of amnesty helps to illustrate the need for the ICRC to balance competing interests. For example, should the ICRC not promote grants of amnesty conditional on the provision of information on missing persons? This could certainly help end the anguish of family members awaiting news of a loved one and, in that regard, the ICRC would be fulfilling its mission. However, it must be recalled that the decision to grant amnesties is an extremely political one. Promotion of conditional amnesties in a specific context could risk undermining the perception of the ICRC worldwide, and particularly its neutrality and impartiality. Moreover, it is likely that advocating amnesty for serious crimes would be constrictive and short-sighted: constrictive because in the same context other persons in need, who have no missing relatives, might receive less assistance because of the resulting loss of credibility for the ICRC; short-sighted in that it focuses on elucidating the fate of missing persons at the expense of their families' needs, such as bringing perpetrators to account. Nonetheless, as the South African amnesty for truth shows, some societies are prepared to forgo a retributive response to severe human rights violations in return for official acknowledgment of wrongdoing, an accurate historical record from which lessons may be learned in order to prevent future violence, public dialogue between different societal groups, and to give the victims and society the power to forgive, not merely provide evidence in a criminal case. For the perpetrators of serious crimes, participation in a truth commission can have a redemptive quality in a way that a criminal trial cannot. The ICRC is not blind to these considerations and is therefore careful in its approach to supporting truth commissions, guided by the issues identified above.

## Conclusion

Achieving national reconciliation while continuing to combat impunity is a topic the ICRC addressed briefly as early as 1996 at its first workshop on international

18 It would not be contrary to Article 14.7 of the International Covenant on Civil and Political Rights to bring a defendant who has benefited from an amnesty in his own state to justice in another state on the basis of universal jurisdiction. Procedures for awarding amnesties do not amount to “acquittal” within the meaning of Article 14.7. The prohibition of *ne bis in idem* contained in that provision therefore does not apply. Even if it were assumed that the procedures of some truth and reconciliation commissions are sufficiently judicial in character to meet this standard, the Human Rights Committee has held that Article 14.7 does not prohibit trial for the same offence in another state. *A.P. v. Italy*, Comm. No. 204/1986, 2 November 1987, U.N. Doc. A/43/40, at 242; Menno T. Kamminga, “Lessons learned from the exercise of universal jurisdiction in respect of gross human rights offenses”, *Human Rights Quarterly*, No. 23, 2001, pp. 940, 958 & n.81.

humanitarian law and protection.<sup>19</sup> The workshop concluded that “the so-called dilemma arising from the dual ambition to prosecute violators whilst also fostering national reconciliation was in fact a false dilemma — if the cycle of impunity was never properly addressed, true reconciliation would never occur.”<sup>20</sup> While that apparent irreconcilability of objectives may prove to be false, dilemmas clearly remain for the ICRC in responding to such issues, requiring it to balance the duty it has towards the victims of armed conflict with efforts on the part of society to reveal the truth and prevent future violence. Truth and reconciliation commissions face similar dilemmas. Many people associate them with eventual pardoning and forgetting; others conversely see them as a first step towards criminal persecution. It remains indisputable, however, that no single universal model for such commissions exists. This is due not only to the varying contexts but also to the divergent understandings of the term “reconciliation”.<sup>21</sup> The corresponding mechanisms are contextual, and the ICRC must respond accordingly. Its mandate for the victims of armed conflicts in the specific context concerned, but also consideration of its overall and future activities in other countries, restrict its cooperation with truth commissions — like its cooperation in criminal proceedings against war crimes suspects — in order to maintain its access to war zones and enable a meaningful dialogue with all parties to armed conflicts. From another perspective, its role as guardian of international humanitarian law may conflict with amnesty provisions favoured by the protagonists of truth commissions, which preclude the prosecution of persons involved in serious international crimes. Within those parameters, the ICRC can cooperate and indeed has cooperated with truth commissions, especially as they share similar goals, namely to restore a sense of dignity to victims of violence and other forms of abuse.

19 See “Protection — toward professional standards: Report of workshop” (17–19 March 1998), Carlo Van Elüe & Pascal Daudin (eds.), available from the ICRC’s Publication Department (ISBN 2-88145-096-2).

20 Ibid., p. 74. For additional conclusions, see pages 74–75.

21 The *Oxford English Dictionary* defines “reconcile” as “to bring (a person) again into friendly relations ... after an estrangement ... To bring back into concord, to reunite (persons or things) in harmony.” *Oxford English Dictionary*, 2nd ed., Vol. 13, Clarendon Press, Oxford, 1989, pp. 352–353. In the context of political conflict or violence, reconciliation has been described as “developing a mutual conciliatory accommodation between antagonistic or formerly antagonistic persons or groups.” Louis Kriesberg, “Paths to varieties of inter-communal reconciliation”, paper presented at the Seventeenth General Conference of the International Peace Research Association, Durban, South Africa, 22–26 June 1998.

## Selected articles on international humanitarian Law

# The principles of universal jurisdiction and complementarity: how do the two principles intermesh?

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### Abstract

*This article addresses the relationships between the principles of universal jurisdiction and complementarity and the difficulties in their implementation. Even if the two principles are well known, there are still a number of obstacles – legal and non-legal – to proper and better implementation. Moreover, universality and complementarity are quite often to be applied in a difficult political environment, keeping in mind that these principles have to deal with international and national constraints. The number of obstacles is such that the two principles face many challenges. This article advocates that the principle of complementarity represents one aspect of the principle of universality and should rely on its general acceptance to further its efficiency and implementation. In conclusion, the article explores some possible ideas to be developed to reach this goal.*

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Can something original or new be discovered or asserted about the principles of universal jurisdiction and complementarity?<sup>1</sup> Many articles have been written on these heavily debated topics, and it is hard to believe that something new could be revealed. However, the controversy over the principle of complementarity that arose with the adoption of the Rome Statute in 1998, establishing the International Criminal Court (ICC), and the judicial proceedings against former heads of state

\* The article reflects the views of the author alone and not necessarily those of the ICRC.

such as Augusto Pinochet of Chile in the United Kingdom or Hissène Habré of Chad in Senegal have shown that something was changing, even though most such attempts have ended in failure. Moreover, various aspects of that issue – ranging from the compatibility of the ICC Statute with constitutional provisions to the immunity of heads of state and amnesty laws – have been considered recently by several constitutional courts.

There is a starting point that cannot be ignored when dealing with the subject of universal jurisdiction and complementarity: although these principles are extensively discussed, in practice there are still various international crimes that go unpunished despite the international obligation to prosecute those who committed them. In many cases the *aut dedere aut judicare* principle remains purely theoretical, and states that have courageously tried to implement the principles of universal jurisdiction and complementarity in a more systematic and concrete manner through their national legislation have not been long in realizing that the constraints of realpolitik or diplomacy clashed with the concept of universal jurisdiction. Unfortunately, political reasons have prevailed over legal reasoning in a number of cases! Sometimes one cannot help wondering whether discussions on the said principles are no more than an academic exercise without any tangible results.

By examining the meaning and implementation of the principles of universal jurisdiction and complementarity, this article seeks to evaluate the relationship between them, advocating that complementarity is a means of better enforcing the goal pursued by universal jurisdiction.<sup>2</sup> Until now only the goodwill of states could be relied on to guarantee their implementation in good faith, for no sanction mechanisms have been created to induce them, without their consent, to abide by their obligations. Will this situation now persist, considering the changes brought about during the past ten years by the ICC or the creation of ad hoc or mixed tribunals? Is there a new dynamic behind the principle of universal jurisdiction? Is the principle of complementarity a solution that will enable universal jurisdiction to be more pragmatically enforced? There are not necessarily any clear answers as yet to all these questions. Universal jurisdiction is still not always properly addressed by national legislations owing to the lack of proper enforcement provisions. Also, the ICC has not delivered any decision, leaving room for a ‘virtual content’ of the principle of complementarity.

1 This article does not claim to study in depth the principles of universal jurisdiction and of complementarity but to evaluate their relationships and practical implications. The amount of literature on these two principles is substantial.

2 This link is recalled in the preamble to the ICC Statute: (*aut dedere aut judicare* principle) ‘*Affirming* that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation’ (para. 4); (universal jurisdiction) ‘*Recalling* that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes’ (para. 6); (principle of complementarity) ‘*Emphasizing* that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions’ (para. 10).

After a tentative definition of the terms ‘universal jurisdiction’ and ‘the principle of complementarity’, this article considers the relationship between them. It then underscores the obstacles to the enforcement of these principles, before ending with some possible remedies to minimize potential threats to the practical enforcement of universal jurisdiction.

## Definitions of the principles of ‘universal jurisdiction’ and ‘complementarity’

Even though the general meaning of these two principles is known, a definition of them provides a better understanding of their complexity and limits.

### Universal jurisdiction

#### *General meaning*

The principle of universal jurisdiction is classically defined as ‘a legal principle allowing or requiring a state to bring criminal proceedings in respect of certain crimes irrespective of the location of the crime and the nationality of the perpetrator or the victim’.<sup>3</sup> This principle is said to derogate from the ordinary rules of criminal jurisdiction requiring a territorial or personal link with the crime, the perpetrator or the victim.<sup>4</sup> But the rationale behind it is broader: ‘it is based on the notion that certain crimes are so harmful to international interests that states are entitled – and even obliged – to bring proceedings against the perpetrator, regardless of the location of the crime and the nationality of the perpetrator or the victim’.<sup>5</sup> Universal jurisdiction allows for the trial of international crimes<sup>6</sup> committed by anybody, anywhere in the world.<sup>7</sup> This

3 See e.g. Kenneth C. Randall, ‘Universal jurisdiction under international law’, *Texas Law Review*, No. 66 (1988), pp. 785–8; International Law Association Committee on International Human Rights Law and Practice, ‘Final Report on the Exercise of universal jurisdiction in respect of gross human rights offences’, 2000, p. 2. It should be noted that the principle of universal jurisdiction is not per se limited to criminal jurisdiction and could be extended, for instance, to civil responsibility. This is e.g. the case in the United States with the Alien Tort Act (28 U.S.C. para. 1350) and the well-known decision *Filartiga v. Pena-Irala* 630F2d876 (2d Cir. 1980). However, considering the framework of this article, only universal jurisdiction linked to individual criminal responsibility will be considered.

4 The territorial link has been gradually overcome by two criteria allowing for extraterritorial jurisdiction, such as jurisdiction over crimes committed outside the territory by the state’s own nationals (active personality jurisdiction) or crimes committed against a state’s own nationals (passive personality jurisdiction). This latter possibility has been challenged by some states.

5 Mary Robinson, ‘Foreword’, *The Princeton Principles on Universal Jurisdiction*, Princeton University Press, Princeton, 2001, p. 16.

6 International crimes are not precisely defined. There are offences recognized by international law as punishable by any country. Traditionally, piracy on the high seas is regarded as one of the first international crimes, grounded on the violation of international customary law. After the Second World War, the London Agreement of 8 August 1945 establishing the International Military Tribunal at Nuremberg set out international crimes issuing from both treaty law and customary law (crimes against peace, war crimes and crimes against humanity). Later, treaties and international conventions specified

derogation is traditionally justified by two main ideas. First, there are some crimes that are so grave that they harm the entire international community. Secondly, no safe havens must be available for those who committed them. Even though these justifications may appear unrealistic, they clearly explain why the international community, through all its components – states or international organizations – must intervene by prosecuting and punishing the perpetrators of such crimes. Universal jurisdiction is a matter of concern for everybody.

Historically, universal jurisdiction can be traced back to the writings of early scholars of note, such as Grotius,<sup>8</sup> and to the prosecution and punishment of the crime of piracy.<sup>9</sup> However, after the Second World War the idea gained ground through the establishment of the International Military Tribunal<sup>10</sup> and the adoption of new conventions containing explicit or implicit clauses on universal jurisdiction. The Geneva Conventions of 1949 are paramount in this regard, providing in unmistakable terms for universal jurisdiction over grave breaches of those Conventions.<sup>11</sup> International crimes were no longer to remain unpunished. The idea that in certain circumstances sovereignty could be limited for such heinous crimes was accepted as a general principle.<sup>12</sup> Later on, other international conventions and, to some extent, rules of customary law enlarged the principle's scope of application. This was confirmed by a number of cases, starting with the *Eichmann* case in 1961,<sup>13</sup> the *Demanjuk* case in 1985,<sup>14</sup> and more recently the *Pinochet* case in 1999<sup>15</sup> and the *Butare Four* case in 2001,<sup>16</sup> emphasizing that universal jurisdiction could lead to the trial of perpetrators of international crimes. International law empowered and in certain cases mandated states to

various forms of prohibited behaviour recognized as international crimes. Principle 2 of *The Princeton Principles on Universal Jurisdiction* reads: 1. For purposes of these Principles, serious crimes under international law include (1) piracy; (2) slavery; (3) war crimes; (4) crimes against peace; (5) crimes against humanity; (6) genocide; and (7) torture. 2. The application of universal jurisdiction to the crimes listed in paragraph 1 is without prejudice to the application of universal jurisdiction to other crimes under international law'. Robinson, above note 6.

7 Géraud de La Pradelle, 'La compétence universelle', in Hervé Ascencio, Emmanuel Decaux and Alain Pellet (eds.), *Droit international pénal*, Éd. Pédone, Paris, 2000, p. 974.

8 See Grotius, *De Jure Belli ac Pacis*, 1625, Vol. II, Book II, Chap. XXI, para. 3, 1–2.

9 See for instance *United States v. Smith*, 18 US (5 Weat.) 153 at 161–2 (1820).

10 Under the London Agreement of 8 August 1945, Article 1 provided for the jurisdiction of the Tribunal for crimes having no precise geographical location and Article 4 for the jurisdiction of national courts over other war criminals. As Eric David puts it, this has more to do with judicial co-operation between states than with universal jurisdiction (*Le droit des conflits armés*, 3rd edn, Bruylant, Brussels, 2002, p. 722). However, within these provisions the spirit of universal jurisdiction (no safe haven for perpetrators of international crimes) was already present.

11 Also sometimes called grave breaches of international humanitarian law. See common articles GC I, Article 49; GC II, Article 50; GC III, Article 129; GC IV, Article 146. See also the extension made by Article 85 of Additional Protocol I to the Geneva Conventions to the listed crimes.

12 See Supr. Ct of Israel, *Eichmann* case, at 298–300; Supr. Ct of Canada, *Finta*, 24 March 1994, ILR, 104, at 305.

13 *Eichmann* case, above note 12.

14 *Demanjuk v. Petrovsky*, US Court of Appeal, 6th Cir., 31.10.1985, ILR 79, 546.

15 House of Lords, 24 March 1999, [1999] 2 WLR 827 (HL).

16 Cour d'Assises de Bruxelles, 8 June 2001, available at <[http://www.asf.be/AssisesRwanda/fr/fr\\_VE](http://www.asf.be/AssisesRwanda/fr/fr_VE)> (last visited March 2006).



prosecute crimes that were regarded as harming the whole international community.

Nonetheless, implementation of the general principle remained difficult, as the principle of universal jurisdiction is an issue not only of international but also of national law. States are entitled to grant their own courts universal jurisdiction over certain crimes as a result of a national decision, and not only of a rule or principle of international law. Consequently, the universal jurisdiction principle is not uniformly applied everywhere. While a hard core does exist, the precise scope of universal jurisdiction varies from one country to another, and the notion defies homogeneous presentation. Universal jurisdiction is thus not a unique concept but could be represented as having multiple international and national law aspects that can create either an obligation or an ability to prosecute. It is therefore difficult to gain a clear picture of the overall situation.

### *Means of implementation*

The recognition of universal jurisdiction by the state as a principle is not sufficient to make it an operative legal norm. There are basically three necessary steps to get the principle of universal jurisdiction working: the existence of a specific ground for universal jurisdiction, a sufficiently clear definition of the offence and its constitutive elements, and national means of enforcement allowing the national judiciary to exercise their jurisdiction over these crimes. If one of these steps is lacking, then the principle will most probably just remain a pious wish. Several attempts to identify the content and concrete meaning of universal jurisdiction have been made through meetings of experts.<sup>17</sup> In practical terms, the gap between the existence of the principle and its implementation remains quite wide.

From a comparative law perspective, states implement the principle of universality in either a narrow or an extensive manner.<sup>18</sup> The narrow concept enables a person accused of international crimes to be prosecuted only if he or she is available for trial, whereas the broader concept includes the possibility of

17 See e.g. 'Final report', above note 4. The following fourteen principles are usually accepted as the guiding principles on universal jurisdiction. They have been inspired by the Princeton principles, above note 5, and are also referred to by non-governmental organizations (NGOs) promoting the principle of universal jurisdiction. See Amnesty International, 'Universal Jurisdiction: 14 Principles on the Effective Exercise of Universal Jurisdiction', May 1999, AI Index: IOR 53/01/99: 1. State courts should be able to exercise jurisdiction over grave human rights violations and abuses and violations of international humanitarian law 2. No immunity for persons in official capacity 3. No immunity for past crimes 4. No statutes of limitation 5. Superior orders, duress and necessity should not be permissible defences 6. National laws and decisions designed to shield persons from prosecution cannot bind courts in other countries 7. No political interference 8. Grave crimes under international law must be investigated and prosecuted without waiting for complaints of victims or others with a sufficient interest 9. Internationally recognized guarantees for fair trials 10. Public trials in the presence of international monitors 11. The interests of victims, witnesses and their families must be taken into account 12. No death penalty or other cruel, inhuman or degrading punishment 13. International co-operation in investigation and prosecution 14. Effective training of judges, prosecutors, investigators and defence lawyers.

18 See Antonio Cassese, *International Criminal Law*, Oxford University Press, Oxford, 2003, p. 285.



initiating proceedings in the absence of the person sought or accused (trial *in absentia*).<sup>19</sup> This deeply affects the way in which the principle is implemented in actual fact. International law sources often refer to the narrow concept,<sup>20</sup> but the decision to refer to the broader concept is quite often<sup>21</sup> a national choice. However, even though some states such as Belgium or Spain have made some efforts to give concrete effect to the principle of universal jurisdiction by amending their penal code, it has in most cases remained unimplemented, thus more theoretical than practical.

## Principle of complementarity

### *General meaning*

The principle of complementarity can be defined as a functional principle aimed at granting jurisdiction to a subsidiary body when the main body fails to exercise its primacy jurisdiction.

This is nothing other than a principle of priority among several bodies able to exercise jurisdiction.<sup>22</sup> Within the framework of universal jurisdiction, the principle of complementarity – even if not new – regained some interest with the adoption of the Rome Statute in 1998, in which the principle of primacy of jurisdiction recognized in the statutes of the two earlier ad hoc tribunals, the International Criminal Tribunals for the former Yugoslavia and for Rwanda (ICTY and ICTR respectively), was reshaped into a principle of complementarity for the benefit of member states.<sup>23</sup> As stressed by M. El Zeidy,<sup>24</sup> the principle of complementarity in international criminal law requires the existence of both national and international criminal justice systems functioning in a subsidiary manner for curbing crimes of international law: when the former fails to do so, the latter intervenes and ensures that the perpetrators do not go unpunished.

The principle of complementarity is based on a compromise between respect for the principle of state sovereignty and respect for the principle of universal jurisdiction, in other words on acceptance by the former that those who

19 On this issue of trial *in absentia* see the ICJ case *Democratic Republic of Congo v. Belgium*, Warrant Arrest 11 April 2000 Case, 14.02.02. ICJ Rep. 2002.

20 See, e.g., the four Geneva Conventions of 1949 and 1977 Additional Protocol I thereto regarding grave breaches of those Conventions (i.e. of international humanitarian law) or Article 7 of the Convention against Torture. The narrow concept seems to be given preference by a number of international treaties as being more realistic.

21 There are some exceptions, such as Regulation 2000/15 of the UN Transitional Administration in East Timor (UNTAET) (see Articles 2.1 and 2.2), but this regulation, dedicated more to a specific situation, is closer to a municipal law regulation than to an international instrument.

22 Bartram S. Brown, 'Primacy or complementarity: Reconciling the jurisdiction of national courts and international criminal tribunals', *Yale Journal of International Law*, Vol. 23, p. 386. 1998.

23 But see, on the limited impact of this change: Michael A. Newton, 'Comparative complementarity: Domestic jurisdiction consistent with the Rome Statute of the ICC', *Military Law Review*, Vol. 167 (March 2001), p. 20.

24 Mohamed M. El Zeidy, 'The principle of complementarity: A new machinery to implement international criminal law', *Michigan Journal of International Law*, Vol. 23 (Summer 2002), p. 870.

have committed international crimes may be punished through the creation and recognition of international criminal bodies. The ICC Statute is of course an accurate illustration of this idea and probably the most sophisticated. The history of its adoption is a reminder of how states wanted to keep control of the situation and act as primary players, not as spectators, showing their concern for respect for the principle of sovereignty.<sup>25</sup> However, the promoters of international justice regarded the principle of complementarity as a means of giving the last word to the International Criminal Court when states fail to fulfil their obligations in good faith. This is probably where the balance lies in the principle of complementarity between the states and the Court.

Even though the principle of complementarity can be identified elsewhere,<sup>26</sup> the Rome Statute symbolizes its implementation. First and foremost, the principle of complementarity is a means of attributing primacy of jurisdiction to national courts, but includes a 'safety net' allowing the ICC to review the exercise of jurisdiction if the conditions specified by the Statute are met. Second, the principle of complementarity in the ICC Statute is not only a general principle as stated in the preamble<sup>27</sup> and in Article 1, but also includes concrete means of implementation, for the Statute lays down conditions relating to the exercise of jurisdiction.<sup>28</sup> They allow the Court some scope for possible interpretations and could lead it to be regarded as an arbitrator.<sup>29</sup> The principle of complementarity will – beyond any doubt – leave member states free to initiate proceedings, but will also leave the ICC to decide whether the process has been satisfactory or not: 'There must be an impartial, reliable and depoliticised process for identifying the most important cases of international concern, evaluating the action of national justice systems with regard to those cases and triggering the jurisdiction of the ICC when it is truly necessary.'<sup>30</sup> The responsibility therefore rests on the shoulders both of states and of the ICC. The challenge will be to strike the right balance!

### *The legal regime of the principle of complementarity within the International Criminal Court Statute*

As J. T. Holmes puts it, 'the implementation of the principle of complementarity generates two practical questions: (1) how does the Court become aware that there are conflicts between the exercising of its jurisdiction over a situation or case and

25 See e.g. Cassese, above note 18, p. 351.

26 Under the Statutes of the ICTY (Article 9) and the ICTR (Article 8), another version of the complementarity principle was adopted. National courts and the international tribunals were granted concurrent jurisdiction to try international crimes referred to in the Statutes, but in the event of dispute, the Statutes gave primacy to the international tribunals.

27 See preambular para. 10: 'The International Criminal Court ... shall be complementary to national jurisdictions.'

28 As described in Articles 17 f.

29 John T. Holmes, 'Complementarity: National courts versus the ICC', in A. Cassese, P. Gaeta, J. R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, Oxford, 2002, ch. 18.1, p. 672.

30 Brown, above note 22, p. 389.

the assertion and assumption of jurisdiction by a state? (2) what does the Court do when faced with such a conflict?<sup>31</sup> The principle of complementarity in the ICC Statute is not a mere statement. It entails a precise legal regime calling for the issue of jurisdiction to be evaluated by applying conditions of both substance and admissibility. First, the complementarity issue can be raised only if the crime falls within the conditions defined in Articles 5 to 8 of the Statute,<sup>32</sup> which oblige the ICC to examine substantive aspects of the crime in order to assert jurisdiction over a specific case. Second, the Statute requires the fulfilment and analysis of several conditions related to admissibility: ‘genuine investigation and prosecution’,<sup>33</sup> ‘unwillingness’ and ‘inability’ to prosecute.

The lack of a genuine national investigation and prosecution should be regarded as the core criterion for the exercise of jurisdiction by the ICC. If an international crime has been genuinely prosecuted and tried, the ICC should not have jurisdiction. However, the question remains of knowing what a ‘genuine prosecution’ is. It can be imagined that ‘genuine’ means real, not faked. This could, however, be subjective if not more clearly framed. For instance, can it be said that the national prosecution is not ‘genuine’ if it takes more time than it would before the ICC? The idea of the promoters of the principle of complementarity was in fact to make sure that international crimes would be effectively prosecuted and punished by states, but the word ‘genuine’ seemed more neutral than ‘effective’ or ‘efficient’.<sup>34</sup> It will be the prosecution’s responsibility to demonstrate a lack of genuine investigation or prosecution. It must be recognized that such an appreciation could remain open to discussion and has to be considered hand in hand with the other conditions of unwillingness and inability.

Unwillingness is quite simple to understand but is more complicated to evaluate. The meaning of ‘unwillingness to act’ was laid down in Article 17.2 of the ICC Statute.<sup>35</sup> This provision cites three criteria for determining whether

31 Holmes, above note 29, ch. 18.1, p. 671.

32 This limits implementation of the principle of complementarity to ‘the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression’ (Article 5.1). The crime of aggression must be excluded from the Court’s jurisdiction for the time being, as it is not yet defined (Article 5.2).

33 Article 17.1 of the ICC Statute provides criteria of admissibility linked to the principle of complementarity: 1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3; (d) The case is not of sufficient gravity to justify further action by the Court.

34 See e.g. the analysis by J. T. Holmes comparing the ICC Statute with the ILC Draft Statute, above note 29, pp. 673–4.

35 Article 17.2 states: ‘In order to determine *unwillingness* in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable: (a) The proceedings were or are being undertaken or the national

unwillingness exists: (i) shielding a person from criminal responsibility; (ii) unjustified delay in the proceedings which is inconsistent with the intent to bring the person to justice; and (iii) proceedings not conducted independently or impartially and in a manner inconsistent with bringing the person to justice. These criteria could give a better idea of what unwillingness is, but they also are rather subjective in terms of appreciation. Consequently, the implementation process will also define their actual content. Unwillingness does, however, show a state's lack of a positive attitude towards prosecuting and trying perpetrators of international crimes. In some cases there will be no doubt, as the states concerned do not even want to conceal their non-intention to bring some criminals to justice. In other cases, however, a question of threshold will be unavoidable. The Court's responsibility will go as far as discussing all the elements in order to determine whether the unwillingness criterion is met. For instance, the existence of some form of immunity or amnesty could indicate unwillingness to prosecute or try the beneficiaries of those clauses. If a 'presumption of unwillingness' can be established in order to prosecute the perpetrators of such crimes, situations will have to be evaluated on a case-by-case basis, as there are many intermediate situations in which such immunities or pardons are not granted automatically and for any type of crimes.

Inability is defined under Article 17.3 of the ICC Statute<sup>36</sup> in more simple terms than unwillingness. It first includes the non-functioning of a judicial system to such an extent that investigations, prosecutions and trials of perpetrators are impossible. As underlined by certain scholars,<sup>37</sup> this is a fact-driven situation, since inability can be the result of the physical collapse of the judicial system (no more structures) or the intellectual collapse thereof (no more, or only biased, judges or judicial personnel). Inability also includes situations in which the conclusion of trials is impossible, that is, the judicial system can still function but cannot face the challenge of exceptional circumstances usually resulting from a crisis. Here, too, the threshold will be more difficult to evaluate, but will probably be reached when the number of cases to be heard manifestly exceeds the number with which the judicial system could usually cope in peacetime situations.

Article 17.2 of the Rome Statute also provides for two other admissibility criteria.<sup>38</sup> One is quite classic: it is the *non bis in idem* principle, according to which

decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5; (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice; (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice' (emphasis added).

36 Article 17.3 states, 'In order to determine *inability* in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings' (emphasis added).

37 Holmes, above note 29, p. 677.

38 Article 17.1 states, '... (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3; (d) The case is not of sufficient gravity to justify further action by the Court'.

a person cannot be tried twice for the same crime. This does not call for any particular comment except that, according to the unwillingness criterion, the first trial should not be used by a state as a means to shield the perpetrator of an international crime. The second criterion is the gravity or seriousness of the crime, according to which only the most important crimes should be tried before the ICC. These two conditions seem logical and easy to understand. However, they offer another source of discretionary power to implement the principle of complementarity and shape the criminal policy of the ICC.<sup>39</sup>

While all these criteria still give rise to numerous uncertainties regarding their implementation, they do also give an idea of the possible concrete implementation of the principle of complementarity. More importantly, they illustrate how the ICC would be bound to make certain tests linking the issue of jurisdiction to those of admissibility and substantive law. Even though jurisdiction is independent from other conditions, they must be assessed in combination with it in order to be interpreted and applied.

### *The principle of complementarity within the national criminal system*

The principle of complementarity should not, however, be analysed only in the light of the provisions of the ICC Statute. Each national context must be taken into account, as it will influence the state's ability to exercise its jurisdiction over international crimes. This implies an analysis of national criminal justice systems to evaluate their ability to assert jurisdiction. Three elements should be examined: (i) the technical means offered by the state to prosecute these types of crime; (ii) the working methods of the criminal justice system; and (iii) the procedural rules and rules of evidence applicable to judicial proceedings. Without going into detail, it can logically be assumed that the inherent differences between legal systems will influence the way in which the principle of complementarity will be implemented. It will therefore not be uniformly applied. This must be acknowledged as a normal interaction between the international and national legal systems and taken into consideration.

Although simple to understand in definition, the principle of complementarity reveals its complexity in the confrontation with national systems. Conceived as a means of improving implementation of the principle of universal jurisdiction, the principle of complementarity enshrined in the ICC Statute was designed to transform into reality the prosecution of international crimes too often set aside for want of such means. Yet this must not obscure the remaining challenges and difficulties.

39 Discretionary power is shared between the Prosecutor's office, the Pre-Trial Chamber and possibly the UN Security Council. The role of member states in this debate will probably be limited in case of disagreement.

## The challenges faced by the principles of universal jurisdiction and complementarity

Even though the relationship between the principle of universal jurisdiction and the principle of complementarity can be understood from their definitions, a deeper analysis of their interaction, both theoretical and practical, remains necessary. This should lead to a better assessment of the current situation and allow the exact role to be played by the principle of complementarity in the near future to be evaluated.

### General acceptance of the principle of universal jurisdiction

Despite its inherent difficulties, the principle of universal jurisdiction remains widely accepted by states owing to the specific nature of international crimes. No state can officially uphold these crimes and the absence of punishment for them! This truly universal consideration is one of the main strengths of the principle. This being said, however, difficulties arise when it comes to its concrete implementation. Its precise meaning is to some extent vague, and its real legal implications continue to be discussed. Can it be deemed equivalent to a general principle of law entailing simply an ‘obligation to provide means’ that must be fulfilled? Or does it also include some operational guidelines to be followed by the international community as a whole? Have not general references to this principle outside the legal sphere – especially through the media or by its inclusion in politics – weakened its effectiveness?

Asking these questions shows how necessary it is to situate this principle within a more legal framework in order to determine its normative value. In seeking to identify the origin of universal jurisdiction, three possible sources can be considered: international agreements, international customary law and national law.

International conventions sometimes impose an obligation to prosecute and punish those who have committed international crimes.<sup>40</sup> This is the case in the Geneva Conventions through the notion of grave breaches of international humanitarian law.<sup>41</sup> The obligation is clearly stated in the conventions and

40 See, e.g., Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 4 Sept. 1956, 266 UNTS 3; International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted 30 Nov. 1973, 1015 UNTS 244; Convention for the Suppression of Unlawful Seizure of Aircraft, opened for signature 16 Dec. 1970, 10 ILM 133; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, opened for signature 23 Sept. 1971, 10 ILM 1151; International Convention against the Taking of Hostages, adopted 12 Dec. 1979, G.A. Res. 34/146, UN GAOR, 34th Sess., Supp. No. 99, UN Doc. A/34/819, 18 ILM 1456 (1979); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 10 Dec. 1984, S. Treaty Doc. N. 100-20, 1465 UNTS 85. For more details, see H. Osofsky, ‘Foreign sovereign immunity for severe human rights violations: New directions for common law based approaches’, *New York International Law Review*, Vol. 11 (1998), p. 35.

41 Common articles GC I, Art 49; GC II, Article 50; GC III, Article 129; GC IV, Article 146: The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention

imposes on the contracting state a duty to act (obligation of result), but leaves the state to determine the means to enforce it. This can create some difficulties, as each national system is responsible for fulfilling this twofold obligation of both searching for the criminals concerned and bringing them to trial. The inclusion of universal jurisdiction in international conventions – provided that no reservations can be made – implies that the state has the duty and responsibility to enforce it but offers no guarantee that effective trials and punishments will indeed take place, since national legal systems apply different procedural and evidence rules.

Customary international law can also be a source for the recognition of universal jurisdiction when it comes to international crimes.<sup>42</sup> However, it just provides for the principle itself and does not necessarily contain precise directives or guidelines for the implementation of universal jurisdiction. This leads to a weaker practical normative constraint for the state, even though theoretically no value distinction should be made between customary and conventional provisions; between the two, there is only a difference of degree of precision in normative terms. Customary international law can be viewed in two ways. It can be seen as a general obligation to which conventions later give concrete effect through more precise obligations. It can also be seen as an extrapolation of conventional rules so widely accepted that non-party states consent to be bound by the principle as equivalent to a general rule. With regard to universal jurisdiction, this could be the situation of states which refuse to become party to a specific instrument for political reasons, but accept the substance of that principle. Combined rules of international customary law do provide support for the implementation of both universal jurisdiction and the

defined in the following Article. *Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case. Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article...* (emphasis added).

- 42 'Rule 157: States have the right to vest universal jurisdiction in their national courts over war crimes', Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law. Vol. 1: Rules*, Cambridge University Press, Cambridge, 2005, p. 604. See also more generally chapter 44 of this study (pp. 568–621) dealing with rules related to war crimes. Here are the international customary rules that could be related to the exercise of universal jurisdiction: Rule 156: serious violations of international humanitarian law constitute war crimes; Rule 158: states must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects; Rule 159: at the end of hostilities, the authorities in power must endeavour to grant the broadest possible amnesty to persons who have participated in a non-international armed conflict, or those deprived of their liberty for reasons related to the armed conflict, with the exception of persons suspected of, accused of or sentenced for war crimes; Rule 160: statutes of limitation may not apply to war crimes; Rule 161: states must make every effort to co-operate, to the extent possible, with each other in order to facilitate the investigation of war crimes and the prosecution of the suspects.



principle of complementarity, but will not provide the state with precise guidelines or a ready-made course of action.

Universal jurisdiction can also be accepted by states as a voluntary commitment, within their municipal framework, to punish some crimes for which no general international obligation to do so exist. Universal jurisdiction then derives from a national commitment to the international community by one state that is, for instance, not party to certain conventions. To recognize universal jurisdiction in this way can create an asymmetrical obligation for some states. This could be the case of states not party to the ICC Statute, although under no international obligation to do so.

Analysis of the sources of universal jurisdiction would thus appear to show that the principle is not self-sufficient enough to be implemented. It needs both general recognition and measures of implementation, or at least clear obligations to identify the duties of states. In this regard, it would be more accurate to consider that the principle of universal jurisdiction should be completed by legal norms giving precise grounds and designating the conditions or the exact nature of the obligations. This would give rise to multiple grounds for universal jurisdiction, or 'universal jurisdictions'. Each one would be a means in itself. This splitting of the principle of universal jurisdiction is necessary to create clearer state obligations. It is not in itself revolutionary to say this, but it could explain why the principle frequently remains so disappointing in practice. However, if international law were to make progress in formulating a concrete definition of those obligations, the discretionary power consubstantial with state sovereignty would still leave an incompressible margin of appreciation when it comes to final implementation of the provisions.

Another aspect often left out of the analysis of universal jurisdiction is its twofold belonging, to both international law and municipal law. Universal obligation entails a first duty for the state to organize – and if need be, to amend – its own legal system to make the exercise of universal jurisdiction possible by national courts. It must not be forgotten that universal jurisdiction is quite abnormal for national criminal courts, and that it could be difficult for judges to implement it without precise municipal provisions framing or organizing that empowerment. This aspect of universal jurisdiction can in fact impair the whole system or its efficiency if national legislation, most often statutory provisions, is not adopted. Universal jurisdiction can become – and sometimes is – a fake principle owing to a total or partial lack of enactment. It can even be problematic when the national constitutional text conflicts with universal jurisdiction obligations, as it could for instance with regard to immunities or the right to grant pardon; these are often included in a general manner and sometimes left to the discretion of the heads of state or government, although there should normally be exceptions where international crimes are concerned. Quite often, however, the clash between international and constitutional obligations does not take place because of the limited overlap of their respective scope. This does not mean that conflict between them cannot exist!



### *Relationship between the principle of universal jurisdiction and the principle of complementarity*

Within this general framework the principle of complementarity – as enshrined in the ICC Statute – should be considered as a safety valve allowing for rationalization and the improved efficiency of the principle of universal jurisdiction. The principle of complementarity first of all respects two functioning principles of international law, namely the principle of state sovereignty and the principle of primacy of action regarding criminal prosecutions.<sup>43</sup> Second, the principle of complementarity offers the state the right to exercise universal jurisdiction and to decide what to do with the perpetrator according to its own penal rules. As the President of the Rome Conference put it, referring to the penalties that could be imposed on those who commit international crimes, ‘... in accordance with the principle of complementarity between the Court (the ICC) and national jurisdictions, national justice systems have the primary responsibility for investigating, prosecuting and punishing individuals, in accordance with their national laws for crimes falling under the jurisdiction of the ICC’.<sup>44</sup> The principle of complementarity must be neither underestimated nor overestimated. It will not remedy all deficiencies in the efforts of the international community or individual states to try perpetrators of international crimes. It is intended to help states and the international community, through the Rome Statute, the better to enforce the principle of universal jurisdiction. It can be seen as a procedural tool allowing the international community to take back the initiative if states are unable or omit to exercise their jurisdiction. The principle of complementarity is intended to offer states and the international community a possible way out when the absence of trial or punishment for international crimes would be unacceptable. That possibility could have a deterrent effect on perpetrators who otherwise feel safe because they know that no prosecution will be conducted against them. It is not certain that effective prosecution will be initiated, but they will have to live with a permanent sword of Damocles over their heads ... Although this is probably not enough to stop those who commit war crimes, crimes against humanity, genocide or any other international crime, at least the mechanism does exist and should be backed up as a means of progress towards a better implementation of international humanitarian and human rights law.

43 This is an integral part of the ICC Statute. As outlined by some authors (see e.g. Kriangsag Kittichaisaree, *International Criminal Law*, Oxford University Press, Oxford, 2001, pp. 25 f.), this was not the case for the ICTY and the ICTR, since their statutes provided for primacy of the international ad hoc Tribunal and complementarity or at least concurrent jurisdiction for the national courts. Under the ICC Statute the system is inverted.

44 See Rome Conference press release L/ROM/22, 17 July 1998. The statement was made in relation to the possibility for states to impose the death penalty for these types of crimes. According to Article 80 of the Statute, this question is left to the state’s own legal system and is not affected by the ICC Statute; it is not directly connected to jurisdiction but shows how procedural aspects and the overall criminal justice system are linked to the issue of jurisdiction.

The principle of complementarity could also help to resolve some dilemmas that are not necessarily the result of legal failures but are related instead to diplomatic or political problems.

The principle of complementarity also offers an alternative solution to internal legal dilemmas. Even though universal jurisdiction is the responsibility of the state, the internal legal or political system can make the assertion of jurisdiction impossible for reasons outside the state's volition. If the state considers its jurisdiction impossible to exercise, the principle of complementarity offers a possibility of handing it over. Universal jurisdiction can then be regarded as initiated by states through an active use of that principle.<sup>45</sup> For instance, of the current cases brought before the ICC by the end of 2005,<sup>46</sup> three revealed the state's incapacity to prosecute people suspected of international crimes. In those cases (the Democratic Republic of the Congo, Uganda and the Central African Republic) the matter was referred directly to the ICC by the state, which considered that trials of such criminals before its own courts would be impossible; the latest case – Sudan – was referred to the Court by the UN Security Council. In all these cases the Prosecutor did not himself initiate the prosecutions, showing that the principle of complementarity cannot be seen as a one-way principle but rather as offering possibilities of co-operation between the state authorities and the ICC.

In terms of the overall situation, the principle of complementarity represents progress towards the prosecution of international crimes and should rule out any hope of safe havens for those who have committed them. Yet it would certainly be mistaken to see the principle of complementarity as a final remedy to the inadequacies of universal jurisdiction. It should instead be regarded as an interim stage in improving the situation rather than as a definitive achievement. It is a means, not a goal! Like any other means, it needs political will to be effective and efficient. Moreover, the principle itself is not without handicaps.

## **The inherent limits to the principle of complementarity**

There are both subjective and objective reasons for limiting the effectiveness of the principle of complementarity in enhancing the enforcement of universal jurisdiction. They cannot be ignored.

### **Objective reasons**

Objective reasons derive from both the international and the national system. Within the international legal system, two kinds of problems can be identified: the

45 As opposed to a 'passive use of the principle of complementarity' in which the state will not take any initiative if unable or unwilling to try the perpetrators of international crimes. A positive attitude will show the concern of states to try those criminals, seeking to find through the ICC the structure and means they do not have.

46 On these cases see <<http://www.icc-cpi.int/cases.html>> (last visited March 2006).

lack of precise definitions of international crimes, and the conditions of implementation of the principle of complementarity as defined in the ICC Statute.

The lack of precise definitions and enumeration of elements of international crimes may seem a rather surprising problem, since the list of crimes in the ICC Statute under Articles 6 to 8 is quite extensive and detailed. However, when one looks at the definition of crimes, qualification of the crime as international by the national judge can be difficult, as the specific elements qualifying the crime can be relatively inadequate compared with the national system. The dissemination by the Court of its own practice and case-law could help to close the gap, but this weakness cannot be ignored, especially in the present early stages of the Court's work.<sup>47</sup> A communication policy will be needed, for national judges are not accustomed to 'open definitions' or 'elements of crimes'. While the danger should not be exaggerated, there is a risk of disparity between states in their implementation and appreciation of definitions and elements of crimes that could create a disparate implementation of universal jurisdiction.

As defined by the ICC Statute in Articles 1, 15 and 17 to 19, the principle of complementarity is precisely framed through various conditions of implementation. This should allow for better implementation. However, appreciation of the said conditions could, as mentioned above, be quite difficult to assess: what exactly is meant by 'unwillingness' or 'inability' to prosecute? These open terms leave the prosecution authority with discretionary power to decide on their content and framework of application. They are sufficiently broad to leave room for a selection of cases to be brought before the Court and to regard the principle of complementarity as a tool to define a 'criminal policy'. This is not abnormal *per se*, as the definition of a criminal policy is consubstantial to any prosecution authority, but it does mean that the principle of complementarity will be unavoidably selective.<sup>48</sup> Moreover, the discretionary power of the Prosecutor will be reviewed by the Pre-Trial Chamber, leaving room for the exercise of another discretionary power. To this picture should be added the fact that the Security Council may also initiate proceedings leading to indictments,<sup>49</sup> thus allowing for the introduction of yet another appreciation of the principle of complementarity. This could lead to a fragmentation of the meaning of the principle of complementarity by different types of appreciation.

Within the national legal systems there are also objective difficulties that cannot be ignored: the definition of international crimes in domestic legislation should be in line with their definition at the international level. This is an obvious requirement and, although a certain amount of time is always needed for

47 The case-law of the ICTY and ICTR will obviously help as a tool of reference. However, from a purely legal point of view, it must be recalled that the ICC will be free to adopt or reject the reasoning of the *ad hoc* tribunals. They have an interpretative value, not a normative one.

48 For example, cases could be chosen not according to the crimes but to the ease of gathering evidence or the ability to conduct successful prosecutions.

49 See Article 13(b) of the ICC Statute.

adaptation, it should be done as quickly as possible. But this is not always the case, and some international crimes are still differently defined in the two legal systems. For instance, some war crimes are nationally qualified as crimes against humanity, or genocide is sometimes considered as a crime against humanity. This matter should be addressed, and the communication role of the ICC will be important in terms of proposals to resolve the dilemma. It is once again evident here that the principle of complementarity is linked to the substance of the law. There could be some serious contradictions in implementation of the principle of complementarity, even if states want to respect it, since they can disagree on the conditions of implementation by arguing that some crimes are not covered by the Statute.

Another objective risk of disagreement on the principle of complementarity lies in the inherent differences between national legal systems. Even if international crimes are defined in the same way at the international and national level, differences in criminal procedure and admissibility of evidence may lead to divergences of appreciation. For instance, if one person is accused of an international crime but insufficient evidence is gathered or the rules for a fair trial are not met, national judges may be reluctant or refuse to prosecute the accused. They would comply with their national judicial framework, but not necessarily with the international requirement. Would the ICC accept such a situation, or would it initiate proceedings on grounds of unwillingness or inability to prosecute war criminals? Whatever the situation may be, this risk must not be underestimated and there is currently no solution for such a potential conflict. The idea could perhaps be to have special, common rules of procedure and/or evidence for such international crimes to ensure a harmonized approach. But such is not yet the case today!

Immunities and pardons granted at national level, although banned for perpetrators of international crimes owing to the very nature of those crimes, still raise questions regarding the principle of complementarity. Whereas a general amnesty can never be an obstacle to trials of perpetrators of international crimes before the ICC, there are a number of intermediate situations where these issues will in practice weaken the principle of complementarity. Although amnesties are prohibited for certain international crimes, for example torture, they may be granted individually at national level within the framework of a quasi-judicial process. Quite often these immunities are constitutionally granted to heads of states or high-level state officials in a general manner and without any restriction.<sup>50</sup> How will these cases be regarded by the ICC? It is difficult to say! However, the ICC, through the Office of the Prosecutor, may also consider such situations and decide that it is in the interest of justice not to try certain perpetrators.<sup>51</sup> Another possible issue related to the principle of complementarity would be the case of a perpetrator of international crimes who is tried by a national court, convicted and subsequently granted pardon. In such a case, it could be difficult for the Court to

50 See the *Yerodia case (DRC v. Belgium: The Warrant of Arrest from the 11th of April 2000 Case, ICJ)*, 14 February 2002), where this issue was discussed.

51 See Article 53.2 of the ICC Statute.

show that the conditions for admissibility laid down in Article 17 of the ICC Statute are met.<sup>52</sup>

### *State structures and the influence of political regimes on the possible indictment of perpetrators of international crimes*

The constitutional system of a state may give complete independence to the judicial power. There is consequently a risk of disagreement between the various authorities on the prosecution of an international crime. Even if the executive or legislative authorities are in favour of prosecuting an international criminal, there could be some disagreement from the point of view of the judiciary. The reverse is also true, as was illustrated by the Belgian situation with regard to implementation of the law on universal jurisdiction: although amended in 1999, the relevant 1993 Act proved embarrassing for the authorities.<sup>53</sup> Since an investigation must be initiated when there are allegations of international crimes, the judicial authority is bound to do so. This should favour the prosecution of international crimes, but in terms of the principle of complementarity there are two contrasting risks. The first is a possible deadlock between the state authorities, leading to a crisis between the state and the ICC if the national judiciary sticks to its own rules. The second is a possible reluctance of the executive authority (government) to intervene that could complicate their diplomatic relations. In either case, these risks could increase the difficulties in the relationship between the Court and the state.

### *National judicial structures*

The national judicial system can also be a source of complications if the jurisdiction of international crimes is assigned to specific courts, or on the contrary granted to ordinary courts. International crimes are often first and foremost crimes *mala in se* (acts which are wrong or immoral in themselves), meaning that they can frequently be tried directly under a more general indictment.<sup>54</sup> Second, if international crimes fall within the framework of an armed conflict, exclusive jurisdiction could be granted to military courts that

52 See Holmes, above note 29, p. 678. The hypothetical case described by Holmes is quite interesting. The author suggests that if a perpetrator has been prosecuted, tried, punished and later pardoned, it would be very difficult in certain cases to offer evidence that Article 17 conditions had not been met when the trial took place before the national court.

53 Even though the principle of complementarity was not at stake in the *DRC v. Belgium* case (above note 50), the limits of *universal jurisdiction v. realities of diplomacy* showed up. The ICJ did not expressly examine the issue of universal jurisdiction *in absentia*, and it could hardly be said that the decision sets aside this issue. However, the case itself as well as some other indictments against politicians known worldwide led to the amendment of the 1993/1999 Act on Universal Jurisdiction in 2003. See David, above note 10, p. 817; M. Halberstam, 'Belgium's universal jurisdiction law: Vindication of international justice or pursuit of politics?', 2003 *Cardozo Law Review*, Vol. 25, p. 247.

54 'A murder remains a murder!' This occasionally explains the reluctance of some states to bring in line their legislation when they become party to treaties relating to international crimes. However, the specific nature of international crimes must be acknowledged, as it could influence the gravity of the crime. This is why a specific, separate category of offences needs to be established for these crimes in

could be tempted to moderate or mitigate the sanction for such a crime. The question will then not be about the 'genuine prosecution or trial' but about the difference of approach of ordinary courts and military courts. This issue was central to the *Calley* case,<sup>55</sup> in which the reduction of sanction by the Appeal Court raises the question of unwillingness to try the accused. If such a case were to be heard today, how would the principle of complementarity come into play? Does it mean that the possible severity of the sanction will influence the issue of jurisdiction? It might well do so, considering that the appreciation made by a military court could incorporate a more indulgent understanding of the situation of the accused.

Another type of challenge faced by the principle of complementarity lies in the diversity of procedures for extradition and judicial co-operation between states. Extradition and judicial co-operation are obviously aimed at improving the enforcement of universal jurisdiction. However, even though there are some examples of regional co-operation, extradition and judicial co-operation are still mainly based on bilateral relationships between states. Consequently, there can be differences between the conditions set in the respective texts. One usual dilemma is the exclusion of extradition for political crimes. This should normally have no effect on international crimes, but in a number of cases the argument could be used to prevent the extradition from taking place, and differences of appreciation between the authorities can weaken the judicial process. Another side-issue is the discretionary power granted to the executive to decide whether the extradition is appropriate. This is far from being a purely theoretical issue, as was shown by the *Pinochet* case.<sup>56</sup>

### Subjective reasons

Not only are subjective difficulties linked to legal aspects of the relationship between universal jurisdiction and the principle of complementarity; they will obviously also influence the implementation of those principles and therefore cannot be ignored. Like the objective reasons, subjective reasons are of both an international and an internal nature.

### *International law reasons*

An adequate definition of international crimes and adherence to the Rome Statute will not be sufficient to ensure the prosecution of those crimes. One of the very first conditions for an efficient prosecution of international crimes is the existence

order to avoid mixing them up with ordinary crimes. If such confusion were to arise, it would undoubtedly have repercussions on universal jurisdiction and the principle of complementarity.

55 *United States v. William L. Calley, Jr*, US Court of Military Appeals, 21 December 1973, 22 USCMA 534 (1973).

56 Above note 15. Despite the British judiciary's approval of extradition for the former Chilean head of state, the government did not act on it for medical reasons.

of an efficient judicial system, that is, functioning courts with competent judges. But this is not always the case, especially after an armed conflict or crisis has disrupted the country. An assessment should be made in such conditions, but chances are high that both universal jurisdiction and the principle of complementarity will be blurred if viable structures are lacking. The danger will increase as the number of crimes rises. It should not be underestimated, for although there is always the possibility of setting up an ad hoc system (international or mixed), this will depend on the will of the international community. If the ICC is left with the principle of complementarity alone – and provided that the country concerned will co-operate – its role will probably be confined in practice to a small number of cases, with no guarantee that investigations will be possible and sufficient evidence gathered. The ICC cannot compensate for the deficiencies of states or the international community on a large scale.

There is also a high risk of unequal treatment between states that could lead to bargaining between them, especially those not party to the Rome Statute. Considering that international crimes are theoretically subject to universal jurisdiction but cannot necessarily be tried in practice,<sup>57</sup> how effective will the principle of complementarity actually be? Inequality can be the result of contradictory needs for the state. If, for instance, it is a developing country, adherence to the ICC Statute or concluding an agreement under Article 98 thereof can be a means of negotiating economic support in exchange. International relations and politics should not be ignored in this debate. They clearly play a part beyond the adherence of states to general principles. The risk of creating ‘prosecution-proof zones’ for perpetrators of international crimes, with few means of compelling the state to comply with its ‘universal jurisdiction’ obligations, is considerable. The strength of states and the positions they adopt have an obvious influence here.<sup>58</sup>

Another subjective aspect has to do with the overall political situation of each country. It must be kept in view, for the nature of political regimes, depending on the type of separation of powers and the existence of checks and balances (authoritarian or democratic regime), will also affect the implementation of the two principles. Historically, the principle of complementarity is quite new compared with the often long-standing relations between states. Therefore to ignore the individual and global situation of each state and the effect on it of the implementation of the principle of complementarity would be unrealistic. For example, the proximity of two countries could make trials for international crimes difficult if such prosecutions would have too deep and negative an impact on relations between those countries, leading to a crisis that could be worse than the trials themselves. Beyond official speeches in favour of prosecutions and

57 Due to the pressure of other states making their economic support conditional on non-co-operation with the relevant institutions.

58 See Henry J. Steiner, ‘Three cheers for universal jurisdiction – or is it only two?’, *Theoretical Inquiries in Law*, Vol. 5 (2004), pp. 201 f. and 229 f.



co-operation with international bodies, there is a geopolitical dimension that cannot be ignored and could create a high risk of inaction.

The attitude of the international community must not be overestimated either. Behind the official consensus that international criminals should be brought to trial, *realpolitik* resurfaces and the situation is viewed differently. The power granted to the UN Security Council to refer a matter to the Court<sup>59</sup> serves as an example. It could be seen as another positive aspect of the principle of complementarity being applied to give greater concrete effect to the universality principle, and has moreover been used in the case of the Darfur situation in Sudan. Yet this example must not obscure the high risk of selectivity in the international community's approach to international crimes. Even if there was a comprehensive assessment of international crimes worldwide, the working methods and rules of procedure of the Security Council could lead to a selective approach in terms of the proceedings that could be initiated by the ICC. If such proceedings were to be detrimental to the interests of some member states, it would be very hard to obtain their consent regardless of the nature of the crimes. It is enough for them to be permanent members of the Security Council, and the situation can be blocked. Also, there is a 'threshold of concern' that must be reached for the international community to feel concerned and take up the matter. Unfortunately, international crimes are evaluated here according to their number and visibility. If they are not sufficiently high-profile or are committed only sporadically, the risk of lack of interest and hence inaction could likewise be high.

The legal rules deriving from the principle of complementarity should normally lead to the prosecution of perpetrators of international crimes. However, the practical application of that principle will probably be impaired by the necessity for the Court to define its criminal policy. Logically, and according to statements already made by the Office of the Prosecutor and the ICC President,<sup>60</sup> the Court will target those most responsible for international crimes – sometimes referred to as the 'big fish' – thus mainly top officials and military leaders quite often inaccessible to national courts owing to their positions and to national statutes of limitation or immunity, although such statutes are not applicable to international crimes.<sup>61</sup> However, this is not enough to ensure the adequate suppression of such crimes. If they are committed by a number of people in a certain country and the ICC is requested by referral, in one way or another, to try perpetrators who were at the top, those lower down will probably escape prosecution despite having committed international crimes, if that country's

59 See Article 13 of the ICC Statute on the exercise of jurisdiction: 'The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: ... (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations'.

60 See P. Kirsch's presentation of the first report to the General Assembly of the United Nations [UN Doc A.60/177], available at <<http://www.icc-cpi.int/press/pressrelease/120.htm>> (last visited March 2006).

61 As a reminder, universal jurisdiction over international crimes should not entail the application of any national provisions on immunity or amnesty and, in a general manner, no statute of limitation whatsoever.



criminal justice system is in practice unable to try them. This is one of the limitations to the implementation of the principle of complementarity. The inability clause in Article 17 of the ICC Statute could be useless if the ICC, too, is unable to try the offenders because of their number – a risk that is far from hypothetical! No classic solution can be foreseen for such a difficulty. Not only will the ICC's criminal policy be at stake, but also the overall criteria mentioned above. A combination of them could seriously impair not only the effectiveness of the principle of complementarity but also the implementation of universal jurisdiction as a whole.<sup>62</sup>

### *Subjective national reasons*

There are other subjective reasons, linked to national factors, which create difficulties for implementation of the principle of complementarity. Some of these are given below.

First, the specific cultural characteristics of each state must be taken into consideration. Knowledge of this dimension could prove crucial for the efficient curbing of international crimes. Relations between authorities, the ability of witnesses to speak, the disinclination of the population to co-operate, priority given to the process of reconciliation and reconstruction ... there are many factors that could make application of the principle of complementarity more difficult in practice.<sup>63</sup> The situation, for instance, in the Balkan states or more symptomatically in Cambodia shows an obvious earlier and perhaps continuing reluctance – to say the least – to hold trials and to settle accounts with the past. There is never an official refusal, but an organization of priorities. The immediate priorities of states are not necessarily those of the international community, just as those of victims are not necessarily those of the state. International and constitutional laws are clear on these priorities, but not necessarily the international and national decision-makers.

Second, the means provided to implement universal jurisdiction and the principle of complementarity may be insufficient. Even though the decision to prosecute has been made at the international level, there are foreseeable difficulties. Investigations are one example. Proper investigations are needed to hold a trial, but how will an international officer carry them out? Will he or she use an interpreter? What about the reliability of information, of the translation, and so on? There are many concerns in that regard. Such difficulties are not impossible to overcome, but altogether the ICC's success in doing so will depend not only on co-operation by state officials but also on actual access to the requisite information. This shows the part played in dealing with these issues by the Court's relationship with the state, and the need for a positive, constructive attitude by the two if constructive results are to be achieved.

62 On the obstacles to the exercise of universal jurisdiction, see 'Final Report', above note 3, p. 10.

63 See in this regard John Dugard, 'Possible conflicts of jurisdiction with truth commissions', in Cassese et al., above note 29, ch. 18.3, p. 693.

## Conclusion

The relationship between universal jurisdiction and the principle of complementarity is not a revolutionary topic and the contents of this article are intended only to foster debate. By identifying more clearly the role and responsibilities of each player it may be possible to propose some courses of action to make things work better. Here are some ideas to share.

First of all, it seems necessary to identify clearly – in a practical manner – the role that should be played by the ICC. From the wording of the Statute, the role of both the states and the Court appears evident. But this will probably not be enough to ensure that the principle of complementarity will work in practice. The ICC is an autonomous international institution, established under the auspices of the United Nations. Member states must assume responsibility for ensuring the Court's future success. To that end, the Assembly of States Parties to the ICC Statute could use its central position and policies to explore the following avenues. First, it could propose to states a certain harmonization of definitions and working procedures in order to enhance their efficiency and lead to a greater equality between them of prosecutions and trials. It would for instance be conceivable that, for the prosecution of international crimes, some derogation could be made to the national criminal procedure act or code so that differences between legal systems could be reduced. The organs of the ICC should aim at helping the states, not at combating them. This is not mere words. It includes implementation of the Statute *and* a strong communication policy both of member states and of the Court's institutions. Even though the ICC has not yet handed down verdicts, its contacts and communications hitherto seem to indicate that it is following this idea through. Second, the Assembly of States Parties, without interfering in the internal affairs of states, could also formulate and propose some guidelines on practical steps to improve enforcement of the universality principle. This should be done in consultation with member states, but also the entire international community. Third, the Assembly of States Parties and the ICC, later through its case-law, could also play a federative role between states – not to impose solutions but to convince them that universal jurisdiction is a necessary course to take. This would, moreover, make it possible to bring ICC non-member states into the picture and to continue a universal dialogue.

A second idea could be to give more responsibilities to regional international organizations in the initiation and follow-up of prosecutions of international crimes. The current situation is quite often this: international crimes are committed; states are unable or politically unwilling to try international criminals who committed their crimes abroad; the ICC does not have sufficient grounds to initiate the proceedings; and the crime remains unpunished. Such a situation is more the result of a lack of a proper body that could combine two attributes: a knowledge of the specific context, and sufficient independence to speak on behalf of several states sharing the burden of responsibility among themselves. Regional political organizations could be a possible solution, as they meet these two conditions. It would have to be understood that they would not

play this role themselves, but would take responsibility for passing on the initiative to one member state that would either organize the prosecution and trial on behalf of that community of states or refer the matter to the Security Council. Obviously such a solution would require deeper thought, but it would have the advantage of using already existing institutions to give concrete effect to the universality principle and ultimately to enforce the principle of complementarity more effectively.

Finally, the role of sanctions in the implementation of the principle of complementarity cannot be overlooked. Although both are usually seen as separate and without any link, it should be remembered that justice is often seen to be done through sanctions and, more precisely, criminal sanctions. It would be necessary to rethink the judicial process as a chain in which each element is needed to carry on the process to the end. If the principle of complementarity is regarded only as a clause attributing jurisdiction, understanding of it will be incomplete. If sanctions are seen as a separate issue, assertion of jurisdiction will not be properly understood. Even more than sanctions, the whole issue of justice is at stake here. Rethinking universal jurisdiction and the principle of complementarity can only be a multidimensional process without any single answer. A combination of solutions, ranging from national truth and reconciliation processes through national prosecutions to mixed or international criminal prosecutions for perpetrators who bear the greatest responsibility, should be examined and implemented. This is obviously the starting point of another debate to follow the one currently under way...

The principle of complementarity is without doubt an advance towards the greater efficiency of universal jurisdiction. An attempt has been made in this article to show a number of interrelated considerations that should be dealt with if the international community wants to better address that issue. It must, however, be borne in mind that in the end, and despite the best-designed instruments, only the will of states and the international community will make a difference. Justice and dignity for the victims are the underlying objectives of each word of this contribution, and should not be bypassed by the idea that universal jurisdiction is a mere dream for academics or idealists. Only concerted efforts will lead to a change of attitude. A simple message on universal jurisdiction and the principle of complementarity should be sent to all those concerned by its implementation: 'Don't think or talk too much about it. Just do it!'

# The Iraqi High Criminal Court: controversy and contributions

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## Abstract

*The Iraqi High Criminal Court established to prosecute Saddam Hussein and other leading Ba'athists is one of the most visible of the current efforts to establish criminal accountability for violations of international norms. Juxtaposed against other tribunals, the High Criminal Court has provoked worldwide debate over its processes and its prospects for returning societal stability founded on respect for human rights and the rule of law to Iraq. This article explores in detail the legal basis for the formation of the High Criminal Court under the law of occupation. It addresses the relationship between the Iraqi model of prosecuting crimes in domestic fora incorporating international law and the alternative model of transferring jurisdiction to an international forum. The controversial aspects of the Iraqi model are considered, such as the legitimacy of its creation, the revocation of official immunity, the procedural fairness of the Statute in the light of international norms, and the substantive coverage of what some have termed an internationalized domestic process. The author concludes that accountability for international crimes is one of the unifying themes that should bind humanity in common purpose with the Iraqi jurists as they pursue justice in accordance with international norms.*

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The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated. That four great

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nations, flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason.

Justice Robert H. Jackson, 21 November 1945<sup>1</sup>

The creation of the Iraqi High Criminal Court, commonly referred to as the Iraqi High Tribunal (IHT), as an independent component of the Iraqi domestic structure is not only warranted under the existing structure of international law, but accords with the highest aspirations of those who purport to believe in the rule of law. Just as the law-abiding nations of the world could not contemplate a revitalized Nazi domination, public justice for the crimes committed by the Ba’athist regime could be the cornerstone of an Iraqi society built on democratic principles rather than ethnic and religious divisions. The judges have privately reiterated on a number of occasions that they view the work of the Tribunal as being the doorway that will expand the influence and application of international humanitarian law across the Arab-speaking areas of the world.<sup>2</sup>

From the outset, the Iraqi lawyers who sought to develop a legal framework for prosecuting Saddam Hussein, the former Iraqi leader, and other Ba’athist officials were adamant that holding trials in Iraq would be a baseline towards restoration of the rule of law, rather than simply allowing an external tribunal to exercise punitive power.<sup>3</sup> The Iraqi people suffered the injustices and indignities of the Ba’athist regime<sup>4</sup> and have the strongest stake in the restoration of authentic justice. Paraphrasing Justice Jackson’s assessment of the International Military Tribunal at Nuremberg, ‘no history of the era of Iraq under Ba’athist rule will be “entitled to authority” if it ignores the factual and legal conclusions that will be presented in open court in the IHT’.<sup>5</sup> An accurate and comprehensive

1 Opening Statement to the International Military Tribunal at Nuremberg, *Trial of the Major War Criminals before the International Military Tribunal*, Vol. II, 1947, p. 98.

2 For example, Article 17 (Second) of the Statute makes it clear that the judges ‘may resort to the relevant decisions of the international criminal courts’. Statute of the Iraqi High Criminal Court (IHT Statute), available at <[http://www.law.case.edu/saddamtrial/documents/IST\\_statute\\_official\\_english.pdf](http://www.law.case.edu/saddamtrial/documents/IST_statute_official_english.pdf)>. However, investigators and judges preparing for the first trials under the Iraqi High Criminal Court structure were largely unable to obtain Arabic copies of the relevant decisions from the ad hoc Tribunals, the International Military Tribunal at Nuremberg, or other domestic cases applying the relevant principles of international humanitarian law. This defect was remedied in part by the provision of a contract by the US Agency for International Development for translation of the key decisions for the library of the Tribunal.

3 B. Crocker, ‘Iraq: Going it alone, gone wrong’, in R. C. Orr (ed.), *Winning the Peace: An American Strategy for Post-Conflict Reconstruction*, Center for Strategic and International Studies, 2004, p. 281. For a description of the broader mood of the Iraqi people see A. Barnard and M. Kranish, ‘Baghdad falls: Euphoric Iraqis topple symbols; US warns that war not over’, *Boston Globe*, 10 April 2003, art. 1.

4 Non-governmental organizations and the US Department of State have catalogued a panoply of human rights abuses under Saddam’s rule in Iraq, *inter alia* the deaths of 50,000 to 100,000 Kurds, the destruction of 2,000 Kurdish villages, the internal displacement of 900,000 Iraqi civilians, summary executions of over 10,000 political opponents, beatings, rapes, enforced prostitution and the intentional deprivation of food to the civilian population. ‘Past repression and atrocities by Saddam Hussein’s regime’, *White House Fact Sheet*, Washington D.C. 4 April 2003, available at <<http://www.whitehouse.gov/infocus/iraq/news/20030404-1.html>>.

5 Report to the President by Mr Justice Jackson (7 Oct. 1946) in *American Journal of International Law*, No. 49, 1955, pp. 44, 49; reprinted in *Report of RH Jackson United States Representative to the International Conference on Military Tribunals*, Department of State Publication 3080, 1949, pp. 432,

record of the history associated with the crimes in question is, after all, one of the vital purposes of individual accountability mechanisms.<sup>6</sup>

Like other post-conflict settings in which the legislative and judicial systems have become corrupted, have been replaced or have simply collapsed under the weight of tyranny, the pursuit of justice became a focal point for the Coalition military forces in Iraq following the fall of the regime.<sup>7</sup> Assuming its proper role on behalf of the Iraqi people, the Interim Iraqi Governing Council made the creation of an accountability mechanism for punishing those responsible for the atrocities of the Ba'athist regime one of its earliest priorities.<sup>8</sup> The Iraqi Special Tribunal (which Iraqi law renamed as the Iraqi High Criminal Court in August 2005) was not an exercise dictated by occupation authorities, but was initiated by Iraqis and revalidated at every stage by the domestic political processes. After an extensive and genuine partnership that entailed months of debate, drafting and consideration of expert advice solicited from the Coalition Provisional Authority (CPA) – which included both British and US lawyers – as well as the advice of other experts outside Iraq, the Iraqi Governing Council issued the Statute of the Tribunal on 10 December 2003.<sup>9</sup> The announcement of the Tribunal Statute was the culmination of a developmental process carried out under the auspices of the Legal Affairs Subcommittee of the Iraqi Governing Council led by Judge Dara, and by sheer coincidence preceded the capture of Saddam Hussein by only four days. Following the return of full sovereignty, the newly elected Iraqi government repromulgated the Statute and published it in the *Official Gazette* of the Republic of Iraq on 18 October 2005 as the Iraqi High Criminal Court Law.<sup>10</sup>

The IHT was created with the express goal of bringing personal accountability to those Ba'athists who were responsible for depriving Iraqis of their human rights, and for virtually extinguishing the real rule of law for over three decades. It would be ironic indeed if the mechanism created by the Iraqis to address the human rights failings of the past became in itself the vehicle for denying and suppressing human rights into the future. The purpose of this paper is to consider the controversial aspects of the creation and implementation of the IHT as well as its contributions to the progressive development of international humanitarian law. After discussing the legal foundations of the Iraqi Tribunal

438. (Justice Jackson also wrote that 'We have documented from German sources the Nazi aggressions, persecutions, and atrocities with such authenticity and in such detail that there can be no responsible denial of these crimes in the future and no tradition of martyrdom of the Nazi leaders can arise among informed people.')

6 M. P. Scharf and P. R. Williams, 'The functions of justice and anti-justice in the peace-building process', *Case Western Reserve Journal of International Law*, No. 35 (2003), pp. 161, 175.

7 See M. A. Newton, 'Harmony or hegemony? The American military role in the pursuit of justice', *Connecticut Journal of International Law*, No. 19 (2004), p. 231.

8 Interview with David Hodgkinson, Office of Human Rights and Transitional Justice, Coalition Provisional Authority, Baghdad, 11 Dec. 2003.

9 Statute of the Iraqi Special Tribunal. The original statute is available at <[http://www.cpa-iraq.org/human\\_rights/Statute.htm](http://www.cpa-iraq.org/human_rights/Statute.htm)>.

10 IHT Statute, above note 2. The Statute was officially published in the *Official Gazette*, No. 4006, Ramadan 14, 1426 Hijri, 47th year.

under international law and commenting on the salient features of its structure in comparison with earlier accountability mechanisms, the paper will conclude by highlighting the contributions that the Tribunal may make to the evolution of the field of humanitarian law.

## The primacy of domestic enforcement in Iraq

Genuine justice cannot be achieved on the wings of vengeance or external manipulation. As a matter of historical record, the mechanics of establishing a judiciary free of political control were the very first concern of the jurists who gathered in Baghdad in December 2003 to assess the formation of the IHT. As a group, they were committed to a process that would comply with human rights norms and demonstrate the power of legal rules and processes over sectarian revenge, tribal animosity or personal hatred. The very essence of a fair trial is one in which the verdict is based not on innuendo and emotion, but on the quantum of evidence introduced in open court. One distinguished scholar has used the phrase ‘Potemkin Justice’ to describe enforcement efforts aimed at achieving only a shadow of justice through undermining the core human rights of those who will face charges under its authority.<sup>11</sup> Avoidance of this is the rationale behind the requirement of the International Covenant on Civil and Political Rights (ICCPR) that a criminal trial be a ‘fair and public hearing by a competent, independent and impartial tribunal established by law’.<sup>12</sup> This fundamental right derives from both human rights norms<sup>13</sup> and the law of occupation (as a subset of the laws and customs of war).<sup>14</sup> Protocol I refined previous articulations of this cornerstone principle by requiring an ‘impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure’.<sup>15</sup>

International mechanisms provide a necessary forum in circumstances where the domestic courts are unable or unwilling to enforce individual accountability for serious violations of international norms.<sup>16</sup> Phrased another way, none of the international fora in recent history has been created to enforce

11 M.C. Bassiouni, *Introduction to International Criminal Law*, Transnational Publishers, New York, 2003, p. 703.

12 International Covenant on Civil and Political Rights 1966, Article 14 (1), entered into force 23 March 1976.

13 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II); ICCPR, Article 14 (1); European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention) (1953), Art 6 (1); and the American Convention on Human Rights (ACHR) (22 Nov 2 1969), Article 8 (1).

14 Geneva Convention relative to the Protection of Civilian Persons in Time of War 1949 (Fourth Geneva Convention), Article 147; Geneva Convention relative to the Treatment of Prisoners of War 1949 (Third Geneva Convention), Article 130.

15 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts 1977 (Protocol I), Art 75 (4).

16 M. A. Newton, ‘Comparative complementarity: Domestic jurisdiction consistent with the Rome Statute of the International Criminal Court’, *Military Law Review*, No. 167 (March 2001), p. 20.



international norms simply because the offences were defined and proscribed by modern international law norms. The very discipline now termed 'international criminal law' has been described as 'the gradual transposition on to the international level of rules and legal constructs proper to national criminal law or national trial proceedings'.<sup>17</sup> It logically follows that where domestic institutions address the underlying criminal conduct, such transfer to the international level is unnecessary. Though internationalized judicial mechanisms have permanently altered the face of international law,<sup>18</sup> the domestic courts of sovereign states are the courts of first resort. The lengthy debate over the phrase 'international criminal law' during negotiation of the Elements of Crimes for the International Criminal Court<sup>19</sup> reflected a continuing tension between the international respect for sovereign justice systems, and the transcendent importance of truth and accountability. Although states co-operate to define and proscribe crimes under international law, the domestic courts of the world retain the primary role in punishing violations and securing the rule of law within their societal structures.<sup>20</sup>

Nevertheless, the inspiring growth of the field of international criminal law since the Second World War has obscured the historical preference for imposing punishment through the national courts of the countries where the crimes were committed.<sup>21</sup> The military commissions established in the Far East incorporated the principle that the international forum did not supplant domestic mechanisms.<sup>22</sup> The UN Secretary-General has similarly concluded that 'no rule of

17 A. Cassese, *International Criminal Law*, Oxford University Press, 2003, p. 18.

18 See generally P. R. Williams and M. Scharf, *Peace with Justice? War Crimes and Accountability in the Former Yugoslavia*, Rowman & Littlefield, Lanham, 2002.

19 The Elements of Crimes were adopted by consensus and included compromise language in the introduction to Article 7 specifying that the crimes against humanity provisions relate to 'international criminal law' and as such 'should be strictly construed', UN Doc. PCNICC/2000/INF/3/Add.2 (2000).

20 *A-G of Israel v. Eichmann-Supreme Court Opinion*, reprinted in 36 ILR 18, 26 (Isr Dist Ct Jerusalem 1961), *aff'd* 36 ILR 277 (Isr Sup Ct 1962) (international law is 'in the absence of an International Court, in need of the judicial and legislative organs of every country to give effect to its criminal interdictions and to bring the criminals to trial').

21 The Moscow Declaration, signed during the Moscow Conference in 1943 by the United States, the United Kingdom and the USSR, specifically stated that German criminals were to be 'sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the free governments which will be erected therein'. The international forum was limited only to those offences where a single country had no greater grounds for claiming jurisdiction than another country. IX Department of State Bulletin, No. 228, p. 310, reprinted in *Report of RH Jackson United States Representative to the International Conference on Military Tribunals*, Department of State Publication, 1945, p. 11. The Moscow Declaration was actually issued to the press on 1 November 1943. For an account of the political and legal manoeuvring behind the effort to put this stated war aim into practice, see P. Maguire, *Law and War: An American Story*, Columbia University Press, New York, 2000, pp. 85–110. Justice Jackson accepted the fact that the International Military Tribunal was merely a necessary alternative to domestic courts for prosecuting the 'symbols of fierce nationalism and of militarism', and declared that any defendants who succeeded in 'escaping the condemnation of this Tribunal ... will be delivered up to our continental Allies'. Opening Statement to the International Military Tribunal at Nuremberg, above note 1, pp. 99–100.

22 See Regulations Governing the Trial of War Criminals, General Headquarters, United States Army Pacific, AG 000.5 (24 Sept. 1945) [5 (b)] ('Persons whose offenses have a particular geographical location outside Japan may be returned to the scene of their crimes for trial by competent military or civil tribunals of the local jurisdiction') (copy on file with author).

law reform, justice reconstruction, or transitional justice initiative imposed from the outside can hope to be successful or sustainable'.<sup>23</sup> The Iraqi people will determine the ultimate legitimacy and effectiveness of the trials.

The Iraqi High Criminal Court is built on the truism that sovereign states retain primary responsibility for adjudicating violations of crimes defined and promulgated under international law.<sup>24</sup> The process of developing the Statute in late 2003 was opaque to the outside world. This prompted observers to criticize the IHT, on the assumption that it would function in fact as a 'puppet court of the occupying power'.<sup>25</sup> Admittedly its forerunner, the Iraqi Special Tribunal (IST), was formed during the occupation by the United States, its original funding flowed from the United States (a total of US \$ 128 million to date),<sup>26</sup> its judges were selected by the US-appointed provisional government and the judges and prosecutors were to be assisted by US advisors. If the IST had indeed been promulgated as a sham court created only to accomplish the bidding of the occupation authorities, it would violate the basic human right of Ba'athist officials to have an adjudication of their offences based on the highest standards of law and professional conscience of the judges free of external bias or prejudice.<sup>27</sup> Iraqi officials, however, were adamant that a tribunal in Baghdad would be closer to the conflict in temporal terms as well as to the available evidence and the victims whose rights had been violated by the regime. While it created the seeds of subsequent controversy, the Iraqi decision to incorporate international norms into the domestic criminal code was consistent with the established practice of the international community, and prevented a widespread sense of hopelessness and renewed victimization for ordinary citizens.

23 Report of the Secretary-General, 'The rule of law and transitional justice in conflict and post-conflict societies', 23 Aug 2004, UN Doc. S/2004/616 [17], available at <<http://daccessdds.un.org/doc/UNDOC/GEN/N04/395/29/PDF/N0439529.pdf?OpenElement>>.

24 The necessity for states to use domestic criminal fora and penal authority to enforce norms developed in binding international agreements is perhaps one of the most consistent features of the body of international criminal law. See e.g. Convention on the Prevention and Punishment of the Crime of Genocide, US Naval War College, Newport, Rhode Island, 1951 (Article V obligates High Contracting Parties to enact the necessary domestic legislation to give effect to the criminal provisions of the Convention). Of particular note in the post-9/11 world, the imposition of criminal accountability for acts of terrorism is exclusively reserved to the courts of sovereign states through the welter of treaties created by sovereign states. M. A. Newton, 'International criminal law aspects of the war against terrorism', in F. Borch and P. Wilson (eds.), *International Law and the War On Terror*, US Naval War College International Law Studies No. 79, 2003, p. 323; M. C. Bassiouni, *International Terrorism: Multilateral Conventions (1937–2001)*, Transnational Publishers, New York, 2001.

25 M. P. Scharf, 'Is it international enough? A critique of the Iraqi Special Tribunal in light of the goals of international justice', *Journal of International Criminal Justice*, No. 2, 2004, pp. 330, 331; H. Weinstein, 'Law experts divided over legitimacy of tribunal', *Los Angeles Times*, 10 October 2005.

26 2207 Report on Iraq Relief and Reconstruction: Quarterly Update to Congress, Bureau of Resource Management, January 2006, pp. 32–4, available at <<http://www.state.gov/documents/organization/58811.pdf>>. These funds support, *inter alia*, the work of the Regime Crimes Liaison Office, whose staff have played a leading role in supporting Tribunal investigations and operations, the provision of security to both court personnel and defence attorneys, exhumation of mass graves, upgraded facilities for storing and handling evidence, the building of courtrooms, the conduct of investigations, including interrogations, and the training of IST staff.

27 ECHR, *Findlay v. UK* (1997) ECHR Series A No. 115–116; ECHR, *Bentham Case* (1985) ECHR Series A No. 97, 615; ECHR, *Piersack Case* (1981) ECHR Series No. 53, 616.

## The creation of and controversy behind the Tribunal

History is replete with individuals certain of their own superiority and moral impunity. Charles I demanded to know 'by what authority – legal, I mean – do you sit as a court to judge me?'<sup>28</sup> When given a copy of his indictment before the International Military Tribunal at Nuremberg, Hermann Göring stroked the phrase 'The victor will always be the judge and the vanquished the accused' across its cover.<sup>29</sup> Slobodan Milošević demonstrated utter contempt for a tribunal that in his words represents 'a lawless act of political expediency' that has perpetrated a 'terrible fabrication' in order to 'destroy and demonize' him.<sup>30</sup> Likewise, Saddam Hussein demonstrates a pathological narcissism that shows his contempt for the rule of law. Even as the US soldier from the Fourth Infantry Division pulled him from his hole in the ground, Hussein defiantly stated, 'I am Saddam Hussein, the President of Iraq.'<sup>31</sup>

During his first appearance before an IST investigative judge, Saddam was notified of his rights and acknowledged receipt of those rights in writing with the accompanying signature of the investigative judge, as required by the Iraqi Criminal Procedure Law. He challenged the legal authority of the IST and demanded to know: 'How can you charge me with anything without protecting my rights under the constitution?'<sup>32</sup> He argued with the investigative judge and denied that he had any jurisdiction over him by saying, 'I'm elected by the people of Iraq. The occupation cannot take that right away from me.'<sup>33</sup>

For those who have observed the Milošević trial, Saddam's statements were eerily familiar. During his initial appearance before the International Criminal Tribunal for the former Yugoslavia (ICTY) on 3 July 2001, Milošević challenged the legality of the Tribunal's establishment. In a pre-trial motion, Milošević stated, 'I challenge the very legality of this court because it is not established on the basis of law.'<sup>34</sup> Of course, it is an accepted principle of modern international law that 'individuals who commit international crimes are

28 G. Robertson, *The Tyrannicide Brief*, Chatto & Windus, London, 2005, p. 6.

29 J. E. Persico, *Infamy on Trial*, Penguin, Harmondsworth, 1994, p. 83.

30 Statement of Slobodan Milošević on the Illegitimacy of the Hague Tribunal, 30 Aug. 2001, available at <<http://www.slobodan-milosevic.org/spch-icty.htm>>.

31 R. McCarthy, 'I am Saddam Hussein, the President of Iraq', *Guardian*, 2 July 2004.

32 R. Cornwell, 'Saddam in the dock: Listen to his victims, not Saddam, says White House', *Independent*, 2 July 2004 (reporting that Hussein stated, 'This is all theatre,' at his first pre-trial hearing). Available at <<http://news.independent.co.uk/world/americas/story.jsp?story=537296>>.

33 'Defiant Saddam rejects court, charges', CNN.com, 1 July 2004, available at <<http://www.cnn.com/2004/WORLD/meast/07/01iraq.saddam/>> (last visited on 3 March 2006). Lawyers hired by Saddam Hussein's wife rapidly played the legitimacy card by claiming that the IST could not impose any punishments lawfully because it lacked legitimacy, or lawful creation, and accordingly its operation violated core human rights norms. R. McCarthy and J. Steele, 'Saddam on trial: Legitimacy and neutrality of court will be challenged', *Guardian*, 2 July 2004, available at <<http://www.guardian.co.uk/Iraq/Story/0,2763,1252096,00.html>>.

34 'Milošević challenges the legality of the UN tribunal', *Online NewsHour*, 13 Feb. 2002, available at <[http://www.pbs.org/newshour/updates/february02/milosevic\\_2-13.html](http://www.pbs.org/newshour/updates/february02/milosevic_2-13.html)>.

internationally accountable for them'.<sup>35</sup> The Milošević Trial Chamber reaffirmed its jurisdiction, and opined that the lack of immunity for international crimes 'at this time reflects a rule of customary international law'.<sup>36</sup> Rather than relying on an international legal forum to overcome domestic immunity, Iraqi leaders took the preferable path of using domestic legislation to revoke the 'full immunity' that the 1970 Constitution afforded to Ba'athist officials.<sup>37</sup> The IHT Statute almost mirrors the language of the Rome Statute of the International Criminal Court<sup>38</sup> by providing that

The official position of any accused person, whether as president, chairman or member of the Revolution Command Council, prime minister, member of the counsel of ministers, a member of the Ba'ath Party Command, shall not relieve such person of criminal penal [responsibility],<sup>39</sup> nor mitigate punishment. No person is entitled to any immunity with respect to any of the crimes stipulated in Articles 11, 12, 13, and 14 of this law.<sup>40</sup>

In an effort to illustrate the transformation of justice, the Statute specifies that 'No officer, prosecutor, investigative judge, judge or other personnel of the Tribunal shall have been a member of the Ba'ath Party.'<sup>41</sup> This provision has been criticized both within and outside Iraq on the grounds that it fails to distinguish between those lawyers who were active party members and supportive of the Ba'athist policies, and those who were only token members, thus in fact but not in spirit. The effect of this has been to dilute the pool of qualified jurists significantly, even as it introduced an external political vetting process into the selection and qualification of judges.

An international court with international judges and applying international law would have been immune to the concerns of domestic politics or the pressure of the populace. Such an impartial bench could have overturned the immunity of Iraqi officials with barely a ripple of legal commentary. Many close observers have nonetheless concluded that an international tribunal superimposed by the UN Security Council or the political directives of other states would have

35 A Watts, 'The legal position in international law of heads of state, heads of government and foreign ministers', *Recueil des Cours de l'Académie de droit international de La Haye*, No. 3, 1994, p. 82.

36 *Prosecutor v. Milošević*, Case No. IT-99-37-PT, Decision on Preliminary Motion, para. 28 (8 Nov. 2001).

37 1970 Interim Constitution of Iraq, Article 40, reprinted in *Iraqi Laws Referenced in the Statute of the Iraqi Special Tribunal*, US Institute of Peace, 2004.

38 Rome Statute of the International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome Statute), 17 July 1998, UN Doc. A/Conf.183/9 Article 27, repr. in 37 ILM 999 (1998).

39 The omission of the word responsibility in the English version of the revised Statute appears to be an error of translation. Article 15(c) of the original 2003 Statute read as follows: The official position of any accused person, whether as president, prime minister, member of the cabinet, chairman or a member of the Revolutionary Command Council, a member of the Arab Socialist Ba'ath Party Regional Command or Government (or an instrumentality of either) or as a responsible Iraqi Government official or member of the Ba'ath Party or in any other capacity, shall not relieve such person of criminal responsibility nor mitigate punishment. No person is entitled to any immunity with respect to any of the crimes stipulated in Articles 11–14.

40 IHT Statute, above note 2, Article 15 (Third).

41 *Ibid.*, Art 33.

resulted in a crisis of legitimacy that would have doomed efforts to prosecute the Ba'athists responsible for the oppression of Iraqi society. Even if it had been able to function inside Iraq, the ability of such a forum to impose punishments acceptable to the international community would likely have been negated by its form of neocolonialism wrapped in judicial robes.

If international law has indeed progressed to the point that the lack of official immunity is 'indisputably declaratory of customary international law',<sup>42</sup> then the Iraqi decision to incorporate and enforce international norms should be hailed as a positive example of state practice that reinforces the erosion of worldwide impunity. Given the fact that no international tribunal could have exercised jurisdiction, Iraqi officials essentially accepted Justice Jackson's Second World War-era conclusion that 'We may be certain that we do less injustice by the worst processes of law than would be done by the best use of violence. We cannot await a perfect international tribunal or legislature before prosecuting ...'.<sup>43</sup> Though the creation of a domestic process for punishing the officials of the former regime has been criticized for excluding international influence, it represented a courageous principled position to impose law rather than succumb to summary vengeance.

### Substantive scope of the Iraqi High Criminal Court

Grounded as it is in the right of a sovereign state to punish its nationals for violations of international norms, the temporal jurisdiction of the IHT covers any Iraqi national or resident of Iraq charged with crimes listed in the Statute that were committed between 17 July 1968 and 1 May 2003 inclusive. In addition, its geographical jurisdiction extends to acts committed on the sovereign soil of the Republic of Iraq, as well as those committed in other states, including crimes committed in connection with Iraq's wars against the Islamic Republic of Iran and the State of Kuwait.

For the first time in Iraqi domestic law, Articles 11–13 of the Statute establish the competence of the Tribunal to prosecute genocide (Art. 11), crimes against humanity (Art. 12), and war crimes committed during both international and non-international armed conflicts (Art. 13). These substantive provisions are perhaps the most significant aspect of the Statute, because they are modelled on those found in the Rome Statute and thus incorporate the most current norms laid down by international law into the fabric of Iraqi domestic law. Iraqi lawyers and judges are firmly rooted in a positivist tradition, and accordingly expressed concerns about conducting trials of individuals for acts that had not been prohibited under domestic law at the time of the *actus reus*. However, they accepted the principle that the underlying crimes were firmly proscribed under international norms at the time of their commission. In essence, Iraqi officials harmonized the Iraqi criminal code with international law to the same extent as

42 *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Trial Judgment, para. 140 (10 Dec. 1998).

43 A. Tusa and J. Tusa, *The Nuremberg Trial*, Atheneum Press, New York, 1983, p. 69.

those officials in other states who are enacting implementing legislation after accession to or ratification of the Rome Statute.<sup>44</sup>

In addition, Article 14 of the IHT Statute conveys jurisdiction over a core group of crimes defined in the Iraqi criminal code. Article 14 is one of the strongest pieces of evidence that the drafting of the Statute was a genuine collaborative process in which the Governing Council spoke strongly on behalf of the citizens it represented.

The Iraqi lawyers involved in drafting the Statute demanded inclusion of a select list of domestic crimes because the proscribed acts had been so corrosive to the rule of law inside Saddam's Iraq. Article 14 of the IST Statute accordingly reads as follows:

The Tribunal shall have power to prosecute persons who have committed the following crimes under Iraqi law:

- a) For those outside the judiciary, the attempt to manipulate the judiciary or involvement in the functions of the judiciary, in violation, inter alia, of the Iraqi interim constitution of 1970, as amended;
- b) The wastage of national resources and the squandering of public assets and funds, pursuant to, inter alia, Article 2(g) of Law Number 7 of 1958, as amended; and
- c) The abuse of position and the pursuit of policies that may lead to the threat of war or the use of the armed forces of Iraq against an Arab country, in accordance with Article 1 of Law Number 7 of 1958, as amended.

Some observers have criticized the elevation of pre-existing Iraqi crimes to the same plane as genocide, war crimes and crimes against humanity. For armchair lawyers tempted to dismiss the Tribunal as a bald assertion of Coalition power, Article 14 is a window into the soul of the Iraqi bar because it reveals the offences deemed most egregious by peace-loving Iraqis seeking to rebuild an Iraq based on freedom. The officials who committed the acts included in Article 14 in essence waged war on the Iraqi people and society; the prosecution of those acts was seen by the Iraqis as a prerequisite for restoring the rule of law inside Iraq. From the Iraqi perspective, the crimes listed in Article 14 are of comparable severity to the grave violations of international norms found in Articles 11–13. Therefore the Iraqis felt that prosecution of the domestic crimes described in Article 14 would be a necessary component of the broader IST objective of helping to heal the wounds inflicted on Iraqi society by the Ba'athists.

### The 'regularly constituted' nature of the Tribunal

Each conflict environment and accountability mechanism has required a slightly different set of blended procedures. For example, in the domestic prosecutions in

44 For a summary of state practice implementing the comparable criminal provisions in the Rome Statute, see M. C. Bassiouni, *The Legislative History of the International Criminal Court: Introduction, Analysis, and Integrated Text*, Transnational Publishers, Ardsley, New York 2005, Vol. I, pp. 188–91.



Argentina, the trials were conducted using special procedures necessitated by the volume of information and the number of victims in comparison to normal crimes.<sup>45</sup> In the case of the IHT, the civil law foundations of the Iraqi Criminal Code provided the baseline, which was then modified where appropriate to comply with relevant international norms. Unlike the ICTY<sup>46</sup> and the Special Court in Sierra Leone (SCSL),<sup>47</sup> the punitive authority of the IHT derives from the sovereign authority of the Iraqi people rather than the derivative authority of the UN Security Council. The analytical starting point for the IHT is therefore found in pre-existing Iraqi law and procedure.

For example, tribunals enforcing international humanitarian law have permitted evidence as long as it is 'relevant' and 'necessary for the determination of the truth'.<sup>48</sup> This standard, quoted here from the Rome Statute, compares favourably to the IHT Rule of Procedure that permits the Trial Chamber to admit 'any relevant evidence which it deems to have probative value'.<sup>49</sup> Of course, these evidentiary provisions operate against the backdrop of Iraqi practice that requires the prosecutor to produce a quantum of evidence sufficient to satisfy the court of the guilt of the defendant.<sup>50</sup> Rather than developing a straitjacket set of rules related to the introduction of evidence, the civil law groundings of the IHT Trial Chamber convey the broader mandate to 'apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and general principles of law'.<sup>51</sup>

45 *Building the Iraqi Special Tribunal: Lessons from Experiences in International Criminal Justice*, US Institute of Peace Special Report 122, p. 9, available at <<http://www.usip.org/pubs/specialreports/sr122.html>>.

46 UNSC Res. 808 (22 Feb 1993).

47 The SCSL was established by a treaty between the government of Sierra Leone and the United Nations to prosecute those with the 'greatest responsibility' for violations of international humanitarian law: Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (UN Sierra Leone 16 Jan. 2002), available at <<http://www.sc-sl.org/scsl-agreement.html>>. The Appeals Chamber articulated the SCSL's legal basis in *Prosecutor v. Charles Taylor (Decision on Immunity from Jurisdiction)*, SCSL-2003-01-I, 31 May 2004, available at <<http://www.sc-sl.org/SCSL-03-01-I-059.pdf>>. The Appeals Chamber stated, 'It was clear that the power of the Security Council to enter into an agreement for the establishment of the court was derived from the Charter of the United Nations both in regard to the general purposes of the United Nations as expressed in Article 1 of the Charter and the specific powers of the Security Council in Articles 39 and 41. These powers are wide enough to empower the Security Council to initiate, as it did by Resolution 1315, the establishment of the Special Court by Agreement with Sierra Leone,' *ibid.*, p. 18.

48 Rome Statute, above note 38, Article 69 (3), repr. in 37 ILM 999 (1998).

49 Revised Version Iraqi Special Tribunal Rules of Procedure and Evidence, Rule 79 (hereinafter Revised IST Rules), available at <[http://www.law.case.edu/war-crimes-research-portal/pdf/IST\\_Rules\\_of\\_Procedure\\_and\\_Evidence.pdf](http://www.law.case.edu/war-crimes-research-portal/pdf/IST_Rules_of_Procedure_and_Evidence.pdf)>. This provision is adjacent to the common sense caveat that the trial chamber should 'exclude evidence if its probative value is substantially outweighed by the potential for unfair prejudice, considerations of undue delay, waste of time, or needless presentation of cumulative evidence'.

50 Law on Criminal Proceedings with Amendments, Number 23 of 1971, Decree No. 230. Issued by the Revolutionary Command Council (hereinafter Iraqi Law No. 23 on Criminal Proceedings), 14 Feb. 1971, para. 203, reprinted in *Iraqi Laws Referenced in the Statute of the Iraqi Special Tribunal*, US Institute of Peace, 2004 [203].

51 Revised IST Rules, above note 49, Rule 59 (Second).



Regardless of the procedural forms adopted, international law is clear that no accused should face punishment unless convicted pursuant to a fair trial affording all the essential guarantees embodied in widespread state practice.<sup>52</sup> Article 3 common to the 1949 Geneva Conventions states with particularity that only a ‘regularly constituted court’ may pass judgment on an accused person.<sup>53</sup> Interpreting this provision in the light of state practice, the ICRC concluded that a judicial forum is ‘regularly constituted if it has been established and organized in accordance with the laws and procedures already in force in a country’.<sup>54</sup>

Accepting this benchmark of legitimacy, the IHT meets the criteria of Common Article 3 better than other extant tribunals because it is designed from the ground up to apply general principles and specific norms drawn from existing Iraqi criminal law, rather than simply supplanting those norms with externally mandated principles. The IHT Statute provides that the President of the Tribunal shall ‘be guided by the Iraqi Criminal Procedure Law’ in the drafting of the rules of procedure and evidence for the admission of evidence as well as the other features of trial.<sup>55</sup> Furthermore, the Statute specifically lists the provisions of Iraqi law that contain the general principles of criminal law to be applied in connection with the prosecution and trial of ‘any accused person’ (emphasis added to highlight the non-discriminatory intent of the drafters).<sup>56</sup> Where there are lacunae that remain in the IHT Rules and Procedures, they are automatically filled by resort to the underlying principles of Iraqi domestic law, even as the judges are charged with interpreting the substantive international crimes by ‘resort to the relevant decisions of international courts or tribunals as persuasive authority’.<sup>57</sup> This represents an admirable harmonization of international and domestic norms.

These matters were far more than an esoteric concern for the founders of the IHT. The drafters of the Statute were adamant that its structure and operation be perceived in contradistinction to the corrosive effects of Ba’athist efforts to use a charade of justice as a tool for subverting the people’s rights. Like the Nazi regime before them,<sup>58</sup> the ruling regime in Iraq created ‘Special’ or ‘Revolutionary’ courts to impose political punishments at the hands of obedient minions rather than trained legal professionals.<sup>59</sup> As a deliberate amendment at the very last editing session, the authoritative Arabic text used a different term to make a clear distinction from the ‘Special’ or ‘Revolutionary’ courts run under Ba’athist authority, which resulted in a slightly off-kilter English translation. Despite its substantive coverage of war crimes, genocide and crimes against humanity, Article

52 For a summary of state practice and its implementation in treaty norms and military manuals around the world, see J.-M. Henkaerts and L. Doswald-Beck, *Customary International Humanitarian Law* (hereinafter ICRC Study), ICRC/Cambridge University Press, 2005, Vol. I, pp. 352–75.

53 Fourth Geneva Convention, Article 3.

54 ICRC Study, above note 52, p. 355.

55 IHT Statute, above note 2, Article 16.

56 Ibid., Article 17 (First).

57 Ibid., Article 17 (Second).

58 I. Müller, *Hitler’s Justice: The Courts of the Third Reich*, Harvard University Press, 1991, pp. 153–73.

59 R. Chandrasekaran, ‘Tribunal planners hope to start trials by spring’, *Washington Post*, 16 Dec. 2003, Art 1.

1 of the original IST Statute accordingly stated: 'A Tribunal is hereby established and shall be known as the "Iraqi Special Tribunal for Crimes Against Humanity"'.<sup>60</sup> This subtle but powerful reminder shows the keen sensitivity of the Iraqi lawyers responsible for the IHT Statute as well as their commitment to the long-term restoration of the rule of law within Iraq. It is notable that the first trial before the IHT includes at least one Ba'athist official who was implicated in corrupting the process of fair and orderly criminal proceedings in violation of Article 14(a) of the IHT Statute.

The structure of the IHT and its accompanying procedures are similarly valid when measured against applicable human rights principles. The ICCPR phrases the concept noted above as requiring that a tribunal be 'established by law'.<sup>61</sup> The UN Human Rights Commission adopted a functional test that the tribunal should 'genuinely afford the accused the full guarantees' in its procedural protections.<sup>62</sup> Litigating its first case, the ICTY was forced to determine whether this human right is per se violated by the prosecution of an accused before a post hoc tribunal created after the commission of the crimes.<sup>63</sup> Noting that the ICCPR drafters rejected language specifying that only 'pre-established' fora would provide sufficient human rights protections, the ICTY Appeals Chamber concluded that

The important consideration in determining whether a tribunal has been 'established by law' is not whether it was pre-established or established for a specific purpose or situation; what is important is that it be set up by a competent organ in keeping with the relevant legal procedures, and that it observes the requirements of procedural fairness.<sup>64</sup>

For the purposes of human rights law, the IHT is 'established by law' because it is designed to provide the full range of human rights to the accused. Moreover, the IHT Statute establishes a firm duty on the court to 'ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with this Statute and the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses'.<sup>65</sup> By extension, the Trial Chamber must 'satisfy itself that the rights of the accused are respected',<sup>66</sup> and publicly support its decisions with 'a reasoned opinion in writing, to which separate or dissenting opinions may be appended'.<sup>67</sup> The Iraqi Judicial

60 IST Statute, above note 9, Article 1 (a).

61 ICCPR, above note 12, Article 14 (1).

62 General Comment on Article 14, HR Comm 43rd Sess. Supp. No. 40 [4], UN Doc. A/43/40; *Cariboni v. Uruguay* HR Comm 159/83 39th Sess. Supp. No. 40 (1988) UN Doc. A/39/40. The Inter-American Commission has taken a similar approach. See e.g. Inter-American Court of Human Rights Annual Report (1972), OEA/Ser. P, AG/doc. 305/73 rev. 1 (14 March 1973) 1; Inter-American Court of Human Rights Annual Report (1973), OEA/Ser. P, AG/doc 409/174 (5 March 1974), 2–4.

63 M. P. Scharf, *Balkan Justice: The Story behind the First International War Crimes Trial since Nuremberg*, Carolina Academic Press, 1997, pp. 104–6.

64 *Prosecutor v. Duško Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)*, 2 Oct. 1995, 45 (*Dule case*), available at <<http://www.un.org/icty/tadic/appeal/decision-e/51002.htm>>.

65 IHT Statute, above note 2, Article 21 (Second).

66 *Ibid.*, Article 21 (Third).

67 *Ibid.*, Article 23 (Second).

Law specifies that the judge shall be bound to ‘preserve the dignity of the judicature and to avoid anything that arouses suspicion on his honesty’.<sup>68</sup> An *a priori* conclusion that the IHT judges will ignore their professional ethos by wilfully undermining the rights of the accused would betray an unseemly paternalism on the part of the international community. In fact, though the al Dujail trial has at times been turbulent in the courtroom and often unpredictable, it has proceeded based on the procedural rules specified in the Statute, its implementing rules and underlying Iraqi criminal procedure law.

### Procedural rights for the accused<sup>69</sup>

The provisions governing the rights of the accused are among the most highly criticized yet vital provisions of the IHT Statute. The Coalition Provisional Authority Order that delegated authority to the Iraqi leaders to promulgate the Statute required that the tribunal meet ‘international standards of justice’.<sup>70</sup> In accordance with underlying Iraqi procedural codes, the IHT Rules stipulate that the investigating judge must notify all suspects of the following rights during their first appearance for questioning:

- i. The right to legal assistance of his own choosing, including the right to have legal assistance provided by the Defence Office if he does not have sufficient means to pay for it;
- ii. The right to have interpreting assistance if he cannot understand or speak the language used in questioning;
- iii. The right to remain silent. In this regard, the suspect or accused shall be cautioned that any statement he makes may be used in evidence.<sup>71</sup>

In accordance with basic standards of representation, if a suspect expresses the desire to be represented by an attorney, the investigative judge must

68 Law of Judicial Organization, Number 160 of 1979, Resolution No. 1724 issued by the Revolutionary Command Council (12 Oct. 1979), Article 7, published by the Ministry of Justice, *Official Gazette of the Republic of Iraq*, Vol. 23 No. 27, 2 (2 July 1980), reprinted in *Iraqi Laws Referenced in the Statute of the Iraqi Special Tribunal*, US Institute of Peace, 2004.

69 The Iraqi lawyers selected this term rather than ‘perpetrator’ that was used in the International Criminal Court Elements of Crimes. There was extensive debate during the drafting of the Elements of Crimes for the International Criminal Court over the relative merits of the terms ‘perpetrator’ or ‘accused’. Though some delegations were concerned that the term ‘perpetrator’ would undermine the presumption of innocence, the delegates to the Preparatory Commission (PrepCom) ultimately agreed to use the former in the Elements after including a comment in the introductory chapeau that ‘the term ‘perpetrator’ is neutral as to guilt or innocence’. See UN Doc. PCNICC/2000/INF/3/Add.2 (2000), in K. Dormann, *Elements of War Crimes under the Rome Statute of the International Criminal Court*, Cambridge University Press, Cambridge, 2002, p. 14.

70 Coalition Provisional Authority Order No. 48: Delegation of Authority regarding an Iraqi Special Tribunal, available at <[http://www.cpa-iraq.org/regulations/20031210\\_CPAORD\\_48\\_IST\\_and\\_Appendix\\_A.pdf](http://www.cpa-iraq.org/regulations/20031210_CPAORD_48_IST_and_Appendix_A.pdf)>.

71 Revised IST Rules, above note 49), Rule 27. This rule should be understood in light of the requirement that the investigative judge may not question the witness or suspect ‘in a declaratory or insinuating manner’ or direct any sign or gesture ‘that would tend to intimidate, confuse or distress him’. Iraqi Law No. 23 on Criminal Proceedings, above note 50), para. 64 A.

end the examination and may not resume until an attorney for the suspect is present.<sup>72</sup> Any statement of the accused to the investigating judge is recorded in the written record and 'signed by the accused and the magistrate or investigator' as required by Iraqi law.<sup>73</sup> Thus all suspects who have appeared before the IHT investigative judges to date have each been notified of their rights to counsel and have acknowledged their comprehension of those rights in writing. These provisions are reflective of the practices of other international tribunals, though they are drawn from the domestic system.<sup>74</sup> Critics who assume that the IHT will ignore and subvert the rights of defendants in the future must also assume that the investigative judges will abandon this established practice, but in doing so they would depart from a foundational aspect of criminal practice in Iraq which by any measure meets human rights standards.

In its core operative provision, the Statute incorporates a range of trial rights that, in the aggregate, are compatible with applicable human rights norms. Echoing the fundamental guarantees of the ICCPR and other human rights instruments, Article 19 of the Statute states,

- a) All persons shall be equal before the Tribunal;
- b) Everyone shall be presumed innocent until proven guilty before the Tribunal in accordance with the law;
- c) In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of the Statute and the rules of procedure made hereunder;
- d) In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to a fair hearing conducted impartially and to the following minimum guarantees:
  1. To be informed promptly and in detail of the nature, cause and content of the charge against him;
  2. To have adequate time and facilities for the preparation of his defence and to communicate freely with counsel of his own choosing in confidence. The accused is entitled to have non-Iraqi legal representation, so long as the principal lawyer of such accused is Iraqi;
  3. To be tried without undue delay;

72 Iraqi Law No. 23 on Criminal Proceedings, above note 50). For example, Saddam was questioned by the investigative judge in the presence of defence counsel Khalil Abd Salih Al-Dulaimi on 12 June 2005 regarding the Dujail massacre. Available at <<http://www.iraqispecialtribunal.org/en/press/releases/0017e.htm>>.

73 Ibid., para. 128.

74 See e.g. Rule 63 of the ICTY Rules of Evidence and Procedure, available at <<http://www.un.org/icty/legaldoc-e/index.htm>>, which reads as follows: Questioning of Accused (Adopted 11 Feb. 1994, amended 3 Dec. 1996) (A) Questioning by the Prosecutor of an accused, including after the initial appearance, shall not proceed without the presence of counsel unless the accused has voluntarily and expressly agreed to proceed without counsel present. If the accused subsequently expresses a desire to have counsel, questioning shall thereupon cease, and shall only resume when the accused's counsel is present. (B) The questioning, including any waiver of the right to counsel, shall be audio-recorded or video-recorded in accordance with the procedure provided for in Rule 43. The Prosecutor shall at the beginning of the questioning caution the accused in accordance with Rule 42(A)(iii).

4. To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
5. To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute and Iraqi law; and
6. Not to be compelled to testify against himself or to confess guilt, and to remain silent, without such silence being a consideration in the determination of guilt or innocence.<sup>75</sup>

These affirmative rights were intended to breathe life into the esoteric obligation found in Article 20 of the 1970 Interim Constitution of Iraq, which provides that an accused is ‘innocent until he is proven guilty in a legal trial’.<sup>76</sup> The constitution also proclaims in evocative terms that ‘the right of defence is sacred in all stages of investigation and trial in accordance with the provisions of the Law’.<sup>77</sup>

International practitioners have observed that the provision of international defence attorneys might have been the surest method of achieving a process perceived to be fair around the world. While international attorneys may support the defence, the lead defence attorney is required to be an Iraqi, and any counsel retained by a suspect or accused is required to ‘file his power of attorney with the Judge concerned at the earliest possible opportunity’.<sup>78</sup> The judge, in turn, shall consider the counsel to be qualified ‘in accordance with the *Iraqi law on lawyers*’.<sup>79</sup> Rather than an attempt to minimize international influence, this small phrase constitutes an important safeguard because it reflects the intent of Iraqi drafters to ensure that defence counsel remain bound by the codes of practice governing their profession and are qualified in accordance with the rigorous standards found in Iraqi law.<sup>80</sup> In the light of the serious allegations of misconduct of counsel in other

75 This provision of the IHT Statute preventing any adverse inference from the silence of the accused is noteworthy because it is the first time that such a protection was specifically found in Iraqi law. This provision amended Paragraph 179 of the 1923 Iraqi Law on Criminal Proceedings to comply with relevant human rights norms. The previous Iraqi procedural rule stated that ‘The court may ask the defendant any question considered appropriate to establish the truth before or after issuing a charge against him. A refusal to answer will be considered as evidence against the defendant.’

76 1970 Interim Constitution of Iraq, above note 37, Article 20. The Iraqi Law on Criminal Proceedings makes clear that the judge must release an accused if ‘there is insufficient evidence for conviction’. Iraqi Law No. 23 on Criminal Proceedings, above note 50, para. 203.

77 1970 Interim Constitution of Iraq, above note 37, Article 20. All of the judges and investigators with whom I have dealt have been completely comfortable with the presumption of innocence and the duty of the prosecutor to produce evidence sufficient to warrant a guilty verdict.

78 Revised IST Rules, above note 49, Rule 48 (A).

79 Ibid. (emphasis added).

80 Ibid., Rule 48 (C).

tribunals,<sup>81</sup> the IHT Rules provide that ‘a Judge or Criminal Court may impose legal proceedings against counsel, if in its opinion, the Council’s [*sic*] conduct becomes offensive or abusive or demeans the dignity and decorum of the Special Tribunal or obstructs the proceedings’.<sup>82</sup> The fact that the principal attorney remains bound by the Iraqi code of professional conduct gives some force to the underlying right of the court to ‘prevent the parties and their representatives from speaking at undue length or speaking outside the subject of the case, repeating statements, violating guidelines or making accusations against another party or a person outside the case who is unable to put forward a defence’.<sup>83</sup>

All in all, these terms give teeth to the obligation of the trial chambers to ‘ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with this Statute and the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses’.<sup>84</sup>

## Legal authority for the creation of the Iraqi Special Tribunal

### The legal backdrop of occupation

All of the procedural and substantive components of the IHT function in the shadow cast by its inception during the Coalition occupation. The circumstances surrounding the Tribunal’s formulation are at once the most potent legal and political hurdle to its long-term reputation. In view of the revalidation of the Statute by Iraqi authorities following the return to full sovereignty, an analysis of its formation under the umbrella of the Coalition Provisional Authority becomes a moot point. However, the development of the IHT has served to clarify the normative content of occupation law in relation to the principles of transitional justice. The relationship of a subjugated civilian population to a foreign power temporarily exercising *de facto* sovereignty is regulated by the extensive development of the law of occupation.<sup>85</sup> In terms of legal rights and duties, Iraq was considered as occupied territory when it was ‘actually placed under the authority of the hostile army’.<sup>86</sup> This legal criterion is fulfilled when the following

81 For example, repeated abuses by counsel were responsible for the ICTY shift from paying hourly defence fees to a flat fee system. Bassiouni, above note 44, p. 6.

82 Revised IST Rules, above note 49, Rule 31 (First) (emphasis added).

83 Iraqi Law No. 23 on Criminal Proceedings, above note 50, para. 154.

84 IHT Statute, above note 2, Article 21(b).

85 See in general Regulations annexed to Hague Convention IV of 1907 respecting the Laws and Customs of War on Land (hereinafter 1907 Hague Regulations), entered into force 26 Jan. 1910, repr. in A. Roberts and R. Guelff (eds.), *Documentation on the Laws of War*, 3rd edn, Oxford University Press, Oxford, 2000, p. 73; Fourth Geneva Convention, Articles 47–78.

86 1907 Hague Regulations, *ibid.*, Article 42. See also *The Law of Land Warfare*, Department of the Army Field Manual 27-10, Washington, 1956, para. 351 [FM 27-10]. The entire Chapter 6 of the US Army Field Manual relating to the law of armed conflict is devoted to explaining the text of the law on occupation and US occupation policy.

circumstances prevail on the ground: first, that the existing government structures have been rendered incapable of exercising their normal authority; and second, that the occupying power is in a position to carry out the normal functions of government over the affected area.<sup>87</sup> For the purposes of US policy, occupation is the legal state occasioned by ‘invasion plus taking firm possession of enemy territory for the purpose of holding it’.<sup>88</sup> Although a state of occupation does not ‘affect the legal status of the territory in question’,<sup>89</sup> the assumption of authority over the occupied territory implicitly means that the existing institutions of society have been swept aside.

Because the foreign power has displaced the normal domestic offices, the cornerstone of the law of occupation is the broad obligation that the foreign power – ‘the occupant’ – must ‘take *all* the measures in his power to restore, and ensure, as far as possible, public order and safety’.<sup>90</sup> In the authoritative French, the occupier must preserve ‘l’ordre et la vie publics’ (public order and life).<sup>91</sup> On that legal reasoning alone, the establishment of the IST could have been warranted under the inherent occupation authority of the Coalition as an integral part of the strategic plan for restoring public calm and peaceful stability to the civilian population across Iraq. From that perspective, the IST is the intellectual twin to the ICTY because the UN Security Council established the ICTY with a ground-breaking 1993 resolution<sup>92</sup> that was premised on the legal authority of the Security Council to ‘maintain or restore international peace and security’.<sup>93</sup>

As criminal fora conceived and created pursuant to the broader responsibility of the authorities empowered to maintain or restore peace and security, both the ICTY and the IHT were appropriate non-military mechanisms (though each was creative in its own time and in different ways). The IHT and ICTY were both founded on the assessment by the officials charged with

87 *The Manual of the Law of Armed Conflict*, UK Ministry of Defence, Oxford University Press, Oxford, 2004, p. 275, para. 11.3.

88 *US Army Field Manual 27-10*, above note 86, para. 352.

89 Protocol I, above note 15, Article 4. The US policy in this regard is clear that occupation confers only the ‘means of exercising control for the period of occupation. It does not transfer the sovereignty to the occupant, but simply the authority or power to exercise some of the rights of sovereignty.’ *US Army Field Manual*, above note 86, para. 358.

90 1907 Hague Regulations, above note 85, Article 43 (emphasis added).

91 *Ibid.* The conceptual limitations of foreign occupation also warranted a temporal limitation built into the 1949 Geneva Conventions that the general application of the law of occupation ‘shall cease one year after the general close of military operations’, Fourth Geneva Convention, Article 6. Based on pure pragmatism, Article 6 of the Fourth Geneva Convention does permit the application of a broader range of specific treaty provisions ‘for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory’, *ibid.* The 1977 Protocols eliminated the patchwork approach to treaty protections with the simple declaration that ‘the application of the Conventions and of this Protocol shall cease, in the territory of Parties to the conflict, on the general close of military operations and, in the case of occupied territories, on the termination of the occupation’, Protocol I, above note 15), Article 3(b).

92 UNSC Res. 827 (25 May 1993).

93 UN Charter, Article 39 (giving the Security Council the power to ‘determine the existence of any threat to the peace, breach of the peace, or act of aggression’ and it ‘shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security’).



preserving stability and the rule of law that prosecution of selected persons responsible for serious violations of international humanitarian law would facilitate the restoration of peace and stability (*'l'ordre et la vie publics'* in the wording of the 1907 Hague Regulations). After the first defendant, a Serb named Duško Tadić, challenged the legality of the ICTY, the trial chamber ruled that the authority of the Security Council to create the Tribunal was dispositive.<sup>94</sup>

Just as the Security Council has the 'primary responsibility' for maintaining international peace and security,<sup>95</sup> the CPA had a concrete legal duty to facilitate the return of stability and order to Iraq after the fall of the regime. Indeed, the CPA Mission Statement read as follows:

The Coalition Provisional Authority (CPA) is the name of the temporary governing body which has been designated by the United Nations as the lawful government of Iraq until such time as Iraq is politically and socially stable enough to assume its sovereignty. The CPA has been the government of Iraq since the overthrow of the brutal dictatorship of Saddam Hussein and his deeply corrupt Baath Regime in April of 2003.

### *The minimalist principle*

The legal framework of occupation rests on a delicate balance that has been particularly challenged by the events on the ground in Iraq. On the one hand, the civilian population has no lawful right to conduct activities that are harmful to persons or property of the occupying force, and may be convicted or interned on the basis of such unlawful activities.<sup>96</sup> Article 42 of the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War, more frequently referred to as the Fourth Geneva Convention, specifically permits the deprivation of liberty for civilians if 'the security of the Detaining Power makes it absolutely necessary'.<sup>97</sup> Even large-scale internment may be permissible in situations where there are 'serious and legitimate reasons' to believe that the detained persons threaten the safety and security of the occupying power.<sup>98</sup> At the same time, the coercive authority of the occupying power is limited by a specific prohibition against making any changes to the governmental structure or institutions that

94 'This International Tribunal is not a constitutional court set up to scrutinize the actions of organs of the United Nations. It is, on the contrary, a criminal tribunal with clearly defined powers, involving a quite specific and limited criminal jurisdiction. If it is to confine its adjudications to those specific limits, it will have no authority to investigate the legality of its creation by the Security Council.' *Prosecutor v. Tadić (Decision on the Defence Motion on Jurisdiction)*, IT-94-1, 10 August 1995, available at <<http://www.un.org/icty/tadic/trialc2/decision-e/100895.htm>>.

95 UN Charter, Article 24(1).

96 Fourth Geneva Convention, Articles 68 and 78 (permitting detention of civilians for 'imperative reasons of security'). See also Human Rights Watch, *A Face and a Name: Civilian Victims of Insurgent Groups in Iraq*, Vol. 17, No. 9 (E), October 2005 (finding that the insurgents in Iraq who are indiscriminately targeting civilians and Western contractors are not entitled under the Geneva Conventions to conduct hostilities and are thus committing war crimes).

97 Fourth Geneva Convention, Article 42.

98 *Prosecutor v. Delalić, Mucić, Delić, and Landžo (Čelebići) (Judgment)*, IT-96-21-T, 20 Feb. 2001.

would undermine the benefits guaranteed to civilians under the Geneva Conventions.<sup>99</sup>

Thus the baseline principle of occupation law is that the civilian population should continue to live their lives as normally as possible. This concept may be termed the minimalist principle, though some observers have termed it the principle of normality.<sup>100</sup> As a policy priority flowing from the mandates of the Fourth Geneva Convention, domestic law should be enforced by domestic officials insofar as is possible, and crimes not of a military nature that do not affect the occupant's security will normally be delegated to the jurisdiction of local courts.<sup>101</sup> The IHT Statute fits this legal/policy model precisely, as it was created and subsequently ratified by Iraqi authorities as an Iraqi domestic statute.

However, occupation law does not doggedly elevate the provisions of domestic law and the structure of domestic institutions above the pursuit of justice. Despite the minimalist principle, international law allows reasonable latitude for an occupying power to modify, suspend or replace the existing penal structure in the interests of ensuring justice and the restoration of the rule of law. In its temporary exercise of functional sovereignty over the occupied territory, and as a pragmatic necessity, the occupation authority must ensure the proper functioning, *inter alia*, of domestic criminal processes and cannot abdicate that responsibility to domestic officials of the civilian population who may or may not be willing or able to carry out their normal functions in pursuit of public order.<sup>102</sup> In accordance with the baseline principle of normality, Article 43 of the 1907 Hague Regulations stipulates that the occupying power must respect, 'unless absolutely prevented, the laws in force in the country'.<sup>103</sup>

### *The legitimacy of the Iraqi High Criminal Court under occupation law*

The duty found in Article 43 of the Hague Regulations to respect local laws unless 'absolutely prevented' (in French 'empêchement absolu') imposes a seemingly categorical imperative. However, rather than being understood literally, 'empêchement absolu' has been interpreted as the equivalent of 'nécessité'.<sup>104</sup> Under the obligations of modern human rights law, the occupier may amend local law to 'remove from the penal code any punishments that are "unreasonable,

99 Fourth Geneva Convention, Article 47.

100 J. S. Pictet, *The Principles of International Humanitarian Law*, ICRC, Geneva, 1967, p. 50.

101 *US Army Field Manual*, above note 86, para. 370.

102 Fourth Geneva Convention, Article 54: 'The Occupying Power may not alter the status of public officials or judges in the occupied territories, or in any way apply sanctions to or take any measures of coercion or discrimination against them, should they abstain from fulfilling their functions for reasons of conscience.'

103 1907 Hague Regulations, above note 85, Article 43.

104 Y. Dinstein, 'Legislation under Article 43 of the Hague Regulations: Belligerent occupation and peacebuilding', No. 1, Fall 2004, Program on Humanitarian Policy and Conflict Research, Harvard University Occasional Paper Series 8. See also E. . Schwenk, 'Legislative powers of the military occupant under Article 43, Hague Regulations', *Yale Law Journal*, No. 54 (1945), p. 393.

cruel, or inhumane” together with any discriminatory racial legislation’.<sup>105</sup> For example, the Israeli decision to confer the vote in mayoral elections on women who had not formerly enjoyed this right would probably comport with the Article 43 obligation of an occupier.<sup>106</sup> In the post-Second World War context, this meant that the Allies could set the feet of the defeated Axis powers ‘on a more wholesome path’<sup>107</sup> rather than blindly enforcing the institutional and legal constraints that had been the main bulwarks of tyranny.<sup>108</sup>

Article 64 of the Fourth Geneva Convention clarified the old Hague Article 43 by explaining the exception to the minimalist principle in more concrete terms. In ascertaining the implications of Article 64 with regard to the occupation in Iraq, it is important to realize that its drafters did not extend the ‘traditional scope of occupation legislation’.<sup>109</sup> Hence the law of the Geneva Convention amplified the concept of necessity understood at the time to be enshrined in the old Hague Article 43. Article 64 incorporates the baseline of normality within the confines of protecting the legal rights of the civilian population. It accordingly reads as follows:

The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws.

The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.

The plain language of Article 64 must be interpreted in good faith in the light of the object and purpose of the Fourth Convention,<sup>110</sup> which seeks to

105 L. C. Green, *The Contemporary Law of Armed Conflict*, Juris, Huntingdon, NY, 1999, p. 259.

106 Ibid.

107 M. Greenspan, *The Modern Law of Land Warfare*, University of California Press, Berkeley, 1959, pp. 223–7.

108 For example, the oath of the Nazi party was: ‘I owe inviolable fidelity to Adolf Hitler; I vow absolute obedience to him and to the leaders he designates for me.’ D. A. Sprecher, *Inside the Nuremberg Trial: A Prosecutor’s Comprehensive Account*, University Press of America, Lanham, 1999, pp. 1037–8. Accordingly, power resided in Hitler, from whom subordinates derived absolute authority in hierarchical order. This absolute and unconditional obedience to the superior in all areas of public and private life led in Justice Jackson’s famous words to ‘a National Socialist despotism equaled only by the dynasties of the ancient East’. Opening Statement to the International Military Tribunal at Nuremberg, *Trial of the Major War Criminals before the International Military Tribunal*, Vol. II, 1947, p. 100.

109 G. Schwarzenberger, *The Law of Armed Conflict*, Stevens, London, 1968, p. 194.

110 Vienna Convention on the Law of Treaties, Article 31(1), 27 January 1980, 1155 UNTS 331, reprinted in 8 ILM (1969).

alleviate the suffering of the civilian population and ameliorate the potentially adverse consequences of occupation subsequent to military defeat. The first paragraph strikes a balance between the minimalist intent of the framers and the overriding purpose of making due allowance for both the rights of the civilian population and the concurrent right of the occupier to maintain the security of its forces and property. The second paragraph of Article 64 morphed the implicit meaning of ‘necessary’ drawn from the old Hague Article 43 into an explicit authority to amend the domestic laws in order to achieve the core purposes of the Convention. Article 64 has thus been accepted in the light of the common-sense reading and the underlying legal duties of the occupier to permit modification of domestic law under limited circumstances.<sup>111</sup>

### Legal authority for the formation of Iraqi Special Tribunal

The IHT as it exists today is cloaked in a seamless garment of legality both in terms of its origination and in its ongoing existence as a distinct branch of Iraqi bureaucracy. The touchstone of analysis for the promulgation of the original Tribunal Statute in December 2003 is to recognize that the CPA mission statement gave it affirmative authority as the ‘temporary governing body designated by the United Nations as the lawful government of Iraq until such a time as Iraq is politically and socially stable enough to assume its sovereignty’.<sup>112</sup> The CPA posited its power as the occupation authority in Iraq in declarative terms: ‘The CPA is vested with all executive, legislative, and judicial authority necessary to achieve its objectives, to be exercised under relevant UN Security Council resolutions, including Resolution 1483 (2003), and the laws and usages of war.’<sup>113</sup>

The appellation ‘Coalition Provisional Authority’ was a literal title in every aspect: (i) it represented the two states legally occupying Iraq (the United States and the United Kingdom) as well as the coalition of more than twenty other states referred to in Resolution 1483 as working ‘under the Authority’; (ii) it was intended to be a temporary power to bridge the gap to a full restoration of Iraqi sovereign authority; and (iii) (perhaps most importantly), it exercised the obligations incumbent on those states occupying Iraq in the legal sense, and conversely enjoyed the legal authority flowing from the laws and customs of war. This understanding of CPA status comports with the diplomatic representations

111 *The Manual of the Law of Armed Conflict*, UK Ministry of Defence, Oxford University Press, Oxford 2004, p. 275 [11.56]. US doctrine states that the ‘occupant may alter, repeal, or suspend laws of the following types: a. Legislation constituting a threat to its security, such as laws relating to recruitment and the bearing of arms. b. Legislation dealing with political process, such as laws regarding the rights of suffrage and of assembly. c. Legislation the enforcement of which would be inconsistent with the duties of the occupant, such as laws establishing racial discrimination’. *US Army Field Manual 27-10*, above note 86), para. 371.

112 Overview of Coalition Provisional Authority, available at <<http://www.iraqcoalition.org/bremerbio.html>>.

113 Coalition Provisional Authority Regulation 1, available at <[http://www.cpa-iraq.org/regulations/20030516\\_CPAREG\\_1\\_The\\_Coalition\\_Provisional\\_Authority\\_.pdf](http://www.cpa-iraq.org/regulations/20030516_CPAREG_1_The_Coalition_Provisional_Authority_.pdf)>.

made at the time of its formation.<sup>114</sup> The UN Security Council unanimously recognized ‘the specific authorities, responsibilities, and obligations under applicable international law of these states [the members of the Coalition] as occupying powers under unified command (the Authority)’.<sup>115</sup>

Though strikingly similar to the declaration of Allied power in occupied Germany after the Second World War,<sup>116</sup> CPA Regulation 1 was founded on bedrock legal authority flowing from the Chapter VII power of the Security Council as supplemented by the pre-existing power granted to the CPA under the law of occupation.<sup>117</sup> Security Council Resolution 1483 was passed unanimously on 22 May 2003, and called on the members of the CPA to ‘comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907’.<sup>118</sup> Resolution 1483 is particularly noteworthy for the formation of the IHT because the Security Council specifically highlighted the need for an accountability mechanism ‘for crimes and atrocities committed by the previous Iraqi regime’.<sup>119</sup> The Security Council further required the CPA to exercise its temporary power over Iraq in a manner ‘consistent with the Charter of the United Nations and other relevant international law, to promote the welfare of the Iraqi people through the effective administration of the territory’.<sup>120</sup>

Resolution 1483 operated in conjunction with the residual laws and customs of war to establish positive legal authority for the formation of the IHT by the CPA and Governing Council. The subtle linkage between Article 43 of The Hague Regulations and Article 64 gave the CPA broad discretion to delegate the authority for promulgation of the Tribunal to the Governing Council as a matter

114 See Letter from the Permanent Representatives of the United Kingdom and the United States to the United Nations, addressed to the President of the Security Council, 8 May 2003, UN Doc. S/2003/538, available at <<http://www.globalpolicy.org/security/issues/iraq/document/2003/0608usukletter.htm>>.

115 SC Res. 1483, 22 May 2003, preamble.

116 General Eisenhower’s Proclamation said, ‘Supreme legislative, judicial, and executive authority and powers within the occupied territory are vested in me as Supreme Commander of the Allied Forces and as Military Governor, and the Military Government is established to exercise these powers.’ Reprinted in *Military Government Gazette, Germany, United States Zone*, Office of Military Government for Germany (US 1 June 1946), 1 Issue A (copy on file with author).

117 The Fourth Geneva Convention recognizes the importance of individual rights enjoyed by the civilian population and the correlative duties of the occupier to that population. The structure of the Fourth Convention focused on the duties that an Occupying Power has towards the individual civilians and the overall societal structure rather than on the relations between the victorious sovereign and the defeated government. Under the rejected concept termed ‘*debellatio*’, the enemy was utterly defeated and accordingly the defeated state forfeited its legal personality and was absorbed into the sovereignty of the occupier. Greenspan, above note 107, pp. 600–1. The successful negotiation of the Geneva Conventions in the aftermath of the Second World War marked the definitive rejection of the concept of *debellatio*, under which the occupier assumed full sovereignty over the civilians in the occupied territory. E. Benvenisti, *The International Law of Occupation*, Princeton University Press, Princeton, 1993, p. 92. *Debellatio* ‘refers to a situation in which a party to a conflict has been totally defeated in war, its national institutions have disintegrated, and none of its allies continue militarily to challenge the enemy on its behalf’. Ibid., p. 59.

118 SC Res. 1483, 22 May 2003, para. 5.

119 Ibid., preamble.

120 Ibid., para. 4.

of necessity. At its core, Article 64 protects the rights of citizens in the occupied territory to a fair and effective system of justice. As a first step, and citing its obligation to ensure the ‘effective administration of justice’, the CPA issued an order suspending the imposition of capital punishment in the criminal courts of Iraq and prohibiting torture as well as cruel, inhumane, and degrading treatment in occupied Iraq.<sup>121</sup> Exercising his power as the temporary occupation authority, Ambassador Bremer signed CPA Order No. 7, which amended the Iraqi Criminal Code in other important ways seeking to suspend or modify laws that ‘the former regime used ... as a tool of repression in violation of internationally recognized human rights’.<sup>122</sup>

Furthermore, the subsequent promulgation of CPA Policy Memorandum No. 3 on 18 June 2003, which amended key provisions of the Iraqi Criminal Code in order to protect the rights of the civilians in Iraq,<sup>123</sup> was based on the treaty obligation to eliminate obstacles to the application of the Geneva Conventions. The Fourth Geneva Convention prescribed a range of procedural due process rights for the civilian population in occupied territories that presaged the evolution of human rights norms following the Second World War.<sup>124</sup> The implementation of these goals in Iraq accorded with the established body of occupation law and simultaneously fulfilled the requirements of Security Council Resolution 1483 pursuant to the duty of all states to ‘accept and carry out the decisions of the Security Council’.<sup>125</sup> Though the said Policy Memorandum effectively aligned Iraqi domestic procedure and law with the requirements of international law, it was at best a stopgap measure that was neither designed nor intended to bear the full weight of prosecuting the range of crimes committed by the regime. Indeed, Section 1 of the original 18 June 2003 Policy Memorandum No. 3 expressly focused on the ‘need to transition’ to an effective administration of domestic justice weaned from a ‘dependency on military support’.<sup>126</sup>

The second paragraph of Article 64 of the Fourth Geneva Convention is the key to understanding the promulgation of the IHT. Juxtaposed against the Article 64 authority to ‘subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention’, Article 47 of the Convention makes it clear that such ‘provisions’ may include sweeping changes to the domestic legal and governmental structures. Article 47 implicitly concedes power to the occupying force to ‘change ... the institutions or government’ of the occupied territory, as long as those changes do not deprive the population of the benefits of

121 Coalition Provisional Authority Order Number 7 (9 June 2003) Doc. No. CPA/MEM/9 (3 Jun 2003) [2] [3], available at <<http://www.cpa-iraq.org/regulations/index.html#Orders>> (copy on file with author).

122 Ibid.

123 Coalition Provisional Authority Memorandum Number 3 was revised on 27 June 2004, available at <[http://www.cpa-iraq.org/regulations/20040627\\_CPAMEMO\\_3\\_Criminal\\_Procedures\\_\\_Rev\\_.pdf](http://www.cpa-iraq.org/regulations/20040627_CPAMEMO_3_Criminal_Procedures__Rev_.pdf)>.

124 ICCPR, above note 12, Article 14 (describing analogous provisions derived from international human rights law).

125 UN Charter, Article 25.

126 Copy on file with author.

that Convention.<sup>127</sup> Of particular note for the negotiation of the IHT, Article 47 also prevented the CPA from effecting changes that would undermine the rights enjoyed by the civilian population 'by any agreement concluded between the authorities of the occupied territories and the Occupying Power'.<sup>128</sup>

Thus the CPA could not have lawfully hidden behind the fig-leaf of domestic decision-making and simply stood aside if domestic authorities in occupied Iraq had sought to create a process that would have undermined the human rights of those Iraqi citizens accused of even the most severe human rights abuses during the period of the 'entombed regime'. US Army doctrine reflects this understanding of the normative relationship with the reminder that 'restrictions placed upon the authority of a belligerent government cannot be avoided by a system of using a puppet government, central or local, to carry out acts which would have been unlawful if performed directly by the occupant'.<sup>129</sup>

The Commentary to the Fourth Geneva Convention on the protection of civilians also makes it clear that the occupying power may modify domestic institutions (which would include the judicial system and the laws applicable thereto) when the existing institutions or government of the occupied territory operate to deprive human beings of 'the rights and safeguards provided for them' under the Fourth Convention.<sup>130</sup> These provisions of occupation law are consistent with the Allied experiences during the post-Second World War occupations, and were intended to permit future occupation forces to achieve the salutary effects inherent in rebuilding or restructuring domestic legal systems when the demands of justice require such reconstruction. Against that legal backdrop, direct CPA promulgation of the Statute and the accompanying reforms to the existing Iraqi court system could have been justified on the basis of any of the three permissible purposes specified in Article 64 of the Fourth Convention (i.e. fulfilling its treaty obligation to protect civilians, maintaining orderly government over a restless population demanding accountability for the crimes suffered under Saddam, or enhancing the security of Coalition forces).

In other words, both Articles 47 and 64 provided a positive right to the CPA to impose a structure on the Iraqis for the prosecution of the gravest crimes of the Ba'athist regime. Given the state of occupation law, the reality of the matter is that the delegation of authority to the Governing Council to establish the IHT meant that the Tribunal was grounded in Iraqi sovereignty rather than susceptible to portrayal as a vehicle for foreign domination. If the CPA had the power unilaterally to create a structure for the prosecution of leading Ba'athists, the decision to delegate responsibility for developing and promulgating the IST to the

127 See also *US Army Field Manual 27-10*, above note 86, para. 365.

128 *Ibid.*

129 *US Army Field Manual 27-10*, above note 86, para. 366 (further specifying that 'Acts induced or compelled by the occupant are nonetheless its acts').

130 J. Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary*, Vol. IV, *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, ICRC, Geneva, 1958, p. 274 (explaining the intended implementation of the provision in Article 47 that any change introduced to domestic institutions by the occupying power must protect the rights of the civilian population).



Iraqi officials follows as a logical extension. Closer examination shows that the formation of the IST under the authority of the Iraqi Governing Council actually mirrored the practice in Second World War occupations in which the British and Americans created guidelines to direct Germany towards democracy, but ultimately gave the Germans great latitude in rebuilding their country.<sup>131</sup>

## Conclusion

Although it had its genesis during a period of occupation, the IHT was lawfully promulgated by the Iraqis under international norms, and as such should be entitled to the respect and assistance of the leaders and lawyers outside Iraq who support restoration of the rule of law. In any event, the choice of punishments should be reserved for sovereign governments answerable to a society in which they live and work, rather than external players. The inclusion of the death penalty as a permissible punishment for the IHT derived from pre-existing Iraqi law and has generated controversy outside Iraq. However, permitting external players to supersede the established set of domestic punishments would be a modern form of legal colonialism that would have undermined the drafters' aspirations for the Iraqi people to accept the IHT's verdicts, both guilty and innocent, as authoritative and legitimate.<sup>132</sup>

It has been controversial in no small part due to the political circumstances surrounding the invasion of Iraq and the termination of Ba'athist tyranny. Nevertheless, Iraqi jurists are best placed to determine the sequence of trials and choice of accused that will help create the conditions in which democratic freedom can flourish. The first case began on 19 October 2005 and involved an assassination attempt on Saddam Hussein carried out by civilians in the village of al Dujail and the retaliatory killings that followed. Some observers and Iraqis criticized the Dujail case on the grounds that the crimes against civilians were not of a scale comparable with other violations under Ba'athist rule.<sup>133</sup> On 4 April 2006, the second case was referred for trial, charging Saddam Hussein and six co-accused with egregious crimes committed against the Kurdish population during the Anfal campaigns in 1988.<sup>134</sup> The Anfal trial will test the maturity of the IHT in applying international law, as it is an enormously complex series of events

131 W. M. Hudson, 'The US military government and the establishment of democratic reform, federalism, and constitutionalism during the occupation of Bavaria 1945–47', 180 *Military Law Review* 115 (Summer 2004), p. 123.

132 For a detailed account of the Cold War politics and unravelling of wartime unity that doomed the effort to convene a second International Military Tribunal after the Second World War, see D. Bloxham, *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory*, Oxford University Press, Oxford, 2001, pp. 28–37.

133 For a justification of the al Dujail charges in response to some of the media critics, see <[http://www.law.case.edu/saddamtrial/entry.asp?entry\\_id=15](http://www.law.case.edu/saddamtrial/entry.asp?entry_id=15)>.

134 The official fact sheet on the Anfal case referral released by the IHT is available at <[http://www.law.case.edu/saddamtrial/entry.asp?entry\\_id=106](http://www.law.case.edu/saddamtrial/entry.asp?entry_id=106)>.

that highlight the suffering under Ba'athist rules and may well raise the first genocide jurisprudence that the Iraqis will face.

The creation of the IHT as a component of the domestic justice system comports with the reality that the field of international criminal law has emerged as an interrelated system in which domestic fora are responsible for implementing international norms. The UN Secretary-General recently commented that without human rights and the rule of law 'any society, however well armed, will remain insecure; and its development, however dynamic, will remain precarious'.<sup>135</sup> The tribunals created by international efforts have an important role, but are in no way elevated to a *de facto* hierarchical supremacy; they have been the courts of last resort rather than the courts primarily charged as the optimal first response. The pursuit of accountability for international crimes is one of the unifying themes that should bind humanity in common purpose with the people of Iraq and the Iraqi jurists as they pursue justice in the chambers of the Iraqi High Criminal Court.

135 UN Secretary-General Kofi Annan, A new mindset for the United Nations, UN Doc. SG/SM/10325, available at <<http://www.un.org/News/Press/docs/2006/sgsm10325.doc.htm>>.

## REPORTS AND DOCUMENTS

# Future themes of the International Review of the Red Cross

September 2006 – September 2007

## Aim and scope of the Review

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The aim of the *International Review of the Red Cross* is to promote reflection on humanitarian law, policy and action in armed conflict and other situations of collective armed violence. A specialized journal on humanitarian law, it endeavours to promote knowledge, critical analysis and development of this law and to contribute to the prevention of violations of rules protecting fundamental rights and values. The *Review* also offers a forum for discussion on contemporary humanitarian action and for analysis of the causes and characteristics of conflicts so as to give a clearer insight into the humanitarian problems they generate.

## Structure and composition of the Review

The *Review* is made up of four main sections. The first contains *articles on the theme under discussion* in the respective issue. *Selected articles on international humanitarian law* not related to that theme may be published in the second section, according to their originality, importance and academic standard. The third section, entitled *Notes and comments*, contains shorter contributions and comments on specific events, legislation or judgments. Like the selected articles on humanitarian law, these notes and comments need not necessarily be linked to the particular theme of the *Review* concerned. They are also meant to take up current issues giving rise to debate. Finally, in the *Reports and documents* section, the *Review* publishes official ICRC documents, conference reports, etc.

## Future themes

September 2006 – September 2007

The following list of topics indicates areas of reflection, debate and critical analysis for contributions to the *Review*. Within the parameters of the journal's aim, topics

may be examined from a historical, legal, political, military-security, psycho-sociological or humanitarian perspective, taking either a general or a regional approach. The points of interest mentioned below by no means exhaust the various subjects that could be addressed in relation to the future themes.

The dates given below for each theme indicate the planned dates of publication of the respective issue of the *Review*. Articles must be submitted not later than four months ahead of publication (e.g., by the end of August 2006 for the December 2006 issue). Also see information for contributors and the guidelines for referencing on the *Review*'s website: <<http://www.icrc.org/eng/review>>.

### Non-state actors (September 2006)

*Deadline for submission: end of May 2006*

The important role played by non-state actors in armed conflicts today raises a number of challenges for international humanitarian law and action. Phenomena such as globalisation and the privatisation of the prerogatives of states force us to rethink international humanitarian law rules in light of this contemporary context. The questions raised by the emergence of non-state actors in armed conflicts can be analysed from a variety of perspectives, whether political, historical or legal. We particularly welcome articles studying the correlation between the evolution of conflicts and the role of non-state actors; analysis of specific categories of non-state actors and the problems they raise; and articles on the question of failed states.

#### *Possible topics*

- The post-Westphalia period? (historical)
- New forms of conflict and the privatization of war (political science)

#### *Humanitarian law*

- Private actors in warfare
- Outsourcing of warfare and implications for international humanitarian law
- Proxy wars and outsourcing
- Economic actors in warfare
- Mercenaries
- International humanitarian law and failed states
- Non-state actors and compliance with international humanitarian law

### Methods of war (December 2006)

*Deadline for submission: end of August 2006*

Social developments, shifting political relationships, technological progress and cultural change all contribute to the forever-changing appearance of war. The

question of the methods of war, therefore, is always a topical issue as it forces us to analyse the factors behind the changes in the forms taken by war and also how these changes affect international humanitarian law and humanitarian action. The theme can be approached from a general perspective, such as the asymmetry of modern-day wars, or from a more specific angle, such as the question of targeted killings. Here are some of the possible topics we would like to address in this issue:

*Possible topics*

- Nihilism, anarchism or a new method of warfare (philosophical)
- Motivation of suicide attackers (historical, sociological and political)

*Humanitarian law*

- Occupation law and change of regimes
- Neutrality and terrorism
- The notion of protection of civilians in contemporary armed conflicts
- Widening the definition of a “military objective”: consequences for the protection of civilians and civilian objects
- Suicide attacks and the law of war
- The problem of targeted killings and related issues
- Conduct of hostilities in asymmetric conflicts: the impossibility to comply with international humanitarian law?
- Conduct of hostilities in non-international armed conflicts: insufficient rules?
- Urban warfare and the challenges to international humanitarian law
- Covert military operations
- Air warfare

Humanitarian actors (March 2007)

*Deadline for submission: end of November 2006*

New humanitarian actors are making headlines in the international media. This issue is dedicated to the different humanitarian actors of today, who they are and what they do. This will help to differentiate the skills and capacities of each humanitarian organization and underline the current changes taking place in the humanitarian environment. We welcome articles on the humanitarian role of the following actors, as well as reflections on the principles behind their mandates and their operational theatres:

*Possible topics*

- Ambassadors of humanitarian action (humanitarian action)
- Governments and military as humanitarian actors (humanitarian action)
- ICRC delegates (humanitarian action)
- Security Council’s role in humanitarian action (legal and political)
- Humanitarian networking (politics of humanitarian action)
- Islamic NGOs (humanitarian action)

- Importance of National Red Cross and Red Crescent societies (humanitarian action)

#### *Humanitarian law*

- Independence of humanitarian actors
- Accountability of humanitarian actors
- Security of humanitarian actors
- What is meant by neutrality today?

### Disasters (June 2007)

*Deadline for submission: end of February 2007*

Disasters are natural or man-made events that bring permanent change to societies, ecosystems and the environment. Often, disasters are qualified as “natural disasters” owing to their natural causes. But it is the human and social vulnerability of the persons affected by the event that transforms it into a disaster. This issue aims to analyse the links between disasters and armed conflicts on a variety of levels. Articles written from a political or legal perspective and related to state security in these situations are particularly welcome, as are articles dealing with the impact of diseases or pandemics on humanitarian action. The following problems could be analysed:

#### *Possible topics*

- Bio-safety and bio-security (political aspects)
- Diseases and war (health and social consequences of diversion of economic resources to war and preparation of war)
- Impact of war on the environment (ecology)
- Prevention and awareness building (humanitarian action)
- AIDS and war (humanitarian action)
- Humanitarian action in apocalyptic situations (humanitarian action)

#### *Humanitarian law*

- Potential risks in warfare and disaster law
- Role of medical personnel
- Epidemics and state security

### Human rights (September 2007)

*Deadline for submission: end of May 2007*

Humanitarian actors today, including the International Committee of the Red Cross, work principally in situations that fall below the threshold of armed conflict. It is particularly in these situations, where international humanitarian law is not applicable, that international human rights law can be invoked as the basis

for protecting persons in violent situations. Moreover, international human rights law plays a complementary role to international humanitarian law in armed conflicts. The debate on the relationship between international human rights law and international humanitarian law has therefore shifted from the applicability of human rights law to the question of the extent to which recourse should be had to human rights law and, conversely, on the desirability of invoking international humanitarian law to “grey” situations. We welcome articles dealing with this general problem and articles that explore the links between United Nations’ human rights instruments or regional human rights instruments and international humanitarian law.

*Possible topics*

- Universality of international humanitarian law and international human rights law (philosophical)
- Obligation or rights-approach? (legal)
- Coordination between human rights organizations and humanitarian actors in the field (humanitarian action)
- Tolerance and respect for the person (philosophical)

*Humanitarian law*

- Protection under international humanitarian law and protection under international human rights law
- Below the threshold of international humanitarian law
- The Human Rights Council
- Special rapporteurs, thematic rapporteurs and international humanitarian law
- The case law of the European Court of Human Rights and international humanitarian law
- The case law of the Inter-American Court of Human Rights and international humanitarian law
- Extraterritorial application of the European Convention of Human Rights
- Enforced disappearances



## BOOKS AND ARTICLES

Recent acquisitions of the Library & Research Service, ICRC

### Africa – books

- Bangoura, Mohamed Tétémedi. *Violence politique et conflits en Afrique: le cas du Tchad*. Paris: L'Harmattan, 2005, 487 pp., Etudes africaines
- Châtaignier, Jean-Marc. *L'ONU dans la crise en Sierra Leone: les méandres d'une négociation*. Paris: Karthala, 2005, 197 pp.
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- Pronk, Jan, Rex Sean O'Fahey, Adam Azzain Mohamed. 'The Sudan: past, present, and future', *Fletcher forum of world affairs*, Vol. 30, no. 1 (Winter 2006), pp. 11–59.
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