Editorial

In this edition of *Law Democracy and Development* the focus is on transitional justice specifically in the African context. Transitional justice is a key area of focus and specialisation at the Law Faculty of the University of the Western Cape because as the twenty-first century begins, transitions from repressive rule to democracy have become a worldwide phenomenon. In many cases, the displaced regimes have been characterised by massive violations of human rights. Dealing with these past injustices is a crucial test for a new democratic order. Facing the tension between justice and peace, the transitional process entails tremendous challenges. Countries in these situations have to resolve similar problems: should or must they punish human rights violations committed under the old order? Is an amnesty permissible and necessary in the interest of peace, reconciliation and unity? Does a society need an official accounting and acknowledgment of the wrongs of the past? Must the public sector be purged of supporters of the old regime? How can the victims of human rights violations be assisted in some way and have their dignity restored? To what extent should unjustly expropriated property be restored? New democracies have various options in dealing with these issues. They make their choices according to the contexts of their transitions, taking into account the seriousness of the crimes committed and the amount of resources available to deal with these issues.

Avril McDonald deals with the possible right of victims to truth, justice and remedies in situations where violations of international humanitarian law are so serious as to constitute crimes under international law. She examines international law on genocide, crimes against humanity and the law on war crimes applicable in both international and internal armed conflicts as well as customary international law. Her paper then turns to examine the duty to prosecute international crimes and reviews international practice on amnesties and truth commissions. McDonald then deals in some detail with the different approaches that have been adopted in South Africa, Rwanda and Sierra Leone. She concludes that legitimate concerns for the rights of perpetrators and the needs of the society as a whole cannot be used as an excuse for ignoring the legitimate needs, interests and rights of victims. While recognition of the existence and status of victims; their involvement in a process of truth-telling and discovery; acknowledgement of the wrongs done to victims; the payment of reparations; rehabilitation; and other modes of compensation are all very well, for many victims the need to see the worst organisers and perpetrators of the most heinous crimes prosecuted and punished remains. If this is not accomplished, the unfulfilled need for justice and the widespread sense that law is worthless may remain an open wound, and reconciliation may be thwarted.

Based on research with 560 victims of human rights violations in South Africa during the apartheid era, **Gabriel O'Malley** argues that the Truth and Reconciliation Commission's work is flawed by the lack of institutional recognition for the desire of many victims for revenge. The commission aimed to achieve restorative (rather than retributive) justice in two ways. It demanded the "truth" about what happened from perpetrators, offering in return possible immunity from criminal and civil claims and the granting of amnesty for certain political acts. It offered victims the opportunity to publicly share their stories, through written statements and public hearings. Perpetrators were not required to apologise or to show regret. While some victims forgave perpetrators of their own accord, the commission's human rights values and Christian ethos *required* victims to forgive. Any expression of anger or demand for revenge was out of place. The author argues that retributive institutions are necessary to remove the psychic burden of vengeance from individuals whose vindictiveness might otherwise endanger them, as well as others. He says a programme to allow victims to meet the perpetrators of the human rights violation in question should be set up; high-ranking perpetrators should not be allowed to hold public office; a reparations fund should be set up to which perpetrators and beneficiaries may contribute; and perpetrators who did not apply or qualify for amnesty should be prosecuted.

Former Truth and Reconciliation Commission of South Africa research director **Charles Villa-Vicencio** sees reactions to the work of the commission as falling into three categories: those who rejected the mandate of the commission, those who enthusiastically embraced it, and the majority who are ambivalent. He explores the role of the commission in creating an institutional memory of the past and how difficult it is for many to "get on with life" once the process is over. In the author's view, it is too soon to tell whether this attempt to heal the wounds of the past has been successful.

Lovell Fernandez discusses the reparations policy of the Truth and Reconciliation Commission of South Africa. In terms of the founding Act, the commission merely has the power to make recommendations on reparations – Parliament is to decide on the matter, acting on the recommendation of the President. The Reparations and Reconciliation Committee of the commission recommended the reparations take five forms: urgent interim reparation, individual reparation grants, symbolic reparation and community rehabilitation, community rehabilitation programmes, and institutional reform. Although some urgent interim reparation payments have been made since 1998, many applicants are still waiting. While individual reparation grants are in place in theory, in practice no money has been earmarked for this in the Budget, and no government ministry has been given responsibility for implementing this process. The author points out that the cost to government of paying reparations would be a mere 0,5 per cent of the annual budget over six years. It is not clear why the government is failing to meet its obligations to pay reparations to the 22 000 victims identified by the commission.

Jeremy Sarkin suggests a possible model for a truth and reconciliation enquiry in Rwanda which was presented to that government in 1998. Having sketched the enormous difficulties of prosecuting the estimated

125 000 alleged perpetrators of the 1994 genocide in Rwanda in which up to one million people died, he makes the case for the necessity of establishing a truth and reconciliation commission. As an interim measure, the author suggests that use be made of existing community-based dispute resolution forums known as the Gacaca for local-level enquiries into the genocide. The implementation of this idea would require careful planning and gradual expansion from a pilot programme. Traditionally made up of respected older men, the makeup of these structures would have to be carefully considered to achieve a representative body which has the support of the community which it serves. Communities would have to reach agreement before being able to apply to the government for such a structure to be established. The powers of these bodies and their relationship to the formal justice system would have to be clearly defined and the proceedings would have to be conducted in an open manner. In conclusion, Sarkin emphasises says that the Gacaca model can only be a first, interim step in the necessary process of national healing – a national truth and reconciliation commission must be established to ensure lasting peace in the country.

Abdul Tejan-Cole deals with the controversial amnesty provisions of the Lomé Peace Agreement in Sierra Leone. While the agreement calls for the establishment of a Truth and Reconciliation Commission and recognises the basic civil and political rights adopted by the United Nations and the Organisation of African Unity, it grants blanket amnesty to all combatants and collaborators against a background of appalling atrocities against civilians, including mass murder, rape, abduction and the brutal amputation of arms, legs and hands. The agreement also gives rebel leaders important positions in the executive. The author argues this amnesty removes any incentive for perpetrators to participate in the proposed commission's work – in fact the rebels have been rewarded for what they have done. The amnesty has been widely condemned. Even the United Nations, a guarantor of the agreement, has dissociated itself from the amnesty, saying it does not apply to genocide, war crimes and other serious violations of international humanitarian law. The author argues that the agreement clearly flouts international human rights and humanitarian law and says true and lasting peace and reconciliation cannot be achieved unless the rights of victims to truth, justice and reparation are adequately addressed.

Jeremy Sarkin describes how Ethiopia has chosen to prosecute perpetrators of past human rights violations rather than to use the truth commission route favoured by many other countries. However, Haile Mengistu Mariam and other high ranking figures in former regimes have fled to countries where they are immune from prosecution or extradition. Faced with a choice between using Ethiopian law or international customary law, the Office of the Special Prosecutor (SPO) decided to use the former because its definition of genocide includes offences against political groups, unlike the Genocide Convention. A second reason for this choice is that it was not clear whether it is possible to charge alleged perpetrators with war crimes under international customary law if the alleged crimes were committed in an internal conflict. (This uncertainty has subsequently been cleared up.) Problems with the process include

severe delays, inexperienced and undertrained public defenders, the fact that *habeas corpus* does not apply to those accused of war crimes; and the fact that it may take up to 20 years to complete the process. The author argues that experience shows it is very difficult to meet the hopes and expectations of victims during war crimes trials. Among other things, victims are seldom involved in such trials; they are denied the catharsis of a truth commission process which focuses on them as victim; a trial allows for only a single version of events; and a guilty verdict is far from certain, given the standards of proof demanded in a criminal trial.

Jeremy Sarkin