

# A right to truth, justice and a remedy for African victims of serious violations of international humanitarian law

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## 1 INTRODUCTION

African victims of serious violations of international humanitarian law and victims of such violations the world over seem to be caught between a rock and a hard place, accessories to political processes that habitually see them, and the rule of law, as the losers. They are not usually consulted as to their views on how their states should deal with violations of international humanitarian law that are so serious that they are considered international crimes; they are not generally asked what they want or need; they do not have a choice or any representation in the decision-making process; they may be told that compromise is the price of peace which they simply have to accept; and, if they are lucky, they may be able to tell their story in an official, institutional environment that is sympathetic if relatively toothless.

The decision by national authorities to punish or to grant amnesty for serious violations of international humanitarian law or human rights is not usually a free choice between equally attractive and legitimate ways of dealing with a legacy of massive violations. The granting of amnesties along with the establishment of a national truth commission, rather than the adoption of a punitive approach, is often the only realistic way to ensure a peaceful transition from situations of armed conflict to peace or from dictatorial to democratic regimes. They are a compromise approach, with the truth commission frequently serving as a sop to the amnesties, a recognition of the need to take notice of the crimes and of the victims when national prosecutions are or seem to be impossible.<sup>1</sup>

While some victims of atrocities committed either by the state or by non-state actors have an extraordinary capacity to forgive, and their demands of their assailants and of society are incredibly modest and do

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1 Judge Richard Goldstone said that “the [South African] TRC was a political decision. It wasn’t taken for moral reasons or for reasons of justice. It was a political compromise between having Nuremberg-style trials on the one hand and forgetting on the other”. TRC preferable to trials *Pretoria News* 18 August 1997:5.

not reflect a desire for retribution,<sup>2</sup> for many other victims, the need to see justice done is very real. Even the ideal truth commission or other non-judicial approaches have serious limitations if what is sought is some kind of reckoning for the perpetrator. 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: these are all very well, and are, indeed, essential ingredients of any healing and reconciliation process, and should be part of every method of dealing with serious and widespread violations of international humanitarian law and human rights. But, for many victims, beyond this is the need to see the worst organisers and perpetrators of the most heinous crimes prosecuted and punished. 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.

This paper examines the experiences of three African states that are currently dealing – each in its own way – with a legacy of serious violations of international humanitarian law and human rights: South Africa, Rwanda and Sierra Leone. Africa presents as an urgent subject for study considering the enormous numbers of victims of international crimes in her constituent countries and the devastating effects that the many armed conflicts there have wrought on the civilian population. The aim is to discover where and how African victims of international crimes fit into the processes that transitional states use to deal with international crimes and their perpetrators, and to what extent, if at all, the needs and maybe even rights of victims are taken into account in the terms of peace agreements, and in the implementation of their provisions. National and international approaches to dealing with serious international crimes generally focus on the perpetrators rather than their victims. A few perpetrators can create a very substantial problem, and victims are generally not problem-creating, so the greater proportion of resources for dealing with criminality of this type is devoted to the instigators of the mayhem, rather than its casualties. Victims are generally on the fringes of the process, whatever that may be in the circumstances. While they suffer the most, they tend to be accorded relatively little attention and concern.

However, the exclusion of victims of international crimes from whatever method for dealing with international criminality is adopted, or their marginalisation, is both inequitable and shortsighted. Moreover, it may violate the victims' rights under international law. Establishing rights

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2 Mr Dullah Omar, the then-South African Minister for Justice said "often, victims seeking compensation seek very little. a tombstone for the grave of a loved one, the possibility to be educated or to have access to medical treatment. . . .The victims of apartheid. . . have displayed remarkable generosity of approach. In general, they have not asked for revenge or vengeance; they've asked for the truth, and they've asked for a measure of understanding." 'Statement made on 'Facing the Past'. Newshour with Jim Lehrer. On-line Focus. transcript 8 April 1997

[http://www.pbs.org/newshour/bb/africa/april97/south\\_africa\\_4-8.html](http://www.pbs.org/newshour/bb/africa/april97/south_africa_4-8.html).

under international law of victims of serious violations of international humanitarian law and human rights to truth, justice, and, more substantially, a remedy, would bolster arguments for giving more attention and weight to victims in designing approaches for dealing with international crimes, at both national and international levels. Any rights of victims must of course be weighed against the rights of the perpetrators, respect for which is paramount, as well as the interests and needs of the society in general. It is not suggested here that the rights of victims should take precedence over the rights of accused persons, or that responses to such criminality should be driven only by a concern for victims. Indeed, an approach that only takes account of the interests and desires of victims may turn out to be almost wholly retributive, which may not be in the interests of the wider society or serve the goal of reconciliation. However, legitimate concern 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.

Considering the rights of victims of international crimes may also assist in drawing attention to the position of these people as the most and worst affected, individually and collectively, directly and indirectly. The effects of victimisation can have repercussions across a whole society. It is also an attempt to promote an alternative way of approaching international criminality, and, most fundamentally, considering it not as a bipolar relationship between the perpetrator and the state, with the victim at best in a supporting role, but instead as a triangular relationship involving the victim, the perpetrator and the state. There is some reason to believe that the practical application of an approach that takes due cognisance of victims might prove beneficial to the process of reconciliation in divided and antagonistic societies.

Our three case studies have each taken very different approaches to dealing with human rights and humanitarian law violations, and the position of the victims of these crimes differs in each case. The first, South Africa, seeking to deal with its legacy of apartheid, has taken a middle road, establishing its Truth and Reconciliation Commission (TRC) and granting amnesties to the perpetrators of crimes, but only in respect of persons who first give a full and truthful rendition of the facts and only when the crimes were political and proportionate to the aim sought to be achieved (Sarkin 1996; 1997; 1998). However, the amnesties in South Africa have not let everyone off the hook. Persons who did not apply for amnesty or in respect of whom amnesties have been denied are liable to be prosecuted. Victims have been able to tell their stories before the TRC, and the Promotion of Truth and Reconciliation Act 34 of 1995 provides for compensation to victims at the same time as it denies them a legal right to pursue either criminal or civil claims.

Rwanda, faced with a rather different sort of problem, the mass murder of up to one million of its population, has tried to take a more aggressive approach. The government, alongside the *ad hoc* International Criminal Tribunal for Rwanda (ICTR), is seeking to prosecute a great number of

people implicated in the genocide (Sarkin 1999). It has faced, and continues to face, massive problems and challenges. The judicial system was destroyed in the genocide. The government has over 130 000 people in prison and few resources to try them. Even a country with adequate resources and infrastructure would find it impossible to undertake prosecutions on this scale. Rwanda has come to realise that not all of those who are guilty can ever be adequately punished. However, some form of judicial response to atrocities on such a scale is required. The Organic Law of 30 August 1996 on the organisation of prosecutions for offences constituting the crime of genocide or crimes against humanity since 1 October 1990<sup>3</sup> provides the legal framework for prosecuting the perpetrators and for compensating victims of the genocide.

Sierra Leone has taken the most problematic route. Its July 1999 Peace Agreement<sup>4</sup> provides for a blanket amnesty for all persons involved in the eight and a half year-old civil war. It is unlikely that prosecutions will be undertaken, at least at a national level, although a national truth and reconciliation commission is in the process of being established, as well as an international Commission of Inquiry, and international prosecutions have even been suggested, although no-one should be holding his breath for the latter. The victims of the atrocities perpetrated by both state and primarily non-state actors have been denied any legal right to pursue civil or criminal claims before the national courts.

One obviously cannot draw any conclusions as to the legal positions of victims of serious violations of international humanitarian law from the practice of these three states alone. To understand the international legal position within which the position of victims of these violations must be considered, it will be necessary to examine the experiences of several states in dealing with serious violations of international humanitarian law. But first, a word about the kinds of crimes with which this paper is concerned, and then a brief discussion of what is meant by and the content of the right to truth, justice and a remedy within the context in which these terms are used here.

## 2 THE RELEVANT INTERNATIONAL CRIMES

This paper is not concerned with the full range of behaviour that is criminalised under international law, or even all of the types of criminal behaviour featuring in the International Law Commission's Draft Code of Offences against the Peace and Security of Mankind (International Law Commission 1996). Its ambit, rather, is limited to serious violations of international humanitarian law, using that term in its broadest sense to

3 Published in *The genocide and the crimes against humanity in Rwanda law 1996*. Reprinted in TMC Asser Instituut 1998:625–635. For a detailed commentary on the law see De Beer 1999.

4 Lomé Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone. [[http://www.sierra-leone.gov.sl/peace\\_agreement.htm](http://www.sierra-leone.gov.sl/peace_agreement.htm).]

include not only violations of the laws and customs of war, but also certain acts which could also be considered as extremely grave human rights violations when committed by a state, that is, genocide and crimes against humanity. These latter crimes can also be perpetrated by non-states actors who are sufficiently organised to be in a position to commit them. For our purposes, useful reference points are thus the Statutes of the *ad hoc* International Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR) and the Statute of the International Criminal Court (ICC), the latter which has jurisdiction over four categories of crimes: aggression, genocide, crimes against humanity and war crimes. This paper is not concerned with aggression, however, but only with the other three categories of crimes.

The violations of the laws and customs of war with which the paper is concerned include the law applicable in both international and non-international armed conflicts. Applicable during the former are grave breaches of the Geneva Conventions of 1949 and their Additional Protocol I of 1977 as well as customary international law. Applicable during non-international armed conflict are common Article 3 of the Geneva Conventions of 1949 and their Additional Protocol II of 1977, *inter alia*,<sup>5</sup> as well as some customary international law. Common Article 3 has been found by the International Court of Justice to be customary,<sup>6</sup> while the ICTY confirmed this and also declared that the core elements of Protocol II, particularly its Article 4 (fundamental guarantees) are customary in nature.<sup>7</sup>

While there has been a willingness by some states and jurists to consider that grave breaches may be considered as applicable, not only in international armed conflicts but also in internal armed conflicts,<sup>8</sup> for the purposes of this paper, grave breaches are considered in their conventional sense, that is, as applicable only when committed against protected persons as defined in common Article 4 of the Geneva Conventions, that is, persons in the hands of a party to the conflict of which they are not nationals. Thus, it is accepted here that grave breaches can only be committed during international armed conflicts. However, the vast majority of armed conflicts today, in Africa and elsewhere, are non-international armed conflicts. Thus, for our purposes, of greater practical importance than the grave breaches provisions are the parts of the law applicable in non-international or internal armed conflicts. While much controversy has surrounded the question whether the law applicable in internal armed

5 For a discussion of the law applicable in non-international armed conflicts and the question of criminal liability, see McDonald 1999:79–104.

6 *Nicaragua case* Merits ICJ Rep 1986 para 218.

7 'Customary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife'. *Prosecutor v Dusko Tadic*, case IT-94-I-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction 2 October 1995 para 134. See also generally section IV of the decision.

8 For a discussion see McDonald forthcoming 2000.

conflicts gives rise to individual criminal responsibility, the decision on jurisdiction of the Appeals Chamber in the *Tadic* case,<sup>9</sup> and subsequent cases of the ICTY and ICTR<sup>10</sup> have all found that individual criminal responsibility for breaches of the law applicable in internal armed conflicts arises under customary international humanitarian law.<sup>11</sup> That war crimes in internal armed conflicts give rise to individual criminal responsibility has also been confirmed by their inclusion in the Statute of the International Criminal Court,<sup>12</sup> as well as, previously, in the Statute of the ICTR.

### 3 THE RIGHT TO TRUTH, JUSTICE AND A REMEDY FOR SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW

In the context in which they are considered here, truth, justice and a remedy refer to three claims that are inextricably interlinked. While they exist as separate concepts, from the perspective of the victim of serious violations of international humanitarian law, they are connected. Truth is a form of justice and also a remedy; justice consists of truth and a remedy; a remedy consists of truth and justice. Thus, while for the sake of clarity we will consider them separately below, they are in fact a trioka.

#### 3.1 Truth

The subject of truth has engaged philosophers and all thinkers, including lawyers, for as long as civilisation has existed. And yet, after all these efforts, truth remains a slippery notion. As a recent commentator notes, “‘truth’, like ‘justice’ and ‘reconciliation’, is an elusive concept that defies rigid definitions” (Parlevliet 1998:141). Unfortunately, there is no room here for any meaningful contribution to this incessant discussion.

For our purposes, what is important is not so much the ability to reach a definition of truth, but rather to determine whether the search for and discovery of ‘the truth’ can be regarded as a worthwhile endeavour and an end in itself, or whether the search for ‘the truth’ should be seen as a preliminary step on a journey to some other ultimate goal. From the former perspective, finding the truth is not seen as a precursor to (criminal) justice, and ultimately a judicial remedy for the victims, but as a substitute for judicial justice or indeed as a form of justice in itself.<sup>13</sup> According to Parlevliet (1998:142), “the increasing number of such bodies

9 See footnote 7.

10 *Inter alia Prosecutor v Zejnir Delalic Zdravko Mucic Hazim Delic and Esad Landco* (celebici), IT-96-21-T 16 November 1998 at 113; *The Prosecutor v Akayesu* case ICTR-96-4-T Judgment 2 September 1998.

11 See McDonald 1999.

12 In Article 8. For a discussion of the negotiations on the parts of Article 8 dealing with war crimes committed in an internal armed conflict see Robinson & von Hebel Forthcoming 1999.

13 See Popkin & Roht-Arriaza 1995:79; Bronkhorst 1995.

[truth commissions] that investigate and record yet do not punish, indicates that 'telling the truth' has come to be regarded as an important contribution to strengthen the rule of law. This is remarkable considering that punishment is usually regarded as an effective deterrent and retribution; criminal prosecutions have thus often been emphasised as the best approach towards past violations in asserting the rule of law". One could draw a different conclusion. Rather than the establishment of truth commissions being seen as an alternative, even preferable, way of dealing with the past, or strengthening the rule of law, it can be seen as the defeat of justice, as the triumph of utilitarianism and compromise over the rule of law and justice.

As Parlevliet notes (1998:143), the search for the truth is not only about gaining knowledge, but also about providing acknowledgement: "the determination of facts about the past, *and* a full, public and official acknowledgement thereof. The basic facts of what happened are often already known to some extent, in which case establishing the truth comes down to confirming what is already widely believed to be true". This is also the view of the UN Special Rapporteur on the Question of the impunity of perpetrators of violations of human rights (civil and political), Mr Louis Joinet.<sup>14</sup> Mr Joinet refers to the right to know, rather than the right to truth, although in his reports, these are closely related concepts. In fact, the right to know is probably broader than the right to truth, certainly in the context in which the latter term is used here, encompassing the full range of available human knowledge and information.<sup>15</sup>

The debate over whether truth is objective or subjective is never-ending, and, again, there is no room here to engage with this discussion. Some commentators argue that truth is objective. According to Carr (1998:88), truth is "the objective matter *par excellence*. What is true is true for everyone . . . independently of what anyone believes". On the other hand, "some scholars reject the idea that truth is ever objective, but argue instead in favour of a contextual conception of truth" (Parlevliet 1998:147).<sup>16</sup>

In the view of this writer, there is no absolute truth; facts are subjectively interpreted and perhaps it is impossible to find a version of the truth that satisfies everyone. In the context of dealing with serious violations of international humanitarian law and human rights, we can only try to establish the most objective truth possible, by means of witness testimony, and forensic and other evidence. To be credible and accepted by the majority of the population and the wider world, determinations of truth must be made by a body that is as far as possible above reproach. It

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14 In his revised and expanded Final Report submitted pursuant to Sub-Commission decision 1996/119, Mr Joinet stated that the right to know, expressed as one of the three fundamental rights of victims (along with the right to justice and to reparation), is not just a right of individuals or their families, it is a collective right, whose corollary is the duty to remember on the part of the state. It implies the preservation of archives. UN report E/CN.4/Sub.2/1997/20 26 June 1997 paras 17-25.

15 See for example Weeramantry 1997.

16 See also Rorty 1991.

should be independent, impartial and adequately-resourced, and of a stature that will ensure that the version of the truth it delivers will be widely accepted. This author agrees with Parlevliet (1998:152) that a precondition for achieving this “truth” is an open dialogue. Thus, a body that is established with a view to unearthing “the truth” must provide the right conditions for an open exchange of views. This means that the victims ideally should be able to contribute to the dialogue without fear of retribution and the same is true for the perpetrators. One could argue that perpetrators will not speak openly if they fear prosecution and punishment and that amnesty for the perpetrators is one way of encouraging perpetrators to speak freely. On the other hand, one can equally assert that where, as in Sierra Leone, blanket amnesties are given even before the establishment of a truth commission, any incentive for perpetrators to come forward is removed, and the consequence may be a very one-sided version of the truth, with only the victims’ stories being related. This begs the question as to the “best” way to reach “the truth”. For many people, and for many victims, the only acceptable truth is a judicial truth. But if the judiciary is impotent or lacks credibility and independence, or if, for political reasons, a judicial solution is not possible, the task of managing and delivering the truth may fall to another body, which may also be vested with an authoritative status and which may be able to deliver a credible and acceptable version of the truth. The South African TRC is a good, perhaps rare, example of a non-judicial body that has executed its mandate of reaching the truth with admirable impartiality, independence and integrity, but here, it should be remembered, the amnesties were contingent on telling the truth, openly and honestly. In order to reach a broadly accepted version of the truth, it is important that the truth-telling process not be one-sided, but that it should involve perpetrators as well as victims. Perpetrators will probably need some incentive to come forward and tell the truth. One carrot is making the grant of amnesty conditional on the perpetrators’ giving a full and honest rendition of the facts.

It is impossible to judge or choose between a judicial truth and one that is reached in a different manner since, as noted, it is not a free choice, and TRCs are usually the second-best option, when prosecutions are impossible. It would appear that, at least in some instances, such bodies are capable of managing the truth and reconciliation process in a way that promotes integration rather than divisiveness, and of delivering to victims and to the population at large a version of events that they can, for the most part, accept, as well as some sense of satisfaction. To achieve this, however, there are certain procedural minimum requirements. In particular, it is necessary for the process to be as transparent as possible. There will be occasions where some secrecy is necessary, for example, to protect witnesses, but, for the most part, the work of a TRC should be conducted in public, its findings should be made public, and it should be able to identify and name perpetrators if it is to fulfill its truth-telling function adequately.

While prosecutions and TRCs are usually seen as, and frequently are, alternative processes, in some situations, the establishment of a TRC can complement the criminal justice process. The former Chief Prosecutor of



the ICTY, Judge Richard Goldstone (1998) has said that while the “judicial process is essential for reconciliation to begin, it is insufficient alone to satisfy the human need for knowing the truth of a tragic series of events. In addition to criminal prosecution, it is necessary for a damaged society to arrive at a wider understanding of the causes of its suffering”.

A complementary process might best be realised in a situation where amnesties are offered to lesser criminals in return for a full confession and apology, and giving evidence against persons accused of more serious crimes, including serious violations of international humanitarian law and human rights. Any complementary or hybrid scheme should be planned and implemented in a co-ordinated way, so that the relationship between these processes and the lines of demarcation of their roles are made clear and the potential for conflict between them is minimised.

Perhaps the key question for our purposes is whether the right to truth is an international legal right rather than merely an aspiration. Mr Joinet, who has by now presented three reports on the question of the impunity of perpetrators of violations of human rights (civil and political),<sup>17</sup> uses the language of human rights. However, the Joinet principles, along with the van Boven principles on the right to reparation for victims of gross violations of human rights and humanitarian law,<sup>18</sup> appear to be catalogues of aspirations rather than legally enforceable rights. As reports of special rapporteurs prepared pursuant to resolutions of the UN Sub-committee on the Prevention of Discrimination and the Protection of Minorities, they are not legally binding on states. However, an examination of state practice reveals that in the majority of states that have moved from conflict to peace and from repression to democracy, some form of truth telling has been a part of the transition process. Even where circumstances have prevented the national authorities from undertaking prosecutions, it has been recognised that some form of institutional investigation and acknowledgement of the past are essential elements of the reconciliation process. Practice indicates that states believe that victims of serious violations of international humanitarian law and human rights deserve at least this much. The question is whether this can be considered as a right of victims or simply as a concession of states. However, if one considers truth as a form of a remedy, one can regard it as a right under international human rights law. All of the international and regional human rights instruments recognise the right of individuals to a remedy.

### 3.2 Justice and remedies

In this context, justice is given two main interpretations, while recognising that, like truth, justice is a nebulous concept, subject to endless debate. First, criminal justice, that is, the prosecution and punishment of persons

17 E/CN.4/Sub.2/1996/18 29 June 1996; E/CN.4/Sub.2/1997/20 of 26 June 1997 and E/CN.4/Sub.2/1997/20/Rev.1 of 2 October 1997.

18 *Van Boven* reports – UN report E/CN.4/Sub.2/1993/8 of 2 July 1993; E/CN.4/Sub.2/1996/17 of 24 May 1996; and E/CN.4/1997/104 of 16 January 1997. See also Bassiouni 1999.

accused of serious violations of international humanitarian law. This can be accomplished at the national level, by the state where the violations have been committed, and by states exercising universal jurisdiction over these crimes, and also by international criminal tribunals or courts. We can also speak of justice in a much broader sense, including, for our purposes, in the sense of the victim's satisfaction with a result and the restoration of the *status quo ante*, in so far as that is possible. Even in the absence of criminal justice, there could be alternative forms of justice. Victims could achieve some sense of satisfaction, if not by seeing their assailants prosecuted and punished, at least by taking part in the work of a truth commission, by being recognised and acknowledged and by attaining some form of restitution.

The subject of remedies is very complex, and our discussion here can only offer a perfunctory analysis. A remedy could consist of a broad variety of possibilities. First, there are judicial remedies. This could mean that the perpetrator is prosecuted and punished before a criminal court, whether national or international, or alternatively that the victim has access to civil remedies. In the absence of judicial remedies, there may still be the possibility of other forms of remedies. A non-judicial body, such as a TRC, may be empowered to provide for remedies in respect of victims, such as monetary or other forms of compensation, access to services and grants, and various forms of rehabilitation. As shown below in part 5, almost all states that have gone through a transition period, from dictatorship to democracy, or from armed conflict to peace, have granted victims of the crimes committed some form of a remedy, although one can certainly argue over the adequacy of such remedies. It is worthwhile considering what might be the legal source of any right of victims to a remedy in respect of serious violations of international humanitarian law, and whether states that grant victims remedies act in the belief that they have an international obligation to do so.

Possible sources of a right of victims to a remedy could be general international law, where the right of victims to a remedy is regarded as the flip side of the responsibility of states to provide one, assuming we can show that such responsibility actually exists, or, alternatively, and more promisingly, under international human rights law.

### 3.2.1 *State responsibility*

The principle of state responsibility for violations of international obligations is well established in international law. It arises, *inter alia*, in respect of serious violations of international humanitarian law, as provided for in the Hague and Geneva Conventions.<sup>19</sup>

The state is responsible for all acts committed by members of its armed forces, but not for other forces, including non-state actors. However,

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19 Article 3 Hague Conventions and Regulations of 1907; Article 51(I) Geneva Convention of 1949; Article 52(II) Geneva Convention; Article 131(III) Geneva Convention and Article 148 Fourth Geneva Convention.

under international law, the principle of state responsibility concerns obligations interstate, and does not regulate relationships between states and individuals. "The draft articles of the International Law Commission on State Responsibility, provide that any breach of an obligation under international law, entails a secondary obligation to make reparation designed to wipe out all the consequences of an unlawful act (Article 41). But it is by no means clear whether these rules, which codify the traditional law of inter-state relations, also apply to the relationship between states and their citizens" (Tomuschat 1999:152).

It is not true to say that state responsibility can never concern individuals, or that states do not have any obligations towards individuals. States may, in fact, be responsible to the nationals of third states, but, in most cases, any claims by them cannot be made directly but must be made through their state of nationality. This was stated to be the case in several recent cases, although another case has said that individuals can make claims directly against third states. In Japan, the District Court, ruling on the question of whether former Filipino "comfort women" could claim compensation against Japan for the acts of Japanese soldiers, found that a state was not liable to directly compensate the individual victims of other belligerent states. This was reaffirmed in other Japanese cases concerning prisoners of war and comfort women, which confirmed that individual victims could not seek compensation under Article 3 of the Hague Conventions or under customary international law.<sup>20</sup> An American case concerning slave labour in the Second World War also found that "the cases are unanimous . . . in holding that nothing in the Hague Convention even impliedly grants individuals the right to seek damages for violation of [its] provision".<sup>21</sup> These cases are currently in the appeals phase.

However, in a recent decision of the Russian Constitutional Court concerning cultural property transferred into the USSR after the Second World War which considered Article 18(1) of the Federal Russian Act of 15 April 1998 on Cultural Property Transferred into the USSR, in Consequence of World War II and being found in the Territory of the Russian Federation,<sup>22</sup> \*\*found that while the intergovernmental (diplomatic) way of solving

20 *Korean ex-comfort women v Japanese Government*. Yamaguchi District Court 27 April 1998. Reported in *Hanrei Jiho* 1642:24-88; *Filipino ex-comfort women v Japanese Government*. Tokyo District Court 9 October 1998 not yet reported; *English ex-prisoners of war et al v Japanese Government* Tokyo District Court 26 November 1998 not yet reported; *Dutch ex-prisoners of war et al v Japanese Government*. Tokyo District Court 30 November 1998. Reported in *Hanrei Taimuzu* 991:262-277. For a discussion, see Japan, in TMC Asser Instituut forthcoming 1999.

21 *Fishel v BASF Group et al* Civil No 4-96-CV-10449 Lexis 21230 (SD Iowa 1998).

22 Which provided that only foreign governments have the right to file claims concerning property issues, including on behalf of their citizens, and that these claims should be addressed only to the government of Russia. No claims will be received from individuals and organisations. Adopted by GosDuma (lower Chamber of the Russian Parliament) in 5 February 1997, approved by the Soviet of Federation (the upper Chamber of the Russian Parliament) on 5 March 1997, signed by Russian President on 15 April 1998. Entered into force on 20 April 1998, the day of its official publication in *Sobronya Zakonodatelstva RF* 20 April 1998 16: 1799. For a discussion, see Blischenko & Doria forthcoming 1999.

property issues in case of restitution and reparations may sometimes be the easiest way for citizens to recover their goods, it cannot be understood as denying access to whoever wants to follow the normal judicial procedure. Consequently, access to the court for individual foreigners is still open, under international law and the Russian Constitution.

Even if states could be held responsible to nationals of third states, the principle of state responsibility does not govern the relationship between states and their own nationals. Strictly speaking, this is a matter of human rights law. According to Tomuschat (1999:152): "since States are obligated to respect and ensure human rights, general disregard for such elementary entitlements of the human purpose calls for suitable remedies. . . . No subsequent Government, even if it has nothing to do with a prior system of terror and injustice, may ignore what happened before it assumed power. Human rights do not only have a preventative function, they additionally require adequate measures of reparation as a response to their breach".

### 3.2.2 *Human rights law*

The right to a remedy for violations of fundamental human rights is guaranteed in all of the major human right conventions.<sup>23</sup> One can deduce from the fact it is contained in every human rights instrument that it is a universal customary norm. Although the African Charter does not speak expressly of a right to a remedy, it states that everyone whose fundamental rights have been infringed has the right to have his or her cause heard by a national court. However, "if the victim has gained some sort of national redress (which may not necessarily be adequate) in respect of the communication, it appears that the case will be inadmissible on the grounds that an amicable settlement has been attained" (Murray 1997:412).

Victims of human rights abuses in Africa may have some recourse before the African Commission, claiming that their human rights have been

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23 Article 8 of the Universal Declaration of Human Rights stipulates: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the constitution or by law". Article 2 of the International Covenant on Civil and Political Rights (ICCPR) obliges state parties to guarantee the rights contained therein. Article 2(3) specifically provides for the right to a remedy. Under Article 4 of the ICCPR, state parties may derogate from Article 2 during states of emergency or armed conflicts. However, although the right is suspended and thus is unenforceable during the state of emergency or armed conflict, it is reinstated once the emergency or armed conflict ends and must then be enforced. Under Article 13 of the European Convention on Human Rights: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity". Article 25 of the American Convention on Human Rights also provides for a right to a remedy. Under Article 7 of the African Charter on Human and Peoples' Rights: "1. Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force".

abused and that their right to recourse before their national courts has not been respected. They might also be able to petition the UN Human Rights Committee regarding a violation of the International Covenant on Civil and Political Rights. However, the remedy which is guaranteed in each case is one in respect of violations of the human rights conventions; thus, it would probably not cover violations of international humanitarian law. There is nothing in the African Convention that says that victims of humanitarian law violations should have the right to recourse before national courts in respect of violations of humanitarian law, or, as a last resort, to the African Commission. And there is nothing in Geneva law that says that victims of humanitarian law violations have a right to a remedy before national bodies in respect of violations of the Geneva Conventions or their Additional Protocols. Nor do they apparently have any right to petition international human rights bodies in respect of violations of humanitarian law. In this respect, human rights and humanitarian law are distinct bodies of law. This means that while they may have the right to remedy in respect of violations of fundamental human rights by states or by persons acting on behalf of states, this would not cover violations of humanitarian law by rebels. Unfortunately, these are the people who are perpetrating the most atrocious and widespread violations in Africa today.

Recent years have seen a greater willingness by human rights bodies to consider and refer to humanitarian law, although they have not yet gone so far as to proclaim a remedy in respect of humanitarian law violations, enforceable through the human rights bodies. In fact, that may be impossible as long as the human rights bodies are only willing to consider applications made against states. But the Inter-American Commission has gone so far as to say that it can directly apply humanitarian law.<sup>24</sup>

While regional courts may not be able to grant specific remedies in respect of humanitarian law violations, they can declare an amnesty law to be illegal, which may open up some other channels of resort for victims of humanitarian law violations, in particular, before their national courts. In 1992, the Inter-American Commission on Human Rights ruled that amnesty laws immunising military offenders in El Salvador, Uruguay and Argentina violated the American Convention on Human Rights.<sup>25</sup> The Inter-American Commission on Human Rights in February 1994 again found the Salvadoran amnesty to be a violation of El Salvador's commitments under the American Convention on Human Rights. It found the amnesty unlawful "because it makes possible a 'reciprocal amnesty' without first acknowledging responsibility (despite the recommendations of the Truth Commission); because it applies to crimes against humanity,

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24 See Inter-American Commission on Human Rights Report 1/99 case 10.480 27 January 1999; the *Tablada Case* Inter-American Commission of Human Rights Report 55/97, case 11.137 Argentina OEA/Ser/L/V/II.97 Doc 38 30 October 1997; Inter-American Commission on Human Rights Report 1/99 case 10.480 27 January 1999.

25 Report 26/92 (El Salvador) Inter-Am CHR 83 OEA/ser L/V/II 83 (1992); Report 29/92 (Uruguay) Inter-Am CHR 154 OEA/ser L/II 83 doc 25 (1992); Report 28/92 (Argentina) Inter-Am CHR 41 OEA/ser L/II 83 doc 24 (1992).

and because it eliminates any possibility of obtaining adequate pecuniary compensation, primarily for victims. Salvadoran human rights groups unsuccessfully petitioned the Supreme Court to find the amnesty unconstitutional.<sup>26</sup> Lately, the tide has been shifting, however. After years of finding the Chilean self-amnesty law to be legal,<sup>27</sup> the Chilean Supreme Court in 1998 declared it to be contrary to international human rights law.<sup>28</sup> This decision is discussed below in part 5.

Unfortunately, for the majority of victims of humanitarian law violations in Africa, unless they can show that they are also victims of human rights violations, there is little hope of redress before human rights bodies. The major gap in the law concerns responsibility of rebels in internal armed conflicts. States are not responsible, civilly or criminally, for their behaviour. Victims of their crimes would seem to have little possibility of redress before regional or international human rights bodies. They may be able to sue individual rebels under national law, but most amnesty laws preclude this. Criminal prosecution is usually not possible either. An amnesty law may have prevented prosecution in some or all cases.

If national prosecutions or civil suits are not possible, there are a few remaining hopes of obtaining a remedy.

### 3.2.3 Other possible remedies

Prosecutions could be undertaken or civil suits initiated in the courts of third states. As we will see below, several states have undertaken prosecutions against non-nationals based on universal jurisdiction or indicated that they are in a position to do so.<sup>29</sup> Most of these cases have been initiated by victims, and in some countries, victims can become *parties civiles*.<sup>30</sup> Several victims have pursued civil suits in the United States under the Alien Tort Crimes Act, in some cases obtaining huge awards, although collecting them is next to impossible.<sup>31</sup>

The only other possibility is prosecution by an international criminal tribunal or court. Regarding the International Criminal Court, such prosecutions can only concern crimes committed after the entry into force of

26 US Delegation to the ICC, Draft Paper on State Practice Regarding Amnesties and Pardons presented to Preparatory Committee Fourth Session (August 1997).

27 For a discussion see Roht-Arriaza & Gibson:843.

28 Supreme Court 9 September 1998 Rol 469-98 concerning the illegal detention of Pedro Poblete Córdova.

29 For an overview of recent caselaw see Kamminga 2000.

30 In France, for example, the suit against Wenceslas Munyeshyaka was initiated by victims. The French Cour de Cassation agreed that Munyeshyaka, a Rwandan priest residing in France and accused of genocide and crimes against humanity, could be tried in France for these crimes, if the accused was present on French territory and if the accusations covered facts which, under a different qualification, would come under the competence of the French courts. See *In re Wenceslas Munyeshyaka* Cour de Cassation Paris 6 January 1998 *Revue generale de droit international public* 102:825. For analysis, see Stern 1999:525.

31 See, for example, Stephens 1997:117.

the Statute.<sup>32</sup> However, conceivably, *ad hoc* tribunals could be established by the Security Council with jurisdiction over certain crimes committed in particular places. Such tribunals have recently been mooted for Sierra Leone and East Timor, and one cannot completely rule them out for these and other places. Even when the ICC comes into being, there may still be room for *ad hoc* International Criminal Tribunals. If prosecutions were successfully undertaken by an International Criminal Tribunal, this could open the door to some sort of a civil remedy for the victims. The provisions of the ICTR and ICTY in this respect should not, however, serve as a model for any future *ad hoc* tribunals. There is nothing in the statutes of either tribunal concerning remedies for victims. Under Rule 106 of the ICTY, individuals must pursue their claims through their national courts, under their national legislation, although the judgment of the tribunal is binding as to the criminal responsibility of the convicted person for any injury. As recent commentators have noted, "these rules fall well short of providing reparations or establishing a compensation scheme" (Clarke & Tolbert 1998).

In many cases, it would be impossible for victims to pursue remedies before national courts, and they may be prevented from doing so by amnesty legislation. Thus, such a provision would not prove very useful in the Statute of any International Criminal Tribunal for Sierra Leone, for example. Much more useful is when an international court is able to make awards itself, directly enforceable against convicted persons. The Statute of the ICC goes far beyond the tribunals in providing that "The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation".<sup>33</sup> Such a provision would usefully be included in the statutes of any future *ad hoc* tribunals. Together with a provision enabling the tribunal to seize the assets of convicted persons, this could provide a solid legal basis for an enforceable right to a remedy in respect of serious humanitarian law violations.

Even supposing an international criminal tribunal or tribunals were to be established, their reach will be very limited, and they will not respond to the needs of the vast majority of victims of serious humanitarian law violations in Africa. Into this void steps the other forms of non-judicial remedies, numerous in character, which in almost every case form part of the response of governments to a legacy of humanitarian law or human rights violations. Monetary reparations are often provided for, in some cases, through trust funds established for this purpose. Payments may be made to individual victims and/or their relatives or to groups and communities. Victims and their relatives may also be entitled under a national peace and reconciliation law to other, non-monetary forms of compensation, such as medical services or educational grants. Remedies can also take other forms. For example, a national holiday in honour of the victims

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32 Article 11(1) ICC Statute.

33 Article 75(2).

may be declared, or monuments to commemorate them may be built. Streets may be renamed in their honour. These kinds of remedies, though they are no substitute for judicial remedies, are nonetheless important and a mark of respect to victims of terrible abuses.

Whether or not there is any international obligation on states to provide remedies in respect of serious violations of international humanitarian law, even states that opt for amnesties tend to make some provision for remedies, monetary and otherwise, for victims. In fact, state practice indicates that this is the rule, rather than the exception.

#### 4 INTERNATIONAL LEGAL POSITION REGARDING AMNESTIES AND THE DUTY TO PROSECUTE

The legal position regarding amnesties under international law depends on the nature of the crime. It is widely considered that amnesties are illegal with respect to crimes giving rise to an obligation *aut dedere aut judicare* (prosecute or extradite), that is, the obligation that arises under treaty law with respect to the grave breaches provisions of the Geneva Conventions, violations of the Apartheid Convention, violations of the Torture Convention and violations of the Slavery Convention.

The situation regarding other crimes is less clear. Certain crimes give rise to responsibilities *erga omnes*, meaning that all states and all of humankind have an interest in seeing them suppressed. However, it is not entirely clear whether this is a duty or merely a competence of states. Crimes giving rise to responsibilities *erga omnes* include genocide, war crimes and crimes against humanity. Recently, a Belgian court found that it could exercise universal jurisdiction over crimes against humanity based on customary international law, even though Belgium at that time had not yet adopted legislation to implement crimes against humanity into its legal system.<sup>34</sup> Many states have adopted legislation enabling them to exercise universal jurisdiction over crimes against humanity,<sup>35</sup> and it is clear that they are able to do so, but some commentators nonetheless argue that permissive rather than mandatory jurisdiction arises with respect to crimes under customary international law.<sup>36</sup> Another commentator concurs that the legal interest *erga omnes* permits any state to exercise universal jurisdiction over persons suspected of committing crimes against humanity (Bassiouni

34 Decision of 6 November 1998 of the Brussels Tribunal of First Instance on extradition request in respect of Augusto Pinochet Ugarte. Ruling on Article 61 quinquies 5 C.I. Cr-request for an instrument of supplementary preliminary investigation. Dossier 216/98. Notices 30.99.3447/98.

35 For example, Belgium: Loi du 10 février relative à la répression des violations graves du droit international humanitaire. *Moniteur belge* 23 March 1999. Under the Canadian Criminal Code, Canadian courts have the jurisdiction to try and punish conduct committed outside Canada at any time if the conduct constitutes, in international law, a crime against humanity (Article 57(3.71)). Other examples include Bolivia, Brazil, Chile, Colombia, Costa Rica, Denmark, Ecuador, El Salvador, France, Germany, Guatemala, Honduras, Israel, Mexico, Nicaragua, Norway, Panama, Peru, Spain, Switzerland, Uruguay and Venezuela. See Amnesty International 1999a.

36 See for example Scharf 1995.



1992). Still another states: "every state may prosecute violations of fundamental norms of international law, particularly those relating to war crimes and crimes against humanity". The opposing view is that: "given that crimes against humanity are *erga omnes*, it follows that all states . . . are under an obligation to prosecute and punish crimes against humanity and to cooperate in the detection, arrest, extradition and punishment of persons implicated in these crimes" (Amnesty International 1999a).

With respect to war crimes committed in an internal armed conflict, while these crimes seem give rise to permissive universal jurisdiction, meaning that any state can prosecute them, either under its national implementing legislation or under customary international law, states do not appear to be under any international legal obligation to prosecute persons accused of committing such crimes. Article 6(5) of Protocol II provides that: "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". While it is clear from the *travaux* that this was never intended to apply to serious violations of the Protocol or to persons committing war crimes (Levie 1987:247), it still remains that "amnesty is a matter within the competence of the authorities" (Sandoz et al 1987:para. 4617). While Article 6 of Protocol II leaves intact the right of national authorities to prosecute war crimes committed in an internal armed conflict, there does not appear to be any duty on states to prosecute. Therefore, states could conceivably grant amnesties in respect of war crimes committed in internal armed conflicts, since Protocol II does not forbid them from doing so. However, since states may claim universal jurisdiction over non-nationals who have committed serious violations of international humanitarian law applicable in internal armed conflicts, even persons who may have legally been amnestied under national law could remain subject to prosecution by the courts of third states with the ability and inclination to prosecute them or by an international criminal tribunal.<sup>37</sup> Thus, amnesties in respect of war crimes committed in an internal armed conflict occupy a sort of grey zone area; on the one hand, international law does not seem to prohibit states from granting them, on the other, individuals who have legally been amnestied can still be subject to prosecution under international law. In this respect, Article 6(5) of Protocol II is unsatisfactory in not specifying that war

37 Some states have undertaken criminal prosecutions against non-nationals for violations of international humanitarian law committed in recent non-international armed conflicts in third states, for example Switzerland, Germany, France, Denmark and Austria. In an important decision in November 1998, the Netherlands Supreme Court found that the 1952 War Crimes Act, which makes punishable, *inter alia*, any violation of the laws and customs of war (without restriction to grave breaches), could be "construed in such a way that its Article 3 establishes universal jurisdiction for violations of the laws and customs of war, including when the Netherlands is not a party" to the armed conflict (Keijzer 1998:484). See also *Prosecutor v Darko Knesevic*, Hoge Raad Der Nederlanden 11 November 1997 Criminal Division 3717 reprinted in TMC Asser Instituut 1998:600.

crimes cannot be amnestied.<sup>38</sup> However, it will only be the case that war crimes committed in internal armed conflicts cannot be amnestied under national law when states are under an obligation *aut dedere aut judicare* in respect of them.

## 5 STATE PRACTICE REGARDING AMNESTIES AND TRUTH COMMISSIONS

If we look at state practice, we see that the amnesty and truth commission/commission of inquiry approach has frequently been the preferred (or rather, the only realistic) route for many states emerging from repression or from conflict, but that in all cases where prosecutions have not been undertaken and amnesties have been granted, some sort of alternative mechanism has been established, usually a truth commission and provision for reparations and compensation. Various different approaches have been adopted.<sup>39</sup>

One should distinguish between amnesties granted and truth commissions established by incoming democratic governments to investigate human rights abuses by the state, and those whose role it is to investigate violations of international humanitarian law, including genocide and crimes against humanity, committed in the context of an armed conflict, whether international or internal in character. Most analyses of African and other states relate to the former. While the experiences of post-repressive states may be instructive in analysing the experiences of post-conflict states, one should be wary of drawing too many neat conclusions from the experiences of post-repressive states and trying to apply them to post-conflict states. The key differences relate to the nature of the crimes committed and the range of actors who can commit them. Where crimes committed by a repressive state against its own population amount to crimes against humanity or genocide, or where they involve crimes giving rise to a treaty obligation to prosecute or extradite, the experiences of those states may be instructive for our purposes. On the other hand, as noted earlier, one must be careful to distinguish between human rights violations committed by states, and violations of international humanitarian law, which can be committed by either states or non-state actors.

In Africa, two states stand out for taking a robust approach to violations of international humanitarian law – Rwanda and Ethiopia. The former is

38 Proposed amendments to draft Article 10 (Article 6) of draft Protocol II by the Communist block countries that a paragraph be included specifically providing, "Nothing in the present Protocol shall be invoked to prevent the prosecution and punishment of persons charged with crimes against humanity or who participate in the conflict as foreign mercenaries". Another would have provided: "None of the provisions of this Protocol may be used to prevent the prosecution and punishment of persons accused of war crimes and crimes against humanity". However, these amendments were excluded from the final draft. See Levie 1987:266 (CDDH/II/260 24 March 1975 IV 34) and 270 (CDDH/II/GT/87).

39 For a comprehensive discussion see Hayner 1994:597. See also Steiner 1997.

discussed in the following section. The latter created, in 1992, an Office of the Special Prosecutor to investigate and bring to trial persons suspected of having abused their position in the government of Mengistu Haile Mariam, and a number of prosecutions have been undertaken (Shariff 1996:96).

In many other countries, however, amnesties have been granted and in some cases truth commissions have been established. In most cases, amnesty laws do not refer specifically to humanitarian law or human rights violations, nor do they specifically grant or exclude amnesties in respect of these types of crimes. Instead, the language used is broader and more ambiguous, with reference being made to "political crimes" or "military crimes" or "crimes against the security of the state", without defining precisely which crimes are encompassed, or, which, if any, are excluded. The amnesty law adopted by Angola in 1996, for example, provided for amnesty "for all crimes against the internal security of the State and all related crimes committed by national citizens in the framework of the armed conflict, beginning 31 May 1991 up to the date of approval of the present Law".<sup>40</sup> Article 2 also grants amnesty "for all military crimes committed in the referred period". The Sudan Peace Agreement signed by the government and the rebels on 21 April 1997 provided for a general amnesty to members of the South Sudan Defence Forces from any criminal or civil culpability relating to acts committed during the date of signing the peace accord. A joint amnesty commission was established to receive, examine and determine cases which are covered by this amnesty commission.

In May 1986, the government of Yoweri Museveni in Uganda established a Commission of Inquiry into Violations of Human Rights "to inquire into all aspects of violation of human rights, breaches of the rule of law and excessive abuse of powers" by the governments of Milton Obote and Idi Amin between 9 October 1962 and 25 January 1986.<sup>41</sup> Its report was published in 1994.

In Zimbabwe, various amnesties have been granted over the years, and on two occasions, commissions of inquiries into past abuses have been established. However, these have not been full truth commissions and their findings have never been published (Shariff 1996:96). In Guinea, following the political transition in 1984, the incoming government avoided taking any action against former officials of the Sekou Toure regime (Shariff 1996:96). An amnesty law was also adopted in Benin following the political transition in 1990 and only a couple of trials of members of the former Mathieu Kerekou government have been undertaken (Shariff 1996:96). In Mali, the need for reconciliation was also

40 Available as a UN Doc S/1996/340 8 May 1996 Article 1.

41 Established under the Commissions of Inquiry Act, Legal Notice (16 May 1986) (Cap. 56). Published online at the website of the United States Institute of Peace <http://www.usip.org/>. Truth Commissions: Charters: Uganda.

stressed above all, following the overthrow of President Moussa Traore, who had held power for 23 years, although a few trials have been initiated. Amnesties were also granted in the Congo, in 1991 and 1992, and no investigations in past human rights violations were undertaken.

In Algeria, an amnesty law was adopted on 13 July 1999 in an effort to end the fractitious conflict which had terrorised the civilian population. The Law regarding the re-establishment of civil harmony<sup>42</sup> grants concessions to persons implicated in terrorist or subversive acts, who convey their willingness to desist from further criminal acts. Chapter I, Article 2, provides that such persons shall benefit from either exoneration from punishment, the placing under probation, or the attenuation of penalties. However, the amnesty does not apply to persons who have been involved in murder, rape or bomb attacks on public areas. Moreover, those wishing to benefit from it had to swear allegiance to the state within six months of its taking effect.

Following the overthrow of the Chadian dictator, Hissein Habré, the Commission of Inquiry into the Crimes and Misappropriations Committed by Ex-President Habré, His Accomplices and/or Accessories was established on 29 December 1990, under the chairmanship of the Chief Prosecutor, Mahamat Hassan Abakar. Its findings were published in May 1992. It found that the government had carried out 40 000 political killings and 200 000 cases of torture, and that Mr Habré gave direct orders to single out certain groups of people (Human Rights Watch 2000). The crimes committed by Mr Habré's regime recently returned to the international spotlight when Habré, who had taken refuge in Senegal since his overthrow in 1990, was arrested pursuant to an indictment on charges of torture. He is expected to be tried there later this year on the basis of universal jurisdiction. The case has widely been hailed as the first use of the so-called Pinochet precedent. A human rights group investigating the case documented 97 cases of political killings, 142 cases of torture and 100 disappearances (Onishi 2000). The indictment against Habré was initiated by a group of his victims who are living in Senegal. International human rights groups, including Human Rights Watch and the International Federation of Human Rights, have joined in the case.

Nigeria is also beginning to come to terms with its past. On 4 June 1999, President Olusegun Obasanjo appointed a commission to investigate human rights abuses committed during the military regime between 1 January 1994 and 29 May 1999. With the formal inauguration of the commission on 14 June 1999, this was extended to cover crimes committed from 31 December 1983. The commission's mandate is:

"to ascertain or establish, to whatever extent the evidence and circumstances may permit, the causes, nature and extent of human rights violations or abuses and in particular all known or suspected cases of mysterious deaths and assassinations or attempted assassinations committed in Nigeria since the last

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42 Loi 99-08 du 29 Rabi El Aoul 1420 correspondant au 13 juillet 1999 relative au rétablissement de la concorde civile.

democratic dispensation; to identify the person or persons, authorities, institutions or organisations which may be held accountable for such mysterious deaths, assassinations or attempted assassinations or other violations or abuses of human rights, and to determine the motives for the violations or abuses, the victims and circumstances thereof and effect on such victims or the society generally; to determine whether such abuses or violations were the product of deliberate state policy or the policy of any of its organs or institutions or individuals or their office or whether they were the acts of any political organisation, liberation movements or other group or individual; and to recommend measures which may be taken, whether judicial, administrative, legislative or institutional to redress past injustices and to prevent or forestall future violations or abuses of human rights”.

The commission’s chairman has requested that the Government adopt enabling legislation to clarify the commission’s status and powers, including giving it subpoena powers.<sup>43</sup>

One cannot, however, draw any conclusions based on the experience of Africa alone. A great deal of the practice in this area arises out of the experiences of South and Central American countries, coming to terms with a legacy of military repression. Amnesty laws were adopted and, in some cases, truth commissions or commissions of inquiry were established in Argentina, Bolivia, Chile, Uruguay, Brazil, Peru, El Salvador, Honduras, Nicaragua and Guatemala, *inter alia*. Of these countries, only El Salvador, Guatemala, and Nicaragua can definitively be said to be internal armed conflicts, although there is argument over whether the situation in Chile during the military junta could be considered as an internal armed conflict.<sup>44</sup> For reasons of limited space, we will thus confine ourselves to a brief discussion of the experiences of just these four countries.

Following the end of the civil war, El Salvador passed a series of amnesty decrees, one of which granted a general amnesty, with certain exceptions.<sup>45</sup> It exempted persons convicted by juries (to cover certain officers convicted for the murder of Jesuit priests) and persons “who, according to the Truth Commission Report, may have participated in flagrant violence after January 1 of 1980, whose impact on society demands with utmost urgency the public exposure of truth, regardless of the

43 See website of US Institute for Peace: <http://www.usip.org/>.

44 A Belgian Court recently found that the situation in Chile during the regime of General Pinochet could not be considered to be an internal armed conflict to which common Article 3 or Protocol II applied. (Decision of 6 November 1998 of the Brussels Tribunal of First Instance on extradition request in respect of Augusto Pinochet Ugarte. Ruling on Article 61 quinquies 5 C.I. Cr- request for an instrument of supplementary preliminary investigation. Dossier 216/98. Notices 30.99.3447/98.) However, the Chilean Supreme Court has found that the situation was an internal armed conflict, to which common Article 3 of the Geneva Conventions applied. The court also invoked Article 146 of the Fourth Geneva Convention, which is normally only applicable during international armed conflicts. Supreme Court, 9 September 1998 Rol 469-98 concerning the illegal detention of Pedro Poblete Córdova. Reprinted in TMC Asser Instituut forthcoming 1999.

45 National Reconciliation Act (Decree 147) 23 January 1992.

perpetrators' role in society". To balance the amnesties, El Salvador established a Truth Commission in the Mexico Agreement of April 1991 concluded between the government and the National Liberation Front and by virtue of the peace accords of 16 January 1992. The three-member commission was appointed by the UN Secretary-General to investigate "the most serious acts of violence" that had occurred since 1980. It was the first truth commission to include non-nationals and to have been empowered by the UN to investigate violations and make recommendations. The Commission began its work in July 1992 and had six months to submit its report. That report, *From madness to hope: report of the Commission on Truth for El Salvador* contained far-reaching findings and recommendations, resulting in the resignation from public office of several key government figures.

After the release of the Truth Commission's report on 15 March 1993, President Cristiani addressed the nation and called for a general amnesty. On 20 March 1993, the Legislative Assembly passed the General Amnesty Law for the Consolidation of Peace.<sup>46</sup> Article 1 grants a "full, absolute and unconditional amnesty to all those who participated in any way in the commission, prior to 1 January 1992, of political crimes or common crimes linked to political crimes or common crimes in which the number of persons involved is no less than twenty". The law also provided that it extends to those persons referred to in Decree 147. The definition of "political crimes" included "crimes against the public peace", "crimes against the activities of the courts", and crimes "committed on the occasion of or as a consequence of the armed conflict". In addition to protection from criminal liability, the "amnesty granted by this law cancels civil responsibility in all instances". As already noted, the Salvadoran amnesty was declared illegal by the Inter-American Commission in 1992 and 1994.<sup>47</sup>

The Peace Agreement in Guatemala, signed on 29 December 1996 by the Guatemalan government and the National Guatemalan Revolutionary Unit (URNG) was harshly criticised for encouraging impunity, because it provided for an amnesty for crimes committed by both sides during the 36-year civil war, including political crimes such as sedition, illicit association, crimes against the security of the states, and weapons-related crimes. However, it specifies that no amnesty can be granted for crimes that are criminalised by international treaties. The National Reconciliation Law, adopted by the Congress on 18 December 1996, states that while clearly political crimes are exempt from prosecution, serious human rights violations are not. Article 8 provides that the amnesty "will not be applicable to crimes of genocide, torture and forced disappearances, as well as to those crimes for which a statute of limitation does not apply (this would potentially include crimes against humanity) or those for which the extinction of the criminal responsibility cannot be admitted in accordance with

46 Decree 486.

47 See footnote 26.

the Guatemalan internal legislation or the international treaties ratified by Guatemala". The law makes no mention of exemption of any of the amnestied crimes from civil liability. A Comprehensive Agreement on Human Rights was signed on 29 March 1994.

Guatemala established the Historical Clarification Commission on 23 June 1994 as part of the peace process. Its mandate was to investigate human rights violations during the war.<sup>48</sup> The purposes of the commission were:

I. To clarify 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.

II. To prepare a report that will contain the findings of the investigations carried out and provide objective information regarding events during this period covering all factors, internal as well as external.

III. To formulate specific recommendations to encourage peace and national harmony in Guatemala. The Commission shall recommend, in particular, measures to preserve the memory of the victims, to foster a culture of mutual respect and observance of human rights and to strengthen the democratic process."

The Commission could receive particulars and information from:

I. . . . individuals or institutions that consider themselves to be affected and also from the Parties.

II. The Commission shall be responsible for clarifying these situations fully and in detail. In particular, it shall analyse the factors and circumstances involved in those cases with complete impartiality. The Commission shall invite those who may be in possession of relevant information to submit their version of the incidents. Failure of those concerned to appear shall not prevent the Commission from reaching a determination on the cases.

III. The Commission shall not attribute responsibility to any individual in its work, recommendations and report nor shall these have any judicial aim or affect.

IV. The Commission's proceedings shall be confidential so as to guarantee the secrecy of the sources and the safety of witnesses and informants.

V. Once it is established, the Commission shall publicize the fact that it has been established and the place where it is meeting by all possible means, and shall invite interested parties to present their information and their testimony."

On 26 February 1999, the truth commission published its report.<sup>49</sup> The Commission for Historical Clarification was established through the accord of Oslo on 23 June 1994 to clarify the history of the events of more than

48 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. Published online at the website of the United States Institute of Peace, <http://www.usip.org/>. Truth Commissions: Charters: Guatemala. Also available online at <http://www.un.org/Depts/minugua/paz6.htm>.

49 Guatemala: Memoria del Silencio. Available online at <http://hrdata.aaas.org/ceh/index.html> (Spanish only). An English language summary is available at <http://hrdata.aaas.org/ceh/report/english/toc.html>.

three decades of war. Rather than focusing on individual criminal responsibility, it looked at institutional responsibility, particularly of the Guatemalan state and armed forces but also of the rebels and outside forces, including the US. The report concluded that an estimated 200 000 people were killed or disappeared. State forces were responsible for 93 per cent of the violations documented, the guerrillas for three per cent. Eighty-three per cent of the victims were Mayan. Most importantly, the report found that agents of the state of Guatemala committed genocide against the Mayan people during counterinsurgency operations, and that these acts were not investigated or punished by Guatemala, despite its obligations under the Genocide Convention. Finally, the report proposed a Guatemalan presidential commission to purge the military of human rights violators and called for justice in connection with crimes excepted from the 1996 Amnesty Law.

Law 81 on General Amnesty and National Reconciliation was adopted in Nicaragua in March 1990. It provided for a:

“general and unconditional amnesty law for all Nicaraguans, with no distinctions made for particular class. The Presidential decree specified that amnesty is granted to ‘[a]ll Nicaraguans . . . who committed crimes against the public order and the internal and external security of the State, and other related acts’ as well as ‘all civilian and military Nicaraguans who may have committed infractions in the course of carrying out or investigating the criminal acts described’. During the administration of President Chamorro, the National Assembly passed a law that revoked the amnesty in Law No. 81, but granted an amnesty to anyone responsible for ‘political crimes or common crimes related to them’ committed at any time prior to the passage of this law” (Graditzky 1998:29).

Chile’s incoming democratic government in 1990, led by President Aylwin, inherited a self-amnesty law which the military had granted itself in 1978.<sup>50</sup> Conscious of the fragile political situation and the likelihood of a military coup, Aylwin did not call the amnesty law into question. In May 1990, a truth and reconciliation commission was established, by executive order of 25 April 1990, with the goal of getting a picture of the serious abuses that had occurred. It was strictly a non-judicial body, and could not determine individual criminal responsibility, but it could recommend measures of compensation and legal measures to be taken to avoid future violations. The commission’s 2 000 page report, known as the ‘ Rettig Report’, was presented in February 1991 (Chilean National Commission on Truth and Reconciliation 1993). A summarised version was made available and widely distributed as part of an educational campaign aimed at promoting awareness of what had happened in Chile. In January 1992, a law was passed to create a National Corporation for Compensation and Reconciliation, with a two-year mandate to encourage moral and material compensation (such as pensions, health and educational grants) to victims and their families (Shariff 1996:96).

50 Decree 2.191 of 1978. Article 1 granted an amnesty to all persons who had taken part in punishable offences between 11 September 1973 and 10 March 1978.



There have been some prosecutions in Chile<sup>51</sup> but most of the military Junta has never been tried. However, the story has not quite ended in the cosy retirement that the Chilean generals counted on. The case of General Pinochet shows that amnesties apparently legal under national law may have no international legal currency and are no safeguard against international prosecution. At the time of writing, General Pinochet, who was arrested in London in October 1998 pursuant to a Spanish arrest warrant, had been returned to Chile by the United Kingdom on medical grounds, and it was not clear if he would be tried in Chile. A major obstacle will be the 1978 Amnesty Law. However, a decision of Chile's Supreme Court of 1998 regarding the legality of the 1978 self-amnesty law gives some cause for optimism. The legality of that self-amnesty decreed in 1978 to all persons who have taken part in punishable offences between 11 September 1973 and 10 March 1978 during the regime of General Augusto Pinochet, was examined by the Chilean Supreme Court.<sup>52</sup> The appellant challenged the amnesties, claiming, *inter alia*, that they infringed Chile's obligations under international human rights and humanitarian law conventions.<sup>53</sup>

The majority of the court found that the Higher Military Court of Santiago had erred in its decision to dismiss the case with prejudice on the grounds that the penal liability of the accused had been extinguished by the grant of amnesty. The Chilean judicial system is founded on the investigation of the facts alleged in criminal accusations:

"Consequently, the penal procedure in the case of crime or simple misdemeanor aims in the first stage of the summary to determine the punishable fact and the person who committed it. . . . To grant amnesty, the person who committed the crime must be unequivocally identified, because that is the only way that penal action for his part in the crime can be stopped. . . . by applying a ground of termination of penal liability, that does not have the power to decide the case, the judges . . . have violated justice."

The Court determined that the Geneva Conventions of 1949, in particular, common Article 3, was applicable in Chile at the relevant time and noted that it compels the partaking nations in the case of an internal armed conflict to the use of humane treatment, including those who have laid down their arms, and forbids attempts on life, or bodily integrity or attacks on personal dignity:

"Under the terms of the Convention, the state of Chile has undertaken to guarantee the safety of those who might have taken part in armed conflicts within the territory, especially if they have been taken prisoner, while it remains forbidden to use means to conceal the offences that have been committed against certain persons or even to get exemption from punishment for the offenders, whilst keeping in mind that international agreements should be executed in good faith. . . . Under these circumstances, not applying aforementioned provisions brings

51 Since 1994 there have been about 20 convictions (Shariff 1996:96).

52 See footnote 28.

53 According to the appellant: "These texts have constitutional primacy according to the amendment of art 5 of the Constitution of the Republic and take precedence over the internal legislation in case of disparity as is the case with the amnesty in question".

about a violation of the law, that must be put right through this appeal. in particular if it is kept in mind that according to the principles of international law, international treaties must be interpreted and executed in good faith. From this it may be deduced that internal law must adjust itself to these and the legislator must assimilate the new norms as laid in these international instruments. He may not infringe on its principles, without first denouncing the treaty.”

## 6 SOUTH AFRICA

South Africa's Promotion of National Unity and Reconciliation Act,<sup>54</sup> adopted as a means of dealing with the crimes of apartheid and attempting to move beyond that legacy, was an unpleasant medicine for many victims of apartheid. The Act provided for the establishment of a Truth and Reconciliation Commission and reparations and rehabilitation to victims, but it prevented victims or their relatives from pursuing criminal or civil suits against perpetrators who had been granted amnesty (Sarkin 1996; 1997; 1998) The widow of Steve Biko, one of South Africa's most prominent anti-apartheid activists, applied to the Constitutional Court in an attempt to prevent the TRC from beginning its work. “The amnesty procedure of the commission”, she said, “was denying her constitutional right to justice by indemnifying her husband's murderers against standing trial” (Mrs Biko's dilemma 1997).

As is well known, the Constitutional Court found against her.<sup>55</sup>

“The Court accepted the South African Government's argument that only an offer of amnesty would draw apartheid murderers out of the woodwork. With the TRC, Mrs Biko might not get justice but at least she would get the truth. Without the TRC she would get neither – as evidenced by the fact that three separate inquests had failed, previously, to identify Biko's killers” (Mrs Biko's dilemma 1997)

The case of Mrs Biko neatly illustrates the conundrum facing states with a legacy of human rights or humanitarian law abuses: the best guarantee of a peaceful transition may sometimes be to overlook some of the crimes of the past. While this may be in the interests of the society as a whole, for individual victims it may mean justice denied.

The South African Truth and Reconciliation Commission, provided for in the 1995 Act, was established in 1996 and was composed of 17 members appointed by the President to establish, by means of public hearings and investigations, a complete picture of the “gross violations of human rights” committed between 1960 and 1993; to facilitate the granting of amnesty; to restore the dignity of victims by providing them with an opportunity to testify publicly; to grant reparations to the victims; and to write a report documenting the abuses, including recommendations to prevent such violations in future. The TRC was composed

54 Act 34 of 1995.

55 *The Azanian People's Organisation (Azapo) v The President of the Republic of South Africa* Constitutional Court of South Africa case CCT 17/96 25 July 1996.

of three committees: the Committee on Reparation and Rehabilitation; the Committee on Amnesty, and the Committee on Human Rights Violations.

The tasks of the Reparation and Reconciliation Committee (RRC) were to find out what harm the victims of gross human rights abuses suffered and what the effects were on their families and dependants; to provide emotional support for victims and witnesses, before, during and after hearings; to consult communities and individuals about the impact of violations on their lives and possible ways of achieving reparation and rehabilitation; to make recommendations to the President and Parliament for urgent assistance in cases where immediate relief was needed; and to recommend to the President what type of reparation should be made and ways to prevent similar human rights violations in future (TRC no date:1 – 2).

According to the RRC, “‘Reparation and rehabilitation’ is a term for what can be done to assist victims to restore the damage that victims have suffered, to give them back their dignity and to make sure that these abuses do not happen again. Although this could include compensation, a financial payment is not the only form of reparation and rehabilitation that the Committee will recommend. The Committee will look at individuals, communities and the nation as a whole when making recommendations to achieve reparation and rehabilitation’ (TRC no date:2).

The RRC focused on people who were victims of gross human rights abuses or crimes which were committed within a political context between 1 March 1960 and 5 December 1993. Victims are people who were killed, abducted, tortured or severely ill-treated; and family members or dependents of a person who was killed or who disappeared. The RRC had the power only to make recommendations to the President; it could not itself decide what to do. Its recommendations were in the report sent to the President after the TRC had completed its work.

The South African TRC, cognisant of the fact that for many victims it would be too long to wait until the publication of the TRC’s final report, developed legislation that would enable victims to receive interim reparations and rehabilitation. The nature of urgent interim relief envisaged were: social assistance, pensions or disability grants; medical care and assistance; material or financial need and limitations; access to and continuation of education; and the duty and obligation to remember victims or events through symbolic measures and intervention. The symbolic interventions for people who were terminally ill, for example, would include clearing of victims’ names, especially those with criminal records or those considered to be informants; settling legal procedures and issuing death certificates.

Victims could not apply directly to the RRC. “Instead, the Committee [found] out who the victims are and what their needs are by receiving reports from the other two Committees; and not every victim is entitled to interim relief. The Committee will only recommend this relief where there is an urgent need which cannot wait until the Commission has completed its work, and where the situation is a direct result of the gross violations”.

Victims could write, visit, phone or fax the TRC. The TRC would arrange for a statement to be taken, which would then be sent to the Committee on Human Rights Violations. If that committee found that someone was a victim, it included his or her name in the report sent to the RRC. Reparations would only be finalised after the TRC finished its work. In April 1997, the TRC unveiled plans to pay more than R3-billion to people who suffered human rights violations during the apartheid era, on the recommendations of the RRC. The RRC Commissioner said that they were obliged in terms of international treaties and TRC legislation to give victims adequate compensation to make a “meaningful and substantial impact on their lives”.<sup>56</sup>

The work of the Amnesty Committee was the most controversial and high profile of that carried out by the TRC. The Act enabled the TRC to grant amnesties to persons who make full disclosure of all the relevant facts. Amnesty could only be sought for gross human rights violations committed with a political motive. The criteria to be employed for deciding whether the act was one “associated with a political objective” are drawn from the principles used in extradition law for deciding whether the offence in respect of which extradition is sought is a political offence. The criteria include, *inter alia*, the motive of the offender; the context in which the act took place and, in particular, whether it was committed “in the course of or as part of a political uprising, disturbance or event”; the gravity of the act; the objective of the act, and in particular, whether it was “primarily directed at a political opponent or state property or personnel or against private property or individuals”; and the relationship between the act and the political objective pursued, “in particular the directness and proximity of the relationship and the proportionality of the act to the objective pursued”. One could argue that crimes against humanity are never a proportionate means of achieving a particular political end, and the same could surely be said of genocide, grave breaches of the Geneva Convention and apartheid. The range of crimes which can be considered as political crimes has narrowed considerably in recent years. Serious violations of international humanitarian law, including crimes against humanity and war crimes are not considered political crimes for the purposes of extradition or for exclusion under Article 1(f) of the Refugee Convention. A person granted amnesty shall not be criminally or civilly liable in respect of the act in question.<sup>57</sup>

As of 9 December 1998, the Amnesty Committee had received 7 124 applications from perpetrators of violations.<sup>58</sup> Where crimes were committed with political motivation, but there were no gross human rights abuses, the amnesty application could be assessed by looking at documentation. However, where there were human rights violations like

56 Give apartheid victims R3b says the TRC 1997 *The Star* 4 April: 1.

57 S 20 of the Promotion of National Unity and Reconciliation Act.

58 See Truth Commissions. United States Institute of Peace Library online <http://www.usip.org/>.

murder, torture, abduction or severe ill treatment for instance, there had to be a public hearing in which dependants of the victim/s had to be invited and were entitled to oppose amnesty if they chose. In fact, any interested party could oppose amnesty. After 10 months of hearings, however, the TRC started to hear some submissions *in camera*. According to the deputy chairperson of the TRC:

"The reasoning behind the decision to hold *in camera* hearings is that many people would then be more willing to share information with the Commission. This way they do not have to fear the possible consequences or even have their colleagues know that they have shared this information . . . The Commission has the discretion of disclosing the information received in these closed hearings" (*Truth Talk* 1996).

Both applicants for amnesty and their victims were entitled to legal representation at these hearings. Where the hearings were open, they were televised and well-attended, and the proceedings of the TRC were followed closely in the media.

In order to arrive at the truth, it was not enough for perpetrators to confess. Confessions had to be corroborated, and the TRC could conduct investigations. This is also true of victims' statements, which had to be confirmed before victims could qualify for reparation and rehabilitation. While the TRC followed a process of voluntary submissions, it also had the power to subpoena people and to search for and seize materials where they were not readily available.

There has been no direct relationship between the amnesty system and the South African judicial system: the Amnesty Committee does not refer anything to courts and the courts do not refer anything to the committee. However, when appropriate, the Amnesty Committee can have access to court records. For instance, where an applicant is someone who has been tried and convicted by a court, it may be necessary to have access to the court records in order to assess their applications. Those in respect of whom amnesty is denied, and those who have not applied for amnesty, are liable to prosecution. Some prosecutions have already been undertaken.

The Committee on Human Rights was established on 16 December 1995. Its function was to try and establish a complete picture of the gross human rights violations that had been committed. Public meetings were held throughout the country to explain the committee's work. Ten months into the process, because of the vast number of people who wanted to make statements but could not be accommodated through the hearings process, the TRC decided to reduce the number of hearings and concentrate resources on taking statements (*Truth Talk* 1996). The committee:

"devised a form, referred to as a 'protocol' or 'statement form', for recording the statements made to the Commission by people who believed that they had suffered gross violations of human rights. It appointed and trained 'statement takers' to listen to the accounts related by such persons, and to record them in a manner which would facilitate their entry into the Commission's database. For thousands of people, statement takers represented their first and often their only face-to-face encounter with the Commission" (TRC 1998 vol 5 chapter 1: paras 18–19).

Victims who gave statements received written acknowledgement and thanks for having made them (TRC 1998 vol 5 chapter 1: para. 39). The work of the South African TRC lasted for two and a half years. In fact, the commission has still not finished its work, as the Amnesty Committee is still processing the more than 7 000 claims that were submitted. The other committees completed their tasks on 31 October 1998, and a final report was presented to President Nelson Mandela on 29 October 1998.

The final report of the Truth Commission is a mammoth piece of work, consisting of five volumes. An additional volume will be added once the Amnesty Committee completes its report. Volume 2, following an introductory volume 1, documents the human rights violations carried out in South Africa between 1960 and 1990 and the political situation during that period. Volume 3 addresses the position of the victim. Volume 4 takes a wider look at the nature of the society in which the violations occurred. Volume 5 contains the conclusions and recommendations of the TRC.

The report is obviously too voluminous to attempt any sort of an evaluation. However, some points are worth noting. The TRC Report names individuals, institutions and organisations: the State President at the time, FW de Klerk was condemned for his role in the facilitation of gross human rights violations; Winnie Madikizela-Mandela was found responsible for committing gross violations of human rights; the African National Congress (ANC); the organs of state, the media, the judiciary, the health sector and a wide range of others are all identified and responsibility is attributed to them.

As the final report documents, acts such as torture and severe ill treatment, assassinations and killings could qualify as political crimes and be amnestied. This, however, seems to be in contravention of international law. Even if South Africa was not a party to the Torture Convention at the relevant time, torture is a crime under customary international law. While there is a proportionality test, as one commentator notes, "any sort of proportionality test raises the question of how a gross human rights violation, such as torture, could be proportional to the objective being pursued" (Parker 1996:7). South Africa endeavoured to avoid running into the tricky problem of apartheid as a crime giving rise to an obligation *aut dedere aut judicare* by limiting the TRC's mandate to crimes "which emanated from the conflicts of the past, rather than from the policies of apartheid" (TRC 1998 vol 5 chapter 1: para 48). This meant that the TRC could avoid having to consider amnesties for what were strictly speaking apartheid crimes. But this results in a very artificial distinction being drawn. Most of the crimes were committed precisely because of apartheid; indeed, it was apartheid that, for the perpetrators acting on the government side, provided the political motivation. For the sake of providing a fuller understanding of the underlying causes of particular crimes, the TRC should have been able to examine apartheid policies and the idea of apartheid itself. That would, however, have potentially put the TRC in a legally difficult situation. Even without the inclusion of apartheid, however, one can question whether many of the crimes which qualified for amnesty really were political crimes under international law.

The amnesties were subject to legal challenge in the *Azapo* case, mentioned previously. Dugard notes that the Constitutional Court, called upon to examine the applicability of international law within the South African legal system and the place of customary international law in municipal law, did not rise to the challenge:

"It might have been expected that the Court would have thoroughly examined the conventional and customary rules that appeared to require prosecution of human rights violators, the practice of other states in transition and finally whether the drafters of the Interim Constitution intended to overrule international law on the subject of amnesty. Unfortunately this was not done. The Court considered only the question whether the provisions of the 1949 Geneva Conventions requiring prosecution for 'grave breaches' were applicable (which it held were not applicable to the South African situation), but made no attempt to examine whether the customary law rules relating to genocide, torture, war crimes and particularly crimes against humanity required prosecution of offenders. As apartheid has been labelled a crime against humanity by the GA . . . it is surprising that no attempt was made to address the question whether customary international law requires the prosecution of those who commit this crime, particularly in respect of systematic murder, torture and disappearances which were crimes under South African law before 1990. State practice is likewise given inadequate attention." (Dugard 1997:90-91)

The Court took the view that international law was relevant only in the interpretation of the Constitution. But, as Dugard points out, while the Constitution and other legislation is presumed to accord with international law,

"this requires a court of law first to ascertain the rule of law of international law in a thorough and proper manner and, secondly, to attempt to reconcile it with the Constitution or an Act of Parliament. Only when this has been done can the court consider the question of consistency. In *Azapo*, however, the Court appears to have proceeded from the assumption that international law was irrelevant if it was inconsistent with the Constitution, instead of attempting first to reconcile the two *before* considering the question of inconsistency." (Dugard 1997:90-91)

By failing to consider the position of international law on the question of amnesties, the court demonstrated disregard for the principles of international law, a particularly unfortunate stance for a court in the new South Africa to take.

While the TRC Report did not attempt to identify the nature of the conflicts in southern African from the perspective of international humanitarian law, it indicated that it was guided by the principles of international humanitarian law, although it did not qualify the violations committed during the course of the conflicts as breaches of international humanitarian law but as violations of human rights:

"In cases where the Commission could not determine whether a combatant was out of combat, and therefore regarded as a protected person, it followed the precedent set by international humanitarian law. The commission gave the benefit of the doubt to people killed or seriously injured in uncertain circumstances and found them to be the victims of gross violations of human rights" (TRC 1998 vol 1:76).

Significantly, the report, while noting the distinction between international and internal armed conflicts, and between grave breaches and common Article 3 breaches, stated: "This distinction between international and internal armed conflicts is less relevant today, as the laws of war have evolved to regulate more closely the use of force in all situations of armed conflict".

The commission made findings on specific incidents, such as the attack on the Kassinga refugee camp in 1978, describing this as the commission of gross human rights violations against the civilian occupants of Kassinga camp by reason of the use of fragmentation bombs in the initial air assault which constituted an indiscriminate use of force, and the failure to take adequate care to protect the lives of civilians. The language speaks of humanitarian law violations although there is no reference to violations of humanitarian law.

The reason for the TRC's reluctance to qualify the crimes as international humanitarian law violations may be explained by its view that international humanitarian law violations was of itself inadequate to address all the problems which it had to deal with. "The Commission found the Geneva Conventions and its various protocols to be of great assistance, but believes that there is still more that could be added" (TRC 1998 vol 5:348). This does not answer the question whether humanitarian law was applicable. Even if humanitarian law did not cover all the situations arising, it would still apply, as well as human rights law, and it is unfortunate that the TRC did not qualify the crimes as breaches of humanitarian law in addition to their being gross human rights violations. The same acts could indeed have been both and by avoiding qualifying certain acts as humanitarian law violations or apartheid crimes, South Africa has attempted to circumvent its international legal obligations.

The TRC process has other shortcomings. According to the then-Minister of Justice Dullah Omar:

"... the perpetrators of apartheid crimes have not been as forthcoming as they should have been... When applying for amnesty, there is a concern that a number of perpetrators of very serious crimes, ... come along to the TRC with a view to obtaining amnesty and show very little emotion, very little contrition, very little regret, and one would have hoped that the humanity and generosity displayed by victims would be matched by some degree of contrition on the part of the perpetrators".<sup>59</sup>

Other bodies have been established to investigate other parts of the story. The Commission of Enquiry into Certain Allegations of Cruelty and Human Rights Abuses Against ANC Prisoners and Detainees by ANC Members was established in January 1993 to investigate abuses in detention camps by the ANC in Angola, Tanzania, Uganda and Zambia. Its report was issued on 23 August 1993.

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59 Statement made on 'Facing the Past International Criminal Tribunal for Yugoslavia (ICTY)' Newshour with Jim Lehrer. Online Focus. Transcript April 8 1997 [http://www.pbs.org/newshour/bb/africa/april97/south\\_africa\\_4-8.html](http://www.pbs.org/newshour/bb/africa/april97/south_africa_4-8.html).



## 7 RWANDA

Rwanda has had to cope with crimes committed on an even larger scale and with consequences that were even more devastating.<sup>60</sup> Estimates put the number killed in the genocide at between 500 000 and one million.<sup>61</sup> Particularly chilling is the manner in which the entire state apparatus was committed to the goal of genocide and the widespread participation of the civilian population.

Although the international community was not able to prevent or stop the genocide, in 1994, it established the International Criminal Tribunal for Rwanda, a sister tribunal to the ICTY. The tribunal has jurisdiction over crimes against humanity, genocide and violations of common Article 3 and Protocol II. The work of the tribunal has received some scholarly attention,<sup>62</sup> although nothing compared with that shown the ICTY. We will not consider the tribunal here, confining ourselves to a brief examination of the response shown by Rwanda itself to the genocide.

Faced with the complete collapse of its judicial system, Rwanda has had to build a new one from scratch. Judges and prosecutors must be trained, courtrooms built, dossiers compiled and an entire infrastructure constructed. Time is not on the side of the Rwandans; many suspects languish in terrible conditions of detention without being charged or without being aware of the charges against them. The Rwandan government changed the law to retrospectively validate detentions.<sup>63</sup> Because of the need to speed things up, prosecutors and judges receive scant training, and individuals with four months' training can preside over death-penalty cases. In 1998, almost 130 000 individuals were in detention, pending trial, but even allowing for ways to make trials more expeditious, it will take decades to try everyone, if that is the intention. Recognising the problem, in 1996 the government adopted the Organic Law of August 30, 1996 on the organisation of prosecutions for offences constituting the crime of genocide or crimes against humanity since 1 October 1990, which entered into force on 1 September 1996.<sup>64</sup> The Organic Law provides for a system of plea-bargains for lesser crimes as well as introducing the crimes of genocide, crimes against humanity and war crimes into the Rwandan legal system.<sup>65</sup> The law divides the crimes committed into four categories: Category one includes all the planners, organisers, leaders, instigators, persons in positions of power or authority and perpetrators of sexual torture. Persons accused of these crimes are not entitled to any reduction of sentence and are subject to the death penalty. On 30 November, the Attorney-General of the Supreme Court, pursuant to

60 See Sarkin 1999: 767.

61 See Segui 1994: para. 57.

62 See for example Cissé 1998:161; Shraga & Zacklin 1996:501; Lee 1996:37.

63 The Law 9/96 of 8 September 1996 relating to provisional modifications to the Criminal Procedure Code entered into force retroactively being effective from 6 April 1994.

64 See footnote 3.

65 The penal code of Rwanda adopted on 18 August 1977 does not list genocide and crimes against humanity, but a draft law is expected to be adopted in the near future. See Cissé 1998.

Article 9 of the Law, published a list containing 1 946 persons who fell into category one. If, after publication of this list, a person confessed, he or she would be put into category two, regardless of the nature of the crime.<sup>66</sup> Category two includes persons who are the “perpetrators or accomplices of intentional homicide” or suspected of serious assaults resulting in death. Perpetrators who confess and enter a guilty plea before prosecution will receive a sentence of seven to eleven years’ imprisonment, while persons confessing after prosecution are liable for 11 to 15 years’ imprisonment. Persons in category two not confessing and being found guilty are liable to life imprisonment.

Category three includes persons accused of serious assaults. If they plead guilty before prosecution, their sentence will be reduced by two-thirds. If they plead guilty after prosecution, their sentence will be halved. Category four includes persons who have committed property crimes.

Importantly, once a plea-bargain has been entered, the perpetrator has to apologise to the victim.<sup>67</sup> “Such an act of apology must be understood as a full component and condition of national reconciliation” (Cissé 1998:180–181).

Genocide and crimes against humanity are to be tried in special courts created for the purpose by the Organic Law.<sup>68</sup> Military personnel suspected of genocide or crimes against humanity are to be tried by Military Courts if they are high-ranking and by law counsels if they are rank and file.

Significantly, the 1996 law allows civil parties to appear in court to obtain compensation for damages resulting from the genocide. Under Article 32, the victims have a right to compensation. Another law provides for interim assistance to needy victims.<sup>69</sup> Under the Organic Law, while perpetrators can be held civilly liable for their particular victims, they are also held responsible *vis-à-vis* all the victims of the genocide.<sup>70</sup>

There have also been other attempts to probe events in Rwanda, including the UN Commission of Inquiry for Rwanda, which preceded the establishment of the ICTR. In 1992, four NGOs namely the International Federation of Human Rights, Africa Watch, the Inter African Union for Human Rights and the Rights of Peoples and the International Centre for the Rights of the Individual and the Development of Democracy, created the International Commission of Investigation on Human Rights Violations in Rwanda since 1 October 1990. Comprised of ten members from eight countries, the commission reported its findings in March 1993 based on

66 *Journal Officiel special edition* 30 November 1996.

67 Article 6(b).

68 Article 19.

69 Law 02/98 of 22 January 1998.

70 Under Article 30(1), “convicted persons whose acts place them in Category 1 under Article 2 shall be held jointly and severally liable for all damages caused in the country by their acts of criminal participation, regardless of where the offences were committed”. In contrast, offenders falling into the other categories are only liable “for damages for the criminal acts they have committed”. (Article 30(2)).

investigations of civilian deaths during Rwanda's civil war beginning in October 1990. Africa Watch distributed the Commission's final report.

## 8 SIERRA LEONE

At the opposite end of the scales of justice, for Sierra Leone, an end to the eight and a half year old war has come at a very high price: complete impunity for all the rebels and government soldiers. The Lomé Peace Agreement, signed on 7 July 1999, not only allows a complete and unconditional pardon and blanket amnesty to all combatants and collaborators in respect of anything done by them in pursuit of their objectives up to the signing of the present agreement,<sup>71</sup> but also grants eight positions in government and the vice-presidency to the rebels.<sup>72</sup> No criminal or civil proceedings are to be taken against perpetrators of serious violations of international humanitarian law, although a Truth and Reconciliation Commission is to be established, "to address impunity, break the cycle of violence, provide a forum for both the victims and perpetrators of human rights violations to tell their story to get a clear picture of the past in order to facilitate genuine healing".<sup>73</sup>

This seems like a very ambitious programme for a body that is hamstrung from the start by the fact that perpetrators have no incentive to testify before it. While it may offer victims some opportunity to relate their experiences in a sympathetic and authoritative environment, and for their stories to be recorded, it will be hard for the commission, for example, to get a clear picture of what happened without hearing from the perpetrators. It can construct a mosaic of victims' stories, but there will be no getting to the foundational causes of the conflict. Without this, the commission will have only a limited role in facilitating genuine healing. It is also hard to imagine how it can address impunity considering that its very existence is owed to impunity. Impunity is a fact in Sierra Leone, and the truth commission is not capable of addressing the impunity that now exists, although it may consider how to prevent such situations arising in the future.

While perpetrators of serious violations of international humanitarian law would appear to be getting off scot-free in Sierra Leone, they should not rest too easy. The international community has suggested that it might consider setting up an International Criminal Tribunal with jurisdiction over the crimes committed in Sierra Leone. When the UN special representative for Sierra Leone, Francis Okelo, signed the peace agreement, he made an oral disclaimer that the amnesties did not apply to crimes against humanity, genocide war crimes and other serious violations of international humanitarian law.<sup>74</sup>

71 Lomé Peace Agreement Article IX. See footnote 4.

72 Article IV of the Lomé Peace Agreement enables members of the RUF/SL to hold public office; Article V grants the mentioned positions.

73 Article XXVI, Human Rights Violations.

74 UN Secretary-General Kofi Annan stated: "I instructed my special representative to sign the agreement with the explicit proviso that the United Nations holds the understanding that the amnesty and pardon in article IX of the agreement shall not apply to international crimes of

*[continued on next page]*

Pending the establishment of an International Criminal Tribunal, if that ever happens, an International Commission of Inquiry will be established. On 6 August 1999, Mary Robinson named an expert to study the link between a truth and reconciliation body in Sierra Leone and a possible (international) Commission of Inquiry. Bethuel Kiplagat of Kenya was appointed

“to prepare an in-depth report, based on consultations with all concerned, on the nexus between a Truth and Reconciliation Commission and a Commission of Inquiry, and the possible future role of the latter, and to submit recommendations to the High Commissioner, the Special Representative of the Secretary-General and the Secretary-General of the United Nations”.<sup>75</sup>

It is to be expected that, if established, an international commission of inquiry would work in co-operation and co-ordination with a national truth commission. But one cannot really imagine what the function of such a commission of inquiry might be, other than as an information-gathering mechanism with a view to future prosecutions. But unless the commission has the power to subpoena witnesses, few perpetrators will volunteer to give evidence to it if it might be used as evidence before any international criminal court. Thus, we may end up with a fuller picture of events from the victims' side. It is also important that any international commission of inquiry does not undermine the work and role of the national body.

In Sierra Leone, as in South Africa, serious violations of international humanitarian law, including crimes giving rise to an obligation to prosecute or extradite, have been committed. In both instances, they have been subject to an amnesty, although the Sierra Leonean one is completely indiscriminating, whereas the South African one is at least subject to certain conditions. Even in South Africa, though, violations of humanitarian law have probably been subsumed under the umbrella of political crimes. In Sierra Leone, the number of crimes which have been forgotten is potentially vast, and Sierra Leone has made no attempt to distinguish between crimes giving rise to international obligations and lesser crimes, or even to invoke the political crime exception. At least in relation to crimes against humanity, it may be in violation of international law by not prosecuting or punishing persons accused of committing them. Sierra Leone, however, incurs no penalties for its violation. In a sense, being a sovereign state, it is free to adopt any law it wants, at least under its national law. But Sierra Leone also has obligations arising under international law, and being a party to certain international conventions, it is obliged to incorporate their provisions into its national law. If it does not do so, it is in violation of international law. Furthermore, the amnesties are valid only inside Sierra Leone. Once a person suspected of atrocities travels abroad, he or she could be arrested and prosecuted by the courts of another state exercising universal jurisdiction.

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genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law”. S/1999/836.2 para 7. See also Amnesty International 1999b.

75 UN doc HR/99/74 6 August 1999.

And, of course, they can be prosecuted by an international criminal tribunal, in the unlikely event that one is established.

## 9 CONCLUSION

No continent has been more ravaged by war in recent decades than Africa. Of 27 armed conflicts in 1996, 14 were in Africa, affecting a quarter of all states.<sup>76</sup> Millions have been butchered, whole groups have been wiped out. Millions have been uprooted and forced to live in refugee camps, where they are at particular risk from militias. Living standards are reduced to abysmal conditions. Typically, the response of the international community is half-hearted. Platitudes are muttered during visits of heads of states and dignitaries, but the message is "you're on your own". Europe and America refuse to take responsibility for their role in the crises that are burning holes in the continent. To use one recent example, the French parliamentary report into the role that France played in Rwanda during the genocide, exonerated France from any responsibility for the genocide or for the existence of the *Interahamwe* militia.<sup>77</sup> Insufficient steps are taken to curb the flow of arms to the continent and specifically to those areas most at risk of conflict or where conflicts have already broken out. These arms are fueling conflicts which could not be waged without them. The responsibility of the international community is to take action to halt arms flows to trouble spots and to more closely monitor legitimate arms sales, which are often diverted.

The experiences of Sierra Leone and Rwanda demonstrate that the international community will not intervene unless its vital interests are at stake, and Africa does not figure in the equation. One of the worst genocides this century was able to unfold, according to a meticulously drawn-up plan which was known to the international community, under the nose of the international community, and the international community could or would do nothing to prevent it. Africa and individual states are effectively alone in preventing and responding to major conflicts or atrocities.

Victims are even more isolated. In the three cases examined, only in Rwanda are prosecutions being undertaken in a systematic and determined manner. In South Africa and Sierra Leone, however, there is no possibility of a judicial remedy. Most victims will just have to learn to live with their tormentors living side by side with them and accept the reality of justice denied. In all three cases, however, reparations for the victims and the establishment of a truth commission are provided for. For some victims, this may be enough. The damage is done and there is no resurrecting the dead. As Sierra Leoneans know only too well, limbs cannot grow back. Perhaps if they are assisted in coping with their losses, some

<sup>76</sup> See SIPRI 1998.

<sup>77</sup> Rapport d'Information 1271 par la mission d'information de la commission de la Défense Nationale et des Forces Armées et de la Commission des Affaires Étrangères sur les opérations militaires menées par la France, d'autres pays et l'ONU au Rwanda entre 1990 et 1994.

modicum of justice will be done. But for many victims, justice can only be done when the worst offenders are prosecuted and a moral retribution is accomplished. For them, truth can never be an end in itself. Instead, the truth has consequences and gives rise to moral and perhaps legal responsibilities. Knowing the truth, one must act on it, in according with one's moral and legal obligations. Thus, the exposure of truth by a truth commission without it giving rise to any penal consequences only reinforces the sense that justice is the first casualty of truth and reconciliation commissions.

In an imperfect world, the law cannot always be obeyed and the right thing done. All political solutions represent a compromise and a truth commission is nothing more than a political solution. But cognisant of that inherent limitation, one can observe that it is possible for truth commissions to provide a credible and acceptable version of the truth. Whether they also promote reconciliation is far more difficult to ascertain. Perhaps in individual cases, as before the South African TRC, there may be instances of reconciliation, but it is another thing for any judicial or administrative body to be able to reconcile different groups and a whole population ravaged and traumatised by war or institutionalised repression. Healing, if it is possible, takes decades and efforts in many directions. Perhaps a TRC can play some role in this multi-dimensional process, but it is too much to expect any single administrative or judicial body to be the major force for reconciliation in the country. Reconciliation is by-product rather than a specific aim of truth commissions.

Where possible, prosecutions are to be preferred. In some cases, because of the enormous numbers of accused, it will not be possible to dispense perfect justice, but at least efforts should be made to ensure that the worst offenders are brought to justice. It must be recognised that in situations where there are tens of thousands of criminals and limited resources, a state may be in breach of its legal obligations by granting amnesties, not because it wants to, but because it has no other realistic choice. In these cases, states should be assisted to prosecute the greatest number possible and to ensure that serious offenders do not receive amnesty. In some cases, prosecutions that are not possible now may become possible in the future when the political situation changes. Where the opportunity arises, they should be pursued, in fulfillment of the international legal obligations of states.

The legal situation regarding amnesties shows that the concept of state sovereignty is changing. States can still pass whatever laws they wish, but those laws need not be recognised, and persons amnestied under national amnesty laws can still be subject to prosecution before the national courts of third states or by an international criminal court. States may still be able to do what they want, and even then only up to a point, but their nationals and officials cannot, and when a state fails in its international obligations, other states or an international court can act in lieu of the state. It is true that, at least in a virtual sense, the world has become a smaller place for offenders against the international code of conduct.

Victims may not yet be any safer in their beds but at least their cries are starting to be heard.

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