

International Humanitarian Law Series

The Legal Regime of the International Criminal Court

Essays in Honour of
Professor Igor Blishchenko

Edited by
José Doria, Hans-Peter Gasser and M. Cherif Bassiouni



MARTINUS NIJHOFF PUBLISHERS

International Humanitarian Law Series

VOLUME 19

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The Legal Regime of the International Criminal Court

Essays in Honour of Professor Igor Blishchenko

In Memoriam

Professor Igor Pavlovich Blishchenko

(1930 – 2000)

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2009

Chapter 47

Ten Principles for Reconciling Truth Commissions and Criminal Prosecutions

Lyal S. Sunga

I. Introduction

In so many countries plagued by civil war or dictatorship, serious human rights violations have been committed with impunity on a systematic and widespread basis. Thankfully, such dark chapters in the political history of a nation do not last forever. Once the violence ends and conditions favour the installation of democratic governance, an important issue must be addressed: what should be done about the violations?

On the one hand, it seems obvious that the restoration of democracy, full respect for human rights and the rule of law, requires the criminal prosecution of perpetrators of genocide, mass murder and rape, systematic torture, and other violations of similar gravity. It is difficult to imagine how society can liberate itself from a past in which impunity, lawlessness and abuse of power have prevailed, unless respect for the basic principle of individual criminal responsibility is resurrected. It seems axiomatic that a climate of 'impunity' (from the Latin *impunitas* literally meaning 'lack of punishment') cannot be dispelled unless fair and effective criminal prosecutions are carried out to remove the threat of criminals at large from society, provide redress and deter further violations.

On the other hand, the establishment of democracy, full respect for human rights and the rule of law, might not be feasible unless practical measures are taken to foster a minimum level of reconciliation and peace among people of various religious, ethnic, racial and political backgrounds who may long have been in conflict if not at war. When political conditions change, stirring hope for a return to democracy, pressure can grow quickly for the new government to launch an officially sanctioned process of thorough and transparent investigation, documentation, and reporting on human rights violations committed in the past. Often in such situations, victims and survivors feel that they first need to learn what, how, when, where and why, violations were committed before their sense of dignity can be restored. They need to learn the details surrounding the violations they suffered and to have these facts recognized publicly. Society at large may also encounter greater difficulty in moving towards a more constructive future unless and until facts and responsibilities are clarified about the past. In such circumstances however, criminal prosecution of the perpetrators of past political violence may be out of step, or even at odds, with a new regime's effort to unify the country. To this end, a number of governments in transitional societies

have established national truth and reconciliation commissions (which we hereinafter refer to as 'truth commissions'), either as an alternative to, or as a complementary process with, criminal prosecutions.

Criminal prosecutions and truth commissions each seek to investigate, document and clarify facts and responsibilities relating to violations, but their aims, approaches and procedures, differ. At certain points, they may be complementary and mutually supporting, and at others, incompatible in principle and practice. Truth commissions could uncover facts which facilitate or lead to criminal prosecutions. Criminal prosecutions might prove instrumental in settling accounts so as to pave the way towards eventual reconciliation between or among former enemies – complementary roles. On the other hand, the threat of criminal prosecutions from an emergent democratic regime could convince military leaders to hang on to power rather than to negotiate an end to war, delaying an end to hostilities and prolonging human rights violations. In such case, national reconciliation, peace, democratic governance, respect for human rights and the rule of law, all get postponed indefinitely. Here, criminal prosecution and reconciliation efforts conflict. To complicate matters further, a grant of amnesty by the new regime to protect perpetrators of past atrocities from criminal prosecution might figure as a key element in the transition to peace. If war could be brought to a swifter end, and thousands of men, women and children saved from genocide or other such horror, by trading amnesty from prosecution in exchange for a surrender of power and an end to violence, would it not be immoral to insist on criminal prosecutions at such high cost? Once peace has been restored, an extension of amnesty from prosecution might also prove necessary to draw out cooperation and truthful testimonies from perpetrators about how and why violations were committed. Yet, amnesties constitute an obvious denial of criminal justice, and a particularly serious one where they involve genocide, war crimes or crimes against humanity. At the moment when a country is trying to move itself beyond impunity, amnesties pull in the exact opposite direction.

Do truth commissions promote criminal justice, or to the contrary, do they hinder, obstruct or subvert it? Under what kinds of circumstances or arrangements do truth commissions and criminal prosecutions conflict, and how could such conflicts be resolved? Does international law allow countries to use truth commissions as alternatives to criminal prosecutions? Where does amnesty from prosecution fit into this puzzle? In short, can truth commissions and criminal prosecutions be reconciled, and if so, how?

This paper compares and contrasts the functions of truth commissions and criminal prosecutions and proposes some considerations for optimizing the relationship between the two. To do this, we first situate the rise of truth commissions in the historical context of international relations. We then consider the role and value of truth commissions in relation to the inadequacy of criminal prosecutions in societies struggling with the aftermath of major violence. Next, we highlight points where truth commissions conflict with criminal prosecutions in principle and in practice, focusing mainly on the use of amnesties. Following this discussion, we take account of the international community's renewed commitment to combat impunity for serious crimes, and how this conditions the degree of freedom States have to establish a truth commission as an alternative to criminal prosecutions. Finally, we propose ten general principles for reconciling truth commissions and criminal prosecutions with a view to

optimizing their respective contributions to justice, peace and human rights.

II. The Rise, Role and Value of Truth Commissions

A. The Rise of Truth Commissions in International Context

Frequently in the context of civil war, military rule or dictatorship, the Government, rebel movements, and even private citizens, violate human rights in ways that escape justice. In many situations of mass violence, individuals holding public office in the political and legal institutions of the State have failed to stop, were complicit in, or have even perpetrated, serious violations. In Rwanda in 1994, for example, State organs and officials, together with militia and many ordinary citizens, joined together to exterminate around a million mainly Tutsi men, women and children, apparently with little fear of ever having to face criminal justice. In the conflicts in the former Yugoslavia, Burundi, Darfur, and in so many other places, mass violence plunged society into utter chaos. Even once the violence has ended, and prospects return for peace, stability and respect for human dignity, the State may be unable or unwilling to prosecute the perpetrators of serious human rights violations. The establishment of truth commissions in transitional societies reflects political will to reckon with the past and move towards democratic governance, respect for human rights and the rule of law.

The phenomena of civil war, military dictatorships and serious human rights violations, do not by themselves explain the rise of truth commissions however. These situations have plagued political society since time immemorial, whereas truth commissions to deal with past violations in transitional societies have been established only since the early 1980's.¹ Even national commissions dealing with historical violations committed decades ago date only from the early 1990's.²

What factors then, explain the rise of truth commissions in countries experiencing the aftermath of mass violence?

First, from the end of the Second World War until 1991, there was a marked increase in the number of civil wars³ during which human rights violations were

1 The United States Institute of Peace website, visited on 1 August 2006 listed truth commissions that had been established in 24 countries: Argentina, Bolivia, Chad, Chile, East Timor, Ecuador, El Salvador, Germany, Ghana, Guatemala, Haiti, Nepal, Nigeria, Panama, Peru, Philippines, Serbia and Montenegro (formerly Federal Republic of Yugoslavia), Sierra Leone, South Africa, South Korea, Sri Lanka, Uganda, Uruguay and Zimbabwe.

2 Under the title "Historical Truth Commissions", Hayner lists: the United States Commission on Wartime Relocation and Internment of Civilians covering the years 1942-1945, established in 1981, the Canadian Royal Commission on Aboriginal Peoples dealing with the situation of indigenous communities from before 1500 until 1996; the United States Advisory Committee on Radiation Experiments covering the period 1944-1974, established in 1994; and the Australian Human Rights and Equal Opportunity Commission's Inquiry into the separation of aboriginal and Torres Strait Islander Children from their families, established in 1996. *See ibid.* at Chart 2 of Appendix 1 at 312-313.

3 *See* the Human Security Report 2005: War and Peace in the 21st Century (2005) at 8, which notes that: "Between 1946 and 1991 there was a twelve-fold rise in the number of

committed on a severe and systematic basis. Violence perpetrated along ethnic, racial or religious lines, seems in many countries to have been a recurring phenomenon, particularly where past violations have gone unaddressed.⁴ The increased number of situations in which civilians were directly targeted, created greater demand from victims, survivors, and society at large, to see the establishment of official commissions dedicated to clarifying the truth and promoting national reconciliation, once peace was at hand.

Second, in the late 1970's, the Carter Administration emphasized human rights as an explicit part of US foreign policy⁵ and, working through the Organization of American States and the Inter-American Commission on Human Rights, pressured the Governments of Argentina, Bolivia, Chile, El Salvador, Guatemala, Haiti, Nicaragua, Paraguay and Peru, to improve their human rights records.⁶ With encouragement from the US and active support of the Inter-American Commission on Human Rights, NGOs in Latin America found greater margin to mobilize public opinion against the right-wing dictatorships that were in place, and to highlight, monitor and report on the extent and character of violations being perpetrated.⁷ The US delegate to the UN Commission on Human Rights, Mr. Jerome Shestack,⁸ together with representatives of many other like-minded Governments in the Commission, established the UN Working Group on Enforced or Involuntary Disappearances in 1979-1980 – the first thematic special procedure mandate.⁹ Soon, other Commission on Human Rights thematic mandates under ECOSOC resolutions 1235 and 1503 were established to monitor, investigate, and discuss publicly, the human rights situation in any part of the world.¹⁰ These advances in the international

civil wars – the greatest jump in 200 years. The data suggest that anti-colonialism and the geopolitics of the Cold War were the major determinants of this increase.”

- 4 Ethnic, racial or religious violence has erupted often as part of a pattern of recurring mass violence stretching over decades or even centuries in countries all over the world. *See generally* David A. Lake and Donald S. Rothchild (eds.), *The International Spread of Ethnic Conflict: Fear, Diffusion, and Escalation* (1998); Donald L. Horowitz, *Ethnic Groups in Conflict: Updated Edition* (2000); Ted Robert Gurr and Barbara Harff, *Ethnic Conflict in World Politics* (2000); Michael E. Brown (ed.), *Ethnic Conflict and International Security* (1993); and Irwin Deutscher, *Preventing Ethnic Conflict: Successful Cross-National Strategies* (2005).
- 5 The Carter Administration (1977-1981) suspended economic and military assistance to Chile, El Salvador, Nicaragua, and Uganda, to register its concern over serious human rights violations.
- 6 *See* Cristina Eguizabal, *Latin American Foreign Policies and Human Rights*, in David P. Forsythe, (ed.), *Human Rights and Comparative Foreign Policy* (2000) 276-309 at 291.
- 7 *See* Melissa Ballengee, *The Critical Role of Non-governmental Organizations in Transitional Justice: A Case Study of Guatemala*, 4 (Fall/Winter) *UCLA Journal of International Law and Foreign Affairs* (1999-2000) 477-506.
- 8 *See* David Weissbrodt and Maria Luisa Bartolomei, *The Effectiveness of International Human Rights Pressures: the Case of Argentina, 1976-1983*, 75 *Minnesota Law Review* (February 1991) 1009-1035 at 1031.
- 9 In his book, *NGOs and the Universal Declaration of Human Rights: A Curious Grapevine* (1998) at 253, William Korey provides an interesting account of the UN Commission on Human Rights session that led to the establishment of the Working Group on Enforced or Involuntary Disappearances.
- 10 *See* Lyal S. Sunga, *NGO Involvement in International Human Rights Monitoring*, in

monitoring of human rights, together with the rising effectiveness and professionalism of human rights NGOs, helped to spotlight gross human rights abuse and delegitimize dictatorships in many countries.

Third, in the early 1980's, a sharp reduction in the number of armed conflicts around the globe afforded countries emerging from a period of mass violence the opportunity to develop measures to foster peace, stability, democratic governance and the rule of law. As the Human Security Report, 2005, observes:

By the early 1980's the wars of liberation from colonial rule, which had accounted for 60% to 100% of all international wars fought since the early 1950's, had virtually ended. With the demise of colonialism, a major driver of warfare around the world – one that had caused 81 wars since 1816 – simply ceased to exist.¹¹

Human rights norms and implementation had become more precise and consolidated at global and regional levels than ever before, which helped victims and human rights NGOs better recognize violations as well as to articulate clearer demands for compensation, official apologies and the enforcement of criminal responsibility.

Fourth, the end of the Cold War ended US and Soviet support for proxy wars in Africa and Latin America, and many civil wars ran out of steam.¹² This reduced the overall level of violence, and expanded political space beyond Cold War ideological constraints at domestic and global levels to address violations and support democratic governance, human rights and the rule of law. A rise in inter-ethnic violence within the borders of single States in the 1990's as compared to inter-State violence, such as in the former Yugoslavia, Rwanda and East Timor, made clear that international community had to focus more clearly on solutions tailored to the particular exigencies at the local level. By this time, truth commissions had met with varying degrees of success in Bolivia, Argentina, Uruguay, Zimbabwe, Uganda, Nepal and Chile, drawing the international community's attention to this approach. The UN brokered a peace agreement to end the El Salvadoran civil war and set up a truth commission there in July 1992¹³ as well as in Guatemala in 1994.¹⁴

International Human Rights Law and Non-Governmental Organizations (2005) 41-69. The UN Commission on Human Rights has been replaced by the UN Human Rights Council pursuant to General Assembly resolution 60/251 of 3 April 2006. The new Council held its first session from 19 to 30 June 2006.

11 Human Security Report 2005: War and Peace in the 21st Century (2005) at 8.

12 See the Human Security Report 2005: War and Peace in the 21st Century (2005) at 8 which notes that: "With the colonial era and then the Cold War over, global warfare began to decline rapidly in the early 1990's. Between 1992 and 2002 the number of civil wars being fought each year plummeted by 80%. The decline in all armed conflicts – that is, wars plus minor armed conflicts – was 40%. The end of the Cold War not only removed a major source of conflict from the international system, it also allowed the UN to begin to play the security-enhancing role that its founders had intended, but which the organization had long been prevented from pursuing."

13 See "From Madness to Hope: The 12-Year War in El Salvador", report of the Commission on the Truth for El Salvador, annex to a Letter dated 29 March 1993 from the UN Secretary-General to the President of the Security Council, UN Doc. S/25500 of 1 April 1993.

14 See the Agreement on the Establishment of the Commission to Clarify Past Human

Fifth, the dissolution of the Soviet Union in December 1991¹⁵ exposed former Eastern Bloc regimes to popular demand for democracy, transparency and the rule of law and swept away many dictatorships. Rather than to rely mainly on criminal prosecutions, the new Governments of Albania, Bulgaria, Czechoslovakia, Estonia, the German Democratic Republic, Hungary, Latvia, Lithuania and Poland, enacted laws of lustration to prevent individual collaborators of the former Communist governments from taking up public office as a way to break cleanly from past oppression.¹⁶ In 1992 however, a truth commission was established with respect to East Germany “to analyze the structures, strategies and instruments of the SED dictatorship, in particular the issue of responsibilities for the violation of human and civil rights and for the destruction of nature and the environment”.¹⁷

Finally, in the 1990’s and early 21st Century, a number of old dictatorships and corrupt regimes in Asia¹⁸ and Africa¹⁹ were replaced by more democratic and pluralist Governments, improving the international climate on human rights and rule of law issues generally.

Thus, while mass violence is nothing new, the rise of truth commissions in many parts of the world can be explained by the increased targeting of civilians by repressive governments as the number of civil wars rose sharply from the end of World War Two to the 1990’s, and the international community’s response to such violations through strengthened UN and regional human rights law and implementation. The subsequent sharp decrease in the number of international armed conflicts with the end of the Cold War, together with a relative rise in civil war and ethnic conflict, as well as the rise of democracy movements in Eastern Europe, Asia and Africa, provided greater need and opportunity to address past violations more in line with human rights standards focussing on victims and survivors.

Rights Violations and Acts of Violence that have Caused the Guatemalan Population to Suffer, *signed*, 23 June 1994, in Oslo. *See also* General Assembly resolution 48/267 of 19 September 1994 on the “Mission for the Verification of Human Rights and of Compliance with the Commitments of the Comprehensive Agreement on Human Rights in Guatemala” which indicates the UN involvement in the peace process.

- 15 The Union of Soviet Socialist Republics was formally dissolved on 8 December 1991 with the conclusion of the Belavezha Accords, *signed* in Belarus, by the Presidents of Russia, Belarus and Ukraine, and replaced with the Commonwealth of Independent States.
- 16 *See* Mark S. Ellis, *Purging the Past: The Current State of Lustration Laws in the Former Communist Bloc*, 59 *Law and Contemporary Problems* (Fall 1996) 181-194. *See also* Roman David, *Lustration Laws in Action: The Motives and Evaluation of Lustration Policy in the Czech Republic and Poland (1989-2001)*, *Law and Social Inquiry* (Spring 2003) 387-439. *See further* Myroslava Antonovych, *The Human Rights Accountability of Ukraine’s Communist Regime*, 8 *Ius Gentium* (Fall 2002) 39-48.
- 17 *See* the Law Creating the Commission of Inquiry on “Working Through the History and the Consequences of the Sed Dictatorship”; Act No. 12/2597, *adopted* 14 May 1992, by the Parliament of the Federal Republic of Germany.
- 18 One can recall for example, democratic reforms in Mongolia, South Korea, Indonesia, the Philippines and more recently, in Kyrgyzstan.
- 19 Momentum for political pluralism and democracy was strongly felt, for example, in Benin, Democratic Republic of Congo, Ethiopia, Gabon, Ghana, Guinea, Ivory Coast, Kenya, Liberia, Madagascar, Mali, Mozambique, Rwanda, Sierra Leone, South Africa, Togo, Tunisia and Zambia.

B. The Role and Value of Truth Commissions in Relation to Criminal Prosecutions

i. Situations Where Truth Commissions Might Be Needed

Not in every situation of serious violations will truth commissions necessarily be better placed than criminal prosecutions to uncover the truth, and meet the needs of victims, survivors and society at large. Where the judiciary remains independent from the Executive and criminal prosecutions function effectively before, during and following a period of violence, there would be less need for the establishment of a truth commission. Where the rule of law, general respect for human rights, and the ways and means of democratic governance continue to be upheld, or the courts can resume their functions quickly and effectively, even systematic, widespread and severe human rights violations could be addressed adequately. After all, criminal prosecutions are designed to expose facts and responsibilities surrounding violations and to deter the commission of further violations. Although primarily retributive in character, in many countries, the courts can go beyond the rendering of a guilty verdict to provide victims and survivors of serious human rights violations with redress, through adjudication connected directly to criminal findings of guilt, such as in *partie-civile* procedures, or in separate civil law trials. Redress might take the form of compensation for harm suffered, restitution of property unlawfully taken by the perpetrator, as well as assistance to receive physical or psychological therapy and rehabilitation or official apologies.²⁰

Similarly, truth commissions might not be necessary in situations where facts and responsibilities surrounding violations might be known sufficiently or amenable to being uncovered adequately through the criminal prosecution of relatively few individuals. Here we could recall the military coup in Greece on 21 April 1967 led by Colonel George Papadopoulos, purportedly to prevent an impending communist takeover. During the ensuing seven year period of military rule (1967-1974), the regime systematically persecuted political opponents and committed serious human rights violations including torture. Once the military regime fell from power in 1974, after having failed to topple the Makarios Government of Cyprus, around one hundred individuals responsible for the military take-over and subsequent violations were prosecuted and stiff prison sentences were handed out.²¹ The system of criminal justice played a more than adequate role in prosecuting the guilty individuals and allowing Greece to move beyond its military past toward the consolidation of peace and democratic governance. The establishment of a truth commission became unnecessary once the regime had fallen and democracy was restored. Moreover, the Council of Europe played a critical role in exposing the abuses of the military regime shortly after the coup took place,²² and the European Commission on Human Rights

20 See generally Ilaria Bottigliero, *Redress for Victims of Crimes under International Law* (2004).

21 See generally Christopher Montague Woodhouse, *The Rise and Fall of the Greek Colonels* (1985).

22 The Council of Europe's Consultative Assembly comprised of Member State parliamentarians, denounced the coup already on 26 April 1967 and over the next several years, applied considerable political pressure on the military regime to step down.

Judgement in *The Greek Case* provided an impartial and independent ruling that documented the character and extent of human rights violations as well as the State's responsibility for them.²³

Consider the situation in Northern Ireland between August 1971 and March 1975 which presents a borderline example. There, around 1,100 people were killed, over 11,500 were injured and more than £140,000,000 worth of property was destroyed. Security personnel of the United Kingdom resorted to extrajudicial arrests, arbitrary detention and internment as well as ill-treatment of persons deprived of their liberty. Despite all this, the courts were still able to address violations effectively in a number of ways. Prosecutions of security personnel affirmed the principle of individual criminal responsibility, deterring and preventing further violations. The courts also ensured redress for victims and documented facts and responsibilities. In addition, the European human rights framework played a key role in establishing facts and in holding the UK Government to account.²⁴ Concrete measures to promote reconciliation between Protestants and Catholics in Northern Ireland were established as part of negotiated peace settlements between the Government of the United Kingdom and the Irish Republican Army. Even with all these measures and initiatives however, the Government of the United Kingdom still felt compelled to appoint a special one-person commission "to examine the feasibility of providing greater recognition for those who have become victims in the last thirty years as a consequence of events in Northern Ireland, recognising that those events have also had appalling repercussions for many people not living in Northern Ireland."²⁵

Clear examples where criminal prosecutions were considered insufficient and a truth commission necessary, are found in the more extreme situations in El

23 In September 1967, Denmark, Norway, Sweden and The Netherlands lodged the first ever inter-State complaint against another High Contracting Party of the Council of Europe with the Parliamentary Assembly which took the view that the Contracting States had a duty to lodge an application pursuant to Article 24 concerning serious violations of the European Convention on Human Rights, *adopted* 4 November 1950 in Rome, *entered into force* 3 September 1953. See *Denmark, Norway, Sweden and The Netherlands v. Greece Applications* 3321, 3322, 3323, 3344/67 of September 1967, IX Yearbook of the European Convention on Human Rights (1968).

24 As explained in the European Court of Human Rights Judgement in *Ireland v. The United Kingdom*; 5310/71 [1978] ECHR 1, 18 January 1978, there was "no suggestion that the domestic courts were or are anything other than independent, fair and impartial". There were 2,615 complaints made against the police between 9 August 1971 and 30 November 1974 out of which 1,105 alleged ill-treatment or assault. This resulted in 23 prosecutions that brought about 6 convictions leading to fines and one instance of conditional discharge. Between 31 March 1972 to 30 November 1974, there were 1,268 complaints concerning shootings or assaults. Between April 1972 and the end of January 1977, 218 members of the security forces were prosecuted which resulted in 155 convictions. Disciplinary hearings were held in respect of a further nearly 1,800 soldiers. There were also procedures in place to obtain compensation in respect of ill-treatment from the security forces which provided compensation totalling £302,043 to settle 473 civil claims in respect of wrongful arrest, false imprisonment, and assault and battery committed between 9 August 1971 and 31 January 1975. In addition, a series of commissions were set up to look into specific issues.

25 See *We Will Remember Them: Report of the Northern Ireland Victims Commissioner*, Sir Kenneth Bloomfield KCB, April 1998, commissioned on 19 November 1997 by Secretary of State for Northern Ireland Marjorie Mowlam.

Salvador,²⁶ Guatemala,²⁷ Chile,²⁸ Argentina²⁹ and South Africa,³⁰ where the judiciary became largely subordinate to the will of the Executive and serious human rights violations were perpetrated with impunity on a mass, systematic and widespread basis. The principles that 'no one is above the law' and 'all are equal before the law' did not function in South Africa with an explicitly discriminatory apartheid system, nor in Chile, where the abuse of power by State officials during the Pinochet regime was rampant. In El Salvador and Guatemala, democratic governance, human rights and the rule of law, were largely absent during the military dictatorships where the army and right-wing death squads systematically perpetrated murder, torture and rape, terrorizing the political opposition and public at large.

ii. Exposing the Truth

Turning to the value of truth commissions in relation to criminal prosecutions, as Kiss points out:

Truth serves justice in a basic sense stressed by the Argentinian truth commission in its report *Nunca Mas*: without truth one cannot distinguish the innocent from the guilty. Less directly, truth serves justice by overcoming fear and distrust and by breaking the cycles of violence and oppression that characterize profoundly unjust societies.³¹

While the truth is always partial and tentative to some extent, the central point is that in transitional societies, a lack of objectively ascertained, truthful accounts makes open, democratic and informed debate about violations more difficult. Truth commissions could provide a valuable means by which to raise the quality of society's understanding about the violence suffered, so that informed and constructive policies to deal with the past could be developed through a more accountable, transparent and democratic manner, with a view to ensuring a peaceful future.

As a practical matter, it is almost always more difficult to identify perpetrators than victims. Even in the case of involuntary or enforced disappearances, a victim's

26 See Thomas Buergenthal, *The United Nations Truth Commission for El Salvador*, 27 (October) *Vanderbilt Journal of Transnational Law* (1994) 497-544.

27 See Nathanael Heasley et al., *Impunity in Guatemala: The State's Failure to Provide Justice in the Massacre Cases*, 16 *American University International Law Review* (2001) 1115-1194.

28 See Jorge Correa, *Dealing with Past Human Rights Violations: The Chilean Case after Dictatorship*, 67 *Notre Dame Law Review* (1992) 1455-1485.

29 See Daniel W. Schwartz, *Rectifying Twenty-Five Years of Material Breach: Argentina and the Legacy of the 'Dirty War' in International Law*, 18 (Spring) *Emory International Law Review* (2004) 317-370.

30 See Ronald C. Slye, *Apartheid as a Crime Against Humanity: A Submission to the South African Truth and Reconciliation Commission*, 20 (Winter) *Michigan Journal of International Law* (1999) 267-300.

31 Elizabeth Kiss, *Moral Ambition Within and Beyond Political Constraints*, in *Truth v. Justice: The Morality of Truth Commissions* (eds. Robert I. Rotberg and Dennis Thompson) (2000) 68-98 at 71.

body may never be recovered, but at least family and friends of the victim are likely to know that he or she has disappeared. Perpetrators on the other hand, particularly those backed with State authority and power, frequently can destroy or cover up evidence needed to convict them. Criminal prosecutions might not be very effective in bringing out the truth surrounding violations without the active cooperation of the perpetrators themselves because in many cases, they may be the only ones who know the factual details about, motives behind, and responsibility for, violations they and their co-perpetrators committed. In many cases, evidence of hierarchical structure and command responsibility might exist in the form of written decisions and orders that may be scattered among millions of documents in vast State archives, as in the case of the Stasi, East Germany's secret police.³² To deal with such situations, a truth commission could marshal expert knowledge in the ways and means of the bureaucracy in order to locate, open up and examine evidence in an efficient, orderly and comprehensive manner.

Even where there remains a functioning judiciary that can operate independently and impartially, criminal prosecutions still might not be adequate to uncover truth and foster reconciliation for several reasons. First, criminal trials often get bogged down in procedure. Because of the high standard of fair trial guarantees that have to be met, such as the presumption of innocence, right to prepare an adequate defence, right to an appeal, and right to be tried before an independent and impartial tribunal, and above all, that the burden remains on the Prosecution to prove its case beyond a reasonable doubt, criminal trials might produce few convictions and only after considerable time has elapsed. Second, criminal trials consume considerable prosecutorial resources, forensic expertise and scarce public funds, at the expense of other priorities that press upon Government, particularly in a time of transition from conflict to peace. In Rwanda, where some 80% of judges and lawyers had been assassinated, criminal prosecutions, at least at the domestic level, could not be carried out. In other situations, such as Somalia since the overthrow of dictator Siad Barre in 1991, at least until the time of this writing, State institutions seemed not to function at all. Even were peace to return to Somalia today, domestic criminal prosecutions would likely not be feasible for a considerable time in this 'collapsed State'. Third, where the remnants of a prior abusive regime continue to influence the country's political and legal institutions, the administration of justice is likely to remain particularly weak. Even where criminal prosecutions could possibly be undertaken, they might be less effective in dispelling rumours swirling around a frightening past, or in clarifying facts and responsibilities with regard to gross violations because of a lack of political will. In Serbia, for example, the post-conflict Government seemed largely unwilling to prosecute because many high-level perpetrators continued to exercise considerable influence over the country's political and legal establishment. Tellingly, numerous high-level war crimes suspects such as Radovan Karadic and Ratko Mladic still had not been apprehended by the time of this writing, although more than a decade had passed since their alleged involvement in the massacre of some 7500 civilians in

32 See Maryam Kamali, *Accountability for Human Rights Violations: A Comparison of Transitional Justice in East Germany and South Africa*, 40 *Columbia Journal of Transnational Law* (2001) 89-141.

Srebrenica in 1995, and the shelling of Sarajevo in 1995.³³ Where high profile perpetrators of mass violence remain relatively secure in the countries they committed their crimes, prospects for effective criminal justice in general are likely to remain poor. In such a situation, by exposing the extent and character of violations, a truth commission might help the new regime to distinguish itself morally from the old one. Fourth, by focussing narrowly on the question of legal guilt of a limited number of persons, criminal prosecutions may not adequately clarify the bigger picture of the events that led to the abuse of power, or of the scale and character of violations committed in general. In some situations, truth commissions could assist society to reckon with the violence of the past more effectively than criminal trials could do alone. Finally, in some situations, criminal trials might be used to throw the blame on a few in order to save higher-level officials and obscure what in fact might have been a concerted and organized abuse of power involving the highest echelons of the State. Here again, truth commissions could provide a fuller and more accurate picture for victims, survivors and the general public.

iii. Recognizing the Dignity of Victims and Survivors

Exposing the truth could help victims heal and move on with their lives³⁴ whereas the adversarial procedure of criminal trials often seems to accord comparatively little recognition to victims themselves. Kiss contends that truth commissions serve justice in this sense much better than do traditional criminal prosecutions by shifting the focus to the restoration of victims and survivors:

Prosecution witnesses at trials undergo constant interruption and aggressive cross-examination; they are not treated with the deference and respect that truth commissions can accord to victims giving testimony. In the TRC hearings, the testimony of witnesses was not treated as 'arguments or claims in a court of law', but rather as 'personal or narrative truth' providing 'unique insights into the pain of South Africa's past.'³⁵

Crocker points out that the South African Truth and Reconciliation Commission "took more than 22,000 testimonies from victims or their families, made its sessions public, encouraged extensive media coverage, including extensive radio coverage and nightly and weekly TV recaps of highlights and maintained a web site."³⁶ For many

33 See the Indictments of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia against Ratko Mladić and Radovan Karadžić; Case No. IT-95-5/18-I.

34 David A. Crocker, *Truth Commissions, Transitional Justice, and Civil Society*, in *Truth v. Justice: The Morality of Truth Commissions* (eds. Robert I. Rotberg and Dennis Thompson) (2000) 99-121 at 100-101. Crocker contends that truth serves justice by fulfilling the moral right of victims and survivors to know the truth about the violations they suffered.

35 Elizabeth Kiss, *Moral Ambition Within and Beyond Political Constraints*, in *Truth v. Justice: The Morality of Truth Commissions* (eds. Robert I. Rotberg and Dennis Thompson) (2000) 68-98 at 74.

36 David A. Crocker, *Truth Commissions, Transitional Justice, and Civil Society*, in *Truth*

survivors, recounting details of violations to an official commission helped them gain respect and recognition and to heal.³⁷

iv. Contributing to Criminal Prosecutions

If provided with sufficient authority, time and resources, a truth commission could contribute to criminal prosecutions by uncovering factual details that would ordinarily remain beyond the reach of even the most competent prosecutor. A truth commission might clarify the role of particular government departments, army and police units, and detention centres, in violating human rights, which could guide prosecutors in identifying individual perpetrators working inside or alongside these bodies.

The arguments above highlighting the role and value of truth commissions in relation to criminal prosecution indicate ways in which truth commissions could function on a complementary basis to promote truth, justice and reconciliation in transitional societies. None of these elements detract in any way from the general principle that all perpetrators of serious human rights violations should be prosecuted and punished for their crimes. Rather, they are based on the importance of establishing truth and reconciliation, exposing the truth, recognizing suffering caused by violations, and the fact that in transitional societies, criminal prosecutions may be inadequate or ill-suited to serve these goals.

Some commentators take this argument further, contending that truth commissions might be even more effective than criminal prosecutions in establishing justice and accountability in transitional country situations. To be made effective however, truth commissions must be equipped to grant amnesties as a means by which to secure the cooperation of perpetrators themselves – an issue we discuss next.

III. Where Truth Commissions and Criminal Prosecutions Conflict

The most contentious issues in regard to the relationship between truth commissions and criminal prosecutions arise over the question of the grant of amnesties from criminal prosecution. On the one hand, truth commissions are likely to be more effective where they can offer amnesty from criminal prosecution as leverage to uncover the truth about serious violations. On the other hand, amnesties from criminal prosecution contradict the principle of individual criminal responsibility and undermine the country's efforts against impunity. At this juncture, we consider the points at which truth commissions and criminal prosecutions conflict by focussing mainly on the issue of amnesties, but also on the general question of using truth commissions as alternatives to criminal prosecutions.

v. Justice: The Morality of Truth Commissions (eds. Robert I. Rotberg and Dennis Thompson) (2000) 99-121 at 102.

37 As Hayner says: "Remembering is not easy, but forgetting may be impossible. ... Only by remembering, telling their story, and learning every detail about what happened and who was responsible were they able to begin to put the past behind them. In South Africa, time and again I heard survivors say that they could forgive their perpetrators only if the perpetrators admitted the full truth." Priscilla B. Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions* (2002) at 2.

A. Arguments in Favour of Amnesty from Criminal Prosecution

Arguments in favour of granting amnesty from criminal prosecution to individuals implicated in serious violations of human dignity basically boil down to the following points.

First, where amnesty could help bring war or dictatorship to an end and avoid exposing thousands of persons to threat of immediate harm, they should be used as the lesser of two evils. While individual criminal responsibility ranks of great importance as a principle, the protection of human life must prevail when it comes under direct threat. An objection might be that the fact that a regime feels weakened to the point that it must negotiate for an amnesty from prosecution in some situations signals not that insurgents should compromise, but that they should instead harden their resolve to overthrow the government and then prosecute perpetrators of serious violations. The difficulty with this objection from a moral and practical point of view is that the true capacity of a dictatorship to cling to power by force and threat cannot be known with much certainty at the moment. Often, a dictatorship seems to commit the most serious violations when it feels most insecure, weak or in danger of losing its grip on power. While this point may come near the end of its rule, even then, it might still retain enough power to commit serious human rights violations on a mass scale.³⁸

The decision therefore for democratic forces to compromise under the circumstances, rather than to continue fighting, has to be taken in the context of the uncertain and shifting balance of power. In South Africa, for example, since the apartheid regime's ascent to power in 1948, the Government demonstrated its willingness and ability time and time again to resort to violence to maintain power. Not to negotiate a peaceful transition from apartheid to democracy with the help of amnesties, while President FW de Klerk was still in power and Nelson Mandela had not passed from the scene, could perhaps have meant the continuation of apartheid for many more years, costing future generations their right to self-determination, freedom and independence.³⁹ Depending on the situation then, the use of amnesty from prosecution

38 More people were killed between 1990 and 1994 when apartheid was nearing its end in South Africa, than during the whole decade of the 1980's, despite the high level of insurgency and State repression during that period. See Richard A. Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State* (2001) at 63. One can recall also the increasingly large-scale massacres of Christian minorities that challenged the rule of the Porte as the Ottoman Empire's power crumbled in the late 19th Century, such as the Massacre of the Bulgars, and the slaughters of the Armenians in 1915. See generally Lord Kinross, *The Ottoman Centuries: The Rise and Fall of the Turkish Empire* (1977).

39 Boraine relates that in the case of South Africa: "Mbeki made it absolutely clear, in a private interview with President Nelson Mandela, that senior generals of the security forces had personally warned him of dire consequences if members of the security forces had to face compulsory trials and prosecutions following the election. According to Mandela, they threatened to make a peaceful election totally impossible. Some compromise had to be made and, in the postamble of the Interim Constitution, provision was made for the granting of amnesty to advance reconciliation and reconstruction and for its legislative implementation." See Alex Boraine, *Truth and Reconciliation in South Africa: The Third Way*, in *Truth v. Justice: The Morality of Truth Commissions* (eds. Robert I. Rotberg and Dennis Thompson) (2000) 141-157 at 143-144.

to facilitate a dictatorship to give up power, unsavoury as it must be from a moral and legal point of view, may be the lesser of two evils, and remains defensible on humanitarian grounds.

Second, amnesties granted on a conditional, case-by-case, individualized basis, are likely to offend the principle of individual criminal responsibility less seriously than 'blanket amnesties' which suspend criminal prosecutions for an entire group or class of people with few or no conditions. The South African example offers valuable lessons for future practice:

First, amnesty had to be applied for on an individual basis – there was no blanket amnesty. Second, applicants for amnesty had to complete a prescribed form that called for very detailed information relating to specific human rights violations. Third applicants had to make a 'full disclosure' of their human rights violations in order to qualify for amnesty. Fourth, in most instances applicants had to appear before the Amnesty Committee in open hearings. Fifth, there was a time limit set in terms of the Act. Only those gross human rights violations committed in the period 1960 to 1994 were considered for amnesty. Then, there was a specified period during which amnesty applications had to be made, from the time of the promulgation of the Act, which was in December 1995, to 10 May 1997. Finally, a list of criteria laid down in the Act determined whether the applicant for amnesty would be successful.⁴⁰

Boraine, who served as Vice-Chairperson of South Africa's Truth and Reconciliation Commission, contends that the commission should not be considered merely as a substitute for criminal justice, but instead, as an indispensable tool for getting at the truth. Similarly, Rotberg argues that:

To meet those goals – to encourage the kinds of testimony that would reveal apartheid at its moral worst – the TRC had to find a way to compel the real culprits to come forward and confess. Amnesty was the result, as the postamble to the interim constitution prefigured: perpetrators, black and white, would receive perpetual immunity from prosecution if they testified fully and candidly about their terrible deeds and if they could demonstrate (by the loose standards that the TRC used pragmatically) that their crimes were political; that is, that they served political ends or were motivated by political beliefs.⁴¹

Blanket amnesties, granted *en bloc* to promote reconciliation, lack the saving grace of drawing out truth because individuals do not have to compete with one another by offering valuable information to get an amnesty.

Third, the use of amnesties could be critical in gaining the cooperation of suspected perpetrators of serious human rights violations in order to expose facts and

⁴⁰ Alex Boraine, *Truth and Reconciliation in South Africa: The Third Way*, in *Truth v. Justice: The Morality of Truth Commissions* eds. Robert I. Rotberg and Dennis Thompson (2000) 141–157 at 148.

⁴¹ Robert I. Rotberg, *Truth Commissions and the Provision of Truth, Justice, and Reconciliation*, in *Truth v. Justice: The Morality of Truth Commissions* (2000) 3–21 at 7–8.

responsibilities for the benefit of victims and survivors.⁴² Knowing the truth could in itself constitute an essential catalyst for victims and survivors to heal psychologically, which in turn could contribute to the process of national reconciliation as well.

Finally, the grant of amnesty from prosecution to certain key individuals could bring to light evidence to enable successful criminal prosecution of other perpetrators, perhaps at higher numbers and levels of criminal responsibility than would otherwise have been possible. In this respect, some commentators have argued that truth commissions might even be more effective than criminal prosecutions at establishing individual criminal responsibility.⁴³ Slye, for example, contends that in the case of South Africa, where evidence was hard to get at without offers of amnesty: “there is no doubt that the quantity, and probably also the quality, of the information elicited from the amnesty hearings was higher than what would have been elicited from criminal trials.”⁴⁴

B. Have Amnesties Actually Led to Criminal Prosecutions?

Among the more striking claims put forward for the use of amnesties is that they uncover a large volume of information that could be used as probative evidence, substantially raising the number of successful criminal prosecutions. Imagine where a grant of amnesty to a key mid-level military commander affords access to written orders, decisions, financial accounts, eyewitness testimony, audiovisual recordings of violations, and other sources of information, that implicate hundreds of subordinates in murder, rape, torture, forced disappearances or other violations. This information might also implicate superiors who knew of or ordered such violations to be committed.

While this scenario sounds very attractive, the actual practice of truth commissions thus far has been less encouraging. In Argentina, around 2,000 criminal complaint cases were launched against junior officers of the military forces in 1984, but as the truth commission was collecting information, military officers registered their discontent by staging an uprising. Following the publication of the truth commission report which had implicated hundreds of military officers in serious human rights violations, President Carlos Menem (1989-1999) issued a blanket amnesty for all law enforcement officers and members of the military.⁴⁵ In this case, the truth commis-

42 See Jamie O’Connell, *Gambling with the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?* 86 (Summer) *Harvard International Law Journal* (2005) 295-345.

43 One could add here that widely accepted criminal prosecution practice allows prosecutors to plea bargain with criminal suspects in order to gather evidence against other criminal suspects for prosecution and in some cases, to drop charges entirely against some suspects in order to secure evidence against others – a practice in this respect to some kinds of amnesty agreements.

44 Ronald C. Slye, *Amnesty, Truth and Reconciliation: Reflections on the South African Amnesty Process*, in *Truth v. Justice: The Morality of Truth Commissions* (eds. Robert I. Rotberg and Dennis Thompson) (2000) 170-188 at 177.

45 In September 1983, the Argentinean military regime adopted the Law of National Pacification, giving itself an amnesty, but this was ruled to violate the Constitution in December 1983. In 1987, the Alfonsín Government adopted the Full Stop Law (No. 23,492 (1986)) and the Due Obedience Law (No. 23,521 (1987)) granting amnesty from prosecution to the majority of military officers. In 1989, President Menem pardoned mil-

sion's contribution to criminal prosecutions seems doubtful. The Argentinean truth commission report named suspected military and police perpetrators all at once, which may well have sharpened their common interest to threaten to launch another coup, in turn forcing President Menem's hand in granting them amnesties. On the other hand, perhaps without the truth commission process, which at least signaled a clear end to the period of political repression, there would not have been much chance of criminal prosecutions in any case. By the same token however, it is hard to find other examples where truth commissions have contributed concretely to criminal prosecutions, partly because in many countries, amnesties have been granted on a blanket basis.⁴⁶

Even the sophisticated South African truth commission seems to have offered at best an ambivalent contribution to criminal prosecutions. General Magnus Malan, who had been chief of the army and defense minister, was brought to trial following truth commission testimony indicating his involvement in ordering hit squads and exterminations, but he was acquitted after a trial lasting eighteenth months and costing twelve million Rand.⁴⁷ Another illustrative case concerns the notorious Dr. Wouter Basson, former head of the apartheid Government's secret biological and chemical warfare programme called "Project Coast". In truth commission testimony, a number of former senior security officers heavily implicated Dr. Basson in the deliberate poisoning of anti-apartheid activists. Criminal proceedings were launched against him on 64 charges including involvement in 229 murders, drug possession, illicit trafficking, fraud and embezzlement. In April 2002, at the end of a criminal trial that lasted 30 months and cost 40 million Rand, he was acquitted. In late 2005, the South Africa's Constitutional Court ruled that prosecutors could reopen the case, but it was unclear at the time of writing whether they would do so.⁴⁸

When the constitutionality of the South African truth commission's amnesty was challenged by the families of Steve Biko and Griffith Mxenge, the Constitutional

itary officers and some 200 guerillas, as well as former military leaders who had already been convicted. See further Daniel W. Schwartz, *Rectifying Twenty-Five Years of Material Breach: Argentina and the Legacy of the 'Dirty War' in International Law*, 18 (Spring) *Emory International Law Review* (2004) 317-370; and William W. Burke-White, *Reframing Impunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation*, 42 (Summer) *Harvard International Law Journal* (2001) 467.

46 One can recall for example: the amnesty President Augusto Pinochet of Chile granted himself in 1978; the 1990 Bulgarian Law on Amnesty and Restoration of Confiscated Property which extends amnesty in respect of political crimes committed between 1945 and 1989; the Law of General Amnesty and the Consolidation of Peace which El Salvador adopted in 1993 for perpetrators of 'political crimes' as well as certain common crimes; Hungarian Law No. 11, 1992, which nullified convictions in respect of certain serious crimes committed between 1944 and 1990; the Nicaraguan Law on General Amnesty and National Reconciliation, adopted in 1990; the South African National Reconciliation Act, 1995; and the Uruguayan Law Nullifying the State's Claim to Punish Certain Crimes, 1986.

47 Elizabeth Kiss, *Moral Ambition Within and Beyond Political Constraints*, in *Truth v. Justice: The Morality of Truth Commissions* (eds. Robert I. Rotberg and Dennis Thompson) (2000) 68-98 at 77.

48 See further Albie Sachs, *War, Violence, Human Rights, and the Overlap between National and International Law: Four Cases before the South African Constitutional Court*, 28 (January) *Fordham International Law Journal* (2005) 432-476.

Court of South Africa upheld the Constitution's postamble authorizing the grant of amnesty from criminal prosecution, opining that it did not violate international law. The Constitutional Court also held that the amnesty arrangement protected perpetrators from civil liability, making the affront to basic principles of moral and legal justice all the more stark, particularly for victims and survivors, who otherwise could have hoped for compensation, rehabilitation or other forms of redress.⁴⁹ Where an amnesty protects perpetrators from civil liability, then at least other means have to be put in place to ensure effective redress for victims. Again, the South African truth commission seems to have failed as regards restorative justice. As Wilson explains:

The TRC made clear that victims should expect little from the process and only a fraction of what they might have expected had they prosecuted for damages through the courts.⁵⁰

The elimination of civil as well as criminal liability not only goes much further than necessary to gain the cooperation of the perpetrator, but runs counter to international standards on victims' redress that seek to maintain in central focus the rights of parties injured by serious human rights violations.⁵¹ In short, truth commissions that employ amnesties eliminating civil as well as criminal liability severely undercut the claim that truth commissions honour restorative justice better than do criminal trials. Moreover, the extent to which truth traded for amnesty actually contributed to reconciliation in South Africa remains unclear because the Amnesty Committee's work continued long after the Truth and Reconciliation Commission had issued its final report. Amnesties granted after the final report was already issued could not possibly have contributed to this key element of the truth and reconciliation process.⁵²

While the contribution of truth commissions to criminal prosecutions may have been less than hoped for thus far, this could change in future. The more important point however is that jettisoning criminal justice on grounds that amnesties actually contribute more to criminal justice than they take away, appears thus far to be unsupported by practice.

49 See Anurima Bhargava, *Defining Political Crimes: a Case Study of the South African Truth and Reconciliation Commission*, 102 (June) *Columbia Law Review* (2002) 1304.

50 Richard A. Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State* (2001) at 22.

51 See Ilaria Bottigliero, *Redress for Victims of Crimes under International Law* (2004) which examines norms and implementation relating to the victims' right to redress in respect of crimes under international law in international human rights law, humanitarian law and international criminal law.

52 See Amy Gutmann and Dennis Thompson, *The Moral Foundations of Truth Commissions*, in *Truth v. Justice: The Morality of Truth Commissions* (2000) 22-44 at 25-26. See also Richard A. Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State* (2001).

*C. Do Amnesties Violate the Principle that 'The Punishment
Should Fit the Crime?'*

The arguments in favour of granting amnesties are based largely on the inadequacy of criminal prosecutions following a period of mass violence where the judiciary remains unwilling or unable to enforce criminal responsibility on a fair, effective and impartial basis. Where criminal justice does not function, truth commissions seem comparatively more attractive, but one must ask whether the use of amnesties from prosecution is one step too far. There is a great moral difference between, on the one hand, establishing truth commissions to support criminal prosecutions that are weak or ineffective, and on the other hand, nullifying criminal responsibility entirely for certain individuals through amnesty. In the first case, truth commissions could help to promote national reconciliation with more or less success, according to the prevailing conditions of the time. Once law and order can be reestablished and the prosecutor's office and judiciary can be brought into line with the *ethos* of the new regime in a way that hopefully reflects the values of democracy and human rights, perpetrators should continue to be hunted down. The use of amnesties, in contrast, undermines the basic principle of individual criminal responsibility because amnestied perpetrators do not have to worry about eventual prosecution even for such serious violations as genocide, war crimes and crimes against humanity.

Another basic difficulty in terms of morality, legal equality and fairness, is that the grant of amnesty to certain individuals in order to obtain evidence to convict others means that those fortunate enough to make deals with the prosecutor get away without punishment. The prosecutor then targets other perpetrators who could be tried and punished. This approach can introduce a large measure of arbitrariness in the sense that individuals can escape prosecution, regardless of the degree of their legal culpability, as long as they can bargain well with prosecutors.

Perhaps worst of all, the provision of amnesty from prosecution to high level perpetrators of serious violations insidiously distorts the scale of punishment and introduces fundamental imbalance throughout the country's whole administration of criminal justice. A repeat small time thief or a person convicted for possession of a small amount of narcotic drugs, might face six months or even years in prison. In contrast, an amnestied military commander or police officer who perhaps ordered thousands of murders, rapes and tortures, as part of a government campaign of mass violence, not only avoids spending even a single day in jail, but can rest assured he or she will never be punished. Amnesties cause palpable inequality and injustice, and they violate the principle that 'the punishment must fit the crime'.

D. Do Amnesties Promote, or Instead Undermine, Truth and Reconciliation?

As argued above, the provision of amnesty from prosecution to those in a position to end war might be a necessary evil to avoid further infliction of human misery. It undeniably contradicts the principle of individual criminal responsibility however and, because it often relates to such cruelties as mass murder, mass rape, and systematic torture, does so in a particularly blatant way. It also introduces gross unfairness into the administration of justice and, if amnesty is acquired also in respect of civil liability, it denies the rights of victims and survivors to restorative justice as well.

Another damning aspect of the use of amnesties is that they might even undermine truth and reconciliation in some cases because perpetrators who are left unprosecuted might continue to pose a threat to the country's future peace and stability. It will always be difficult to know whether and to which extent compromising on individual criminal responsibility actually contributes to the recurrence of political violence. Before a sense of confidence can return however, victims and society in general, need to see that justice will be meted out to perpetrators of mass violence. A general failure to establish criminal justice for serious violations can stoke the fires of private vengeance and inter-communal violence for the future and perpetuate insecurity throughout the country. Criminal trials on the other hand, can exert a powerful deterrent effect on the commission of future crimes and help dissuade potential violators from committing serious violations, although the extent of this is also very difficult to measure empirically. The larger point is that criminal prosecutions should not be sacrificed lightly on morally or factually ambiguous grounds: the use of amnesties must remain highly suspect.

*E. Could Truth Commissions That Do Not Use Amnesties
Still Undermine Criminal Justice?*

Aside from the blatant and obvious contradiction that amnesty from prosecution poses to criminal justice in principle and practice, truth commissions – whether or not they grant amnesties – could interfere with or undermine criminal prosecutions in several other ways. Truth commissions often accept hearsay evidence and hear allegations with few admissibility restrictions in order to get at the truth. Suspected perpetrators might not be accorded sufficient opportunity to rebut statements that inculpate him or her in a crime, or to offer an explanation that could be carefully and impartially considered by a judge. In this sense, truth commissions might prevent a named person from the benefit of a fair and impartial trial. Admittedly, truth commissions typically allow an alleged perpetrator also to present his or her side of the story, and in some cases, can require the presence of the suspect by subpoena. Still, there are likely to arise many situations where an individual's legal guilt or innocence would be much more fairly judged before a criminal court rather than before a truth commission.

The requirements of fairness in criminal trials also open up greater possibilities for suspected perpetrators to play off a truth commission against the criminal prosecution process. As Wilson recounts, in South Africa, five security police officers were about to be arrested for their involvement in 27 murders. These alleged perpetrators ran to the truth commission's Amnesty Committee where they received amnesty in respect of their crimes and the suspension of criminal prosecution, even as regards the torturing of an African National Congress activist to death by electric shock.⁵³

Finally, it has to be kept in mind that, like criminal prosecutions, truth commissions suffer from other serious shortcomings. Weak mandates, lack of staff, insufficient time and resources to carry out their work, and in many cases, lack of dissemination or implementation of recommendations or reports, have limited the

53 Richard A. Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State* (2001) at 24.

effectiveness of many truth commissions.⁵⁴ Moreover, if a truth commission arrives at an officially sanctioned version of the truth in a way that ends up stifling rather than encouraging rational debate, then the effect may be to produce a one-sided version of events that suits the political winds of the day and obscures other aspects unpalatable for public consumption. A disturbing example of political convenience is found in the South African truth commission's handling of Chief Mangosuthu Buthelezi, who was head of the Inkatha Freedom Party. The commission did not find him responsible for having authorized even one of some 9,000 serious human rights violations committed by Inkatha, despite voluminous evidence indicating his personal responsibility. Buthelezi was not even subpoenaed by the truth commission. Wilson opines that the Commission was simply intimidated by the prospects that Inkatha would oppose the new African National Congress Government.⁵⁵

Ultimately, the practical dilemma for societies seeking transition from a period of mass violence remains a serious one because of the brutal reality that the criminal justice system simply does not function for whatever reason at a time when it is particularly needed. At this point, domestic solutions reach an impasse and international solutions have to be considered, bringing us to the question of the international community's renewed commitment to combat impunity.

IV. The International Community's Renewed Commitment to Combat Impunity

A. Transnational Criminal Law

The end of the Cold War and the democracy movements that swept through Africa, Asia, Eastern Europe and Latin America, shifted the focus of Governments from an almost exclusive reliance on domestic policy to fight impunity, towards much greater engagement with the international community on this issue. This shift is reflected in a number of UN General Assembly and Commission on Human Rights resolutions that highlight the connection among democracy, human rights and the rule of law, and in this context, stress the threat of impunity and the importance of criminal prosecutions in a general way.⁵⁶ The International Conferences of New or Restored

54 See generally Priscilla B. Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions* (2002), Chapters 14 and 15 concerning problems and challenges facing the practical operation of truth commissions.

55 Richard A. Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State* (2001) at 71-72.

56 See General Assembly resolution 55/96 *adopted* 4 December 2000, entitled "Promoting and Consolidating Democracy" at paras. 1(c)(vii) and 1(f)(ii) as regards criminal prosecutions; and Commission resolutions 1999/57 *adopted* 27 April 1999 at para. 2(c) on the rule of law, on "Promotion of the Right to Democracy", 2000/47 *adopted* 25 April 2000 on "Promoting and Consolidating Democracy" at para. 2(c) on ensuring appropriate civil and administrative remedies as well as criminal sanctions for human rights violations, 2001/41 *adopted* 23 April 2001 on "Continuing Dialogue on Measures to Promote and Consolidate Democracy" at para. 3 emphasizing the mutual interdependence of democracy, development and respect for human rights, and 2002/46 on "Further Measures to Promote and Consolidate Democracy" *adopted* 23 April 2002 at para. 1 stressing the rule of law and human rights as essential elements of democracy.

Democracies, convened since 1988, recognize impunity more specifically as a threat to democracy, human rights and the rule of law, in connection with organized crime, money laundering, drug trafficking, corruption, terrorism, the crime of aggression, war crimes, crimes against humanity, genocide, and the systemic challenge of ensuring civilian control over the military.

Recalling that countries that had been dominated by military rule or totalitarianism had to “consolidate their democratic achievements and reconciliation, to hasten economic and social reforms and to revitalize the civil society organizations that had little or no participation in governance during the period of military rule”, the Bucharest Declaration⁵⁷ emphasized the need for stronger human rights promotion and protection, judicial reform, and measures to fight corruption and organized crime. Four years later, the Cotonou Declaration condemned “all military coups d’état, all forms of terrorism and violence against democratic, freely elected Governments” and affirmed the principle of accountability of all public authorities for their acts⁵⁸ – a point reiterated yet again in the Ulaanbaatar Declaration in 2003.⁵⁹ Reflecting regional concerns over the threat of impunity, the Managua Declaration focussed more on the lethal combination of money laundering, drug trafficking, organized crime and corruption, and urged greater international cooperation to assist Governments in addressing these problems.⁶⁰

Impunity for serious violations of human rights and humanitarian law has also been the subject of UN expert study in: the Final Report of Mr. Louis Joinet on the Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political),⁶¹ the report of Professor Diane Orentlicher on Impunity⁶² which took

57 Progress Review and Recommendations for Strengthening Policies and Principles Addressed to the Governments of the New or Restored Democracies *adopted* at the Third International Conference of New or Restored Democracies on Democracy and Development, Bucharest, 2-4 September 1997; A/52/334 of 11 September 1997.

58 Declaration and Final Report, *adopted* at the Fourth International Conference of New or Restored Democracies, Cotonou, 4-6 December 2000; A/55/889 (2001) of 5 April 2001. See paras. 14 and 15 of the Declaration.

59 Declaration and Plan of Action, *adopted* by the Fifth International Conference of New or Restored Democracies, Ulaanbaatar, 10-12 September 2003; A/58/387 of 23 September 2003 at para. 16.

60 Progress Review and Recommendations *adopted* at the Third International Conference of New or Restored Democracies on Democracy and Development, Bucharest, 2-4 September 1997; 11 September 1997, A/52/334 (1997), Part I(D).

61 This report, submitted to the Sub-Commission on the Promotion and Protection of Human Rights, pursuant to Sub-Commission decision 1996/119, analyzes the question of impunity and proposes a set of principles for the protection and promotion of human rights through action to combat impunity that comprises: the victims’ right to know; the victims’ right to justice; and the victims’ right to reparations; E/CN.4/Sub.2/1997/20 of 26 June 1997.

62 See Independent Study on Best Practices, including Recommendations, to Assist States in Strengthening Their Domestic Capacity to Combat All Aspects of Impunity, which reviews best practices and recommends that the Commission on Human Rights appoint an independent expert to update the Set of Principles for the Promotion and Protection of Human Rights through Action to Combat Impunity with a view to their adoption by the Commission.

into account the Joint Principles as revised,⁶³ and the reports of Professor Theo van Boven⁶⁴ and Professor Cherif Bassiouni⁶⁵ on the right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms.

Thus, while individual States have resorted to truth commissions, at the same time, the international community at large has been concentrating more on strengthening the role of criminal prosecutions at the domestic level. Because transnational criminal law has always developed on an incremental basis through the web of inter-State treaty agreements on extradition, counterfeiting, illicit traffic in narcotic drugs, and various other matters of mutual concern, it generally involves only marginal adjustments to domestic criminal law, unlike international criminal law, which we consider next.

B. International Criminal Law

The establishment of the ICC in July 2002⁶⁶ represents a major achievement in the architectural edification of international criminal law, symbolizing the international community's political resolve to prosecute individuals regardless of rank or official capacity for the most serious crimes of international concern. The ICC is designed to seize jurisdiction over cases of genocide, war crimes and crimes against humanity, and eventually over the crime of aggression as well, where States with prime responsibility to prosecute, are unwilling or unable to do so. As such, the ICC represents the international community's most important means by which to enforce criminal responsibility in countries reeling from atrocities that may be perpetrated along national, racial, ethnic or religious lines. As a permanent, standing institution, established by a treaty that allows no reservations,⁶⁷ the ICC is equipped to enforce criminal responsibility relatively quickly with regard to transitional country situations, and to symbolize criminal justice on a continuous basis.

The degree to which the ICC will actually deter further atrocities and help foster conditions for national reconciliation and peace may be impossible to quantify accurately, just as it is difficult to ascertain the contribution of the ICTY or ICTR in this regard. Since the ICC's establishment and the ratification of its Statute by 100 States Parties however, it is hard to believe that rational political and military

63 The revised version of the Joint Principles is the "Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity" (E/CN.4/Sub.2/1997/20/Rev.1, annex II).

64 See Final report submitted by Mr. Theo van Boven, Special Rapporteur on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, E/CN.4/Sub.2/1993/8 of 2 July 1993.

65 Final report of the Independent Expert on the Right to Restitution, Compensation and Rehabilitation for Victims of Grave Violations of Human Rights and Fundamental Freedoms, submitted pursuant to Commission resolution 1999/33, E/CN.4/2000/62 of 18 January 2000.

66 Statute of the International Criminal Court, *adopted in Rome in a non-recorded vote, 120 in favour, 7 against and 21 abstaining*, on 17 July 1998, *entered into force* on 1 July 2002; (A/CONF.183/9). As of 1 July 2006, there were 100 States Parties to the Statute.

67 Article 120 of the Statute provides that: "No reservations may be made to this Statute."

commanders will feel they can discount completely the eventuality of facing ICC prosecutions should they implicate themselves in serious violations. As such, the ICC seems likely now to form part of the rational calculus of the potential perpetrator, particularly at high levels of policy making, planning and organizing. Where the ICC successfully deters crimes under international law, the world may never come to know of it because the crimes will not have been committed.

While criminal trials must focus on the question of the criminal responsibility of alleged offenders, rather than on educating society on the history of events that led to mass violence, nothing prevents courts and tribunals from expanding on the larger picture as well. The Judgements of the International Military Tribunals at Nuremberg and Tokyo, and those of the ICTY and the ICTR, for example, not only detail the facts and responsibilities relating to individual perpetrators, but also place the crimes in larger political and historical narrative. Of course, one has to wonder about the extent to which the general public is likely familiarize itself with any of the voluminous judgements of the Nuremberg and Tokyo Tribunals, or those of the ICTY or ICTR. In any case, some truth commission reports have managed to expatiate only very little on the larger picture of mass violence, and so their value as compared to criminal trials in this regard may be doubted. A number of commentators have noted that the South African truth commission focussed less on victims than on perpetrators, and moreover, moved away from providing a comprehensive narrative of the historical context of violations. This was also true of the Argentinean and Chilean truth commission reports, in contrast to the Guatemala report.⁶⁸

In light of the ICC's operating principle of complementarity with domestic jurisdictions, perhaps the ICC's most far reaching influence will be seen at regional and domestic levels of criminal law enforcement. In order to become parties to the Statute, States have to ensure that their domestic law, policy and practice are brought into line with the Statute's obligations. In addition to the wide range of legal obligations outlined in Part 9 of the Statute concerning modes and extent of the State Party's cooperation with the ICC and with other State Parties, there is a general and indirect – yet very significant – obligation upon all States Parties to observe international human rights standards pertaining to the administration of criminal justice.⁶⁹

Practically speaking, like the International Military Tribunals at Nuremberg and Tokyo, and the ICTY and ICTR, the ICC process will probably produce relatively few convictions. As the UN Secretary-General noted:

The two ad hoc tribunals have grown into large institutions, with more than 2,000 posts between them and a combined annual budget exceeding a quarter of a billion dollars – equivalent to more than 15 per cent of the Organization's total regular budget. Although trying complex legal cases of this nature would be expensive for

68 *See further* Richard A. Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State* (2001) at 51–55 and at 60.

69 Part 9 of the Rome Statute on International Cooperation and Judicial Assistance imposes mandatory obligations on States Parties. Article 86 provides that: "States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in the investigation and prosecution of crimes within the jurisdiction of the Court". Article 88 obliges States Parties "to ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part".

any legal system and the tribunal's impact and performance cannot be measured in financial numbers alone, the stark differential between cost and number of cases processed does raise important questions.⁷⁰

By July 2006, after 13 years of operation, only 47 individuals had been found guilty at the ICTY. At the ICTR, in operation since 1994, there were only 17 completed cases.

The ICC was never intended nor designed to be a supranational criminal court of final appeal, a global human rights court, or a truth commission. It would be unrealistic therefore to consider the ICC capable of single-handedly overcoming the complex obstacles to peace and national reconciliation. Rather, the ICC has to be viewed as an important part of the broader solution.

The obvious conclusion to be drawn is that criminal law enforcement remains a necessary but insufficient means by which to reestablish justice and foster national reconciliation as catalysts for peaceful and democratic governance based on human rights and the rule of law in transitional societies. All the same, as discussed above, truth commissions do have a very valuable role to play in this process, which brings us to the question as to how truth commissions and criminal prosecutions (whether international, domestic or mixed) could be reconciled.

V. What Should be the International Community's Attitude to Amnesty from Criminal Prosecution?

We have argued that truth commissions and criminal prosecutions each help to establish facts and responsibilities with regard to past violations, but they do so with different aims and procedures. Truth commissions usually work to establish facts and responsibilities as a way of exposing violations, dispelling rumours, acknowledging the pain and suffering of victims and survivors, and symbolizing the community's resolve to ensure accountability, transparency, respect for human rights and the rule of law for the future. It remains the task of duly authorized criminal courts and tribunals however, rather than truth commissions, to ensure fair and effective criminal justice in respect of individual perpetrators. In order to consider what should be the international community's attitude to amnesty from criminal prosecution, it is valuable to reflect upon the following questions:

- first, what is the position of international law as regards the validity of domestic amnesties from prosecution for crimes of international concern?
- second, should international criminal courts and tribunals respect amnesties that were granted by domestic authorities?
- third, should Governments and courts of other countries respect domestic amnesty agreements?
- finally, are there circumstances under which the international community itself should provide amnesties to perpetrators of serious violations of human rights, perhaps as part of international peace negotiations?

⁷⁰ Report of the UN Secretary-General on "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies"; S/2004/616 of 23 August 2004 at para. 42.

A. What is the Position of International Law on Domestic Amnesties?

Customary international law concerning a State's obligation to prosecute or extradite perpetrators of serious crimes, dating far back in history, contradict the notion that a State is completely free to decide whether or not to prosecute. States have recognized universal jurisdiction for war crimes since the Middle Ages, and a mandatory obligation to prosecute war crimes has been enshrined in the grave breaches provisions of the 1949 Geneva Conventions.⁷¹ Since the Congress of Vienna, 1815, universal jurisdiction has developed also for slave-trading and piracy. The number of criminal cases where universal jurisdiction has been invoked as the sole or main ground for prosecution has been small however,⁷² indicating that States consider universal jurisdiction more as an optional (or permissive) ground for them to exercise their criminal jurisdiction, rather than as a mandatory obligation.

Protocol II additional to the Geneva Conventions, 1949, on non-international armed conflict, says in Article 6(5) 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." The International Committee of the Red Cross Commentary to Article 6(5) considers that the "object of this subparagraph is to encourage gestures of reconciliation which can contribute to reestablishing normal conditions in the life of a nation which has been divided."⁷³ At the time Protocol II was drafted, serious violations committed during civil war were considered to give rise to individual criminal responsibility under domestic law only, and not under international law. As regards non-international armed conflict, there is no obligation on the Government to set up a prisoner of war system because the notion of 'combatant' does not apply in the sense of the Geneva Conventions. In civil war situations, martial law may be in force and many human rights guarantees are likely to have been suspended.

Protocol II addresses the kind of situation where thousands upon thousands of persons may be detained, as for example, in the case of Rwanda following the end of the 1994 civil war. For all these reasons, Protocol II's encouragement of amnesties in this connection was considered to make good humanitarian sense. It also falls in line with Article 3 common to the four Geneva Conventions, 1949, which leaves the question of criminal prosecutions squarely in the hands of the State Party. Indeed, the Constitutional Court of South Africa interpreted Article 6(5) in this way, holding that: "there is no obligation on the part of a contracting state to ensure the prosecution of those who might have performed acts of violence or other acts which

71 Geneva Conventions, *adopted* 12 August 1949, *entered into force* 21 October 1950. Articles 49, 50, 129 and 147 of Conventions I, II, III and IV, respectively, provide that: "The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article."

72 *See generally* Cherif Bassiouni and Edward Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (1995).

73 Commentary to Article 6(5) of Protocol II at 1402, at paras. 4617-4618, International Committee of the Red Cross 1987.

would ordinarily be characterised as serious invasions of human rights".⁷⁴

One must not lose sight of the fact however that Article 6(5) appears amid the rest of Article 6 which is devoted to criminal prosecutions. Articles 6(1) to 6(4) establish minimum standards relating to fair trial, and limit the use of the death penalty. The presumption behind Article 6 is that a High Contracting Party will in fact prosecute individuals for criminal violations, not that it will fail to prosecute entirely. Thus, Article 6, read as a whole, aims at ensuring fair trial and encouraging amnesties wherever appropriate so as to prevent criminal prosecution from being used as a *de facto* continuation of hostilities. Also, Article 6(5) encourages a State to grant an amnesty as regards 'persons who have participated in the armed conflict' or who have been deprived of their liberty 'for reasons related to the armed conflict'. These important qualifications guide a State to promote reconciliation by extending amnesty to persons caught up in the armed conflict, rather than to shield perpetrators of serious violations of human rights or humanitarian law in general from prosecution.

Second, the very fact that the Geneva Conventions, 1949, criminalize grave breaches – an obligation reiterated in Protocol I – shows that while the international community was not yet ready in 1949, or even in 1977, to recognize an international legal obligation upon High Contracting Parties to prosecute and punish violations of humanitarian law committed during time of non-international conflict, this cannot be construed as leaving total freedom to the State to grant amnesties on an arbitrary basis. Third, it is significant that Protocol I contains no similar provision obliging High Contracting Parties to grant amnesties in situations of international armed conflict.

The trend in international humanitarian law to narrow the State's discretion to grant amnesties is seen very clearly in the establishment of the ICTY, ICTR and ICC, which extend criminal responsibility under international law with respect to non-international armed conflict, first under the rubric of 'crimes against humanity' (Article 5 of the ICTY Statute and Article 3 of the ICTR Statute), then under 'violations of common Article 3 of the Geneva Conventions and of Additional Protocol II' (Article 4 of the ICTR Statute), and finally, under the Rome Statute's expanded category of 'war crimes' (Article 8(2) of the Rome Statute).⁷⁵

74 See *Azanian Peoples' Organization v. the President of the Republic of South Africa*, Case CCT 17/96 of 25 July 1996 at para. 30. The Court went on to say at para. 31 that: "It is one thing to allow the officers of a hostile power which has invaded a foreign state to remain unpunished for gross violations of human rights perpetrated against others during the course of such conflict. It is another thing to compel such punishment in circumstances where such violations have substantially occurred in consequence of conflict between different formations within the same state in respect of the permissible political direction which that state should take with regard to the structures of the state and the parameters of its political policies and where it becomes necessary after the cessation of such conflict for the society traumatised by such a conflict to reconstruct itself. The erstwhile adversaries of such a conflict inhabit the same sovereign territory. They have to live with each other and work with each other and the state concerned is best equipped to determine what measures may be most conducive for the facilitation of such reconciliation and reconstruction."

75 In particular, Article 8(2)(c) and Article 8(2)(e) provide for individual criminal responsibility in respect of 'serious violations of article 3 common to the four Geneva Conventions of 12 August 1949' and '[o]ther serious violations of the laws and customs applicable

Developments in international human rights law, most notably as regards the International Covenant on Civil and Political Rights, 1966,⁷⁶ the Judgements of the Inter-American Court of Human Rights and the practice of the UN Human Rights Committee also indicate the international community's decreasing tolerance for amnesty from criminal prosecution in regard to serious violations. In the *Velasquez-Rodriguez Case*, the Inter-American Court held that Article 1(i) of the Convention obliges States Parties to prevent, investigate, prosecute and punish perpetrators of violations, such that where "the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to guarantee the free and full exercise of those rights."⁷⁷ The Inter-American Human Rights Commission followed the *Velasquez* approach in the *Alicia Consuela Herrera et al.*,⁷⁸ *Las Hojas Massacre*,⁷⁹ and *Hugo Leonardo de los Santos Mendoza et al. Cases*.⁸⁰ These cases establish that amnesty from prosecution violates the rights of victims to a remedy as well as the State's obligation to prosecute and punish perpetrators of serious human rights violations.⁸¹

Similarly, the UN Human Rights Committee underlined in numerous cases the obligation of the State under Article 2(3) of the ICCPR concerning the right to a remedy, and its incompatibility with the grant of amnesty from criminal prosecution in respect of human rights violations. In the *Rodriguez v. Uruguay Case*, the Committee expressed its view that "amnesties for gross violations of human rights ... are incompatible with the obligations of the States Party under the Covenant." The Committee also said that amnesties preclude the possibility of investigations into past human rights abuses and negate the victim's right to a remedy. A number of other human rights treaties also oblige State Parties to ensure an effective right to a remedy. While these developments do not rule out amnesty from prosecution in all cases, the clear trend of the Inter-American human rights and UN Human Rights Committee practice has been to recognize that amnesties violate the international right of victims to an effective remedy.

As discussed above however, the grant of amnesty from prosecution may be necessary in order to avoid further atrocities. This raises questions of justice and moral-

in armed conflicts not of an international character, within the established framework of international law'. See further Lyal S. Sunga, *The Crimes within the Jurisdiction of the International Criminal Court (Part II, Articles 5-10)*, Vol. 6/4 *European Journal of Crime, Criminal Law and Criminal Justice* (1998) 377-399.

76 International Covenant on Civil and Political Rights, adopted 16 December 1966; entered into force 23 March 1976; U.N.T.S. 14668 (1976) at 171.

77 *Velasquez Rodriguez Case*, Judgment of 29 July 1988, Inter-American Court of Human Rights (Ser. C) No. 4 (1988) at para. 176.

78 *Alicia Consuela Herrera et al. Case No 10,147* Annual Report of the Inter-American Commission on Human Rights 1992-3 at 41.

79 *Las Hojas Massacre Case No 10,287*, Annual Report of the Inter-American Commission on Human Rights 1992-3 at 83.

80 *Hugo Leonardo de los Santos Mendoza et al Case No 10,029*, Annual Report of the Inter-American Commission on Human Rights 1992-3 at 154.

81 See further Ilaria Bottigliero, *Redress for Victims of Crimes under International Law* (2004) at 139-141.

ity in a sense larger than those of criminal prosecutions and brings us to our second question.

B. Should International Criminal Courts and Tribunals Respect Domestic Amnesty Arrangements?

While there is a clear trend in international humanitarian and human rights law to view amnesties from criminal prosecutions, and by extension, truth commissions as alternatives to criminal prosecutions, as violations of justice and human rights, the Rome Statute makes no mention either of truth commissions or amnesties and cannot be read to rule them out. Some of the drafters of the Rome Statute recognized that there may be cases where truth commissions, and perhaps even amnesty from prosecution, serve the interests of justice in a larger sense. Sufficient consensus did not exist either to rule out truth commissions and amnesties entirely, or to explicitly authorize the ICC to recognize their validity. The issue arose in the ICC Preparatory Commission proceedings over the principle of *ne bis in idem* and the ICC's general complementarity framework. A proposal was made to include in the Statute a provision to allow the Court to try a person who was convicted by a domestic court, but who was then pardoned, paroled or granted commutation of sentence.

Some delegations continued to argue that the Statute should not permit the Court to intercede in the administrative (parole) or political decision-making process (pardons, amnesties) of a State. A second, more practical, argument was that, given the resistance to the proposal, it could lead to a reopening of the entire package on the subject of complementarity. Finally, there were some who argued that the proposal was not absolutely necessary, as the provisions on admissibility could give the Court sufficient breadth to examine cases of pardons or amnesties made in bad faith.⁸²

Accordingly, the Rome Statute does not address the issue of truth commissions or amnesties directly, and leaves wide margin to the ICC Prosecutor and Judges to recognize them in particular situations.

The Rome Statute maintains this flexibility in several ways. Article 16 of the Statute allows the UN Security Council to request the ICC not to commence or proceed on an investigation or prosecution for a period of 12 months, which may be renewed, by adopting a resolution under Chapter VII of the Charter of the United Nations. One could imagine a situation where the Security Council was conducting or sponsoring, peace negotiations that held out an incentive of amnesty, and it considered that ICC prosecutions would jeopardize these negotiations. Indeed, the Security Council has, at times, endorsed amnesties in a number of UN-spon-

⁸² John T. Holmes, *The Principle of Complementarity*, *The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results* (ed. Roy Lee) (1999) 41-78 at 60.

sored peace negotiations, for example, in regard to Haiti⁸³ and Sierra Leone.⁸⁴ Given the trend away from amnesties at the international level, as well as the difficulties involved in adopting a Security Council resolution under Chapter VII, the use of Article 16 to make room for amnesty arrangements would seem unlikely to arise often in future.

Another possibility could arise where, pursuant to Article 17(1)(d) of the Statute, the Court considered the case inadmissible on grounds that it was “not of sufficient gravity to justify further action by the Court”. This provision might come into play where a State suspended criminal prosecutions in regard to violations that did not rise to the level of “the most serious crimes of international concern” as per Article 1 of the Statute. Suppose the Government offered to amnesty military officers who had tried, but failed, to overthrow it, in order to leave implicated individuals a way out and to avoid further military coup attempts. In such situation, amnestied individuals might have committed violations that fall within ICC jurisdiction, but were of insufficient gravity to warrant the ICC’s action, for example, a single hostage-taking that lasted only for a brief duration, or the issuance of orders to displace a small part of the civilian population for reasons related to the conflict that neither security nor imperative military reasons really required. The Prosecutor could decide not to proceed because of the tenuous situation prevailing in the country despite the fact that both hostage-taking and forced displacement of the civilian population as such constitute crimes within the ICC’s jurisdiction.

83 See the Governors Island Agreement, signed on 3 July 1993. See also Michael P. Scharf, *Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?*, 31 (Winter) Texas International Law Journal (1996) 1-41.

84 See Article IX of the Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, Lomé, Togo, 7 July 1999 which provides a general amnesty as follows: “1. In order to bring lasting peace to Sierra Leone, the Government of Sierra Leone shall take appropriate legal steps to grant Corporal Foday Sankoh absolute and free pardon.; 2. After the signing of the present Agreement, the Government of Sierra Leone shall also grant absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives, up to the time of the signing of the present Agreement.; 3. To consolidate the peace and promote the cause of national reconciliation, the Government of Sierra Leone shall ensure that no official or judicial action is taken against any member of the RUF/SL, ex-AFRC, ex-SLA or CDF in respect of anything done by them in pursuit of their objectives as members of those organisations, since March 1991, up to the time of the signing of the present Agreement”. The matter was further complicated by UN Security Council resolution 1315, adopted on 14 August 2000, which recalls that the Special Representative of the Secretary-General appended to the Lomé Agreement the following statement: “that the United Nations holds the understanding that the amnesty provisions of the Agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law”. Resolution 1315 goes on to reaffirm the principle of individual responsibility for serious violations of international humanitarian law and requests the Secretary-General to establish the Sierra Leone Special Court to prosecute perpetrators accordingly. See further William A. Schabas, *Truth Commissions and Courts Working in Parallel: The Sierra Leone Experience*, 98 American Society of International Law Proceedings (2004) 189-192. See also Marissa Miraldi, *Overcoming Obstacles of Justice: The Special Court of Sierra Leone*, 19 (Summer) New York Law School Journal of Human Rights (2003) 849-858; and Sarah Williams, *Amnesties in International Law: the Experience of the Special Court for Sierra Leone*, 5 Human Rights Law Review (2005) 271-309.

Article 53 relating to the initiation of an ICC investigation pertains more directly to the issue of truth commissions and amnesty. It requires the Prosecutor to initiate an investigation after having evaluated the available information “unless he or she determines that there is no reasonable basis to proceed under this Statute”. To make this decision, the Prosecutor must consider first, whether or not there is a reasonable basis to believe a crime within the ICC’s jurisdiction has been committed, second, whether the case would meet the admissibility criteria under Article 17, and third, whether “taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice”. Were the Prosecutor to conclude that there was no basis to proceed, then he or she must inform the Pre-Trial Chamber, as well as either the Security Council or the State which referred the case to the ICC in the first place, as the case may be. The issue that would then arise in a given instance would be whether the particular amnesty arrangements in question could qualify as sufficiently ‘in the interests of justice’ as to provide the Prosecutor with ‘substantial reasons’ not to initiate or proceed on an investigation.

We have argued above that an amnesty arrangement that has already been agreed upon in order to save thousands from serious violations could be the more ethical course of action. It does not follow however that at the stage amnesty negotiations are going on, that the ICC Prosecutor should stop or refrain from initiating an investigation. Accountability must remain an essential ingredient of the international community’s message to those responsible for serious human rights violations. Criminal justice cannot be something to be bargained away so easily. At the time of writing, Joseph Kony, leader of the Lord’s Resistance Army – a rebel movement operating in Uganda that has long been accused of terrorizing the civilian population by cutting the arms and legs off men, women and children, and committing many other serious violations – was bargaining for amnesty from prosecution in exchange for peace. The President of Uganda, Mr. Yoweri Museveni, promised to grant Kony amnesty from prosecution if he entered peace negotiations, responded ‘positively to the talks ... and abandon[ed] terrorism’. Despite Uganda having ratified the Rome Statute, and itself having referred the situation to the ICC Prosecutor in December 2003, Museveni issued a statement declaring that “the United Nations had no moral authority to insist on Mr Kony’s prosecution”.⁸⁵ In Iraq, Prime Minister Nuri Kamal al-Maliki was holding out amnesty for insurgents not implicated in terrorism as an incentive for them to lay down their arms and join in the rebuilding of Iraq.⁸⁶ If the international community fails to stand for the fight against impunity, the battle will be lost by Governments that cave in to the considerable pressure of warlords who can commit crimes with impunity and then bargain for amnesty at their own political convenience.

Where, on the other hand, an amnesty agreement has been already reached with the pertinent domestic authorities, and the Government considered it would not be in the larger interests of justice to prosecute, then the ICC Prosecutor should definitely take this into account. The question becomes what criteria should guide the ICC Prosecutor’s decision as to whether or not to proceed. As discussed above,

85 “Amnesty’ for Uganda Rebel Chief”, *BBC News*, 4 July 2006.

86 “Insurgents are Offered Amnesty”, *International Herald Tribune*, (International Edition) 26 June 2006 at 5.

amnesty arrangements granted more or less unconditionally on a blanket basis, should be treated with a great deal of skepticism because they contribute little to peace, justice, truth or reconciliation. Communities plagued by impunity are more likely to slide back into conflict, chaos and war.

To avoid sending mixed messages to would-be violators, the ICC Prosecutor should investigate all situations where there is a reasonable basis to do so, regardless as to whether there is an amnesty in place, or negotiations to arrange one. In this way, the Prosecutor could maintain the threat of criminal prosecutions while at the same time keeping apprised of the situation to determine whether or not to take the next steps towards indictment and eventually trial. The decision whether or not to indict particular individuals then has to be taken more carefully. At that stage, the effect of amnesty arrangements as regards particular individuals, and the question as to whether or not the interests of justice would be better served by proceeding to trial, could be much better assessed. Considering the interests of justice vis-à-vis amnesties later on in the prosecutorial phase has the advantage of keeping an eye on the situation as a priority, and not sharing the ICC Prosecutor's intention about proceeding or not, too early on in the game. If the threat of criminal prosecutions is to deter further violations, the ICC Prosecutor should not stop investigations at the mere talk of amnesties. Interestingly in this regard, after many years of waging a bloody insurgency and committing severe violations in Uganda, Joseph Kony suddenly started talking peace only once the ICC Prosecutor proceeded to investigate allegations of Kony's criminal responsibility.

In short, the ICC Prosecutor will have to determine on a case-by-case basis the instances in which prosecution of certain individuals might not serve the interests of justice. The Prosecutor will likely only be in a position to assess this carefully and responsibly however once some measure of investigation has been conducted. Therefore, the ICC Prosecutor should commence all investigations as regards those situations which meet all other admissibility requirements under the Rome Statute, regardless of amnesty arrangements that have been reached, or ongoing negotiations to obtain one. Then, the Prosecutor could decide the cases which might warrant prosecution in spite of amnesty arrangements, and which might not. In any event, if the international community becomes resolved, because of the threat of extreme violations, to prevent ICC prosecutions, then it could always act through the Security Council pursuant to Article 16 of the Statute to request the Prosecutor to defer the ICC's investigation as discussed above.

The issue of the international legal validity of a domestic amnesty agreement in fact arose with regard to the Sierra Leone Special Court. In the Decision on Challenge to Jurisdiction: Lomé Accord Amnesty of 13 March 2004, the Appeals Chamber of the Special Court for Sierra Leone ruled that the Lomé Agreement, reached on 7 July 1999 between the Government of Sierra Leone and the Revolutionary United Front (RUF), Article IX of which granted amnesty from prosecution, did not bind the Special Court. Unfortunately, as Cassese rightly points out, the ruling lacks logical coherence and complicates the issue more than it clarifies it.⁸⁷

87 See Antonio Cassese, *The Special Court and International Law: The Decision Concerning the Lomé Agreement Amnesty*, 2 (December) *Journal of International Criminal Justice* (2004) 1130-1140.

Truth commissions could contribute immensely to reestablishing peace, justice and stability in countries torn by serious violations, as long as they are employed in ways that do not hinder or subvert the functions and role of criminal justice.

*C. Should Foreign Governments and Courts Respect
Domestic Amnesty Arrangements?*

Foreign governments and courts should not consider amnesty agreements reached in regard to a situation in another country as binding upon them, unless the foreign Government was itself a direct party to the agreement or unless the amnesty was concluded under international auspices in regard to ordinary crimes that did not qualify as crimes under international law, as discussed below.

All States should refrain from providing safe haven to perpetrators of crimes under international law. Although it may be doubted as to whether customary international law obliges States either to prosecute or extradite individual perpetrators of crimes under international law, universal jurisdiction for such crimes as piracy, slave-trading, grave breaches of the Geneva Conventions, 1949, and for war crimes in general, at least permits a State to assert its criminal jurisdiction in such cases. In addition, a number of multilateral conventions impose a duty on States Parties to prosecute or extradite alleged offenders with regard to specific crimes, such as torture,⁸⁸ slavery and slave-trading, aircraft hijacking, illicit traffic in narcotic drugs, theft of nuclear materials, corruption, mercenarism, etc. Were every State to decide, according to its own political preference, whether or not to recognize foreign amnesty agreements, perpetrators of serious violations would enjoy greater freedom to travel outside their home countries, undermining the international community's principled stance against impunity.

*D. Should the International Community Provide Amnesties
under Certain Circumstances?*

Suppose a dictator threatened to use biological and chemical weapons to exterminate thousands of million people who may be living in a relatively isolated part of the country. The dictator seemed ready and able to carry out this threat and the international community seemed unwilling or unable to take any effective preventive action through the UN Security Council, regional arrangements, or through any other means. No individual State seemed prepared to intervene militarily to prevent the extermination. Suppose further that the dictator remained concerned for his or her own life and the eventuality of assassination attempts or the possibility of a future coup d'état. He or she would prefer to step down from power on condition that a UN Security Council-backed agreement guarantee him or her amnesty from prosecution by the ICC or any other international or domestic court. Even in such extreme cases,

⁸⁸ UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted by consensus* by the General Assembly 10 December 1984, *opened for signature* 4 February 1985, *entered into force* 26 June 1987. Articles 7 and 8 impose an obligation on State Party either to prosecute or extradite "a person alleged to have committed any offence" set out in the Convention.

the Security Council should not invoke Article 16 of the Rome Statute to defer an ICC prosecution. It is one thing for a successor regime in a particular country to grant an amnesty that the international community then tolerates as long as the perpetrator stays within the boundaries of his or her country. Sovereign States have to be left a certain margin of discretion as to how they should deal with past violations. It is quite another thing for the international community at large to be perceived as directly endorsing or granting amnesty from prosecution for crimes under international law.

As for crimes of lesser gravity, such as ordinary murder, theft, drug-trafficking and corruption, amnesties could be contemplated as an option, but then only through the adoption of a UN Security Council resolution under Chapter VII of the UN Charter, or duly authorized regional arrangement. The advantage of this approach would be to strike a balance between power and law, while maintaining highest regard for the sanctity of human life and dignity as well as a critical distinction between greater and lesser crimes. This suggested approach implies also that the ICC should not take upon itself to honour amnesty agreements that lack Security Council backing, except in the kinds of cases discussed above where, according to Article 53 of the Rome Statute, there is no reasonable basis to proceed and even there, as argued above, this should only apply to proceedings on an indictment and prosecution, not to the initiation of an investigation.

Truth commissions and amnesty arrangements could play a valuable role in exposing facts and responsibilities, recognizing the dignity and suffering of victims and survivors, and even in contributing to criminal prosecutions. They could support a country's quest for democratic governance, full respect for human rights and the rule of law, and foster conditions for national reconciliation, peace, stability and prosperity. Wherever truth commissions are considered or employed as alternatives to criminal prosecutions however, on balance, the damage to the image, principle and practice of criminal justice, is so great that truth commissions and criminal prosecutions cannot be reconciled.

VI. Ten Principles for Reconciling Truth Commissions and Criminal Prosecutions

From the discussion above, we arrive at the following ten general principles to reconcile truth commissions and criminal prosecutions:

1. No Government or international authority, such as the UN or regional collective security arrangement, should ever grant blanket or unconditional amnesties from criminal prosecution because they negate criminal justice and contribute little to truth or reconciliation.
2. In the case that a Government has granted a blanket amnesty, no international or foreign court or tribunal should respect it. The danger to human life will already have been averted when a country's successor regime grants amnesties to allow leaders a way to relinquish power. No further advantage would be gained, except by the perpetrator, in recognizing a blanket amnesty granted by domestic agreement as binding internationally or in other countries. Moreover, such recognition could conflict with a State's treaty or customary international law obligations with regard to prosecuting or extraditing perpetrators of certain crimes of international concern.

3. Truth commissions should be vested with mandates to investigate violations and report on them in such a way that does not cause prejudice to eventual criminal prosecutions, even where the criminal justice system does not yet function adequately. Because the administration of justice takes time and resources to function, it should be strengthened, not abandoned.
4. Criminal proceedings should accord much greater attention to the rights of victims to an effective remedy. They should also encompass procedural means in order to avoid hostile cross-examination which could discourage testimony in court and further traumatize victims.
5. Criminal procedures should also incorporate principles of restorative justice, including those relating to civil liability, so as to complement the valuable role truth commissions play in fostering truth, justice and reconciliation.
6. The ICC Prosecutor should never refrain from commencing an investigation, or stop an investigation, into a case where there is a reasonable basis to proceed, and the other jurisdictional requirements have been met, on the sole ground that an amnesty agreement has been or may be concluded. The ICC must stand clearly for criminal justice and it must conduct at least a proper assessment, which requires that an investigation at least be started.
7. Apart from the situation of a Security Council deferral of an investigation through the Article 16 procedure, the ICC Prosecutor should not take the next step towards indictment or prosecution where this would not be in the interests of justice, particularly where it would seriously undermine peace in a country and pose a clear and immediate threat of harm to a large number of innocent lives.
8. The international community should never grant amnesties from criminal prosecution for aggression, genocide, war crimes or crimes against humanity.
9. The international community should consider granting amnesty for crimes of lesser gravity, in other words, crimes defined in domestic law that do not qualify as crimes under international law of international concern, and then only through the duly authorized procedures under Chapter VII of the Charter of the United Nations or through regional collective security arrangements, as authorized by the UN Charter, in cases where such agreement will likely save thousands from further misery and no other better and practical alternatives seem available. Any amnesties which the UN feels compelled to grant under these circumstances should be respected by all UN Member States and the relevant successor regime of the country concerned.
10. The UN should make every effort within the parameters of international law to apprehend perpetrators of crimes under international law, including those who attempt to extort, by force or threat, amnesty from criminal prosecution in regard to such crimes.