

Transitional Justice and the Norms of International Law

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The term ‘transitional justice’ appears to have been coined by American scholars in the early 1990s.¹ Two seminal conferences held at the time used the term ‘transition’ and framed the evolving discussion: in 1991, ‘Political Justice and Transition to the Rule of Law in East Central Europe’, under the auspices of the University of Chicago and the Central European University in Prague, and in 1992, ‘Justice in Times of Transition’, in Salzburg. These were primarily attempts to apply the experience of the Latin American transitions from dictatorship of the 1980s to the political transformations in Central and Eastern Europe after the fall of the Berlin wall. This field of ‘transitional justice’ was considered to be a component of the wave of democratization that seemed to affect many regions of the world at the time. Other expressions like ‘rule of law’ and ‘post-conflict justice’ were also employed in the same context.

At the time, ‘transitional justice’ was used to describe a range of initiatives such as the nascent truth commissions in Chile, El Salvador and South Africa, and the purging or lustration of former officials in eastern European states. These were essentially national initiatives although in some cases, such as the Salvadorean truth commission, the United Nations was involved. These developments were studied from the standpoint of comparative law and practice rather than from that of international law. There was a sense that these developments were desirable, but little suggestion that they were

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¹ Neil Kritz, ed., *Transitional Justice, How Emerging Democracies Reckon with Former Regimes*, Washington: United States Institute of Peace, 1995; A. James McAdams, ed., *Transitional Justice and the Rule of Law in New Democracies*, Notre Dame and London: University of Notre Dame Press, 1997; Ruti G. Teitel, *Transitional Justice*, New York: Oxford University Press, 2000; M. Cherif Bassiouni, ed., *Post-Conflict Justice*, Ardsley, NY: Transnational Publishers, 2002; Naomi Roht-Arriaza and Javier Mariezcurrena, eds, *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice*, New York: Cambridge University Press, 2006.

mandated by international legal norms. The first major study on the subject of transitional justice, published in 1995, examined ‘the relationship between justice and the prospects for a democratic transition’.² It gave detailed consideration to, in order, commissions of inquiry, criminal sanctions, non-criminal sanctions, and treatment and compensation of victims. The chapter on criminal sanctions did not even consider the subject of international tribunals.

In parallel to the transitional justice phenomenon of the early 1990s, international criminal prosecution began to revive. It had not previously been a realistic option, and does not seem to have been seriously considered either for Latin America in the 1980s or Central and Eastern Europe in the early 1990s. International criminal prosecution had lain dormant since the military tribunals at Nuremberg and Tokyo of the 1940s. The Security Council turned to international justice in 1993 when it created the *ad hoc* tribunal for the former Yugoslavia and, a year later, the companion body for Rwanda. The proposed international criminal court seemed plausible, and much constructive work had been conducted within the International Law Commission, but most believed that its attainment was far in the future. Though they were watched with interest by theorists of transitional justice, the role of international tribunals in the field of transitional justice in these early days was not significant.

Both ‘transitional justice’ and international criminal prosecution might have been discussed together at the time under two other rubrics, ‘accountability’ and ‘impunity’. These concepts owe their salience to international human rights law. The most visible manifestations appear in reports by experts like Louis Joinet³ and Theo van Boven⁴ of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities. There were also important initiatives concerning the rights of victims at the United Nations quinquennial conferences on crime prevention and criminal justice. Human rights NGOs whose mandates were anchored in international norms shifted their

² Neil Kritz, *ibid.*

³ Question of the impunity of perpetrators of human rights violations (civil and political), Revised final report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119, UN Doc. E/CN.4/Sub.2/1997/20/Rev.1

⁴ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc. A/RES/60/147.

focus from one that was essentially devoted to the rights of the defendant and of the protection of detainees in the criminal justice process to one that viewed criminal prosecution as a necessary means of enforcing human rights.

In 2004, the Secretary-General presented a report to the Security Council entitled 'The Rule of Law and Transitional Justice in Post-Conflict Societies'.⁵ According to the Secretary-General,

The notion of transitional justice ... comprises the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.⁶

In the 2004 report, the Secretary-General also considered the term 'rule of law', explaining it was a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards'.⁷ He also defined 'justice', saying it was 'an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs. Justice implies regard for the rights of the accused, for the interests of victims and for the well-being of society at large.'⁸ Probably the star of 'transitional justice' is now waning in the discourse of the United Nations in favour of the cognate concept of 'rule of law'. Since 2009, the Secretary-General has produced an annual report on 'strengthening and coordinating United Nations rule of law activities' within which 'transitional justice' has only a rather secondary role, although perhaps this is only a terminological issue.⁹

⁵ UN Doc. S/2004/616.

⁶ *Ibid.*, para. 8.

⁷ 'The Rule of Law and Transitional Justice in Post-Conflict Societies', UN Doc. S/2004/616, para. 6.

⁸ *Ibid.*, para. 7.

⁹ 'Strengthening and coordinating United Nations rule of law activities, Report of the Secretary-General', UN Doc. A/65/318, paras. 53-55.

Transitional justice initiatives are an important component of the work of such bodies as the United Nations Development Programme,¹⁰ the various peacekeeping missions and the field presences of the Office of the High Commissioner for Human Rights.¹¹ The menu of options can be divided into judicial and non-judicial approaches. This is important because of compelling arguments that trial and punishment of perpetrators is a fundamental right of victims, dictated by human rights norms that are set out in treaties or derived from custom. Before the international human rights tribunals, this is known as the ‘procedural obligation’ associated with the protection of the right to life and the prohibition of torture and cruel, inhuman or degrading treatment or punishment.¹² It may have certain corollaries, such as the claim that amnesty is prohibited as a matter of international law, although this is probably an exaggeration.

Transitional justice trials almost invariably depend upon international law to a greater or lesser degree. The most celebrated are those of the international criminal tribunals. At the national level, only a relatively small number of trials are premised upon universal jurisdiction. Such trials tend to take place precisely because no domestic transitional justice is underway. Much more important are post-conflict trials by ordinary or special courts established pursuant to domestic legislation, often within international participation at the level of personnel and funding, and frequently dependent upon substantive international law as a response to arguments about the principle of legality and statutory limitation.

Truth and reconciliation commissions and similar inquiry bodies are at the heart of the non-judicial side of transitional justice.¹³ They are frequently presented as an alternative to judicial mechanisms although in some cases they have worked alongside criminal prosecution. Typically, there is much international involvement in terms of

¹⁰ ‘Global Programme on Strengthening the rule of law in Conflict and Post-Conflict Situations, Annual Report 2010’, New York: United Nations Development Programme, 2011, pp. 42-43.

¹¹ ‘Study by the Office of the United Nations High Commissioner for Human Rights on human rights and transitional justice activities undertaken by the human rights components of the United Nations system’, UN Doc. E/CN.4/2006/93; ‘Analytical study on human rights and transitional justice’, UN Doc. A/HRC/12/18.

¹² *Šilih v. Slovenia*, no. 71463/01 [GC], 9 April 2009, para. 153; *Ergi v. Turkey*, 28 July 1998, para. 82, *Reports* 1998-IV; *Mastromatteo v. Italy* [GC], no. 37703/97, para. 89, ECHR 2002-VIII.

¹³ On truth commissions, see generally: Priscilla Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*, London: Routledge, 2010.

personnel and funding. The mandates of such commissions are often defined in terms of international norms drawn from the law of human rights or international criminal law. Transitional justice may also involved customary institutions, such as the *gacaca* courts which were revived in Rwanda in order to deal with overwhelming numbers of genocide prosecutions.¹⁴ Reparations are also considered an important component of transitional justice. However, because most transitional justice initiatives take place in poor countries where resources are limited, and because donors will not as a general rule contribute to a reparations programme, the experience in this area is limited.

Most transitional justice activities are conducted in a cooperative spirit between the post-conflict state and various international actors such as the United Nations and certain regional organizations. Nevertheless there is the potential for a degree of tension, where states feel that their sovereignty may be threatened by international initiatives. Attempts to prosecute international crimes outside the territorial jurisdiction, by means of international tribunals or universal jurisdiction, may provoke difficulty and resentment, as shown by the recent debates within the United Nations General Assembly at the instigation of the African Union.¹⁵ The question of immunities may also be relevant when universal jurisdiction is employed, as the Pinochet and Yerodia cases demonstrate. There are also challenges with respect to mutual legal assistance. Third states may refuse to cooperate with the territorial state where extradition is requested because of perceived inadequacies in the national justice framework.

Possibly the greatest challenge is posed by the establishment of the International Criminal Court. The relationship between the Court and transitional justice mechanisms at the national level was left unclear at the Rome Conference, probably because consensus on the subject would have been difficult if not impossible. Since the Court became operational, the Office of the Prosecutor has advanced certain theories about its own attitude to national accountability mechanisms. As a consequence, the Court may now intervene in national transitional justice processes, upsetting approaches that have

¹⁴ Phil Clark, *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda*, Cambridge: Cambridge University Press, 2011.

¹⁵ 'The scope and application of the principle of universal jurisdiction, Report of the Secretary-General prepared on the basis of comments and observations of Governments', UN Doc. A/65/181.

been carefully negotiated during exceptionally delicate peace processes and post-conflict periods.

Sources of international law

The administration of justice would traditionally have been thought of as quintessentially within the scope of national jurisdiction, a matter that flowed from sovereignty and that was essentially of no concern to international law. What a State chose to do with persons who perpetrated offences within its own borders was a matter of concern only to itself. To the extent that there was any role for international law, this concerned conflicts over the extraterritorial exercise of criminal law jurisdiction.¹⁶ International law also encroached upon the territory of States by prohibiting the exercise of criminal law with respect to heads of state and other beneficiaries of immunities according to legal norms that remain essentially unchanged today.¹⁷ Certain crimes were recognized by customary international law or by treaty as being ‘international’ in nature, something that entitled the exercise of universal jurisdiction.

Over the course of the twentieth century, international law came to recognize the interest of third states and of the international community as a whole in the administration of criminal justice concerning crimes associated, in a general sense, with the protection of human dignity: genocide, crimes against humanity, war crimes and the crime of aggression. There were several justifications for this development, including a duty owed to the victims of atrocities pursuant to international law. Prosecution of such crimes was also defended as being fundamentally retributive in nature. Neither of these is particularly close to the modern notion of transitional justice, which tends to view prosecution from a utilitarian perspective. Indeed, in its early manifestation, advocates of international prosecution tempered their thirst for vengeance out of concern that too much justice might destabilize post-war regimes. For example, the Treaty of Versailles provided for an

¹⁶ S.S. Lotus (France v. Turkey), 1927 PCIJ (ser. A) No. 10 (Sept. 7).

¹⁷ Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, ICJ Reports 2000, p. 3.

internationalized prosecution scheme to deal with German war criminals.¹⁸ The victorious allies virtually abandoned the entire project out of concern that systematic prosecution of the German leadership might so weaken the government as to leave it exposed to revolutionary change.¹⁹ Similar concerns led to gradual abandonment of war crimes prosecutions following the Second World War.

In his 2010 Guidance Note on transitional justice, the Secretary-General attempted to address the relevant international law sources:

The normative foundation for the work of the UN in advancing transitional justice is the Charter of the United Nations, along with four of the pillars of the modern international legal system: international human rights law, international humanitarian law, international criminal law, and international refugee law. Specifically, various UN instruments enshrine rights and duties relative to the right to justice, the right to truth, the right to reparations, and the guarantees of non-recurrence of violations (duty of prevention). In addition, treaty bodies and court jurisprudence, as well as a number of declarations, principles, and guidelines have been instrumental in ensuring the implementation of treaty obligations. To comply with these international legal obligations, transitional justice processes should seek to ensure that States undertake investigations and prosecutions of gross violations of human rights and serious violations of international humanitarian law, including sexual violence. Moreover, they should ensure the right of victims to reparations, the right of victims and societies to know the truth about violations, and guarantees of non-recurrence of violations, in accordance with international law.²⁰

The involvement of the United Nations Security Council in transitional justice initiatives provides confirmation that one source of legal norms in this area is the Charter of the United Nations, and in particular Chapter VII. The first of the modern international criminal courts, the International Criminal Tribunal for the former Yugoslavia, was established as the conflict raged and long before it was at all realistic to speak of ‘transition’. When it decided to establish the International Criminal Tribunal, after noting that the violation of international humanitarian law constituted a threat to international peace and security, the Council said it was ‘[c]onvinced that in the particular circumstances of the former Yugoslavia the establishment of an international tribunal

¹⁸ Treaty of Peace between the Allied and Associated Powers and Germany (‘Treaty of Versailles’), (1919) TS 4, arts. 228-230.

¹⁹ See: James F. Willis, *Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War*, Westport, CT: Greenwood Press, 1982; Gerd Hankel, *Die Leipziger Prozesse*, Hamburg: Hamburger Edition, 2003.

²⁰ ‘Guidance Note of the Secretary-General, United Nations Approach to Transitional Justice’, March 2010, pp. 3-4 (references omitted), available at http://www.unrol.org/files/TJ_Guidance_Note_March_2010FINAL.pdf.

would enable this aim to be achieved and would contribute to the restoration and maintenance of peace'.²¹ Adopting the statute proposed by the Secretary-General, the Council repeated these words (adding only that it was undertaken 'as an ad hoc measure'), and said it 'believ[ed] that the establishment of an international tribunal and the prosecution of persons responsible for the above-mentioned violations of international humanitarian law will contribute to ensuring that such violations are halted'.²² Eighteen months later, when the International Criminal Tribunal for Rwanda was established, similar language was employed in the preamble to the resolution, but with the addition of the following: 'Stressing also the need for international cooperation to strengthen the courts and judicial system of Rwanda, having regard in particular to the necessity for those courts to deal with large numbers of suspects.'²³ Thus, the legal justification for the establishment of these tribunals by the Security Council included some recognition that an objective of the mechanisms was to prevent a repetition of the crimes, to restore peace, and to assist in rebuilding the national justice system. At least partially, the *ad hoc* tribunals were placed within a paradigm of transitional justice. Though at the time many international lawyers would have questioned the authority of the Security Council to intervene in this way, there is today little if any controversy about the point.

Since the early 1990s, the Security Council has established two other international criminal tribunals, for Sierra Leone and Lebanon. Both were created with the cooperation of the States concerned and are therefore perhaps less significant in terms of precedents identifying the scope of the powers of the Security Council under the Charter of the United Nations. More relevant is the Council's use of article 13(b) of the Rome Statute of the International Criminal Court. It has now triggered the jurisdiction of the Court twice, first with respect to the Situation in Darfur since 1 July 2002 and second for the Situation in Libya from 15 February 2010. The Darfur resolution noted 'regional efforts in the fight against impunity' and encouraged the Court, 'as appropriate and in accordance with the Rome Statute, to support international cooperation with domestic efforts to promote the

²¹ UN Doc. S/RES/808 (1993), PP 9.

²² UN Doc. S/RES/827 (1993), PP 7.

²³ UN Doc. S/RES/955 (1994), PP 9.

rule of law, protect human rights and combat impunity in Darfur'.²⁴ The Libya resolution did not contain references that might be understood as reflecting a transitional justice perspective.²⁵

The Security Council has noted the significance of transitional justice on other occasions. Following its discussion of the Secretary-General's 2004 report on the Rule of Law and transitional justice,²⁶ the Council produced a Presidential Statement.

The Security Council emphasizes that ending the climate of impunity is essential in a conflict and post-conflict society's efforts to come to terms with past abuses, and in preventing future abuses. The Council draws attention to the full range of transitional justice mechanisms that should be considered, including national, international and 'mixed' criminal tribunals, truth and reconciliation commissions, and underlines that those mechanisms should concentrate not only on individual responsibility for serious crimes, but also on the need to seek peace, truth and national reconciliation. The Council welcomes the report's balanced appraisal of the lessons to be learned from the experience of the ad hoc international criminal tribunals and 'mixed' tribunals.

The Security Council recalls that justice and rule of law at the international level are of key importance for promoting and maintaining peace, stability and development in the world. The Council underlines also the importance of helping to prevent future conflicts through addressing their root causes in a legitimate and fair manner.

The Security Council warmly welcomes the Secretary General's decision to make the United Nations work to strengthen the rule of law and transitional justice in conflict and post-conflict societies a priority for the remainder of his tenure.²⁷

Two years later, after a discussion under an agenda item entitled 'Strengthening international law: rule of law and maintenance of international peace and security',²⁸ a Presidential Statement was issued containing the following:

The Security Council emphasizes the responsibility of States to comply with their obligations to end impunity and to prosecute those responsible for genocide, crimes against humanity and serious violations of international humanitarian law. The Council reaffirms that ending impunity is essential if a society in conflict or recovering from conflict is to come to terms with past abuses committed against civilians and to prevent future such abuses. The Council intends to continue forcefully to fight impunity with appropriate means and draws attention to the full range of justice and reconciliation mechanisms to be considered, including national, international and 'mixed' criminal courts and tribunals and truth and reconciliation commissions.²⁹

²⁴ UN Doc. S/RES/1593 (2005), OP 3-4.

²⁵ UN Doc. S/RES/1970 (2011).

²⁶ UN Doc. S/PV.5052 and S/PV.5052 (Resumption 1).

²⁷ UN Doc. S/PRST/2004/34.

²⁸ UN Doc. S/PV.5474 and S/PV.5474 (Resumption 1).

²⁹ UN Doc. S/PRST/2006/28, pp. 1-2.

In 2008, the Security Council recognized ‘the importance of transitional justice in promoting lasting reconciliation among all the people of Burundi and *welcoming* progress in the preparations for national consultations on the establishment of transitional justice mechanisms, including through the establishment of a Technical Follow-up Committee and a forum of civil society representatives’.³⁰ It encouraged the Government of Burundi ‘to ensure that national consultations on the establishment of transitional justice mechanisms are begun as soon as possible, without further delay’.³¹ In 2011, it ‘stress[ed] the need for alleged perpetrators of crimes against children in situations of armed conflict to be brought to justice through national justice systems and, where applicable, international justice mechanisms and mixed criminal courts and tribunals in order to end impunity’.³² Transitional justice has proved to be of particular importance to the work of the Peacebuilding Commission, which is a subsidiary body reporting to the Security Council.

If transitional justice can only be implied from the Charter of the United Nations, there are a number of more explicit authorizations in specific treaties. The first of the major human rights and international criminal law treaties is the Convention on the Prevention and Punishment of the Crime of Genocide. In its 2007 ruling in the case between Bosnia and Serbia, the International Court of Justice found the respondent to be in breach of the Convention because of its failure to contribute to the arrest of certain individuals charged with genocide by the International Criminal Tribunal for the former Yugoslavia. The Court deduced from article VI of the Convention the existence of an obligation to cooperate in prosecutions by international criminal tribunals such as the International Criminal Tribunal for the former Yugoslavia. Nevertheless, on a plain reading, article VI merely establishes the appropriate jurisdiction for prosecution of genocide. The Court concluded that the obligation to cooperate ‘implies that [States Parties] will arrest persons accused of genocide who are in their territory - even if the crime of which they are accused was committed outside it - and, failing prosecution of them in the parties’ own courts, that they will hand them over for trial by the competent

³⁰ UN Doc. S/RES/1858 (2008), PP 9.

³¹ *Ibid.*, OP 12.

³² UN Doc. S/RES/1998 (2011), PP 8.

international tribunal'.³³ The Court considered that Serbia had failed to do this with respect to suspects in the Srebrenica massacre.

Transitional Justice and the International Criminal Court

The Rome Statute of the International Criminal Court is today at the centre of the legal debate concerning transitional justice. The Rome Statute intrudes deeply into the sovereign sphere of state activity because it recognizes the authority of the Court to intervene when States fail to prosecute serious international crimes that are committed on their territory or by their nationals. These serious international crimes – genocide, crimes against humanity, war crimes and the crime of aggression – are very much the bread and butter of transitional justice. The consequence is that it is now impossible for States to assess the transitional justice options that are best suited to their own needs, political context and historic development without taking into account the possibility that the Court will decide to involve itself based on a different evaluation of priorities and regardless of their concerns.

The South African case provides an example, although of course the International Criminal Court is without jurisdiction *ratione temporis* over the relevant crimes. The South African transition from *apartheid* to pluralist democracy is one of the classic laboratories of transitional justice. The centerpiece of the South African process was its celebrated Truth and Reconciliation Commission, presided over by Archbishop Desmond Tutu. The Commission and more generally the transitional justice model were premised on an agreement reached between Nelson Mandela and F.W. De Klerk and later confirmed in the postamble of the interim constitution by which the crime against humanity of *apartheid* would not be punished as such. Perpetrators of individual atrocities were invited to confess their crimes before the Truth and Reconciliation Commission. In exchange, and to the extent that their accounts were complete and verifiable, they became entitled to an amnesty. Many availed themselves of this

³³ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, ICJ Reports 2007, p. 43, para. 443.

possibility, although a significant number did not. Perhaps the latter had calculated, accurately as it turned out, that prosecutions were highly unlikely anyway.

At the time, this was an exercise of South Africa's sovereign authority. But the situation would not be the same today. It would be possible for the International Criminal Court to intervene and require that those most responsible for the crime against humanity of *apartheid* be brought to justice, assuming the Court would have jurisdiction *ratione temporis*. If necessary, after establishing that South Africa was either unwilling or unable to proceed, a single individual – the Prosecutor – acting without any broader authority in the form of a mandate from South African civil society or for that matter the international community, could decide to upset a very fragile transitional political compromise by prosecuting the *apartheid*-era leaders. The consequences could be enormous. Former tyrants for whom the terms of peaceful transition included a promise they would not be held accountable might refuse to negotiate under such uncertainty. Peaceful transition could prove much more difficult, perhaps impossible.

Although the South African transition is merely a hypothesis, there is also a good example of this problem from the early practice of the International Criminal Court in the case of Uganda, which is a State Party to the Rome Statute. Uganda's government had been unable to achieve military victory in a conflict that had persisted over nearly two decades. In 2003, prompted by the Prosecutor of the International Criminal Court, the President of Uganda, Yoveri Museveni, referred the situation concerning the Lord's Resistance Army in Northern Uganda to the Court. In mid-2005, five arrest warrants were issued by a Pre-Trial Chamber of the Court against leaders of the rebel group. This appears to have had a decisive effect, in that it prompted the rebels to sue for peace. The fighting stopped, and negotiations commenced. It is widely acknowledged that the threat of prosecution by the International Criminal Court helped to bring the Lord's Resistance Army to the negotiating table. On a visit to the Court, the Ugandan Minister for Security, Amama Mbabazi, noted that the issuance of warrants had contributed to driving the Lord's Resistance Army leaders to the negotiating table. In September 2006, Jan Egelund, the United Nations Under-Secretary-General for Humanitarian Affairs and Emergency

Relief, made similar observations in a briefing to the Security Council. Speaking to the Assembly of States Parties in November 2006, Prosecutor Moreno-Ocampo said:

The Court's intervention has galvanized the activities of the states concerned... Thanks to the unity of purpose of these states, the LRA has been forced to flee its safe haven in southern Sudan and has moved its headquarters to the DRC border. As a consequence, crimes allegedly committed by the LRA in Northern Uganda have drastically decreased. People are leaving the camps for displaced persons and the night commuter shelters which protected tens of thousands of children are now in the process of closing. The loss of their safe haven led the LRA commanders to engage in negotiations, resulting in a cessation of hostilities agreement in August 2006.³⁴

Issuance of the arrest warrants had contributed to conflict resolution in Northern Uganda. New and welcome efforts to mediate an end to the civil war gained momentum. The Court was demonstrating its effectiveness.

Predictably, one of the demands of the Lord's Resistance Army leaders was that the International Criminal Court arrest warrants not be pursued. Jan Egelund reported to the Security Council that in meetings with internally displaced persons, civil society and the parties themselves, the 'International Criminal Court indictments were the number one subject of discussion ... All expressed a strong concern that if the indictments were not lifted, they could threaten the progress in these most promising talks ever for northern Uganda.' President Museveni was himself more than happy to do this, and promised as much to the Lord's Resistance Army. But he was unable to withdraw the international arrest warrants, which were valid within Uganda as a result of the country's ratification of the Rome Statute. For the first time in human history, a sovereign government could not promise an amnesty in exchange for peace within an internal armed conflict. This was prevented by the international obligations that Uganda had itself accepted.

The Prosecutor of the International Criminal Court refused to consider a retreat from the arrest warrants, even when this seemed to be in the interests of peaceful transition. In the end, at least in part because Museveni could not remove the threat of prosecution by the International Criminal Court, the peace deal broke down. The Lord's Resistance Army leaders did not show up at the meeting where they were to sign the agreement. They retreated into the bush, to fight another day, and to take new victims.

³⁴ 'Opening Remarks, Luis Moreno Ocampo, Fifth Session of the Assembly of States Parties', 23 November 2006.

Thus, at least as the law is currently understood within the International Criminal Court, decisions like that of South Africa whereby transitional justice will essentially do without criminal prosecution are no longer acceptable. This view was expressed quite explicitly at the Review Conference of the International Criminal Court, held in Kampala in June 2010. One of the four stocktaking sessions held at the Conference was entitled ‘peace and justice’. During the discussion, a panellist said: ‘Amnesties for crimes under the Statute were now definitively off the table.’ In his summary of the debate, moderator Ken Roth, who is the head of the NGO Human Rights Watch, said that ‘amnesty was no longer an option for the most serious crimes under the Rome Statute’.

The same position has been enunciated on various occasions by the Prosecutor himself. Thus, in his ‘interests of justice’ paper issued in 2007, in which he reflected on the scope of the discretion granted him by article 53 of the Statute to decline to prosecute even when requested to do so by the Security Council or a State Party, the Prosecutor said:

In relation to other forms of justice decided at the local level, the Office of the Prosecutor reiterates the need to integrate different approaches. All approaches can be complementary. The Office notes the development of theory and practice in designing comprehensive strategies to combat impunity.¹⁰ The pursuit of criminal justice provides one part of the necessary response to serious crimes of international concern which, by itself, may prove to be insufficient as the Office is conducting focused investigations and prosecutions. As such, it fully endorses the complementary role that can be played by domestic prosecutions, truth seeking, reparations programs, institutional reform and traditional justice mechanisms in the pursuit of a broader justice.

The Office notes the valuable role such measures may play in dealing with large numbers of offenders and in addressing the impunity gap. The Office will seek to work with those engaged in the variety of justice mechanisms in any given situation, ensuring that all efforts are as complementary as possible in developing a comprehensive approach.³⁵

The Prosecutor took the view that there was a strong presumption in favour of proceeding before the Court. Nothing in his statement suggests a willingness to accept serious and genuine efforts at accountability through non-judicial means as being capable of displacing international prosecution. In Regulations of the Office of the Prosecutor proposed by the Prosecutor in 2009 and subsequently adopted by the Court, the criteria for assessing whether or not to proceed with the investigation of a subject were said to

³⁵ ‘Policy Paper on the Interests of Justice’, September 2007, pp. 7-8 (references omitted).

consist of various factors including their scale, nature, manner of commission, and impact'.³⁶

Amnesty and International law

The Rome Statute of the International Criminal Court, adopted in July 1998, is actually silent on the subject of amnesty and similar measures to neutralize criminal justice, as are the constitutive instruments of the other modern-day international criminal tribunals, with one exception. The Statute of the Special Court for Sierra Leone declares: 'An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution.' This text, which entered into force in January 2002, is specifically targeted at the Lomé Agreement of July 1999. It brought an end to a decade-long civil war that had devastated one of the world's poorest countries. A clause in the Lomé Agreement promises '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'.

There is also an historic example. Control Council Law No. 10, which was the legal basis for post-war trials inside Germany, stated that no 'immunity, pardon or amnesty granted under the Nazi regime' could be admitted as a bar to trial or punishment. It seems that in Japan, following the Second World War, an Imperial Rescript granting an amnesty by general pardon for war crimes committed by members of the Japanese Armed Forces during the Second World War was issued on 3 November 1946. It had no effect upon war crimes trials held by the victorious allies, including the International Military Tribunal for the Far East.

In his report on the establishment of the Special Court for Sierra Leone, the United Nations Secretary-General explained that '[w]hile recognizing that amnesty is an accepted legal concept and a gesture of peace and reconciliation at the end of a civil war or an internal armed conflict, the United Nations has consistently maintained the position

³⁶ Regulations of the Office of the Prosecutor, ICC-BD/05-01-09, Regulation 29(2).

that amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law'. The Secretary-General recalled that his Special Representative had objected to the amnesty clause contained in article IX of the Lomé Peace Agreement, noting in addition its 'illegality under international law'.³⁷

Contrast the account with a report published in 2009 by the United Nations High Commissioner for Human Rights:

The lawfulness of amnesty for war crimes, genocide and crimes against humanity was first questioned in relation to the 1999 Lomé Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front, which contained a broad amnesty. Upon witnessing the Agreement, the Special Representative of the Secretary-General in Sierra Leone appended a disclaimer to his signature, reading 'The United Nations does not recognize amnesty for genocide, crimes against humanity, war crimes, and other serious violations of international humanitarian law.'³⁸

The High Commissioner's version is closer to reality. Far from 'consistently maintaining' such an approach to amnesty, in reality the United Nations was charting a new course. The United Nations had not, in fact, objected to an amnesty clause contained in an earlier peace agreement reached with respect to the Sierra Leone conflict, on 30 November 1996. In his objection to the Lomé Agreement in 1999, the Special Representative did not employ the term 'illegality', contrary to the subsequent description by the Secretary-General cited above. There was also something disingenuous about the declaration, because in objecting to the amnesty clause in the Lomé Agreement the Secretary-General was not in fact calling for the peace talks to be aborted and for the parties to return to war until a new agreement could be reached *without* an amnesty clause. Rather, the Secretary-General praised the fact that the parties had agreed to lay down their arms and join in a power-sharing government. He welcomed the end of the conflict. In any case, his agreement was hardly required for the parties to stop fighting.

The amnesty condition may well have been a *sine qua non* for agreement of the parties to the Lomé Agreement. Its removal might have prompted a return to warfare and atrocity. Sometimes, warring groups may only be prepared to lay down their arms in

³⁷ Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, paras. 22-24.

³⁸ Analytical study on human rights and transitional justice, UN Doc. A/HRC/12/18, para. 53.

return for a guarantee they will not be prosecuted. At Lomé, was it in fact the ‘lawfulness’ of amnesty that was being questioned? Did the Special Representative of the Secretary-General object to the Sierra Leone amnesty because it was contrary to international law, or because it was inconsistent with a new policy direction of the United Nations Secretariat? Similarly, when panellists at the Kampala Review Conference said amnesty was ‘off the table’, did they mean that it was prohibited by law or simply undesirable and inadvisable?

Amnesty is defined by the Oxford English Dictionary as ‘an act of forgetfulness, an intentional overlooking, a general pardon, esp. for a political offence’. The word is used in many languages. It originates in the Greek language as *ἀμνηστία*, where it means ‘oblivion’ or ‘forgetfulness’. Sometimes *de facto* amnesties result from a political decision not to prosecute crimes committed during a conflict rather than from a formal agreement or declaration. They may also be the consequence of an offer of asylum which has, as its corollary, the removal of a threat of criminal prosecution. The exile of Napoleon to Elba and later to St Helena furnishes an historic example. A modern one would be Nigeria’s promise of refuge to Charles Taylor as part of the deal brokered by its president to end the civil war in Liberia. In July 2011, the United Kingdom and France contemplated sheltering Libyan dictator Muammar Gaddafi from prosecution by the International Criminal Court if he would consent to leave power.

Amnesty has long figured in peace agreements going as far back as the 1648 Peace of Westphalia and probably before then. At the dawn of international criminal justice, the Treaty of Lausanne of 1923 contained a ‘Declaration of Amnesty’ for all offences committed between 1 August 1914 and 20 November 1922. It replaced the Treaty of Sèvres of 1920, which was never accepted by Turkey, and which authorized prosecution by the victorious allies not only of ‘violations of the laws and customs of war’, but also for the ‘massacres committed during the continuance of the state of war on territory which formed part of the Turkish Empire on August 1, 1914’, a reference to the Armenian genocide.

The Appeals Chamber of the Special Court for Sierra Leone considered whether the prohibition of amnesty in its Statute was actually a rule of international law of more

general application. It took the view that amnesty was ‘not only incompatible with, but is in breach of an obligation of a state towards the international community as a whole’.³⁹ There have been similar pronouncements from the Inter-American Court of Human Rights, where the obligation is presented as a right of victims rather than a duty to the international community. If indeed the prohibition of amnesty is an affirmative rule of international law, where did it come from and what are its exact parameters?

In terms of the principle of amnesties, there are only two references in major multilateral treaties. Actually, both of them are favourable to the concept. Article 6(4) of the International Covenant on Civil and Political Rights declares: ‘Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.’ The context suggests that it applies to specific cases of imposition of capital punishment, rather than to situations of post-conflict justice. Much more relevant is the Protocol Additional to the 1949 Geneva Conventions and Relating to the Protection of Victims of Non-International Armed Conflicts. According to article 6(5) of Protocol II, ‘[a]t 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’.

Article 6(5) of Protocol II is a bone that sticks in the throats of those who insist upon the illegality of amnesty. It has been argued that article 6(5) was never intended to authorize or encourage amnesty for serious violations of international humanitarian law, such as war crimes, crimes against humanity and genocide. Much of the literature on this point harks back to a reference in an article by Douglass Cassel citing a letter from a lawyer in the International Committee of the Red Cross, Toni Pfanner, who claimed that the purpose of the drafters of article 6(5) was not to provide impunity for war crimes.⁴⁰ It is of course not unknown for participants in the drafting of an international treaty to suggest subsequently that it be interpreted in a certain way

³⁹ *Kallon* (SCSL-04-15AR72(E)) and *Kamara* (SCSL-04-16-AR72(E)), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 13 March 2004, para. 73. See also: *Kondewa* (SCSL-2004-14-AR72(E)), Separate Opinion of Justice Robertson, 25 May 2004.

⁴⁰ Douglass Cassel, ‘Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities’, (1997) 59 *Law & Contemporary Problems* 197, at p. 218.

because ‘that is what we meant’ at the time. The problem is that such agreements are often reached precisely because the negotiators intend somewhat divergent results, yet are able to agree upon language that may bridge a gap between different possible interpretations. In any case, Pfanner did not participate in the negotiations of Protocol II in the 1970s and his belief is at the best premised on hearsay from those who did. Their recollections of debates in years past may be coloured by what they would like to remember.

In assessing what the drafters of the Protocol intended in article 6(5), it is probably better to look at the documents themselves. Evidence in these materials that the drafters of article 6(5) of Protocol II meant to exclude serious violations of international humanitarian law is actually very slender. The record shows that when article 6(5) of Protocol II was adopted, the representative of the Soviet Union declared that in his country’s opinion, the provision could not be interpreted as applying to war criminals and those who had committed crimes against humanity. This appears to be the only mention of the issue in the record of the Diplomatic Conference of 1974-1977 at which the Protocol was adopted. More than three decades have passed, and it is now perhaps more difficult to recall the international context of the time. Suffice it to say that an isolated statement from the Soviet Union at a diplomatic conference in the mid-1970s is probably better interpreted as evidence of an absence of agreement, rather than as proof of consensus or acquiescence. One statement of this nature is flimsy authority as a basis for interpretation of a treaty provision.

Moreover, we know that the drafters of Protocol II quite intentionally excluded the concept of war crimes in non-international armed conflict altogether. Early drafts of the Protocol spoke of war crimes known as ‘grave breaches’, parallel to a concept applicable in international armed conflict. But these references were dropped in the final text, failing agreement on the relevance of the entire notion of war crimes to civil wars. Why would the drafters of Protocol II have excluded the concept of war crimes in non-international armed conflict, but at the same time intended to refer implicitly to a non-existent notion in the amnesty provision? This rejection of the very concept of war crimes during non-international armed conflict persisted until the mid 1990s, and

continued to be questioned by large states as recently as the 1998 Diplomatic Conference at which the Rome Statute was adopted.

In 2004 the International Committee of the Red Cross published a study of the customary law applicable to armed conflict. The four Geneva Conventions of 1949 have been ratified by virtually every country in the world, and it is often said that their provisions now amount to a codification of customary norms. The same cannot so readily be said of the two Protocols of 1977, where the ratification pattern is not as unanimous. An important objective of the customary law study was to fill the gaps in treaty ratification. Amongst other things, the authors of the customary law study turned their sights on article 6(5) of Protocol II, which they reformulated slightly by the addition of a final phrase to the text, excluding ‘persons suspected of, or accused of or sentenced for war crimes’.⁴¹ The authors of the Red Cross study on customary law, Jean-Marie Henckaerts and Louise Doswald-Beck, explained that the intent of the drafters of the Protocol was to exclude war crimes from such an amnesty. They asserted that ‘state practice establishes this rule as a norm of customary international law applicable in non-international armed conflicts’. This is a dubious proposition.

In the commentary on the rewritten 2004 version of article 6(5), several amnesties that specifically excluded war crimes from their scope are cited to support the claim about state practice. But surely this is not the way to establish a consistent rule that might then be deemed to be customary in nature. One does not prove a norm that is generally accepted by demonstrating that some people appear to abide by it. Should not the analysis begin by asking whether there are examples of amnesties that *include* war crimes and other atrocities? Louise Mallinder, in her very thorough recent study based on a data base of more than 500 situations, concludes that the practice of amnesty has actually increased in popularity in recent years.⁴² A review of the more detailed sources provided in Volume III of the customary law study confirms the widespread practice of amnesty and the fact that while in some cases war crimes

⁴¹ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Cambridge, Cambridge University Press, 2005, p. 611.

⁴² Louise Mallinder, *Amnesty, Human Rights and Political Transitions, Bridging the Peace and Justice Divide*, Oxford and Portland: Hart Publishing, 2008.

are excluded, this cannot be said to be a general rule. In the introduction the study says that if it is to constitute a basis for a customary norm, state practice must be ‘virtually uniform’.

The study by the International Committee of the Red Cross acknowledges a judgment of the South African Constitutional Court that interpreted article 6(5) of Protocol II and upheld a broad amnesty. It attempts to distinguish this by adding that the amnesty ‘required full disclosure of all the relevant facts’ in exchange, nourishing the argument that South Africa did not have a ‘blanket amnesty’. It selectively omits discussing the much broader and essentially unconditional amnesty with respect to the crime against humanity of *apartheid*.

The Red Cross study also considers the Sierra Leone amnesty, noting that the Security Council confirmed it could not apply to war crimes. That is somewhat of an overstatement. The Security Council Resolution in question involved the establishment of the Special Court for Sierra Leone, which in effect repealed an amnesty accorded to a handful of senior perpetrators, making ‘those who bear the greatest responsibility’ punishable before the international tribunal. In reality, it also implicitly confirmed the ongoing validity of the amnesty accorded to all of the participants in the conflict with the exception of the dozen or so who were to be subject to the Special Court.

Several weeks after the Lomé Peace Agreement was reached the Security Council convened to assess progress in resolving the conflict. It adopted a resolution that alluded to the Secretary-General’s statement on the amnesty provision. The oblique reference was an obvious compromise, reflecting the varied opinions within the Council about the legality and the wisdom of the amnesty. For example, speaking in the debate, the British representative said that the ‘blanket amnesty’ had ‘rightly caused concern. But this was one of many hard choices that the Government and the people of Sierra Leone had to make in the interests of securing a workable agreement.’ The United States said it was ‘committed to the pursuit of accountability’ but that ‘[a]t the same time, we recognize the need to allow the Lomé Agreement to bear fruit’. Argentina spoke expressing its disapproval of the amnesty, but said ‘we understand that that very delicate decisions can be taken only by the parties involved, which

assume the historical responsibility inherent in that decision'. Gabon expressed satisfaction with the amnesty. Gambia said it understood the circumstances under which the amnesty was granted; it mentioned the disclaimer by the Special Representative, saying it shared the views expressed. The Netherlands was the only other state to refer to the Special Representative's reservation, strongly condemning the amnesty. Slovenia said the Lomé Agreement 'highlighted the difficult choices that often confront the peacemakers'. Others, including Canada and France, said nothing about the amnesty.⁴³

Surely it would have been more prudent for the International Committee of the Red Cross to acknowledge that there is actually quite inconsistent practice in this area, and that realistically one cannot conclude there is a prohibition under customary international law. A fairer assessment of law and practice appears in the reasons of Lord Lloyd of the United Kingdom House of Lords in the *Pinochet case*, in 1998.

Further light is shed on state practice by the widespread adoption of amnesties for those who have committed crimes against humanity including torture. Chile was not the first in the field. There was an amnesty at the end of the Franco-Algerian War in 1962. In 1971 India and Bangladesh agreed not to pursue charges of genocide against Pakistan troops accused of killing about one million East Pakistanis. General amnesties have also become common in recent years, especially in South America, covering members of former regimes accused of torture and other atrocities. Some of these have had the blessing of the United Nations, as a means of restoring peace and democratic government... It has not been argued that these amnesties are as such contrary to international law by reason of the failure to prosecute the individual perpetrators.⁴⁴

In fact, there is no treaty text in public international law instruments explicitly prohibiting amnesty and there is no consistent practice of states allowing the conclusion that this is a norm of customary international law.

The argument that amnesty is prohibited by international law relies upon implication. With respect to certain treaties, such as the Convention Against Torture and the Genocide Convention, as well as the 1949 Geneva Conventions, it is said that the duty to prosecute specific crimes precludes the possibility of amnesty. But treaties are also to be interpreted in light of the subsequent practice of their parties. For the same reasons

⁴³ UN Doc. S/PV.4035, p. 5.

⁴⁴ *R. v. Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet*, [1998] 4 All ER 897 (HL), at 929 h-i.

that generate doubts about the consistent practice necessary to conclude that a customary norm exists, the argument that the obligation to prosecute set out in certain treaties is unconditional and without any exception cannot be sustained. Even when states assume their duties to ensure that such atrocity crimes are prosecuted, they often pursue the matter selectively and partially, rather like the United Nations did with respect to Sierra Leone. There may be some symbolic trials, but often there is no attempt at full-blown and exhaustive implementation.

In 2006, four senior Rwandan officials against whom credible allegations of genocide had been made were located in the United Kingdom. The government cooperated with the Rwandan Government in developing an extradition request. When British courts denied the application, in mid-2009, because they considered the Rwandan justice system to be inadequate, the four were released. They now remain at large without any prospect they will be brought to justice. Britain does not have legislation enabling it to exercise universal jurisdiction over the crime of genocide. Presumably, if it believed that it was required by international law to prosecute genocide suspects found on its territory, it would have enacted appropriate laws. The United Kingdom acceded to the Genocide Convention on 30 January 1970, so it has had more than forty years to reflect upon the shortcomings in its legal framework.

The tension between amnesty and international prosecution also manifested itself in the removal of Charles Taylor from power in Liberia. In August 2003, Taylor agreed to leave office in exchange for a promise of asylum in nearby Nigeria. The deal brought an end to a lengthy conflict. Not only were lives spared as a result, Liberia was launched on a process of reform and democratization. Those with an intransigent attachment to justice were shocked, given that Taylor had been indicted for war crimes and crimes against the humanity by the Special Court for Sierra Leone only months earlier. But even they cannot dispute the impressive deliverables that resulted from the departure of Taylor. Without the promise of asylum and, in effect, immunity from prosecution, Taylor probably would have prolonged the conflict. Indeed, he might still be in power.

Later, intense international pressure led Nigeria to revoke the protection of Taylor, and facilitate his transfer to The Hague for trial before the Special Court for Sierra Leone.

This may have been an error, not because Taylor does not deserve to be tried for the crimes with which he has been charged, but because the withdrawal of his effective amnesty demonstrates bad faith of peacemakers, and makes it less likely that the same technique of conflict resolution can be employed again. Unconditional opponents of amnesty welcome such developments. But a useful implement has been removed from the tool-box of the African peacemaker, and more innocent people will die on the continent as a result.

Aside from the claims that such amnesties are not permitted under international law, it is also argued that they are unwise, and that they resolve nothing. A failure to punish perpetrators of serious crimes means uncertain and unstable peace, and strengthens the likelihood of a return to conflict, it is said. This is slightly different from the argument that amnesty is unacceptable because it violates the rights of individual victims. Rather, amnesty is challenged precisely because it does not contribute to lasting peace. The argument is utilitarian, not retributive. Presumably, those who subscribe to this view are not opposed to amnesty as a matter of principle, but rather because it fails to deliver its alleged benefits.

The contention that amnesty does not promote lasting peace is an interesting hypothesis, but it is unproven, and there is much empirical evidence to the contrary. It may well be the case that in some circumstances, a situation of impunity has contributed to continuing instability or at least accompanied it. In the Balkans, for example, it was fashionable to explain the wars of the 1990s as the consequence of unsettled scores dating back to the Second World War and even earlier, to distant centuries. Perhaps that explanation has some validity. But there are other conflicts that ended with impunity, and yet where peace seems permanent enough. Spain is the usual example here, a country that suffered through a fierce civil war followed by more than three decades of brutal dictatorship. Its transition, in the 1970s, was premised upon an amnesty. There are unsatisfied victims, or their descendants, to be sure, and some rumblings from the judiciary and civil society, but this alone does not mean that a generalized social peace has not been achieved.

A more nuanced approach to amnesty was adopted by the Sierra Leone Truth and Reconciliation Commission. In its final report, the Commission concluded:

Accordingly, those who argue that peace cannot be bartered in exchange for justice, under any circumstances, must be prepared to justify the likely prolongation of an armed conflict. Amnesties may be undesirable in many cases. Indeed there are examples of abusive amnesties proclaimed by dictators in the dying days of tyrannical regimes. The Commission also recognizes the principle that it is generally desirable to prosecute perpetrators of serious human rights abuses, particularly when they rise to the level of gravity of crimes against humanity. However amnesties should not be excluded entirely from the mechanisms available to those attempting to negotiate a cessation of hostilities after periods of brutal armed conflict. Disallowing amnesty in all cases is to deny the reality of violent conflict and the urgent need to bring such strife and suffering to an end.

The Commission is unable to declare that it considers amnesty too high a price to pay for the delivery of peace to Sierra Leone, under the circumstances that prevailed in July 1999. It is true that the Lomé Agreement did not immediately return the country to peacetime. Yet it provided the framework for a process that pacified the combatants and, five years later, has returned Sierra Leoneans to a context in which they need not fear daily violence and atrocity.⁴⁵

The Commission's view is probably a minority voice in the current debate, at least in international law circles. At the very least, it usefully recalls that there is no unanimity on these issues.

Justifications for Transitional Justice in Law and Practice

Transitional justice involves a spectrum of alternatives. No situation will be treated in an identical way. As discussed above, the International Criminal Court seems to reduce the degree of discretion at the national level in the selection of the relevant options, by making prosecution an imperative and by authorising the intervention of the Court where it is not undertaken by national authorities. For States Parties to the Court, this is a treaty obligation that they have freely accepted. They are also at liberty to denounce the Rome Statute should they find this limitation on their sovereignty to be unacceptable.⁴⁶ If States Parties find that the International Criminal Court encroaches unacceptably upon the choice of alternatives adopted to deal with transitional justice, they may amend the Statute to limit the discretion of the Prosecutor or the judges. The Prosecutor is, of course,

⁴⁵ *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission*, Vol. 3B, Freetown, 2004, ch. 6, paras. 11-12 (the author of this volume was one of the members of the Commission).

⁴⁶ Rome Statute of the International Criminal Court, (2002) 2187 UNTS 90, art. 127.

only interpreting the Rome Statute. In this respect, he has relied on certain principles derived from international law, but his interpretation of the Statute may deserve reconsideration.

There are still a large number of States, and many very important ones, that have not yet accepted the Rome Statute. The threatened interference of the International Criminal Court in transitional justice processes is not really an issue as far as they are concerned, although it may colour their own decisions about ratification or accession to the Rome Statute. Nevertheless, countries like Sri Lanka, Burma, North Korea, Iraq, Egypt, Tunisia, Syria and Zimbabwe, to name only a few where transitional justice issues may realistically arise now or in the foreseeable future, remain in a situation similar to that of South Africa in the early 1990s. Their choices of transitional justice mechanisms are not subject to a treaty like the Rome Statute. Of course, they may find themselves constrained by Security Council intervention, as has been the case with two other non-party States, Sudan and Libya, a matter discussed earlier in this paper.

It may be the case that general international law, and more specifically international human rights law, imposes duties upon States with respect to transitional justice context. In 2006, a Presidential Statement of the Security Council spoke of the responsibility of States to comply with their obligations to end impunity and to prosecute those responsible for genocide, crimes against humanity and serious violations of international humanitarian law.⁴⁷ It did not indicate the source of these obligations, or whether they resulted from customary international law rather than treaties. According to the ‘Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law’, adopted by the United Nations Commission on Human Rights in 2005, ‘[i]n cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, states have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and,

⁴⁷ UN Doc. S/PRST/2006/28, pp. 1-2.

if found guilty, the duty to punish her or him'.⁴⁸ To the extent that such obligations exist outside of a treaty regime, state practice indicates that they are confined to the traditional jurisdiction of states over territory and nationality. In other words, any claim that there is an *aut dedere aut judicare* duty in the absence of treaty provisions lacks supporting evidence, however attractive the proposition may seem in terms of international morality and civilized behaviour.

There is much authority in the case law of the European Court of Human Rights, the United Nations Human Rights Committee, and the Inter-American Court of Human Rights for the proposition that fundamental rights are breached where a state fails to investigate, prosecute and punish. In a recent case, the European Court of Human Rights held that Bulgaria had breached the European Convention because it did not adequately investigate a complaint of so-called 'date rape'.⁴⁹ Another decision involves a violent attack on Jehovah's Witnesses during a religious meeting, a Chamber of the Court wrote:

Article 3 of the [European] Convention [on Human Rights] gives rise to a positive obligation to conduct an official investigation. Such a positive obligation cannot be considered in principle to be limited solely to cases of ill-treatment by state agents. Thus, the authorities have an obligation to take action as soon as an official complaint has been lodged. Even in the absence of an express complaint, an investigation should be undertaken if there are other sufficiently clear indications that torture or ill-treatment might have occurred. A requirement of promptness and reasonable expedition is implicit in this context. A prompt response by the authorities in investigating allegations of ill-treatment may generally be regarded as essential in maintaining public confidence in their maintenance of the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts. Tolerance by the authorities towards such acts cannot but undermine public confidence in the principle of lawfulness and the state's maintenance of the rule of law.⁵⁰

This is the procedural obligation associated with the protection of the right to life and the prohibition of torture and inhuman or degrading treatment.

The Inter-American Court of Human Rights has addressed this issue somewhat differently, in the specific context of amnesty laws. According to the Inter-American Court, 'states cannot neglect their duty to investigate, identify, and punish those persons responsible for crimes against humanity by enforcing amnesty laws or other similar

⁴⁸ UN Doc. E/CN.4/RES/2005/35, para. 4.

⁴⁹ *M.C. v. Bulgaria* (Application No. 39272/98), ECHR 2003-XII, para. 149.

⁵⁰ *Case of 97 Members of the Gldani Congregation of Jehovah's Witnesses and 4 Others v. Georgia* (Application No. 71156/01), Judgment, 3 May 2007, para. 97 (references omitted).

domestic provisions'.⁵¹ The Court 'considers that all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law'.⁵² The Inter-American Court appears to predicate the obligation on violations of 'non-derogable rights'. These are obligations that cannot be suspended, even in time of war or national emergency. The formulation is imprecise because non-derogable rights include freedom of religion and the prohibition of imprisonment for debt. What the Court probably meant was that there is a hierarchy of rights, with some being so essential to the protection of human dignity that they cannot ever be subject to amnesty.

These pronouncements from the human rights bodies apply to all serious crimes involving violence against the person, and not only to war crimes, crimes against humanity and genocide. There seems to be no logical basis in international human rights law for making any distinction between the rights of the victim of an ordinary murder or rape and the rights of the victim of a murder *qua* crime against humanity or genocide. From the standpoint of the individual victim, how could the legal qualification of such a crime have any significance? Should one victim be denied justice, as a matter of principle, because the perpetrator did not have the elevated degree of criminal intent necessary for a finding of crimes against humanity or genocide?

Any specific human rights norm must normally be balanced against other norms, so that the protection of human rights is viewed as a coherent, indivisible ensemble and not a hierarchical system where one right invariably trumps another. An example of a fundamental right that might enter into the calculus is the right to peace.⁵³ If amnesty is the price to be paid for an end to armed conflict, and the death and destruction that it brings to ordinary people, shouldn't this be a relevant factor that may outweigh or limit, in specific circumstances, the rights of victims of specific crimes associated with that

⁵¹ *Almonacid-Arellano et al. v. Chile*, No. 45 (2006), para. 114.

⁵² *Barrios Altos v. Peru*, 14 March 2001, para. 41.

⁵³ 'Promotion of the right of peoples to peace', UN Doc. A/HRC/RES/11/4.

same conflict to have their tormentors brought to book? Moreover, some attention must surely be paid to the cost of justice. States have limited resources. These must be apportioned in such a manner as to ensure that all fundamental rights, including the economic and social rights to education, housing and medical care, are fulfilled. Do the investments required to ensure justice necessarily override those that would otherwise be devoted to schools and hospitals? In reality, we always make such calculations. When the United Nations insisted on quashing the amnesty in Sierra Leone, it limited its ardour to a tribunal of modest expectations, likely to judge about a dozen people. If justice for all was really such an imperative, would it not have devoted its entire budget to the Special Court for Sierra Leone? But what then would have happened to the humanitarian assistance programmes of the United Nations Development Programme or the World Food Programme or the many peace support operations throughout the world helping to stave off armed conflict?

Article 29(2) of the Universal Declaration of Human Rights affirms that '[i]n the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society'. Thus, in the application of the fundamental rights of defendants to a fair trial, international criminal tribunals have held that the right to defend oneself in person, and the right to be present at trial, are not absolute. Both of these rights are set out in article 14(3) of the International Covenant on Civil and Political Rights in an apparently unqualified manner. If these rights are subject to reasonable limitations, why then are the rights to reparation and remedy also not subject to limitation? The right of victims to justice and to a remedy for a serious violation of human rights, which is the foundation of the condemnation of amnesties by the human rights tribunals, may be limited or tempered by other rights and priorities.

Conclusions

Although both judicial and non-judicial forms of accountability have been in existence since the beginnings of human conflict, the phenomenon of transitional justice has only been considered seriously since the beginning of the 1990s. It emerged from efforts to understand measures taken in Latin America and Central and Eastern Europe, but was then approached as comparative law and practice. That there were international standards and obligations only emerged later.

It is now well-accepted that various bodies of the United Nations, including the Security Council, intervene in post-conflict situations. Sometimes but not always this is by consent of the government concerned. The most significant factor in the contemporary debate is the International Criminal Court. It poses a challenge to non-judicial forms of transitional justice, such as truth commissions, and appears to take the position that amnesty is not only undesirable but is prohibited by both the Rome Statute and customary international law. This paper has taken the view that such a position is too extreme. Transitional justice mechanisms vary enormously, depending on a range of factors including the history of a conflict, the culture and the balance of forces. Invoking international law in order to constrain techniques such as amnesty that have proven so effective in the past in resolving conflicts is not desirable. The search for peace, which is itself grounded in fundamental rights, is an important and delicate task. Peacemakers should not find themselves constrained by the mechanistic application of concepts whose claim to normative status has in any case been somewhat exaggerated.