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Aims and Scope

The International Law FORUM covers all aspects of public and private international law with an unmatched interdisciplinary approach. Its authors include both distinguished practitioners and scholars as well as fresh, new voices in international law. The objective editorial policy allows readers to form their own opinions based on the balanced coverage and diversity of news presented.

Each issue contains: *Editorial*, *In the News*, *Recurring Themes*, a *Profile*, *Work in Progress*, *Conference Scene*, and the *Bookshelf* of a distinguished guest. Pocket-sized and affordably priced, the FORUM provides an accessible way for academics and practitioners to stay current in the field.

Thought-provoking and controversial, it is also up-to-date and truly international.

* * *

La revue FORUM du droit international privilégie une approche inter-disciplinaire sans précédent pour couvrir tous les aspects du droit international public et privé. Parmi les auteurs qui y contribuent figurent d'éminents praticiens, professeurs et chercheurs ainsi que de nouveaux auteurs en droit international. La politique objective de la rédaction permet aux lecteurs de se forger leur propre opinion basée sur la diversité des informations présentées couvrant de manière équilibrée l'actualité.

Chaque numéro comporte les rubriques suivantes: *Editorial*, *Actualité*, *Thèmes récurrents*, *Profil*, *Travaux en cours*, *Le tour des conférences* et *La bibliothèque* d'un éminent invité. De petite taille et pour un prix raisonnable, FORUM constitue un outil accessible pour les universitaires et les praticiens qui souhaitent suivre l'actualité du droit international.

C'est une revue à jour et réellement internationale qui pousse à la réflexion et à la discussion.

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*The opinions expressed herein are those of the authors and
do not necessarily reflect the views of the
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Editorial

Volume 2, No. 2

Our recurring themes section this time treats the relationship between national means for addressing situations of gross violations of human rights and applicable international standards and procedures. It includes contributions by Garth Meintjes and Juan Méndez, Michelle Parlevliet and Jeremy Sarkin. The contributions focus, in particular, on the relationship between international standards and national means that aim primarily at attaining reconciliation in national society, such as truth commissions and amnesties. The central question addressed in these contributions is the extent to which states should enjoy discretionary powers to determine the manner in which they address gross human rights violations in their past that have left a sharp cleavage in their societies. On the one hand, reconciliatory procedures are probably better suited to take into account the specific situation in the society in question, and often are regarded as contributing to the process of democratization in those societies. On the other hand, such procedures may not meet the international minimum requirements of fair trial or do justice to the rights of the victims and their families. As the contributions illustrate, the theme presents us with legal dilemmas that have far reaching social and political implications. These implications include, among other issues, the question of the extent to which the juridical and contentious model for dispute resolution, associated with the western liberal tradition, should be extended to international society at large. Might other models work equally well, or better, and how might international minimum standards be developed that can be applied to all models, including the liberal model? We would be extremely pleased if you would share your views on this topic with us, as we would like to return to it in a future issue of the FORUM.

In this issue of the FORUM we once again present you with a broad overview of events in international public and private law. We are grateful for the fact that once again we have found both well known and younger and lesser known contributors willing to work with us. As always, we welcome comments on the content and format of the FORUM. The ILA London Conference will provide an excellent opportunity for you to discuss the FORUM with us. We all hope to attend, so please seek us out at the Conference and share your views with us on the FORUM; we look forward to the opportunity to meet both our present and future readers at the Conference.

In The News / Actualité

The 1999 *Erika* Oil Spill in France. Can the cargo-owner be held liable for the damage caused?

EDWARD H.P. BRANS*

Introduction

In December 1999 the Maltese tanker *Erika* broke in two some 40 miles off the coast of Brittany in France. The tanker was carrying over 30,000 tons of heavy fuel oil of which about 10,000 tons of oil leaked into the ocean. The remaining cargo sank to the bottom of the sea with the *Erika*. The spill has polluted more than three hundred kilometers of coastline. Due to the characteristics of the oil – a heavy fuel oil with limited capabilities to disperse naturally – and the weather conditions, the spill appears to have caused significant environmental damage. Over 34,000 oiled birds were collected of which two-thirds have died. NGOs have calculated that as many as 195,000 birds were actually oiled. Because some of the impacted birds are migratory birds, NGOs fear that the spill will have an impact on the population of a certain bird species in the Wadden Sea (the Netherlands). Apart from the direct environmental consequences, the spill has also had serious economic consequences for those who depend for their income on the affected environment. Not only have the public authorities imposed a ban on fishing and shellfishing thus impairing the earning capacity of local fishermen and others, but the oil spill will also have a negative impact on the local tourist industry.

Who is Liable for the Damage Caused?

The *Erika* oil spill is covered by the 1992 International Convention on Civil Liability for Oil Pollution Damage (Civil Liability Convention) and the 1992 International Convention on the Establishment of an International Fund for Compensation of Oil Pollution Damage (Fund Convention). The Civil Liability Convention establishes a regime of strict liability for the shipowner and provides for a system of compulsory insurance. The shipowner's liability is limited to an amount that is linked to the tonnage of the ship (in this case about \$12 million). However, the shipowner is not entitled to limit his liability if it is proved that the loss resulted 'from his personal act or omission, committed with the intent to cause such damage, or recklessly and with the knowledge that such loss would probably result'. Additional compensation of up to approximately \$173 million is available from the Fund that has been established under the Fund Convention.

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Liability under the international oil pollution conventions is thus directed to the shipowner. No claim for compensation for damage may be made against the owner otherwise than in accordance with the conventions. The oil pollution conventions also explicitly stipulate that claims cannot be made against the owner's servants or agents, the charterer of the ship, or against a few other specified persons. The only exceptions are if the claimant proves that the damage resulted from their personal act or omission, was committed with the intent to cause the damage, or was committed recklessly and in the knowledge that such damage would probably result. The oil company TotalFina was not only the owner of the cargo, it also chartered the vessel. If the French public authorities and others can prove that the damage resulted from such conduct, TotalFina – in its capacity as charterer – can be held liable for the damage caused and be forced to pay compensation for the damage caused.

Liability of the Cargo-Owner and the Classification Society

Shortly after the incident, a report was published on the causes of the accident. From this report it appears that inspections held in 1997 and 1999 revealed serious corrosion of the tanker (*OSIR*, 13 Jan. 2000). Despite these disturbing facts the classification society allowed the tanker to sail. It has also been suggested that the cargo-owner (TotalFina) knew about the state of the ship. Given these facts, one might ask whether the classification society and the cargo-owner can be held liable for the damage caused. This issue is especially relevant because it is expected that the \$185 million available under the international oil pollution conventions will be inadequate to cover the damage.

As noted earlier, various parties are excluded from liability in these conventions, which in principle prevents damages from being recovered from those parties. Interestingly, however, there is no reference in the conventions to the cargo-owner or the classification society. The international oil pollution conventions therefore do not preclude claims from being brought against these parties. In fact, there are a few cases where legal action was taken on the basis of national law against a range of persons not excluded from liability. In the *Tanio* case for instance – a case concerning a 1980 oil spill incident in France – the French central and local governments and certain private parties took legal action under French law in a French court against the classification society and the shipyard that repaired the tanker *Tanio*. The action was based on the unseaworthiness of the ship, the faulty repairs and the failure to check the quality of the repair work. An out of court settlement was reached resolving most of the claims.

So claims against other parties than the shipowner or its insurer are not unprecedented. Provided that the earlier mentioned report is correct on the causes

of the *Erika* oil spill and the role of both the classification society and the cargo-owner, the French public authorities should consider filing claims against both. Imposing liability on both the owner of the cargo and the classification society will not only benefit those who suffered loss because of this incident (including the environment), it will also provide an incentive to others. The risk of being held liable for oil pollution damage will force cargo-owners to retain the services of good quality shipowners and will force the classification societies to do a better job. To what extent the claims against the classification society and the cargo-owner might succeed in the case in point is difficult to predict since this depends very much on French national law and the extent to which the claimants are able to prove their claims.

In the light of the above, it is interesting to note that the European Commission – in its recently published White Paper on environmental liability – states that it is considering establishing a supplementary liability regime for oil spills. The aim of the regime is to further limit the number of oil spills in Europe. Since many EC Member States are party to the international oil pollution conventions, the only option left seems to be to establish a regime under which parties other than the shipowner, the charterer of the ship and the other identified parties, can be held liable. As noted earlier, the cargo-owner and the classification society are key in this respect. Whether the EC will finally set up such a supplementary regime is as yet unclear.

Restoration of the Marine Environment

As noted earlier, the *Erika* oil spill has caused a significant damage to the environment. Under the international oil pollution conventions, the shipowner can be held liable for the impairment of the environment but only insofar as restoration measures are actually taken or going to be taken. The costs of these measures are only compensated if they are reasonable. In the text of the conventions no explanation is given of the term reasonable. To help the Fund in deciding on this issue, guidelines were developed, however, these guidelines have never so far been used. More importantly, they are not binding on the Member States. Since it is not unlikely that the French public authorities, and maybe even public interest groups, are going to take restoration measures (other than cleanup measures), these guidelines will be used and tested. Decisions regarding the determination of what constitutes a reasonable measure of reinstatement will be of particular interest, not only for the international oil pollution conventions themselves, but also for many other international liability treaties and the future EU environmental liability regime (if established). Most of these legal instruments use the same or a comparable definition of damage as the one in the international oil pollution conventions, but

none of these provide any clear guidance on how to determine the reasonableness of proposed restoration measures.

Conclusion

The legal battle following the *Erika* oil spill promises to be a compelling one and is likely to be of importance for the further development of (international) environmental law. To my knowledge this is the first case in which the guidelines for determining the reasonableness of restoration measures are – probably – going to be applied and tested. It is also interesting that the French government and others are likely to file claims outside the international conventions against the classification society and the cargo-owner. Provided that these claims are successful, they will certainly provide an incentive for these parties and will hopefully stimulate them to do a better job. Another significant development in this respect is the proposal by the EU to establish a supplementary liability regime under which the cargo-owner can be held liable for the damage caused.

Sources:

- G. Gauchi, *Oil Pollution at Sea. Civil Liability and Compensation for Damage*, Chichester 1997.
- E.H.P. Brans, *Liability and Compensation for Natural Resource Damage under the International Oil Pollution Conventions*, 5 *RECIEL* 1996, 297-305.

Judgment of the First Chamber of the European Court of Human Rights in the case *Ignaccolo-Zenide v. Romania* (request no. 31679/96), January 25, 2000 *

ELLEN HEY and CATHERINE KESSEDJIAN

The case concerns a divorced couple of French (wife) and Romanian/French (husband) nationality, and the custody over their two daughters. Prior to reaching the European Court of Human Rights (the "Court"), judgments were rendered in France, the United States (Texas and California) and Romania. The case came before the Court on the basis of a claim that the mother submitted against Romania to the European Commission on Human Rights in 1996, alleging that Romania had violated article 8 (respect for private and family life) of the European Convention on Human Rights (the Convention) by failing to take the necessary measures to ensure the execution of French judgments. In these judgments, the French courts had determined that the parents shared custody over the children and that the place of residence of the two children was to be with their mother. The mother requested from the Commission a declaration to the effect that Romania had violated article 8 of the Convention by not taking the necessary steps to execute the judgments, and sought just satisfaction on the basis of article 41 of the Convention. Both requests were granted.

In 1998, the European Commission on Human Rights adopted a report in the case in which it found that there had been a violation of article 8 of the Convention. In 1999, Romania brought the case before the Court. With the entry into force of Protocol 11 to the Convention, the case was considered by a Chamber constituted within the first Section of the Court.

After reading the judgment, one cannot but wonder what must have been and is going on in the minds of the two young girls who have been the object of a protracted legal battle between their parents, since the first claim in the case was filed in 1990. It is thus with some difficulty that we turn to the legal aspects of the case that merit comment.

The noteworthy legal aspect of the case is that the Court, in deciding that Romania had violated article 8 of the Convention, used the Hague Convention on Civil Aspects of International Child Abduction (the Hague Convention), of October 25, 1980, to determine the duty of care applicable to Romania on the basis of that article.

The Court, in commenting on the nature of article 8 of the Convention, recalled that while the article is directed primarily at protecting the individual from arbitrary

* Available in French at <http://www.echr.coe.int>.

interference by public authorities, it also involves positive obligations on the part of the state to ensure respect of family life. The Court then went on to determine that the positive obligations placed on the state in cases concerning the reunion of a parent and his or her children are not absolute. They involve a margin of appreciation on the part of the state concerned in which the interests of the child must weigh heavily. Given that the claim by the mother did not encompass the execution of the French judgments, the Court did not consider whether Romania had in fact properly exercised its margin of appreciation, in 1994 or thereafter. Instead, it considered the question of whether Romania had complied with the positive obligations resting upon it by virtue of article 8 of the Convention. Article 8 does not explicitly stipulate the positive obligations referred to by the Court. The Court held that when the reunion of a parent and his or her children is at stake, these obligations should be construed in the light of the Hague Convention and, in particular, the types of measures that a state must take on the basis of article 7 and the urgent action required on the basis of article 11 of that convention. The Court found that Romania had failed to meet these standards. The Court thus used the standards of the Hague Convention to determine the duty of care that applies to a state on the basis of the positive obligations that ensue from article 8 of the Convention in a case involving the execution of foreign judgments concerning child custody. Moreover, the judgment reinforces the obligation of states to take effective measures (both administrative and judicial) to implement the obligations that they undertake on the basis of international conventions, such as the 1980 Hague Convention.

The case serves to illustrate the close links between private and public international law and the manner in which these two realms of international law, often thought of as separate, may serve to strengthen each other. The judgment provides an important contribution to the development of international law and an example of the role that courts, be they national or international, may play in developing more integrated approaches to international law.

***Mea culpa* de la communauté internationale**

L'Organisation des Nations Unies s'est récemment penchée, pour la première fois, sur ses responsabilités au cours des épisodes tragiques du génocide au Rwanda et de la chute de la « zone de sécurité » de Srebrenica. Le Secrétaire général de l'ONU a présenté deux rapports détaillés et accablants sur l'attitude de la communauté internationale, en particulier de l'ONU, face aux événements qui se sont déroulés au Rwanda en 1994 et à Srebrenica en juillet 1995. Dans les deux cas, la communauté internationale s'est montrée totalement incapable d'empêcher et de faire cesser les massacres. Rappelons que, malgré la présence sur le terrain des forces de l'ONU, près de 800 000 personnes ont été massacrées au Rwanda lors du génocide de 1994, 2500 hommes ont péri lors de la chute de Srebrenica et des milliers sont toujours portés disparus.

Les rapports analysent de manière détaillée les causes et les effets de cette « impotence internationale » et formulent des recommandations concrètes.

Le premier rapport¹, consacré à la chute de Srebrenica, constate amèrement que les comportements respectifs de la FORPRONU, du Conseil de sécurité et des Etats membres ont tous à des degrés divers contribué à la chute de Srebrenica alors que l'ONU avait pour mandat de prévenir les attaques contre Srebrenica. Parmi les causes multiples de cet échec, on note l'inadéquation entre les ressources et le mandat, le manque de jugement politique, la réticence des Etats à communiquer des informations stratégiques à l'ONU et l'inadéquation du concept d'impartialité. En conclusion, le rapport tire comme leçon principale que face à une menace d'assassiner un peuple, la communauté internationale doit fournir une réponse décisive en mettant en oeuvre tous les moyens nécessaires, comme elle l'a fait au Kosovo. Par ailleurs, une opération de maintien de la paix montée en dehors de tout accord politique est vouée à l'échec. Srebrenica, déclarée zone protégée par le Conseil de sécurité sans le consentement des parties et privée d'un dispositif militaire efficace, s'est révélée être un instrument privilégié de la politique d'extermination menée par les Serbes de Bosnie à l'égard des Musulmans de Bosnie. Ces massacres ne resteront pas impunis. Le général Radislav Krstic, ancien Chef d'état-major du corps Drina de l'armée serbe accusé de crime de génocide, notamment pour les massacres commis lors de la chute de Srebrenica, est actuellement jugé devant le tribunal pénal international pour l'ex-Yougoslavie.

Le rapport sur le Rwanda², préparé par une commission d'enquête indépendante

¹ Rapport A/54/549 du 15 novembre 1999

² Rapport S/1999/1257 du 16 décembre 1999

dirigée par l'ancien premier ministre suédois Ingmar Carlsson, vise les actions de l'ONU dans son ensemble avant et pendant le génocide. La commission a conclu que l'échec « absolu » de l'intervention de l'ONU au Rwanda pour empêcher et arrêter le génocide est imputable au Secrétaire général, au Secrétariat de l'ONU, au Conseil de sécurité, à la MINUAR et aux Etats membres concernés. Les causes de cet échec trouvent leur origine dans l'accumulation d'erreurs graves telle que l'analyse erronée du mandat de la Minuar, le manque de ressources du dispositif militaire sur le terrain, le désengagement du Conseil de sécurité.

Le Secrétaire général, Koffi Anan, a exprimé des remords dès la publication du rapport. Il a également mis en place un comité spécial chargé de revoir chaque aspect des opérations de maintien de la paix. Le Conseil de sécurité vient, à son tour, de reconnaître sa responsabilité.

La rédaction de FORUM

Recurring Themes / Thèmes récurrent

Introduction:

National and international aspects of transitional justice

FRANCES MEADOWS

As the world awaits the inauguration of the first international criminal court to lend further substance to the emerging concept of universal jurisdiction, practice at national level in dealing with cases of gross violations of human rights continues to yield some striking contrasts. In fact it is, and will largely remain, at national level that solutions are most urgently needed and sought. We examine some of them in this issue.

While all of these developments have their underpinnings in international law, the differences in national approaches demonstrate the important role played by the specific societal context – in particular, the existence or otherwise of an adequate national legal infrastructure, the possibility of building on existing community-based mechanisms, and the general political environment. Critical to the success of any attempt to administer “transitional justice” at national level is the degree of willingness of the political leadership to uncover the past and permit it to be subjected to scrutiny, with all the uncomfortable consequences that entails. We see that, while there exists a variety of devices for securing de facto impunity, mechanisms for establishing accountability are much harder to sustain.

Inherent in many of the models for truth and reconciliation commissions is one element which sets them apart from an international criminal tribunal: the incentive for the perpetrators to participate – more or less willingly – in the process in the expectation of playing a legitimate role in the new – or newer – order. Amnesty is an obvious form of such an incentive. Here, Garth Meintjes and Juan Méndez offer an analysis of the uses and abuses of nationally-granted amnesties, their relationship with a state’s obligation in international law to ‘prosecute or extradite’, and their impact on the exercise of international justice, with a particular focus on the experience of the Americas.

Michelle Parlevliet offers a social scientist’s perspective on how two African states, Namibia and Sierra Leone, have sought to address their troubled past, how their contrasting approaches are largely determined by the prevailing political climate and how, in their turn, these approaches condition future attitudes to compliance with the law. Jeremy Sarkin examines the practice in Rwanda, where efforts have been made to draw on existing community structures in order to achieve reconciliation and resolution.

Reconciling Amnesties with Universal Jurisdiction

GARTH MEINTJES and JUAN E. MÉNDEZ¹

I. Introduction

Human rights bodies already have held that domestic amnesty laws may violate a state's international human rights obligations.² Nevertheless, since these laws often continue to be applied domestically, a novel legal situation arises when an amnesty beneficiary like General Augusto Pinochet steps outside of a domestic haven into the ambit of universal jurisdiction. What deference does the international community owe in such cases to the domestic arrangements made by the state in reckoning with the serious human rights violations and international crimes of its recent past?

For many years, the answer may well have been: "complete and absolute deference." Although international human rights law places limits on what states can do to their citizens, those restrictions generally were thought to operate to prevent present and perhaps future abuses. How a newly democratic government treated past human rights abuses and crimes was considered a matter largely within its own discretion. When that treatment included some forms of clemency and oblivion (invariably justified as being for the sake of national reconciliation), this was thought to be well within the attributes of sovereignty and of little concern to the international community.

Amnesty laws obtained a bad name, however, when they became shameful tools for perpetuating the impunity enjoyed by violators of human rights, rather than opportunities for reconciliation among warring parties. Typically, these laws not only prevented victims or their families from seeking justice, they also denied them the possibility of learning the truth about the circumstances in which they were victimized. In addition, by granting impunity to the former dictators and their

¹ Both authors are affiliated with the Center for Civil and Human Rights, Notre Dame Law School. We gratefully acknowledge the valuable research assistance provided by Francisco J. Cox, Carrie Di Santo and Michelle L. Mack. Garth Meintjes also acknowledges the financial support provided by the Helen Kellogg Institute for International Studies, University of Notre Dame, for field research in South Africa.

² See General Comment No. 20 (44) (art.7), U.N. Doc. CCPR/C21/REV.I/Add.3, ¶ 15 (Apr. 1992). See also Inter-American Commission on Human Rights, Report No. 24/92 (Argentina), OEA/ser. L/V/II. 82, Doc. 24 (Oct. 2, 1992); Inter-American Commission on Human Rights, Report No. 29/92 (Uruguay), OEA/ser. L/V/II. 82, Doc. 25 (Oct. 2, 1992); Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in El Salvador*, OEA/ser. L/V/II. 85, Doc. 28 (Feb. 11, 1994); and Inter-American Commission on Human Rights, Report No. 36/96 (Chile), OEA/ser. L/V/II. 95, Doc. 25 (Oct. 15, 1996).

accomplices, these laws often allowed them to retain positions from which they continued to influence the policies of the new regimes.

For political, moral and legal reasons, however, some newly democratic governments attempted to settle these accounts rather than leave them as permanent wounds in the fabric of society. In their attempts to restore justice, they were helped by principles embodied in the international law of human rights. But the reverse also has happened: international human rights law itself has been enriched by the practices and experiences of the various approaches that were attempted in dealing with the demands of truth and justice. As a result, it is now widely, perhaps universally, accepted that the abuses of the recent past require some affirmative responses on the part of the state in which they occurred.³ Moreover, these duties must be carried out regardless of whether the abuses were committed by the present or a former government.

While it is clear that no government is free to completely ignore its past, it is equally apparent that the approaches that governments thus far have adopted run the full gamut from complete impunity on the one hand to full truth and justice on the other. In virtually all cases, some element of clemency (for certain perpetrators or for certain deeds) is included in the balance of considerations. Although most efforts thus far have not met international expectations, it is unfair to color with the same degree of opprobrium a state that has made a good faith effort to confront its past, but yet has not imprisoned all perpetrators, as a state that simply has buried its past.

This point is well illustrated by the case of South Africa, as described below, where a more discerning evaluation is needed to assess the adequacy of the level of accountability that state has achieved. For in its efforts to comply with expectations of the international community, this case represents not only a rejection of broadly drawn amnesties, but also a suggestion that the criteria for granting amnesties

³ See Diane Orentlicher, "Addressing Gross Human Rights Abuses: Punishment and Victim Compensation", in *Human Rights: An Agenda for the New Century* (Louis Henkin and John L. Hargrove eds., 1995); and Naomi Roth-Arriaza, *Impunity and Human Rights in International Law* (Naomi Roth-Arriaza ed., 1995) (for detailed examinations of the state of international law in this subject). See also, "Question of the impunity of perpetrators of human rights violations (civil and political): Revised final report prepared by Mr. Joinet pursuant to subcommission decision" 1996/119, U.N. Subcommission on Prevention of Discrimination and Protection of Minorities, 49th Sess., U.N. Doc. E/CN.4/Sub.2/1997/20/Rev.1 (1997); and Theo Van Boven, UN Special Rapporteur on Restitution, Compensation and Reparations for Gross and Consistent Violations of Human Rights, "Study concerning the rights to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms", U.N. ESCOR, Comm'n on Hum. Rts., 45th Sess., Provisional Agenda Item 4, U.N. Doc E/CN.4/Sub.2/1993/8 (1993).

should be drawn narrowly from the general practice of states in applying the political offence exception to extradition.

At stake here is not simply a matter of moral condemnation, nor even of finding and declaring a technical violation of an international law norm. Instead, it is a judgment that may influence how the international community considers its own obligation to step in and prevent impunity for major crimes. This obligation, embodied in the principle known as “universal jurisdiction,” was largely speculative until a few years ago.⁴ However, the principle now has been reinforced by the creation of the *ad hoc* war crimes tribunals for the Former Yugoslavia and Rwanda, and reconfirmed by the adoption of the Rome Statute for an International Criminal Court (hereinafter Rome Statute and ICC respectively). In addition, the recent arrest of Pinochet in the United Kingdom, at the request of a Spanish judge, has given greater recognition to another form of universal jurisdiction: a state’s extra-territorial competence to prosecute international crimes committed in foreign countries.

The *Pinochet* case brings into focus the question with which we started this article. Among the many novel issues raised by this incident is the persistence with which the democratic government of Chile (in many ways counting itself as one of Pinochet’s victims) has attempted to have him returned to his home country as a free man. In spite of those diplomatic efforts, the Chilean government nevertheless tried to maintain some legal, political and moral distance between its position and that of Pinochet’s defense. For example, the Chilean government does not claim that the crimes attributed to Pinochet are not serious, or that they would not give rise to a legitimate exercise of universal jurisdiction. Rather, Chile asserts that the rest of the world should respect its efforts to deal with its tragic past, because it has already done, to the best of its ability, what the rule of law allows and what international law requires. The problem with this argument is that the crimes for which the former dictator is accused still are covered by a blanket amnesty that Pinochet himself imposed by decree in 1978. As a result, there has never been much hope for his victims to obtain legal redress in Chile for the abuses that they suffered.

⁴ The term “universal jurisdiction” increasingly is being used to refer to states’ jurisdiction to prosecute international crimes. See e.g., “International Council on Human Rights Policy”, *Hard Cases: Bringing Human Rights Violators to Justice Abroad – A Guide to Universal Jurisdiction* (1999). Some have argued that the term only should be used for foreign – but not international – crimes over which a state may have jurisdiction. See e.g., Ian Brownlie, *Principles of Public International Law* 305 (4th edition 1990). For the sake of convenience we use the term in the sense in which it is increasingly being understood, i.e., as the jurisdiction states have over international crimes.

In a more reasonable formulation of its argument, the Chilean government also claims that it should enjoy preference as the jurisdiction most suited to prosecute Pinochet's crimes and that it is both willing and able to do so. However, while it is true that Chilean courts are entertaining a number of criminal complaints in which Pinochet is named, few Chilean courts have thus far taken the steps necessary to tear down the walls of impunity protecting him. These barriers include the self-amnesty law, the assertion of military court jurisdiction, his status as former head of state and his immunity as self-appointed "senator-for-life." It may well be possible, still, to prosecute Pinochet in Chile; but as Home Secretary Jack Straw pointed out in ordering extradition to proceed, this case would be more persuasive if there had been a Chilean extradition request to compete with the Spanish, Belgian, Swiss and French ones.

Whether or not the Chilean position has any merit in terms of the international community's expectations is a question that requires further attention, if for no other reason than the probability that similar arguments will be raised again in other cases following the *Pinochet* precedent.⁵

II. The Scope of the Evolving Principles of Accountability in International Law

The principles of accountability include several that are already well established for certain specific aims of the international community, as well as others which are evolving through customary state practice or through the interpretation and application of more general state obligations. In terms of the former, it is important to note that there are already several treaties and resolutions containing explicit principles aimed at the suppression of international crimes. These principles generally apply to war crimes and crimes against humanity, and though they are by no means uniform in their scope and content, it is increasingly likely that they will be interpreted as giving rise to essentially the same obligations.

For example, the four Geneva Conventions of 1949 and Protocol I of 1977 require that all states search for and prosecute or extradite anyone responsible for "grave breaches" of international humanitarian law.⁶ In the past, this obligation

⁵ See "An African Pinochet", *N.Y. Times*, Feb. 11, 2000.

⁶ Cf. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31, art. 50; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85, art. 51; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, art. 130; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, art. 147; and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, arts. 11(4), 85 & 86.

may have been limited by a distinction between international and non-international armed conflicts that limited “grave breaches” to the former. However, in recent years, that distinction has been blurred and serious violations occurring in non-international armed conflict may now give rise to similar international obligations to prosecute.⁷

In contrast to war crimes, there still is no specific international treaty proscribing “crimes against humanity.” Nevertheless, at least since Nuremberg, crimes against humanity have been viewed as international crimes. This was confirmed by the establishment of the two *ad hoc* international criminal tribunals in 1993 and 1994 to prosecute, among others, crimes against humanity in the former Yugoslavia and Rwanda.⁸ Similarly, crimes against humanity also are among the core crimes included in the Rome Statute.⁹

In addition to their status as international crimes, crimes against humanity also give rise to a duty on the part of states to prosecute or extradite any suspected offenders. The UN General Assembly affirmed this in a 1971 resolution, which declared it contrary to the UN Charter and to generally recognized norms of international law for a state to refuse to cooperate in the arrest, extradition, trial and punishment of persons suspected of war crimes and crimes against humanity.¹⁰ The same body provided further guidance for the fulfillment of this duty in a 1973 resolution on Principles of International Cooperation in the Detention, Arrest, Extradition, and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity.¹¹ Moreover, given the effect of the principle of complementarity under

⁷ See *In re Dusko Tadic: Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction* (Prosecutor v. Tadic), 1995 I.C.T.Y. No. IT-94-1-AR72 (Oct. 2). See also Theodor Meron, “International Criminalization of Internal Atrocities”, 89 *Am. J. Int’l L.* 554 (1995).

⁸ See Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Doc. S/25704, annex (1993), reprinted in 32 *I.L.M.* 1192 (1993); Statute of the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda, SC Res. 955, UN SCOR, 49th Sess., Res. & Dec., UN Doc. S/INF/50 (1994), reprinted in 33 *I.L.M.* 1602 (1994).

⁹ See Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (July 17, 1998) art. 7, reprinted in 37 *I.L.M.* 999 (1998), available in Documents (visited Oct. 22, 1999) <<http://www.un.org/icc/>>.

¹⁰ G.A. Res. 2840 (XXVI) 26 U.N. GAOR Supp. (No. 29), at 88, U.N. Doc A/8429 (1971) cited in M. Cherif Bassiouni, “Search for Peace and Achieving Justice: The Need for Accountability”, 59 *Law and Contemp. Probs.* 5, 16 (1996).

¹¹ G.A. Res. 3074 (XXVIII) 28 U.N. GAOR Supp. (No. 30), at 78, U.N. Doc A/9030 (1973) cited in Bassiouni, *Id.* at 16.

the Rome Statute, crimes against humanity certainly will be viewed as requiring prosecution in future.

The Genocide Convention, which arguably deals with a special category of crimes against humanity, also is explicit in its obligations upon states either to prosecute or extradite suspected offenders.¹² Similarly, the Torture Convention imposes an explicit obligation on states either to prosecute or extradite anyone suspected of committing torture.¹³

In addition to the explicit obligations attached to international crimes by treaties, there are a number of “emerging principles” that are considered binding on states because they are authoritative interpretations of other more general treaty obligations or because they are supported by state practice. In essence, these norms require, with respect to certain human rights violations, that the state take the most effective steps available to restore a measure of justice for the victims and their families and to prevent future violations. A failure to do so may, in some cases, serve to undermine a state’s legitimacy and standing in the eyes of the international community, while in others it could result in the ICC or foreign courts stepping in to do justice where the responsible state has failed.

These principles apply to a relatively narrow class of human rights violations – those affecting rights so fundamental that they put in question the diligence with which a state is adhering to its obligation to respect and ensure all internationally guaranteed rights.¹⁴ These principles are further reinforced by the general obligation on states to provide effective remedies for all human rights violations.¹⁵ This is particularly the case where the most effective remedy available may be to investigate and prosecute a serious violation of the past.¹⁶ These emerging principles at least

¹² Convention on the Prevention and Punishment of the Crime of Genocide, GA Res. 260 A (III) of 9 December 1948 (Entry into force 12 January 1951) arts. I, V & VII.

¹³ See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., U.N. Doc. E/CN.4/1984/72 (1984), arts. 5 & 7 [hereinafter Torture Convention] (requiring state parties to assume jurisdiction over torture committed anywhere, and to prosecute or extradite suspected perpetrators within its jurisdiction).

¹⁴ See International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, arts. 3(1) & 3(2).

¹⁵ See *Id.* art. 3(3). See generally, Dinah Shelton, *Remedies in International Human Rights Law* (1999).

¹⁶ See *X & Y v. The Netherlands*, 91 Eur. Ct. H. R. (ser. A) (1985) Case No. 16/1983/72/110 (where the court held, in a case not involving widespread or systematic abuses, that criminalization and prosecution are still required in order to effectively ensure the victim’s right to privacy, where this offers the most effective protection against rape).

can be said to cover cases involving political murders, massacres, disappearances, torture and prolonged arbitrary detention.

Several obligations are imposed by these emerging principles of accountability on the state where the violations occurred. The abuses must be investigated and, where crimes are discovered, the perpetrators must be prosecuted and punished.¹⁷ To the extent these crimes were kept secret in any important regard, such as in the forced disappearance of persons, the state must also discover the truth and disclose it to families and to society.¹⁸ States must also provide redress to the victims and take measures to prevent repetition. Chief among the latter is the obligation to disqualify known perpetrators from the ranks of police and security forces, whether or not they also can be punished.¹⁹

It must be noted, however, that not all of these obligations are necessarily absolute. In fact, in some cases, international law only imposes obligations of means and not of results. In other words, what is required is a process conducted in good faith and “not as ritual destined to failure.”²⁰ On the other hand, these obligations are not options from which each government can choose; each one must be performed in good faith and to the best of the state’s abilities.²¹ Moreover, even in cases where the state has met its international obligations, a foreign court may legitimately invoke universal jurisdiction to prosecute certain crimes that were inadequately prosecuted at the domestic level. It is therefore important to establish benchmarks to determine when states have either satisfied or fallen short of the international

¹⁷ See *Velásquez Rodríguez v. Honduras*, Merits, Judgment of July 29, 1988, Inter-Am. Ct. H.R., Ser. C, No. 4 (1988).

¹⁸ Juan E. Méndez, “The Right to Truth”, in *Association Internationale de Droit Pénal, Nouvelles Etudes Pénales, No. 14, Reining in Impunity for International Crimes and Serious Violations of Fundamental Human Rights: Proceedings of the Siracusa Conference 255* (Christopher C. Joyner & M. Cherif Bassiouni, eds., 1998).

¹⁹ See U.N. Human Rights Committee, “Concluding Observations of the Human Rights Committee: El Salvador, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant” (Sept. 21, 1994) U.N. Doc. CCPR/C/79/Add.34; A/49/40, ¶¶ 209-224; U.N. Human Rights Committee, “Concluding observations of the Human Rights Committee: Argentina, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant” (April 5, 1995) U.N. Doc. CCPR/C/79/Add.46; A/50/40, ¶¶ 144-165; and U.N. Human Rights Committee, “Concluding Observations of the Human Rights Committee: Peru, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant” (July 25, 1996) U.N. Doc. CCPR/C/79/Add.67 (where it has consistently maintained that the continued service of known perpetrators in the security forces creates an “atmosphere of impunity.”).

²⁰ *Velásquez*, *supra* note 13.

²¹ See Juan E. Méndez, “Accountability for Past Abuses”, 19 *Hum. Rts. Q.*, 255 May 1997.

community's interest in accountability. Societies making serious efforts to come to terms with their past should be rewarded, whereas leaders – even those democratically elected – who prevent the truth from being known or justice from being done, deserve international condemnation.

III. Ensuring Compliance

The same principles that establish obligations for states to prosecute or extradite certain offenders also establish the right and the duty of the international community to intervene where local authorities are unwilling or unable to perform their duties. Thus far, slightly different indications have been given as to when the international community will step in to exercise its jurisdiction in the place of domestic courts. In the cases of the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR), the Security Council resolutions establishing the tribunals granted them primacy over any prosecution being brought before a domestic jurisdiction for crimes falling within the tribunals' jurisdictions. Thus, it was left entirely to the discretion of the international courts to decide when they should exercise their jurisdiction.

By comparison, the Rome Statute does not grant the ICC primary jurisdiction over domestic prosecutions, but instead provides only for complementary jurisdiction.²² Under this principle, domestic efforts to do justice – by *any* state having jurisdiction – are given preference over international efforts. It is clear, therefore, that the ICC's jurisdiction is not intended to replace that of domestic courts or even of foreign courts invoking universal jurisdiction. However, to prevent abuses of this provision, the ICC will not be limited to a purely formal enquiry into the validity of other jurisdictional claims. Instead, it also will consider whether a state claiming jurisdiction is willing and able to genuinely carry out an investigation or prosecution and, where a state already has done so and decided not to prosecute, whether the decision resulted from an unwillingness or inability to genuinely prosecute.²³

In defining the ICC's jurisdiction in relation to domestic prosecutions, the Rome Statute makes no mention of domestic amnesties. It is reasonable, therefore, to infer that the ICC's jurisdiction will not be barred by such measures, except possibly

²² See Rome Statute, *supra* note 9, art. 17.

²³ *Id.* It must be recalled that this clause was the subject of prolonged and substantive debate. Some delegates wanted to interpret the principle of "complementarity" as meaning that a simple expression of interest by a State should be enough to bar any ICC intervention. In the end, some states that voted in favor of the Rome Statute expressed their reluctance to do so over the fact that local decisions on amnesty and memory could be reviewable by the ICC.

where they are part of a process that substantively satisfies the expectations of the international community. Nevertheless, even if domestic amnesties cannot be used as a procedural bar to ICC jurisdiction, what those amnesties reveal about the state's willingness and ability to do justice may influence the discretion of the ICC in deciding whether or not to exercise its own jurisdiction. The same may be said of the discretion of any prosecutor acting under universal jurisdiction. Again, this raises the question of what deference the international community should show towards domestic efforts to deal with the past. Or to put it more positively, how can a state deal with its past in a way that satisfies the expectations of the international community?

IV. Considerations Influencing the Expectations of the International Community

We believe the inquiry into whether a state's treatment of its past satisfies the expectations of the international community should start with an examination of the general efforts towards accountability implemented at the national level. However, as illustrated by the Rome Statute's treatment of the issue of complementarity, it also will be necessary to examine the particularities of each individual case to determine whether the international community's expectations regarding individual accountability have been met.

There is no longer any question about the fact that dealing with the past by simply adopting a blanket amnesty is always unacceptable. By "blanket amnesty," we mean a law that applies across the board without requiring any application on the part of the beneficiary or even an initial inquiry into the facts to determine if they fit the law's scope of application.²⁴ The same may be said of a "self-amnesty" passed by a military dictatorship as a condition for leaving office.²⁵ A more difficult case arises where a "pseudo-amnesty" has been passed by a successor democratic

²⁴ In the 1980s, a Chilean judge (A. Cerda) devised a doctrine by which he would investigate the facts in order to reach a preliminary determination of whether Pinochet's self-amnesty law applied to them. His superiors in the judiciary prevented him from doing so and forced him into a humiliating retreat.

²⁵ The Inter-American Commission on Human Rights early on pronounced the international illegitimacy of self-amnesty laws (Speech of Amb. Oliver Jackman, President, before the First Committee of XIX Regular Meeting of the General Assembly of the OAS to present the Annual Report of the IACHR, November 1989, cited in Diane Orentlicher, "Addressing Gross Human Rights Abuses: Punishment and Victim Compensation" in *Human Rights: An Agenda for the Next Century*, L. Henkin and J.L. Hargrove, eds., ASIL, Washington, 1994). In some domestic jurisdictions they have been declared "null and void" and thus without any legal effect. See Juan E. Méndez, *Truth and Partial Justice in Argentina: An Update*, Americas Watch, (1991).

regime.²⁶ In such a case, it is sometimes difficult to ascertain whether the democratic government is operating under coercion or out of its own conscientious beliefs about what the country needs.

Nevertheless, in our view, states that have passed blanket amnesties and have resisted efforts to moderate their negative impact cannot expect any deference from the international community. Their laws may continue to have domestic effect, at least until such time as more enlightened leadership reviews them, but egregious violators who benefit from them can and must be prosecuted by future international tribunals or by courts of other countries exercising universal jurisdiction.

States that have sweeping amnesty laws but attempt other means of redressing the past and honoring the victims' plight present more complex cases. Chile is an example of such a case. Not only was its truth and reconciliation commission a good faith effort to establish the truth about the past, but the democratic government of President Aylwin also tried – albeit unsuccessfully because of the legacy of artificial majorities left by Pinochet – to repeal the self-amnesty laws. Nevertheless, the impunity enjoyed by the military in Chile has been declared inconsistent with the country's obligations under the American Convention on Human Rights.²⁷ Since the linchpin that protects criminals from prosecution is a blanket amnesty law, Chile cannot expect the rest of the international community to apply it as its own courts do.

An easier case is that of El Salvador, where the Truth Commission investigation, reluctantly agreed to by the right-wing ARENA government, was almost exclusively an effort by the United Nations. Unfortunately, its recommendations have not

²⁶ By “pseudo-amnesty” laws we mean statutes designed to have the same effect as amnesty laws, or something very close to it, while avoiding the damning name of amnesty. See e.g., Robert K. Goldman and Cynthia Brown, *Challenging Impunity: The Ley de Caducidad and the Referendum Campaign in Uruguay*, Americas Watch 5-9 (1989) (describing the impunity created by Uruguay's *Ley de Caducidad de la Pretension Punitiva del Estado*); and Juan E. Méndez, *Truth and Partial Justice in Argentina: An Update*, Americas Watch, (1991) (for a description of the effects of Argentina's *Punto Final* (Full Stop) and *Obediencia Debida* (Due Obediencia) laws which benefited whole categories of potential defendants). Similarly, consider the Salvadoran amnesty passed right after the UN Truth Commission issued its report on El Salvador; and the Peruvian law especially designed to exculpate the recently convicted members of the military covert operations team that killed ten students and a professor of the La Cantuta Teachers University (*Abusando de la Voluntad Popular* (editorial) in *IDEELE*, Lima, No. 77, July 1995). It almost goes without saying that, in each of these cases, military and other undue pressures on the legislative branch are not difficult to prove.

²⁷ See Inter-American Commission on Human Rights, Report No. 25/98 (Chile), OEA/Ser.L/V/II.98, Doc. 6 (Feb. 17, 1998).

been implemented. The government did separate from the ranks a number of officers named in a separate inquiry by a so-called Ad Hoc Commission, also a part of the peace process. But otherwise no effort has been made to achieve justice for the tens of thousands of victims of the cruel war of the 1980s. As a result, notorious criminals from that era should expect to be tried if apprehended abroad.

Argentina presents one of the most complex cases. Its efforts to deal with the past reflect a high degree of compliance with international standards; however, this initial compliance was later followed by backtracking by successive democratic governments acting under pressure. Argentina not only produced an exemplary truth report by a commission chaired by writer Ernesto Sabato, but also succeeded in bringing the principal perpetrators, including three former Presidents, to justice.²⁸ Only later were laws constituting a blanket amnesty adopted to obstruct further attempts at prosecution, while President Carlos S. Menem pardoned the remaining prisoners awaiting trial or serving sentences in 1989 and 1990. Nevertheless, over the years, Argentina has continued to insist on different forms of accountability. Several courts are still investigating events of the “dirty war” for purposes of disclosing the truth to the relatives of the victims and to society, and in some cases they are even compelling testimony.²⁹ In the 1990s, the Chief of the Army repeatedly condemned the “dirty war” tactics of his comrades-in-arms and apologized to the nation for them. The offense of stealing children from their “disappeared” mothers and giving them in irregular adoptions was deliberately exempted from the amnesties and, at long last, several cases are being prosecuted for these crimes. Thanks to these proceedings, General Jorge R. Videla and Admiral Emilio Massera are back in custody under house arrest, while a number of other defendants are in prison.

On another front, Judge Baltazar Garzón, the Spanish Judge who issued a warrant for Pinochet’s arrest, also has sent a request to Argentina for the extradition of about 100 officers (including Videla and Massera) for a variety of crimes he is investigating. President Menem refused to cooperate on the basis of Argentina’s sovereignty. To his credit, his successor, President Fernando De la Rúa has allowed the request to go to the Argentine courts. It is too early to tell how the request will be treated, but it presents an interesting opportunity to reflect on how such cases should be viewed by the international community. For present purposes, we will

²⁸ See Carlos Santiago Nino, *Radical Evil on Trial* (1996). See also Ronald Dworkin, Introduction to Comisión Nacional Sobre la Desaparición de Personas, *Nunca Mas: The Report of the Argentine National Commission on the Disappeared* (Writers and Scholars International trans., Farrar Strauss Giroux 1986)(1984).

²⁹ The Argentine Supreme Court fashioned this “right to truth” in a case called *Urteaga*, in 1998.

assume that Judge Garzón has sufficient evidence to support the extradition request and that it is otherwise formally and materially valid.

To the extent that the request includes cases involving child abduction, Argentina is entitled to refuse to comply, because it has a superior claim to jurisdiction and the cases are actively being prosecuted in good faith. A slightly harder case is that of the generals who were convicted and imprisoned for a period before being released under a pardon granted years later. They have a strong defense under the rule against double jeopardy (*non bis in idem*) which the international community almost certainly will honor. However, if Garzón has charged them with crimes that were not properly tried in Argentina, then the extradition could of course proceed for those charges. Finally, there does not appear to be any reason why the international community would not support the extradition of those officers who were shielded from justice by the Full Stop or Due Obedience laws, which the Inter-American Commission found to be inconsistent with Argentina's human rights obligations.³⁰

The cases of Guatemala and South Africa are much harder. To begin with, the amnesty laws in each country were not the usual blanket amnesties that have been witnessed in so many other countries. In fact, the Guatemalan law was the first of the Latin American laws that tried to track the international law exceptions regarding amnesty, even though some aspects of it are still controversial.³¹ In addition, the UN-brokered peace process yielded an exemplary plan to deal with the past. In fact, the resulting report of the Commission on Historical Clarification has surprised most skeptical observers.³² Nevertheless, the fact that the amnesty law avoids the pitfalls of a blanket amnesty is no guarantee that justice will prevail. The mechanisms of *de facto* impunity are still very much at work in Guatemala, as demonstrated by the botched investigation of the murder of Monsignor Juan Gerardi in 1998 (well after the end of the conflict).³³ Unless significant progress is made in the future, it

³⁰ See Inter-American Commission on Human Rights, Report No. 24/92 (Argentina), OEA/ser. L/V/II. 82, Doc. 24 (Oct. 2, 1992).

³¹ See Douglas Cassel, "Accountability for International Crime and Serious Violations of Fundamental Rights: Lessons from the Americas: Guidelines for the International Response to Amnesties for Atrocities", 59 *Law & Contemp. Probs.* 197 (1996).

³² See *Commission for Historical Clarification, Guatemala: Memory of Silence* (February 24, 1999). The Commission was part of the UN-sponsored peace process: see Agreement on the Establishment of the Commission for the Historical Clarification of Human Rights Violations and Incidents of Violence that Have Caused Suffering to the Guatemalan Population, UN GASC (48th session), UN Doc A/48/954, Annex II, 23 June 1994. See also Guatemala: Nunca Mas, Oficina de Derechos Humanos del Arzobispado de Guatemala, Informe Proyecto Interdiocesano de Recuperacion de la Memoria Historica (1998).

³³ Francisco Goldman, "Murder Comes to the Bishop", *The New Yorker*, March 15, 1999.

is likely that the international community will support international or foreign prosecutions of those responsible for the most serious abuses.

V. The Case of South Africa

The South African case is a significant step in the evolution of domestic efforts to deal with the past in a manner that satisfies the requirements of international law. In part this is because South Africa had the benefit of drawing on the experiences of other states.³⁴ As a result, the innovative approach adopted avoids the pitfalls of a general amnesia about the past and instead reiterates the fundamental importance of truth telling as the foundation for a stable democracy. What makes this approach so unique, is its attempt to combine the truth telling with the selective granting of individual amnesties in a manner that meets the international community's expectations of accountability.³⁵

In examining the South African case, it should be noted at the outset that members of the former government's security forces insisted upon a promise of amnesty as a condition for allowing the transition to go forward. This could easily have led to the adoption of a general amnesty giving complete impunity to all sides involved in the conflict. If it had, the amnesty process would have differed little from the practices of so many states before it and contributed nothing towards the creation of a climate of accountability. Yet to its considerable credit, the new African

³⁴ See generally, Neil J. Kritz (ed.), *Transitional Justice* (1995) (for a collection of literature and documents dealing with various approaches to transitional justice); A. James McAdams (ed.), *Transitional Justice and the Rule of Law in New Democracies* (1997) (for a comparison of several approaches to transitional justice).

³⁵ See John Dugard, "Reconciliation And Justice: The South African Experience", 8 *Transnat'l L. & Contemp. Probs.* 277, 301 Fall, 1998 (noting that the international community has given its full support for the South African truth and reconciliation process). See also "Explanatory Memorandum To The Parliamentary Bill", available in Legal Background to the TRC (visited Feb. 10, 2000) <<http://www.truth.org.za/>>, where the following explicit acknowledgement is made of South African international obligations:

International experience shows that, if we are to achieve unity and morally acceptable reconciliation, it is necessary that the truth about gross violations of human rights must be:—

- established by an official investigation unit using fair procedures;
- fully and unreservedly acknowledged by the perpetrators;
- made known to the public, together with the identity of the planners, perpetrators and victims.

International human rights norms demand that any newly established government should deal with past gross violations of human rights in a way that ensures that the above mentioned requirements are met.

National Congress-led government chose instead to regard its promise not as a commitment to bury the past, but as an obligation to reveal the truth about the past in order to provide a foundation for possible reconciliation.³⁶ To do this, it sought to devise a process that would demonstrate the new government's legitimacy and be compatible with South Africa's international obligations.

Towards this end, the South African Parliament adopted the Promotion of National Unity and Reconciliation Act 34 of 1995 (hereinafter Act) to create the Truth and Reconciliation Commission. Its mandate was to promote unity and reconciliation by establishing as complete a picture as possible of the causes, nature, and extent of the gross violations of human rights committed during the apartheid era.³⁷ In carrying out its mandate, the Truth and Reconciliation Commission was required to consider both the perspectives of the victims and the motives and perspectives of the perpetrators.³⁸ In doing so, it was also required to facilitate the granting of amnesty to persons who made full disclosures of all the relevant facts relating to acts associated with a political objective.³⁹

³⁶ Dullah Omar, Minister of Justice, in his introduction of the decision to establish the Truth and Reconciliation Commission stated:

There is a commitment to break with the past, to heal the wounds of the past, to forgive but not to forget and to build a future based on respect for human rights. This new reality in the human rights situation in South Africa places a great responsibility upon all of us. Human rights is (sic) not a gift handed down as a favour by government or state to loyal citizens. It is the right of every citizen. Part of our joint responsibility is to help illuminate the way, chart the road forward and provide South Africa with beacons or guidelines based on international experiences as we traverse the transition. . . . [A truth] commission is a necessary exercise to enable South Africans to come to terms with their past on a morally accepted basis and to advance the cause of reconciliation.

"Introduction by the Minister of Justice, Mr Dullah Omar", available in Legal Background to the TRC (visited Feb. 10, 2000) <<http://www.truth.org.za/>>.

³⁷ South Africa undertook to deal with its past dating back to March 1, 1960, twenty days before the Sharpsville massacre and a year before it obtained independence from Britain. The question of whether international law requires that South Africa delve deeper into its past will not be addressed here. In any event, this is probably an appropriate temporal restriction, since this is the period during which the worst acts of violence and repression took place, see Allister Sparks, *The Mind of South Africa* 242 (1990). Furthermore, it is unlikely that the question of international accountability for acts which occurred before 1960 will ever arise, although the practice of apartheid, which was later condemned by the UN General Assembly as a crime against humanity, was already being implemented well before that date.

³⁸ Promotion of National Unity and Reconciliation Act 34 of 1995, Section 3(1)(a) (S. Afr.).

³⁹ *Id.* Section 3(1)(b).

VI. General Considerations About the South African Approach

The South African Truth and Reconciliation Commission produced a comprehensive five-volume report documenting the gross violations of human rights committed by all sides during the apartheid era. The report contains the findings of the Commission's own investigations as well as testimony provided by a vast number of victims and witnesses. Unlike many previous truth commissions in other states, the South African Commission did not need to rely solely on the participation of victims and non-governmental groups. Instead, the Commission also had the power to subpoena witnesses and to grant amnesty to those who met the Act's criteria and made full disclosures of their crimes. The Commission has also issued a number of recommendations aimed at victims' rehabilitation and the healing of society.

From the point of view of accountability, South Africa's individualized and conditional approach towards the granting of amnesty is highly commendable in that it avoids the dangers of a blanket amnesty. Instead, it more closely resembles a process of pardoning rather than of oblivion. Moreover, to the extent that amnesty applicants are required expressly to acknowledge both the criminality of their actions and their culpability, it should be seen as tending to uphold rather than deny the victims' right to justice.⁴⁰

Unfortunately, the South African amnesty approach also had the negative consequence of granting immunity to civil liability. Ostensibly, this was done to prevent victims from basing their claims for civil damages upon the confessions elicited by the Truth Commission. This part of the process is a violation of the victims' right to seek redress for abuses of their internationally guaranteed human rights. Such abuses are wrongs against the victims rather than the state and, as such, can only be forgiven by the victims themselves. The state may promise to indemnify the amnesty recipients if it believes that it is in the public interest to do so, but it may not simply abrogate the victims' right to seek redress.⁴¹

⁴⁰ It should be noted that, while international law gives victims the right to demand that those who violate their human rights be held accountable, it does not give them a right to insist on a particular form or severity of punishment. This does not mean that punishment is irrelevant to the pursuit of justice or the rule of law, but only that decisions regarding punishment must be based on the interests of society as a whole and not exclusively on the rights of the victims. Of course, if decisions regarding punishment are not made judiciously and in a manner which maintains the deterrent effect of national and international prohibitions, then they violate the state's duty to "respect and ensure human rights" and do not merit the respect of the international community.

⁴¹ The Truth and Reconciliation Act did ameliorate the injustice done to the victims by creating a Reparation and Rehabilitation Committee to grant compensation to those victims who filed requests with the Commission.

This serious flaw in the South African truth and reconciliation process notwithstanding, the approach did hold the promise of being able to uncover the full scope of the widespread and systematic crimes of both the former government and its opponents. But its potential for doing so depended on the willingness of the rank and file to implicate those higher up the chain of command. If it had worked as had been hoped, it may well have demonstrated that the apartheid regime not only was filled with criminals, but that it was by its very nature also a criminal regime.⁴² Unfortunately, the results thus far appear to have fallen short of this intended goal.

One major reason for the apparent underachievement is that the threat of prosecution was not sufficiently credible. This was due to several factors that were outside the Truth and Reconciliation Commission's control. First and most significantly, an incompetent, possibly even halfhearted, effort to prosecute the former Minister of Defence by the Attorney General of Natal, even before the Commission started its work, showed the former government that they had little to fear from a judiciary still dominated by the old guard. The trial of General Magnus Malan and others for the killing of thirteen innocent civilians under the mistaken belief that they were members of an alleged terrorist group was so poorly prosecuted that the trial judge was compelled to severely admonish the prosecutor.

Second, in an effort to allay white fears of a witch hunt, the new government emphasized the rhetoric of reconciliation so unremittingly that it left itself little room for making credible threats of prosecution. It is hard to fault someone for being too forgiving, yet there should be little doubt that President Mandela's efforts to create a climate of reconciliation did not help the process of trading amnesties for truth.

Third, the behavior of some African National Congress (ANC) officials reflected their own discomfort at delving too deeply into the past, especially regarding the allegations of torture in training camps.⁴³ By not showing sufficient willingness to face their own wrongs, these ANC members signaled to others their eagerness to close the book on the past and to get on with the future. Under these circumstances it is hardly surprising that many of those responsible for gross human rights violations did not believe that the government would have the stomach for a drawn out series of prosecutions.

⁴² Cf. Tina Rosenberg, *The Haunted Land: Facing Europe's Ghosts After Communism* 397-407 (1996) (for a description of the differences between regimes of criminals and criminal regimes).

⁴³ See generally Eddie Koch, "Go to Truth Commission, ANC Tells Members", *Weekly Mail*, March 15, 1996.

Perhaps the most important reason for the Truth and Reconciliation Commission's underachievement in promoting truth and reconciliation is the steadfast refusal by most of the former government officials to show any degree of sincere remorse. No one who followed the proceedings closely could have failed to notice the complete lack of symmetry between the forgiveness urged by President Mandela and the rather sparse number of matter-of-fact acknowledgments from members of the former government. Moreover, not only did former Presidents Botha and De Klerk refuse to seek amnesty or forgiveness, they also actively sought to undermine and discredit the entire truth and reconciliation process.

Although these outside constraints have had a significant impact on the Truth and Reconciliation Commission's efforts, it would be a mistake to pass any final judgements on the success or failure of the South African approach. Not only would this be premature, since the work of the Commission has not yet ended with the issuing of its report, but it also would be unduly speculative, since much will depend on how the new government will build upon the foundations laid. In particular, the integrity of the process will depend on how firm the new government remains in its commitment to prosecute those who did not apply for amnesty. Justice is not necessarily incompatible with acts of forgiveness or pardon, but it can never be reconciled with a state of impunity.

VII. Specific Considerations Concerning Individual Accountability in the South African Context

The work of the Truth and Reconciliation Commission's Amnesty Committee is not yet complete, but the indications thus far are that it has not led to widespread impunity. Indeed, the preliminary numbers suggest something very different. Of the approximately 6850 applications that were received, roughly 80% have already been denied or withdrawn.⁴⁴ Admittedly, about half of these applications came from perpetrators who were already serving prison sentences for crimes that were largely unrelated to the political conflict. By comparison, only about one-tenth of the total number of applicants have thus far received amnesty.⁴⁵ Moreover, of these, more than three-fifths were members of the ANC or Pan African Congress (PAC) and not functionaries or agents of the apartheid-state.⁴⁶

As these numbers indicate, the main beneficiaries of the amnesty process do not appear to have been the generals and apartheid leadership who had insisted upon it

⁴⁴ "TRC: Current Status and Statistics", TRC Mailing List: Message #53, December 10, 1999, available in ListBot Archives (visited January 27, 2000) <<http://www.truth.org.za/>>.

⁴⁵ *Id.*

⁴⁶ *Id.*

as a condition for allowing the transition to go forward. In fact, most of them never even bothered to apply. Thus far, only one member of the National Party, Adriaan Vlok, the former minister of law and order, has received amnesty together with 124 members of the security forces.⁴⁷ Interestingly, of this number, most appear to have been police and security branch officers, not members of the military. Why the military generally chose not to avail themselves of the opportunity to seek immunity remains to be explained. One reason may be the fact that most of the soldiers were conscripts and not career soldiers inculcated into a repressive state apparatus. As such, they may have been responsible for less of the state sponsored violence. They may also feel that all that they did was fight a war against the threat of insurgents, and thus have nothing to apologize for. Or perhaps they are simply confident that most of their crimes will remain buried in the neighboring states where much of the conflict occurred.

While it is promising that the truth and reconciliation process does not appear to have led to widespread impunity, this alone is not enough to determine whether South Africa's approach complies with the principles of accountability and the expectations of the international community. Instead, it is necessary, at least as far as individual accountability created by universal jurisdiction is concerned, to look closely at the criteria by which the amnesties were granted and the manner in which the criteria were applied in each case.

The criteria used appear to have been developed from a combination of the political offense exception to extradition and quasi just war principles.⁴⁸ As set forth in Article 20 of the Truth and Reconciliation Act, the two main criteria are: 1) that the criminal act be associated with a political objective committed in the course of the conflicts of the past; and 2) that the applicant make a full disclosure of all relevant facts. In defining the term "political objective," the Act limits its application to persons who acted on behalf of the state or known political organizations or groups. Further, in deciding whether a particular act qualifies as an act associated with a political objective, the Amnesty Committee is required to consider a number of additional characteristics, the most important of which is the proportionality of the crime to the political objective being pursued.⁴⁹

⁴⁷ *Id.*

⁴⁸ Promotion Of National Unity And Reconciliation Act, Act No. 34 of 1995, art. 20 (S. Afr.)

⁴⁹ *See Id.* art. 20 (3): Whether a particular act, omission or offence contemplated in subsection (2) is an act associated with a political objective, shall be decided with reference to the following criteria:

(a) The motive of the person who committed the act, omission or offence;

The decision to base the criteria on the political offence exception to extradition is interesting in that it largely coincides with the international community's expectations of accountability. If states generally do not believe that a certain kind of offence merits the extradition of a suspect from one state to another for trial and punishment, then granting amnesty for those who have committed such crimes likewise may not offend the expectations of the international community. Unfortunately, the Act does not also explicitly include any of the important exceptions that states have developed, preventing the political offence exception from applying to war crimes and crimes against humanity. However, depending on the interpretation given to it by the Amnesty Committee, it is possible that the proportionality requirement could still serve to secure the interests of the international community in suppressing such crimes. Indeed, as one of the central principles of international humanitarian law and just war theory, proportionality is one of the most widely recognized and supported restrictions on the use of violence, and one that the international community would expect South Africa to follow.

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- (b) the context in which the act, omission or offence took place, and in particular whether the act, omission or offence was committed in the course of or as part of a political uprising, disturbance or event, or in reaction thereto;
 - (c) the legal and factual nature of the act, omission or offence, including the gravity of the act, omission or offence;
 - (d) the object or objective of the act, omission or offence, and in particular whether the act, omission or offence was primarily directed at a political opponent or State property or personnel or against private property or individuals;
 - (e) whether the act, omission or offence was committed in the execution of an order of, or on behalf of, or with the approval of, the organisation, institution, liberation movement or body of which the person who committed the act was a member, an agent or a supporter; and
 - (f) the relationship between the act, omission or offence and the political objective pursued, and in particular the directness and proximity of the relationship and the proportionality of the act, omission or offence to the objective pursued, but *does not include* any act, omission or offence committed by any person referred to in subsection (2) who acted –
 - (i) for personal gain: Provided that an act, omission or offence by any person who acted and received money or anything of value as an informer of the State or a former state, political organisation or liberation movement, shall not be excluded only on the grounds of that person having received money or anything of value for his or her information; or
 - (ii) out of personal malice, ill-will or spite, directed against the victim of the acts committed.

A detailed assessment of whether South Africa's amnesty criteria have been interpreted and applied in a manner that satisfies the international community's principles of accountability is beyond the scope of this paper. However, as the following examples illustrate, whether a particular amnesty merits the respect of the international community can only be determined by an examination of the facts and decisions in each case. In some cases the decisions reveal a careful and strict application of the criteria, while in others the results appear far more questionable.

For example, in the case of Steve Biko, a prominent black consciousness leader, who died in a police interrogation room, the Committee refused to grant amnesty to five police officers who confessed to having caused his death. In their testimony the police indicated that they only used force to subdue Biko when he became combative and that they did not intentionally assault or kill him. With regard to the application of one of the officers, Gideon Johannes Niewoudt, the Amnesty Committee found that he had failed to confess to a crime and, therefore, that no amnesty could be granted.⁵⁰ Similarly, with regard to the applications by the four other officers, the Committee found that they had failed to disclose a crime and that the allegedly "unintentional" killing could not have been actuated by a political motive. Moreover, even without these findings, the Committee was "satisfied that the killing of Biko was wholly disproportionate to any possible objective pursued by the applicants."⁵¹

Had the applicants received amnesty in this case, it is unlikely that the decision would have met the expectations of the international community. The death of Biko was quite possibly the result of torture and, if so, it was clearly an international crime subject to universal jurisdiction.

A more difficult case is the assassination of Chris Hani, a well-known and popular leader in the ANC and South African Communist Party. Here the Committee found that, although Janusz J. Walus and Clive J. Derby-Lewis were members of the Conservative Party (CP) and the latter a former Member of Parliament, they were not acting on the orders of the CP when they conspired and shot Mr. Hani.⁵²

⁵⁰ "Application In Terms Of Section 18 Of The Promotion Of National Unity And Reconciliation Act, No. 34 Of 1995, Gideon Johannes Niewoudt Applicant", *Truth and Reconciliation Commission, Amnesty Committee AC/98/0114* (S. Afr.), available in Decisions (visited February 23, 2000) <<http://www.truth.org.za/>>.

⁵¹ "Application In Terms Of Section 18 Of The Promotion Of National Unity And Reconciliation Act, No. 34 Of 1995, Harold Snyman et al. Applicants", *Truth and Reconciliation Commission, Amnesty Committee AC/99/0020* (S. Afr.), available in Decisions (visited February 23, 2000) <<http://www.truth.org.za/>>.

⁵² "Application In Terms Of Section 18 Of The Promotion Of National Unity And Reconciliation Act, No. 34 Of 1995, Janusz J. Walus and Clive J. Derby-Lewis Applicants",

Because they were not acting on behalf of a known political group or party when committing their crime, they were not eligible for amnesty under the Act. Had the decision been different in this case, it would have been difficult from an international humanitarian law perspective to determine whether this was simply a legitimate act of war or a war crime. On the one hand, Chris Hani was a leader of a movement openly engaged in an armed struggle against the apartheid regime and, on the other, it was common knowledge that the armed struggle had been suspended in favor of a negotiated settlement of the conflict.

The most troubling case, however, is that of the St. James Church massacre in which 11 people were killed and 58 wounded. In this case the Committee granted amnesty to three PAC members, Gcinikhaya Makoma, Bassie Mzukisi Mkhumbuzi and Tobela Mlambisi, who were responsible for the attack. According to their testimony, the applicants were acting on the orders of APLA, the military wing of the PAC, when they threw a hand grenade into St. James Church and fired indiscriminately at the churchgoers inside. Notwithstanding the objections of some of the victims' relatives, the Committee found that the attack was not disproportionate to the PAC's political objectives. According to APLA's submission, they saw "every white South African as a pillar of apartheid protecting white South Africa from the Black danger," and believed that the government was engaged "in the process of arming the entire White South African Society. This militarisation, therefore, of necessity made every white citizen a member of the security establishment."⁵³

This case does not appear to merit the respect of the international community. As non-combatants, the churchgoers in this case clearly fall within the category of protected persons recognized by international humanitarian law. While there may certainly have been extenuating circumstances in this case that mitigate the assailants' blameworthiness, it is doubtful whether the result is sufficient to absolve the assailants of their accountability under international law.

As these contrasting decisions demonstrate, it is possible for a state to make good faith efforts to deal with the crimes of the past in a manner that generally meets the expectations of the international community. However, even in such cases, considerations of policy or circumstance may still produce unacceptable results in some individual cases. As a result, the international community will need to examine

Truth and Reconciliation Commission, Amnesty Committee AC/99/0172 (S. Afr.), available in Decisions (visited February 23, 2000) <<http://www.truth.org.za/>>.

⁵³ "Application In Terms Of Section 18 Of The Promotion Of National Unity And Reconciliation Act, No. 34 Of 1995", Gcinikhaya Makoma *et al. Applicants, Truth and Reconciliation Commission, Amnesty Committee AC/98/0018* (S. Afr.), available in Decisions (visited February 23, 2000) <<http://www.truth.org.za/>>.

each case individually to determine whether an international crime has occurred and whether universal jurisdiction should be exercised to bring those responsible to justice.

VIII. Conclusion

Legal developments and state practice over the past fifty years have resulted in the evolution of principles of accountability reflecting the expectations of the international community and the requirements of international law. As a result, states are no longer unfettered in their decisions about how to deal with the gross violations of the past. Not only must states investigate these abuses, they must also undertake reforms and adopt measures to prevent their repetition and provide redress to the victims. In addition they must also prosecute those responsible for serious abuses as this is generally the most effective method to deter similar abuses in the future. Moreover, where these abuses amount to international crimes, they are now subject to universal jurisdiction, which requires that states either prosecute or extradite the suspected perpetrators.

To the extent that amnesty laws are adopted to deal with the crimes of the past, states can no longer expect unqualified deference on the part of the international community towards their domestic efforts. In particular, the international community will not respect a self-amnesty or blanket amnesty, or any other measure with the same effect. Instead, states wishing to adopt amnesty laws need to do so on an individualized and conditional basis. In this regard, international law does not yet offer explicit guidance as to the criteria to be used. However, as the South African precedent demonstrates, guidance can readily be found in state practice applying the political offence exception to extradition. Insofar as state practice now includes restrictions on the application of the political offence exception, states must be sure to incorporate these into their amnesty criteria. This may be done by adopting specific criteria that exclude crimes against humanity and war crimes from the ambit of the political offence exception, or by adopting a general requirement of proportionality, as done in the case of South Africa.

In the end, whether the international community will respect the amnesties a state has granted in dealing with serious human rights abuses of the past will depend on how carefully the selection criteria were defined and applied. Furthermore, as demonstrated by the adoption of the Rome Statute, it is the international community alone that will decide whether or not to respect a state's domestic efforts at accountability.

Truth Commissions in Africa: the Non-Case of Namibia and the Emerging Case of Sierra Leone¹

MICHELLE PARLEVLIET²

In February of this year, Africa acquired its own 'Pinochet' when a Senegalese court indicted the former dictator of Chad, Hisssein Habré for acts of torture committed during his regime. It was the first time ever that the courts of another country indicted a former African head of state. In the same month, the Supreme Court of Zimbabwe ruled that President Mugabe could be sued in his official capacity for failing to publish the reports of two commissions of inquiry into the deaths of government opponents in the Matabeleland region in the 1980s following clashes with the state security forces. Hitherto, the government had repressed the results of these inquiries, claiming their publication could spark violence between different political constituencies. Also in 1999, a number of developments happened on the African continent that indicated a concern with past human rights violations. In June, President Obasanjo of Nigeria established a commission to investigate human rights abuses that had occurred in his country between January 1966 and his assumption of power in May 1999.³ In July, the civil war in Sierra Leone ended with the conclusion of the Lomé Peace Agreement that provided for, amongst other things, the investigation of atrocities committed during the war.

These developments, though small, form some counterweight to the human rights violations that continue to be committed in the various armed conflicts that pervade the continent, be it in Burundi, Angola, the Democratic Republic of Congo, Western Sahara, or Sudan. As such, these developments correspond to the international trend towards addressing issues of accountability and acknowledgement

¹ Obtaining the information for this article has been a challenge, and the author would like to thank Phil Ya Nangoloh, Zen Mnakapa, Avril McDonald, Larissa Fast, John Saul, Guy Lamb, Melron Nicol-Wilson, Peter Andersen, and Jeremy Sarkin for their assistance and comments in this regard. The understanding of the editors of *FORUM*, Frances Meadows in particular, has been highly appreciated.

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³ *Tribunals of Inquiry Act, Amendment of Instrument Constituting a Judicial Commission of Inquiry for the Investigation of Human Rights Violations* (Cap 447, LFN; 4 Oct. 1999); *Instrument constituting a Panel for the Investigation of Human Rights Violations Under the Tribunals of Inquiry Act* (Cap 447; 4 June 1999).

that arise when countries emerge from a period of violence and repression involving gross human rights violations. Since the mid-1970s, a growing number of states around the world have tried to address atrocities that were committed in their recent history, whether during authoritarian rule or in the course of an armed conflict. The mechanism increasingly used to settle past accounts is the investigation and recording of past abuses by so-called truth commissions. A substantial amount of research and writing has focused on such commissions and the quest for justice in transitional situations.⁴

Despite the number of commissions established on the continent, the African experience remains relatively understudied as compared to the wealth of material available on the Latin American cases.⁵ Only with the establishment of the South African Truth and Reconciliation Commission (TRC) did attention turn to Africa, mostly because of the unique features of the TRC and the appeal of the South African 'miracle' transition. The lack of analysis of African commissions may be attributed in part to a general dearth of information and to the low international profile of the countries concerned. Nevertheless, a closer look at truth commissions in Africa is warranted. Not only will it contribute to our understanding of truth commissions in general; it may also provide us with insight as to whether any specific conditions prevail in Africa pertaining to truth commissions. The latter is especially relevant in light of recent developments, since a number of new commissions are being established or contemplated: aside from Nigeria and Sierra Leone, Guinea Bissau has decided to establish a truth commission and commissions are being considered for Burundi, Rwanda, and Malawi.

This article consists of two parts, which examine two contrasting cases in Africa: Namibia and Sierra Leone. While vastly different, both cases are thought provoking. Namibia is seldom considered in the field of transitional justice, probably because it has never had a mechanism to deal with the abuses committed prior to its transition to democracy in 1990. This, however, is what makes Namibia fascinating. A clear case can be made that the lack of accountability has had lasting repercussions for the Namibian democracy, the relationship between state and citizens, and the

⁴ Priscilla B. Hayner, "Fifteen Truth Commissions – 1974 to 1994: A Comparative Study", *Human Rights Quarterly*, Vol. 16 (1994), p. 597-655; James McAdams (ed.), *Transitional Justice and the Rule of Law in New Democracies* (Un. of Notre Dame Press, Notre Dame: 1997); Neil J. Kritz (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes, Vol. I-III* (United States Institute of Peace: Washington DC: 1995); Naomi Roht-Arriaza (ed.), *Impunity and Human Rights in International Law and Practice* (Oxford UP, Oxford: 1995).

⁵ Truth commissions have been established in Uganda (twice), Zimbabwe, Chad, and South Africa.

conduct of the state security forces. As such, it supports the claim that a violent past, if not dealt with, will impact negatively on a society following a transition – a claim commonly made in the context of transitional justice, yet rarely substantiated with real examples. Aside from Zimbabwe, few other cases exist that indicate how a failure to account for past violations may have serious consequences for a society in transition. The present article examines how the call for accountability surfaced in Namibia, to what it related, how it was dealt with, and what its broader significance is for the Namibian political situation. Sierra Leone, on the other hand, is the most recent example of a society trying to come to terms with a legacy of atrocities in the wake of mass civil strife. As such, it sheds light on the particular exigencies of settling past accounts in such a situation and highlights a number of factors that may relate specifically to Africa. The discussion will focus on the developments towards establishing a truth commission for Sierra Leone and the legislation adopted to that end last February. The conclusion will suggest some conditions that may be particular to Africa and may need to be taken into account when pursuing truth, justice, and reconciliation in the African context. The scope and length of this article precludes a comprehensive in-depth analysis of all the dynamics and complexities at play – both in the past and the present.

Namibia: past atrocities, current politics

As with neighbouring South Africa, Namibia faced questions of accountability and acknowledgement when white apartheid minority rule finally gave way to a black democratic government in the early 1990s.⁶ Having experienced decades of gross human rights violations, both countries had to consider how to deal with past abuses and those responsible. Whereas the new South African government has made a conscious effort to uncover the past, the Namibian political leadership made a conscious decision to let the past lie dormant. Amnesty was granted for politically motivated crimes, and the Namibian government embarked on a policy of reconciliation that rejected any analysis of the past. Over time, this policy has encountered staunch resistance, to the point that its effect is far from reconciliatory. Moreover, the failure to account for past abuses has had serious consequences for the organisation of society in Namibia and the character of Namibian democracy, especially regarding the relations between state and society, the leadership's attitude towards criticism and dissent, and the use of force by state security forces.

⁶ In 1990, Namibia became independent from South Africa following internationally supervised elections in 1989, which had already been called for by the UN in 1978 (Security Council Resolution 435). Between 1920 and 1971, South Africa had had a mandate for (then) South West Africa under the League of Nations.

Ironically, the main thrust of the demands in Namibia for a more satisfactory settling of accounts has been directed at the crimes committed by Namibia's main liberation movement, Swapo (now its ruling party) while in exile, rather than at the atrocities by the former apartheid regime – even though the latter were more serious and extensive in nature and scope. Most of the violations by Swapo occurred in the beginning of the 1980s in Angola, during a severe internal crisis within Swapo known as the 'spy drama'. Influenced by fear of South African infiltration and a range of other factors, nearly a thousand Swapo members in exile, suspected of being spies, were arrested, tortured and detained in covered pits in the ground, and were forced to confess to being 'sent by South Africa'. Many remained in these dungeons for years, several died there, and others were killed by members of Swapo's internal security organ which carried out the arrests. The spy drama became self-sustaining, generating terror and paranoia within Swapo that led to more arrests. The violent cycle was only broken in 1989 when negotiations with the South African regime finally led to elections that engendered Namibia's independence.⁷

The crisis of the 1980s was itself deeply rooted in two earlier crises that occurred in the 1960s and 1970s. These crises centred around questions of accountability, democracy, and transparency within the liberation movement in exile. At both times, discontent had grown amongst the membership about the attitude and activities of the leadership that were considered undemocratic and repressive of any involvement from below. Swapo members demanded that the leadership be more accountable, that it operate on a clearer constitutional base, and that allegations of abuses of authority be investigated. The leadership retaliated harshly on both occasions, having its members arrested immediately without any discussion about the concerns raised. In the 1960s, less than 20 people were imprisoned, whereas in the 1970s, up to 2000 combatants were detained under harsh conditions for nearly two years unknown to the outside world. Following the 1976 crisis, moreover, the Swapo Central Committee adopted a range of 'Revolutionary Decrees' which identified 'crimes against the Namibian's People Revolution' and related punishments. The 'crimes' concerned were any acts that the leadership could deem to be aimed at obstructing the liberation struggle of the Namibian people.

⁷ These violations have been documented in various texts. See John Saul, "SWAPO: The Politics of Exile", in Colin Leys and John Saul (eds.), *Namibia's Liberation Struggle: the Two-Edged Sword* (Peter Currey, London: 1995) (p. 40-65); Lauren Dobell, "Review Article. Silence in Context: Truth and/or Reconciliation in Namibia", *Journal of Southern African Studies*, Vol. 23 No. 2, June 1997 (p. 371-382); Africa Watch, *Accountability in Namibia. Human Rights and the Transition to Democracy*, August 1992; National Society for Human Rights, *NSHR, Media & Issue of 'Missing' Persons*, Press Clippings 1990-1998 (NSHR, Windhoek: 1998).

In considering the 1980s violations in Angola, this broader historical context highlights how there has been a discouraging consistency in the leadership's lack of tolerance towards dialogue and democratic dissent within Swapo. In the course of its existence in exile, the leadership fostered a political culture that rejected open debate, reacted with hostility against any form of (perceived) criticism, and allocated a prominent role to those who protected the movement's 'security'. The stifling of criticism in the 1960s and 70s shaped the conditions in which the abuses of the 1980s could take place as it strengthened authoritarian tendencies within the leadership and facilitated the branding of those suspected of dissidence as criminals and spies.⁸ It would also determine how later demands for accountability would be handled after independence – that is, with little, if any, consideration for underlying concerns and an emphasis on the overarching importance of protecting the nation and being loyal to the leadership. In addition, it would impact on the conduct of the state security forces in later political crises.

In the last decade, the issue of accountability for past human rights violations has surfaced in roughly three phases: successively fuelled by or evolving around the 1989 elections, the publication of the book *Namibia: Breaking the Wall of Silence*,⁹ and the work of the South African Truth and Reconciliation Commission. On the eve of the elections, numerous detainees were released. Their stories, compounded by the fact that many other individuals remained unaccounted for, shocked people inside Namibia. Yet real acknowledgement of the detainee issue was not forthcoming, in part because many Swapo supporters were reluctant to contemplate the issue of abuses by the liberation movement. Also, actors hostile to Swapo seized upon the issue as part of their election campaign to discredit the party. Swapo thus could – and did – dismiss the allegations as misinformation from South Africa, thereby casting further doubt on those demanding an enquiry. Once elected into office, Swapo adopted a policy of 'national reconciliation'. Referring to the need for co-operation between former opponents, the new government emphasised that past injustices should not be investigated as this would simply open up old wounds and undermine the transition. The government thus argued that the crimes committed by the apartheid regime (and its internal supporters) should not be brought to light. Thus, its own dismal human rights record in exile was conveniently relegated to the background as well. Swapo even appointed to positions of authority a number of security officials implicated in the violations in Angola, thus indicating their full participation in the newly independent state. For example, the former Chief of

⁸ Saul, *loc. cit.* (note 4): p. 50-3.

⁹ Siegfried Groth, *Namibia – The Wall of Silence. The Dark Days of the Liberation Struggle*. (David Philip, Cape Town, 1996; Peter Hammer Verlag, Wuppertal; 1995).

Security at the main detention camp in Angola became the Commander of the Namibian Armed Forces, a position he still holds.¹⁰ Finally, Swapo evoked the moral high ground that it –justifiably – held in comparison to the apartheid regime with regard to the liberation struggle and the violence of the past, in order to cover its tracks. This moral argument has long been effective in deflecting criticism about Swapo’s own abuses, for it is difficult to criticise a party that fought for Namibian independence.

Nevertheless, the publication of a book entitled *Namibia: The Wall of Silence* in 1995-1996 catapulted the question of accountability back into the spotlight. The book, written by a German pastor who had worked in Swapo’s camps, recounts the harassment and abuses to which people suspected of treason or dissidence in exile were subjected. It caused a huge controversy in Namibia due, amongst other things, to the fact that the author had been so close to Swapo and was therefore a credible source. The book struck such a strong chord amongst part of the Namibian population that a Breaking the Wall of Silence Committee (BWS) was formed that brought steadily growing numbers of former detainees and relatives together and mobilised them politically. The government vehemently contested the book, with President Nujoma denouncing the author on national television and Swapo’s Secretary-General declaring the party’s and its supporters’ readiness “to go back to war to defeat those ‘evil forces’ that were threatening Namibia’s peace and stability.”¹¹ The growing internal pressure on Swapo, coupled with external interest in the issue, forced Swapo finally in 1996 to release its own list of Namibians who died or were killed in exile while under Swapo’s care, called *Their Blood Waters Our Freedom*. The list, however, did not go very far in appeasing those calling for Swapo to ‘come clean’ because it did not involve any formal clearing of people’s names (with regard to the allegations about treason) and the numbers, names, and causes of death cited were questionable.

At this time, the South African TRC had commenced its work, which exacerbated the situation in Namibia. Since 1995, the Namibian National Society for Human Rights (NSHR) has been calling for a similar truth-seeking process, a call the BWS Committee increasingly supported. The effect of the developments in South Africa has been considerable, in part because certain sectors of Namibian society were becoming disgruntled with the slow pace of reform in their own country. South Africa at least held the promise that things could change. Moreover, some matters under investigation before the TRC related directly to Namibia (such as the assassination in 1989 of Swapo leader Anton Lubowski by South African secret

¹⁰ John Saul and Colin Leys, “Afterword”, in Saul and Leys, *loc. cit.* (note 4): p. 200.

¹¹ Dobell, *loc. cit.* (note 4): p. 379.

agents and the extensive abuses by the paramilitary police unit Koevoet), which meant that the past was brought up anyway. In fact, the TRC itself asked the Namibian government whether it could hold hearings in Namibia. The government rejected this request because such hearings “will not contribute to our own efforts to bring about genuine reconciliation and to continue devising ways and means of healing wounds.”¹²

Clearly, the issue of how to deal with the legacy of the past has become a major and persistent bone of contention in the Namibian context. Despite all efforts from the Namibian government to ignore it, the violations of the past and the related call for accountability have surfaced again and again. Though the main support for this issue is still predominantly linked to the activities of Namibia’s intellectual community and to human rights and detainee-related organisations such as the NSHR and BWS, more general support for raising this issue has grown steadily over recent years. In particular, it has become linked to the rise of strong and credible opposition parties in Namibia, which demand accountability in the political sphere. The main opposition party, the Congress of Democrats, has expressed its support for fair and proper investigations into past human rights violations, and many BWS leaders have joined this party. The Swapo government has consistently dealt with the calls for accountability in an authoritarian manner that includes a complete lack of willingness to engage its citizenry in a debate about its policy on this issue. In addition, its attacks are aimed at discrediting the actors perceived to be challenging the government’s authority – a practice resembling the attitude of Swapo’s leadership while in exile. Criticism of the government or the party is conflated with loyalty to the Namibian nation and state; opponents are depicted as disloyal and unpatriotic. Swapo’s manner also appears aggressive and inflammatory: in its recent campaign for the December 1999 elections, Swapo linked the call for truth-telling in no uncertain terms to the possibility of civil war, if the past were to be re-opened.¹³

This attitude, however, is not confined to the issue of past abuses but extends to criticism in general. It is thus not solely the question of accountability in relation to human rights abuses that is at stake in the Namibian context. On a larger scale, questions of accountability directly relate to the relationship between state and society and the extent to which dissent is possible in the Namibian democracy. Noteworthy in this respect is also the conduct of the state security forces in the

¹² *The Namibian*, “Namibia among countries posing headache for SA truth commission”, 20 May 1997.

¹³ *Swapo Press Release*, “It is either reconciliation or the opening of old wounds”, Office of the Secretary General, 8 July 1999.

August 1999 uprising in the northern Caprivi region and in the current ongoing skirmishes in the Kavango border region between Angola and Namibia flowing from the war in Angola between the Angolan government and UNITA. Both Amnesty International and the NSHR have reported that, following the Caprivi uprising, Namibian security forces made widespread arrests of people suspected of having been involved in the rebellion, many of whom were reportedly tortured. Torture, extra-judicial killings, forcible deportation, and beatings have been reported in Kavango.¹⁴ People suspected of siding with UNITA have been handed to the Angolan authorities without verification of whether they in fact *were* assisting UNITA. These violations bear unnerving similarities to the abuses committed in the 1980s: ‘no question, detention’ still seems to be the guiding principle in crisis situations. Moreover, the Namibian Ministry of Defence recently decided that the violations committed in Caprivi and Kavango are an ‘internal military matter’, and will as such be dealt with by a military tribunal rather than a public court.¹⁵ Consequently, the information about such abuses will not become public and there will be no public oversight as to whether those responsible are actually held accountable.

Overall, therefore, it appears that the lack of accountability has had lasting repercussions in Namibia in a number of respects. Not only has it impacted the way the state perceives and deals with criticism, but it also has shaped how the security forces deal with (suspected) opponents. The ‘no questions’ culture encompasses human rights issues, activities or decisions of the political leadership, and the conduct of the security forces. Admittedly, one has to be careful with presupposing a direct cause-and-effect relationship; the failure to account for past violations has not ‘caused’ the occurrence of abuses in Namibia. Yet it has created the environment for new violations, just as it allowed authoritarian tendencies within the Swapo leadership to gain a firm hold and become part of the political culture in Namibia. With regard to the future, it is clear that as long as Swapo remains in control of the government, past abuses will not be addressed. Only if a transfer of political power to the opposition were to occur, will there be a possibility of tackling the legacy of the past. In that case, however, there will be a deep desire within the military and the SWAPO leadership to keep the past off the table – and it remains to be seen how far they are willing to go to that end.

¹⁴ Amnesty International, *Angola and Namibia. Human rights abuses in the border area*, March 2000 (AI Index AFR: 03/01/00); NSHR, *Human Rights Situation Update*, 7 March 2000; correspondence with Phil Ya Nangoloh, Director of the National Society for Human Rights, 24 February 2000.

¹⁵ *The Namibian*, “Caprivi tortures ‘internal matter’”, 29 March 2000.

Balancing peace and justice in Sierra Leone

In the case of Namibia, one has the benefit of hindsight. Sierra Leone, on the other hand, has only just started its process of coming to terms with what happened in its recent history. The conclusion of the Lomé Peace Agreement in July 1999 brought an end to the eight-year civil war between the government of Sierra Leone and the Revolutionary United Front of Sierra Leone (RUF/SL) and other rebel groups, which devastated the country and its people. The war is infamous for its brutality and the scope and kind of abuses that were committed, of which the rebels' trademark crime of mutilating and amputating hands, limbs and other body parts of civilians was especially notorious. Rape and sexual assault were rampant. Reportedly, rebels committed many atrocities while under the influence of substances such as drugs and alcohol. Children were widely involved as perpetrators and victims of gross violations. Serious abuses have also been attributed to forces fighting on the government's side, namely the defence forces, the Civil Defence Forces (*kamajors*), and especially the regional intervention force of the Economic Community of West African States, ECOMOG.¹⁶ External factors played a large role in the conflict. Mercenaries fought on both sides and neighbouring states, especially Liberia, have tried to influence the outcome. The presence of diamonds in Sierra Leone, providing a continuous supply of money to those who controlled them, increased the stakes in the war considerably.

In light of the above, the Peace Agreement could not be more than an imperfect compromise as it sought to cajole the rebels into ending hostilities, balanced with some concern regarding the atrocities committed and the related demand for accountability. It granted free and absolute pardon and reprieve from prosecution to the leader of the RUF, Foday Sankoh, and to all other combatants for their actions committed in pursuit of their war objectives. The Agreement made Sankoh Vice-President and accorded eight government positions to the RUF in order to form a government of national unity. It also provided for the establishment of a Truth and Reconciliation Commission to address impunity, break the cycle of violence, establish what happened and provide a forum for those affected and involved to tell their stories.¹⁷ The Lomé Agreement has left many with a bitter taste, and the amnesty provision has been widely criticised. Even the UN seemed somewhat ambivalent, if not embarrassed, about it: when signing the Agreement,

¹⁶ Human Rights Watch, *Sierra Leone. Getting Away with Murder, Mutilation, Rape*, July 1999 (HRW: A1103, 6/99); International Crisis Group, *Sierra Leone: A New Beginning? Situation Analysis*, 18 March 1999; *New York Times*, "UN Monitors Accuse Sierra Leone Peacekeepers of Killings", 12 February 1999.

¹⁷ *Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone*, 7 July 1999.

Francis Okelo, the Secretary-General's Special Representative for Sierra Leone, added a disclaimer that the UN did not consider the amnesty to be applicable to genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law.¹⁸ The legal status of this disclaimer is unclear, and so far the UN has not acted upon it.

It is against this backdrop that Sierra Leone is moving towards establishing a Truth and Reconciliation Commission (TRC). The process used has been remarkable in its efforts to combine national knowledge and grasp of the context with international expertise on truth commissions. The Office of the United Nations High Commissioner for Human Rights (UNOHCHR) has played a pivotal role in this regard and will probably continue to do so. It is the first time that the UNOHCHR has been so closely involved in setting up a truth commission. High Commissioner Mary Robinson initially endorsed the idea of an international Commission of Inquiry, raised by the UN Secretary-General following the Peace Agreement. This idea seems to have been put on the back burner, possibly to avoid a situation of two concurrently running bodies that may have a potentially detrimental overlap. The focus of the High Commissioner has shifted towards supporting the TRC, and her Office assisted in preparing the legislation for the Commission by providing consultants with in-depth knowledge of truth commissions to the internal drafting process.

In February, the Parliament of Sierra Leone adopted the *Truth and Reconciliation Commission Act*.¹⁹ The Act contains a number of provisions that are new or specific to the national context, but is also strongly grounded in the experiences of previous truth commissions, most notably the South African TRC. The objectives of the Sierra Leonean Commission sound familiar: "to create an impartial historical record of violations and abuses of human rights and international humanitarian law related to the armed conflict; to address impunity; to respond to the needs of victims, to promote healing and reconciliation and to prevent a repetition of the violations and abuses suffered." The period under investigation is from the beginning of the war in March 1991 to the signing of the Lomé Agreement. Regarding the violations committed, the TRC should investigate their 'causes, nature and extent', as well as 'key events, patterns of abuse, and parties responsible'. The 'role of external factors' is also specified as a matter for investigation, providing scope to consider international involvement in the war.

¹⁸ UN Doc S/1999/836, p. 2 (para. 7); Kofi Annan, "Africa: The Horror . . ." *Washington Post*, 1 Aug. 1999.

¹⁹ *The Truth and Reconciliation Commission Act*, 2000, Republic of Sierra Leone, supplement to the Sierra Leone Gazette Vol. CXXXI, No. 9, 10 February 2000.

It is the first time that a truth commission mandate explicitly refers to 'violations of international humanitarian law'. This was probably done to ensure that acts by state actors as well as non-state actors fall within the mandate of the Commission, an interpretation that is supported by the separate reference to 'abuses'. This term also enables the TRC to consider the conduct of non-state actors or armed opposition groups because it is more inclusive than the term 'human rights violations' (which traditionally only refers to acts of violence by agents of the state.) While technically correct, this provision may cause some confusion amongst Sierra Leoneans about the difference between 'violations' or 'abuses'. The state or non-state nature of the perpetrator does not really matter to the person subjected to the act of violence. The Act instructs the Commission to investigate whether the violations and abuses were the result of deliberate planning, but does not contain any specific references to attributing responsibility. It thus leaves it to the Commission to decide whether to name names.²⁰

With regard to restoring victims' dignity and promoting reconciliation, the TRC will provide an opportunity for victims and perpetrators to tell their stories. New in this respect is the explicit provision that the TRC should create 'a climate which fosters constructive interchange between victims and perpetrators'. The notion of 'constructive interchange' is not further specified in the mandate, but may relate to the possibility of direct interaction between victims and perpetrators in the context of the TRC. Further, the TRC may seek assistance from traditional and religious leaders to facilitate public sessions, resolve local conflicts related to past violations, or support healing and reconciliation. The involvement of traditional leaders in a truth commission process is new, and is based on the strong role that such leaders have traditionally played in Sierra Leone in resolving conflict in local communities. The provisions on 'constructive interchange' and 'traditional leaders' may reflect a desire amongst Sierra Leoneans that the TRC plays an active role in trying to effectuate reconciliation on an individual and community-based level. To date, truth commissions have only had limited success in this regard, and this is yet to be played out in the Sierra Leonean context.²¹ It also remains to be seen whether the TRC will be able to draw in perpetrators to any large extent. No immediate incentive exists for them to participate in the process given the blanket amnesty already

²⁰ On this issue, see Daan Bronkhorst, "Naming Names", *Netherlands Quarterly of Human Rights*, Vol. 16 No. 4 (Dec. 1998): p. 457-474.

²¹ Michelle Parlevliet, "Between Facilitator and Advocate: the South African Truth and Reconciliation Commission", *Forum*, December 1998, No. 36: p. 6-15; Michelle Parlevliet, "Telling the Truth in the Wake of Mass Violence", in *People Building Peace. 35 Inspiring Stories from Around the World* (European Centre for Conflict Prevention and Transformation: Utrecht, 1999): p. 46-60.

granted. Nevertheless, the involvement of traditional and religious leaders may prompt individuals responsible for violations to come forward. A desire to be re-integrated into their communities, flowing from the fact that there will be few options open to them after demobilisation to secure a livelihood, may also motivate perpetrators to do so. It is unlikely that they will be accepted back without some form of owning up to their crimes on their part, especially since many committed acts of violence within their own communities. The truth commission could facilitate such a process.

The Sierra Leonean TRC has powers of subpoena and of search and seizure, may take statements under oath or affirmation, and may conduct public hearings. It can also request information from foreign governments and gather information in foreign countries. The Commission will have four national and three international members, who will be selected through a broad consultative process. Candidates for the national positions will be interviewed and ranked by a selection panel consisting of representatives from the president, rebels, and civil society, whereas the UN High Commissioner for Human Rights will recommend persons for the international positions. No time frame is specified for the selection and appointment of Commissioners, thus it may still take some time before the TRC commences its work. The Commission will operate for one year, with a possible extension of six months. The Act obliges the President to publish the TRC report and make it widely available to the public and a body should be established after the TRC to monitor the implementation of its recommendations.

The mandate of the Sierra Leonean Truth and Reconciliation Commission is ambitious, and the challenges the TRC will face are formidable. Some are common to most truth commissions, such as constraints of time, resources, and gathering information. The tense political environment in which the TRC has to operate presents the greatest obstacle and may limit its activities considerably. Not only is the power sharing between members of the former government and the rebel leadership very tenuous, but many other pressing issues command the attention of the authorities, the people, and the international community. For example, the slow pace of disarmament and demobilisation of ex-combatants is of major concern, as are the problems involved in getting humanitarian aid to a number of areas. Timing is important; the Commission can probably not make much progress if demobilisation has not reached an advanced stage. Violence has continued in parts of the country, and a number of violent clashes have occurred between rebels and the UN forces since the Lomé Agreement. Experiences from previous truth commissions indicate that truth-telling becomes difficult when the security situation remains fragile. Finally, Sierra Leone's diamonds continue to complicate its peace process, since so much money is involved in their management and control and

there are many interested parties. The TRC will have to walk a fine line between seeking accountability and acknowledgement and not exacerbating an extremely volatile situation. The support of the international community will be important in this regard; support from actors within Sierra Leone is crucial.

Conclusion

As the cases of Namibia and Sierra Leone demonstrate, the political parameters during the transitional period are of the utmost importance in determining how a legacy of past human rights violations will be addressed. In Namibia, the government has persistently refused to deal with past abuses. The growing demand for accountability is related to the emergence of strong and credible opposition politics, yet the TRC process in neighbouring South Africa has also been influential. The Namibian case demonstrates that the past will not necessarily disappear when it is ignored. In the Namibian context, the controversy around bringing the past to light only relates in part to the actual abuses that occurred – other real issues at stake are the lack of accountability of the leadership, its authoritarian tendencies and the lack of public consultation and involvement in political affairs. As long as these are not addressed, the past will continue to surface, for it is symptomatic of the larger problems that underlie the current state of affairs in Namibia. Illustrating the kind of consequences that can flow from a failure to account for past abuses, the Namibian case substantiates the claim that the past, if not dealt with, may negatively impact on a state or society following a transition.

The case of Sierra Leone underlines the challenges involved when trying to pursue some degree of accountability and acknowledgement in the wake of mass violence, especially when the political and security situation remains volatile. The TRC legislation, while drawing on international experience with truth commissions, contains a number of provisions that are specific to the national context. Some provisions, such as those related to the potential role of traditional leaders and the interaction between victims and perpetrators, provide scope for the Commission to move into the realm of conflict resolution. Depending on how this plays out, the Sierra Leonean TRC may complement its 'truth' function with an equally active 'reconciliation' function. Political support for the TRC will be essential in securing progress in both areas, and the degree to which this currently exists is questionable. Half-hearted or little support for dealing with past human rights violations is a common element in many transitional situations in Africa. Indeed, Sierra Leone also exemplifies a number of other factors present in a number of African conflicts that may influence the pursuit of truth, justice, and reconciliation on the continent. These are briefly indicated here, in order to raise further interest in African cases and underline the need for further research in this regard.

First, ethnic or social violence often continues during a transition process, causing

insecurity. This undermines the truth-telling process by limiting a commission's freedom of action, intimidating people who wish to participate in the process, and causing new human rights violations. Second, violence is generally widespread and often involves entire communities, whereas in comparison, the violence in the Latin American cases primarily revolved around left and right political ideologies. This means that reconciliation is all the more critical, but likely more challenging. Third, the extent to which civilians are targets and actors in conflicts on the African continent blurs the distinction between civilians and combatants (for example, the prevalence of child soldiers in Sierra Leone). The impact of this on a truth commission process has yet to be analysed. Fourth, it seems that a public *versus* a private approach to truth-telling is favoured in Africa, which may be related to the verbal traditions of many African societies. Fifth, many African cultures have a notion like the South African 'ubuntu', meaning something like 'I am human through other humans' or 'people are people because of (or through) other people'. This may be reflected in a relatively strong emphasis on reconciliation and healing in a truth commission process in an African context, because it embodies the belief that if one is damaged, the collective is not whole. Individual and collective have a responsibility towards one another with regard to healing and reconciliation. Lastly, reconciliation in the African context may have strong socio-economic dimensions, flowing from structural inequalities in the division of resources and opportunities, and possibly exacerbated by the gains that some individuals or sectors of society make in the course of a conflict. This played, for example, a large role in South Africa and the issue may also arise in the Sierra Leonean context.

One must be cautious with forcing different cases into one common mould and labelling that 'African'. Yet, it will be important to devote further study and attention to African experiences in order to gain greater understanding of the diverse aspects that affect the pursuit of truth, justice, and reconciliation on the continent. The issues raised above require further elaboration and consideration; there may be several others that are also relevant. Regional comparisons may point to important implications for truth commissions, and insight into these can contribute to strengthening efforts in that direction. It is clear that accountability and acknowledgement have become increasingly prominent issues on the African continent. Considering current developments, this is likely to continue. It is important, therefore, that we understand as fully and accurately as possible the range of conditions and dynamics that are at play.

**Promoting Justice, Truth and Reconciliation in Transitional Societies:
Evaluating Rwanda's Approach In the New Millennium of
Using Community Based Gacaca Tribunals To Deal With
the Past**

JEREMY SARKIN¹

Introduction

In all probability, how a society decides to deal with its past has a major determining influence on whether that society will achieve long term peace and stability. The critical question for these countries is whether to prosecute and punish those responsible for gross human rights abuses. A policy to deal with past human rights abuses normally takes into account the objectives of preventing the recurrence of human rights abuses and repairing the damage which has been caused. Often it is a question of balancing the needs of the victims, as well as society as a whole, to heal from the wounds inflicted upon them, and the political reality which often finds the new government inheriting a fragile state without much political power. There is, however, a need for the new regime to be founded on a commitment to human rights and a dedication to the rule of law.² Often, however, achieving national reconciliation, building unity, reconstructing the institutions necessary for stable political and economic systems, and obtaining the resources necessary to fund the transition are seen to be in conflict with dealing with the past. At times, the needs of victims are given a low priority.

These are extremely relevant questions for many societies which have had major human rights abuses. They are also considerations necessary for states embarking on a transitional path. This is nowhere more true than in Rwanda where between 800 000 and million people, more than ten percent of the population, died in the genocide of 1994.³

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² See Jeremy Sarkin "The trials and tribulations of South Africa's Truth and Reconciliation Commission" 12 *South African Journal on Human Rights* (1996) 618; Jeremy Sarkin "The Truth and Reconciliation Commission in South Africa" *Commonwealth Law Bulletin* (1997) 528 and Jeremy Sarkin "The Development of a Human Rights Culture in South Africa" 20(3) *Human Rights Quarterly* (1998) 628.

³ See further Jeremy Sarkin "The Necessity and Challenges of a Truth and Reconciliation Commission in Rwanda" 21(3) *Human Rights Quarterly* (1999) 767.

The situation in Rwanda

Although the Rwandan genocide occurred in 1994⁴ it is important to note that that country's cycle of woes still continue. Violence persists. It is problematic that the government must accept a large part of the blame for violence perpetrated against Rwanda's population.⁵ It also promotes violence, for example, by executing people publicly before large crowds.⁶ The government is also not doing enough to promote peace and reconciliation. Thus, the United Nations Committee on the Elimination of Racial Discrimination has stated in the past that '[t]he persistence of certain organs of the mass media in Rwanda in inciting ethnic intolerance and distrust [is] a continuing obstacle to the efforts for peace'.⁷ The government also exacerbates the levels of bitterness and resentment by detaining alleged perpetrators of genocide in severely overcrowded and disease-infested prisons.⁸ Many in prison say they do not know why they are there.⁹ Some state that they have been detained because of their former jobs or jobs that relatives held. The perception of many of those awaiting trial, and their families, is that the process is a Tutsi version of victor's justice.¹⁰

⁴ See Philip Gourevitch *We Wish to Inform You That Tomorrow We Will Be Killed With Our Families: Stories From Rwanda* (1998) 3.

⁵ The United States Department of State in its 1999 Country Reports on Human Rights Practices Released by the Bureau of Democracy, Human Rights, and Labor on February 25, 2000, reported that the government's human rights record remained poor in 1999 and that it "continued to be responsible for numerous, serious abuses". The army was accused of extrajudicial killings and human rights abuses although it was recognised that there were fewer than in the previous year.

⁶ United Nations Commissioner for Human Rights, Mary Robinson, stated that she thought the public executions would "have a negative impact on the process of reconciliation in the country". IRIN Report, 17–23 April 1998.

⁷ UN Doc. A/51/18 (1153rd Meeting of CERD, 13 March 1996). The government is not only to blame. In February 2000 the UN secretariat expressed concern at a hate radio station (Radio Patriote) which had begun to broadcast anti-Tutsi messages in the area. See UN Integrated Regional Information Network, Nairobi, 25 February 2000.

⁸ In February 2000 it was estimated that 125 000 detainees were being held captive in Rwanda even though the detention system had been designed for only 30 000. With such extreme overcrowding, it is not surprising that detention conditions are poor. Problems include poor sanitation, lack of sufficient food and inadequate health care. Detainees have also been subject to cruel and inhuman punishment, including rape, torture of juveniles, and denial of food by RPA soldiers and prisoner guards. See the *Report on the Situation of Human Rights in Rwanda, Submitted by Mr Rene Degni-Sigu, Special Rapporteur of the Commission of Human Rights (20/01/97) E/CN/1997/61*.

⁹ See Amnesty International, *Rwanda Unfair Trials: Justice Denied, April 1997* (AI Index: AFR 47/08/978) (hereinafter AI, Justice Denied).

¹⁰ Stef Vandeginste "Justice, Reconciliation and Reparation after Genocide and Crimes

As far as the courts are concerned, major problems still exist. While it is true that the operations of the legal system and the courts in particular have improved, there are nevertheless problems which hamper the system. Before the 1994 genocide, Rwandan courts had little power. Not only did the judges and magistrates lack formal training, but there was little respect for the rule of law. However, even the experience and knowledge which existed before the genocide was decimated by that event and, since the genocide, the capacity or the legitimacy to properly address those crimes has been lacking. The need for a Rwandan truth and reconciliation commission process is demonstrated by the fact that around 125 000 people accused of participating in the genocide in 1994 are still in detention awaiting trial some six years later. Rwanda does not have the capacity to handle the situation. While the system has improved, it is still weak and the judiciary is still overwhelmed. The courts lack infrastructure, qualified personnel and funding. Due process rights have been practically nonexistent – in violation of both international standards and Rwandan law. The situation has, however, improved to some degree.¹¹ It is however not an issue high up on the agenda for improvement¹² – it has been stated that financial and human resource constraints do not permit this.¹³ Prosecutions of the approximately 125 000 detainees have gone very slowly in Rwanda and, since 1996 when trials began, only about 2 500 cases have been heard.¹⁴ Of these, about 400 accused have been acquitted and about 300 have received the death penalty.¹⁵ As a result of the inability of the legal system to deal with the large number of cases, Rwanda is looking for alternative solutions. The first option that is being pursued is the use of mass trials. This is obviously problematic. Secondly, the government has proposed the use of Gacaca community courts as participatory justice mechanisms to deal with the huge number of cases pending before the

Against Humanity: The Proposed Establishment of Popular Gacaca Tribunals in Rwanda” *Paper to the All-Africa Conference on Principles of Conflict Resolution and Reconciliation*, Addis Ababa, November 1999.

¹¹ See AI, Justice Denied at 5.

¹² See *Report of the Special Rapporteur on the Independence of the Judiciary*, UN Doc. E/CN.4/1998/39. Defendants in the beginning were mostly undefended although, more recently, a number of defendants have been able to get legal representation.

¹³ See *id.* Inadequate financial and human resources has been a major obstacle in the establishment of an independent and impartial judiciary.

¹⁴ Associated Press 29 February 2000.

¹⁵ Stef Vandeginste “Justice, Reconciliation and Reparation after Genocide and Crimes Against Humanity: The Proposed Establishment of Popular Gacaca Tribunals in Rwanda” *Paper to the All-Africa Conference on Principles of Conflict Resolution and Reconciliation*, Addis Ababa, November 1999.

courts.¹⁶ However, the government of Rwanda's idea of how the Gacaca courts would be established, how they will be organised, and the fact that the Gacaca structures will be used only to deal with incidents which occurred between 1990 and 1994 make this model highly problematic, to say the least.¹⁷

Another problem that exists in Rwanda is access to economic resources. While there has been growth in the economy, infrastructure restored and about four million people resettled, major problems exist around the question of access to land.¹⁸ Enormous population growth is exacerbating the problem.¹⁹ Hutus, for the most part, have, since the genocide, been completely marginalised both politically and economically. As refugees return at the rate of about 500 a week, they find others on the land they used to occupy. Fear of being denounced as a genocide perpetrator stops many from reclaiming their land. This is an issue which needs to be resolved as 'the numbers of people forced out of farming and becoming impoverished are likely to pose a social and ethnic threat. Rwanda's history should have shown that an ethnicisation of economic activities is something to be avoided if the country wants to evolve to a more peaceful future'.²⁰

Dealing with the past

In a society which has been ravaged by human rights abuses such as Rwanda, various options are available to deal with the past. These options include (1) criminal sanctions, (2) non-criminal sanctions, and (3) the rehabilitation of the society. Usually, the path chosen takes into account three goals: truth, justice, and reconciliation.

Truth is knowing about and officially acknowledging past human rights abuse. This official acknowledgment can open a dialogue in the state between individuals, and the various groups in the society.²¹ Facilitating an open and honest dialogue

¹⁶ *Christian Science Monitor* 5 August 1999.

¹⁷ A paper on how the Gacaca courts could be used as an interim measure was written by this author for the NGO Relationships Foundation also called the Newick Park Initiative (NPI) for their ongoing work in Rwanda. It was presented to the government of Rwanda in 1998. It is published as Jeremy Sarkin "Preconditions and Processes for Establishing a Truth and Reconciliation Commission in Rwanda – The Possible Interim Role of Gacaca Community Courts" 1999 (2) *Law Democracy and Development*.

¹⁸ Editorial "Rwanda: No Easy Answers" *The East African* (Nairobi) 8 March 2000.

¹⁹ Saskia Van Hoyweghen "The Urgency of Land and Agrarian Reform in Rwanda" 98 (392) *African Affairs* (July 1999) 353.

²⁰ Saskia Van Hoyweghen "The Urgency of Land and Agrarian Reform in Rwanda" 98 (392) *African Affairs* (July 1999) 353, 367.

²¹ M. Cherif Bassiouni, "Searching For Peace and Achieving Justice: The Need For Accountability", 59 *FALL Law & Contemporary Problems* 9, 24 (1996).

can effect a catharsis, and prevents collective amnesia which is not only unhealthy for the body politic but also, essentially an illusion – an unresolved past inevitably returns to haunt a society in transition.

Justice is a critical aspect to ensure respect for human rights and the rule of law. It is necessary to prevent future violations. Justice deters similar acts in the future and promotes peace and human rights while consolidating the new regime as one bound by the rule of law, and therefore, distinct and different from the problematic past. The degree of justice possible depends on a variety of factors – historical, political, military, socioeconomic as well as others. It is shaped by the nature of the past, the obstacles of the present, and the future needs of the society.²²

Reconciliation, in the context of a transitional setting, includes both conflict resolution and social rehabilitation. Without long-term peace, something which cannot occur without reconciliation, a nation cannot ensure stability and growth. The goals of truth, justice and reconciliation are, however, often in conflict with each other. Pursuing one goal can undermine one or more of the others. Thus, for example, the pursuit of truth must sometimes come at the expense of justice. Likewise, the pursuit of justice does not always promote reconciliation.²³

A critical overarching factor is democracy without which, whatever path chosen, a society will be unable to deal with its past in an inclusive manner. Thus, progress towards an inclusive democracy is the process most likely to achieve long-term sustainable growth.

The need for an independent national truth and reconciliation commission in Rwanda²⁴

While Rwanda has established two commissions to assist with unity, reconciliation²⁵ and human rights, the structure and focus of these bodies will not have a major

²² Richard J. Goldstone, “Justice As A Tool For Peace-Making: Truth Commissions And International Criminal Tribunals”, 28 *New York University Journal International Law & Politics* 485, 486 (1996).

²³ See Carlos S. Nino, “The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina”, 100 *Yale Law Review* (1991) 2619 who argues that an absolute rule demanding punishment is not possible. Diane Orentlicher, however, has argued that a choice is not available in certain situations and that international law at times demands prosecution or extradition. See Diane F. Orentlicher, “Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime”, 100 *Yale Law Review* (1991) 2537.

²⁴ A truth and reconciliation commission for Rwanda was recently called for in the Editorial “Rwanda: No Easy Answers” *The East African* (Nairobi) 8 March 2000.

²⁵ At present this body is investigating what reconciliation is. See Jane Lampman “Taming the Desire For Revenge: African nations Draw On Cultural Heritage to Heal Wounds of war and Restore Social Fabric” *Christian Science Monitor* 4 November 1999.

effect on the problems in Rwanda. Without doubt, an independent process aimed at uncovering the truth and achieving national reconciliation in Rwanda is critically necessary.²⁶ But the government of Rwanda, which seemed to investigate the possibility during a visit to South Africa in 1996 and another visit to the South African Truth and Reconciliation Commission in 1997, has rejected such an idea.²⁷ On their visits to South Africa, the Rwandans commented that reconciliation would be nice, but that they preferred justice, and reconciliation could wait. In addition, the Rwandan Minister of Transport commented 'we don't need truth, we know who did what'.²⁸ The government of Rwanda believes that such a commission is not a feasible option at the present time for a number of reasons. One reason is that it says the process should begin at local level to bring communities together. However, many of the reasons for the government's reluctance to have such a process now are predicated on political factors. Politics is being prioritised at the expense of a process which could ensure Rwanda's long term survival, peace and growth.

Should such a national process take place, it would allow the human and civil dignity of survivors to be restored by granting them an opportunity to relate their accounts of the violations they suffered. By recognising the victim's story, the inherent worth and dignity of the person is acknowledged. Such a process would let Rwandan society listen, absorb, and begin the healing process which leads to reconciliation. In the absence of such a process, the pain and anger which exists may never find an outlet. These feelings may ferment for a time before erupting. This would then lead to further social fragmentation. Another advantage of such a process would be that it would mitigate the impulse of survivors to seek retribution. A possible danger, and something which should be anticipated and proactively addressed, is the fact that such a process holds the potential of opening up old wounds, renewing resentment and hostility against perceived perpetrators. Thus, careful planning and preparation is crucial to ensure that the process achieves its aims and objectives. If this is not done, revenge and retaliation killings might result.

It is, of course, vital that such a process be administered by a credible and legitimate authority. If not, it will not be accepted by all in Rwanda. Whatever results it arrives at will be questioned. In other words, it is crucial to ensure that the process has political legitimacy. In the absence of such legitimacy, whatever record

²⁶ Kurt Shillinger "After the Horror, Hope: Rwanda Foes Move Closer" *The Boston Globe* 7 November 1999.

²⁷ William A. Schabas, "Justice, Democracy, and Impunity in Post-genocide Rwanda: Searching for Solutions to Impossible Problems" 7 *Criminal Law Forum* 523 (1996) 559.

²⁸ See David Goodman "Justice Drowns in Political Quagmire" *Electronic Mail and Guardian* <http://web.sn.apc.org/wmail/issues/970131>.

of past human rights abuses the process produces will be contested and reconciliation will remain a vain hope. It is vital to the success of the project that all sectors of the population buy into the process. A neutral appointment process is critical to ensure that those involved have public confidence and trust. If a sector (or sectors) of the population believe the process is partisan, then it will not be believed and respected by that group of people. It is particularly important that those involved are chosen from a wide cross section of society and not be perceived as one-sided or oriented to a certain outcome – otherwise, the process will be considered biased and therefore illegitimate.

If the process is not well managed, it may open wounds without facilitating healing. Such a process must also make counselling available to victims both before and after they testify. It is vital to consider what happens when victims go home – many must live alongside perpetrators. The process must allow for the victim/perpetrator relationship to be dealt with thoroughly. The process of airing the evil done and acknowledging the suffering of the victims sparks the catharsis required for reconciliation. However, there is a danger that a truth and reconciliation commission could do more harm than good and therefore any process must be carefully structured and sufficient groundwork laid to prepare communities for what may emerge.

If it is a legitimate and impartial body, and if its processes facilitate participation by all so that all Rwandans can discern some acknowledgement of their particular truths, then catharsis and reconciliation can be the fruits. The ground is then prepared for the prevention of future abuses and the need for a culture of human rights will become part of the official record.

The Rwandan government's Gacaca community court model

While the necessity of a national process cannot be avoided, it is possible that Gacaca community courts,²⁹ a traditional community-based mechanism, could as an interim measure at local level help to ease some of the pressures and problems in Rwanda. It has to be, however, a prelude to an independent national truth and reconciliation process. The use of the Gacaca courts has been adopted by the Rwandan government as a mechanism to ease the burden on the normal courts and to apply justice.³⁰

²⁹ It derives its name from its meaning “lawn” or “grass”.

³⁰ In February 2000 the Rwandan parliament unanimously enacted the law which established the Gacaca tribunals. It was reported that the Justice Minister Jean de Dieu Mucyo had stated that some high-ranking individuals such as ministers will be immune from prosecution by the Gacaca tribunals. See IRIN Update 862 for the Great Lakes, 16 February 2000.

These proposals do not conform to the customary structure and role of the Gacacas in Rwanda. Traditionally, Gacacas were composed of older men who were respected in their communities. The role of the Gacaca has been to impart justice impartially, with sincerity, wisely, honestly, and freely without benefiting the people who served on them. This new process may see the politicisation of these structures, thus making them lose their traditional function in future.

To assist the legal system to deal with those in detention awaiting trial, the government has proposed a wide-scale pyramid structure in terms of which thousands of Gacaca tribunals, at village, region and provincial level, will be created under a department created within the Supreme Court. It is problematic that, in terms of planning, logistics, training and uniformity, tens of thousands of people will be involved in the process. Whether sufficient training can take place to enable these structures to function fairly and properly to dispense justice in a fair and impartial manner is unknown. But, without doubt, the problems in setting these structures all over the country immediately, and in a proper fashion, will be enormous. It will be necessary to educate those on the structures and the communities they are in about the system, its procedures and what rules it must apply. It is also necessary to educate the community about the benefits of a process which is conducted with dignity and where preconceived notions and beliefs about people who appear before these courts could undermine the work at the Gacacas. It would thus make more sense for the government to establish two or three pilot Gacaca tribunals to see how the process works. Once the initial problems have been ironed out, the government could allow an increasing number of villages and regions to establish Gacaca tribunals over a period of time until the use of these courts has been expanded to all parts of the country. It would probably be wise not to allow the system to expand too quickly to avoid potentially huge problems.

The government model, released in 1999, sees Gacaca tribunals at the lowest level of a pyramid judging those accused of category 4 crimes (the least severe crimes) in terms of the 1996 Rwandan genocide law. No appeal is possible. The next level up the pyramid will deal with more serious crimes, and so on up the pyramid. Some of the Gacaca tribunals will have powers to sentence individuals to life imprisonment. This is obviously problematic because, although criminal sanctions will be handed down, those doing the adjudication are not legally trained, and no procedural or other rights will be guaranteed.

Elections will be part of the process to appoint members to these structures with each lower level having representation on the higher tribunals in a specific area. Mechanisms need to be found to ensure that both Hutus and Tutsis sit on the Gacaca tribunals to ensure that its process encompasses all issues and so that people do not feel marginalised. It is critical to the effectiveness of the Gacacas that it they

are seen to be fair and unbiased. Individuals who serve on a Gacaca must command the respect and support of the people and those who appear before them.

The time period which will be investigated by the Gacaca courts will be particularly contested terrain as they will only be able to deal with crimes committed between October 1990 and December 1994. Apart from other problems, this alone is likely to make large segments of society consider the process illegitimate. These people will probably argue that the history of discrimination and brutality perpetrated against them during colonial times as well as during other periods of Rwanda's history are the causes of the events of 1994. If only the events which occurred between 1990 and 1994 are examined, people would regard this as prejudicially narrow because the process would focus on the Hutu as perpetrators and fail to take into account the long history of human rights abuses in Rwanda in which both Hutus and Tutsis have been perpetrators and victims.

Conclusion

There is no denying the enormous proportions of the tragedy which has befallen Rwanda. The promotion of hatred and violence was utilised so successfully to get neighbours to kill neighbours that it still resonates in Rwandan society. If the Rwandan government wishes to adequately address the legacy of the massive human rights violations of the genocide, it must go beyond mere criminal trials. Despite the existence of the International Criminal Tribunal for Rwanda, the immense task of trying all the accused who are within the Rwandan system is currently too great for the system to bear. The deficiencies of the Rwandan judiciary will not allow those in custody to be tried in an acceptable manner. The use of the Gacacas may go some way to assist in the process of dealing with the genocide, but if this is seen to be the panacea and only process, then Rwanda's problems are far from over.

The issue of democratisation is one that Rwanda cannot avoid. Rwanda cannot have a transition and deal with the past in a way which has long-term positive effects without moving to a democracy. The Hutu government was overthrown in 1994 and Hutus have since been excluded from positions of power, although the government states that there are only Rwandans, no Hutus or Tutsis. Hutus comprise 85 percent of the population and need to be incorporated politically in some way. While the new government in 1994 stated that it was a transitional government and that elections would be held in 1999, in June 1999, a month before the elections were due to be held, the government prolonged the transitional phase to 2003. While local government elections were held in 1999, as a move to begin the democratisation process, party politics and campaigning were forbidden. In addition, these elections were seen not to be free and fair.

Only by means of democratisation can all of the essential elements for an effective system of transitional justice be met. For the transition in Rwanda to be successful,

a structure based on some system of power sharing must be found. This has to be done on a basis of negotiation and agreement involving all parties. This will not, however, be achieved unless there is a generally accepted view that reconciliation ought to be achieved. Thus, a comprehensive education campaign of Rwandans needs to occur to eliminate the ideology of genocide and the collective responsibility placed upon the Hutu by the Tutsi. Critically, there must be a systematic and all-encompassing investigation into the truth of the events leading up to the genocide and the genocide itself. The objective truth must then be made public to the victims, their families, and all of society. It is only with a complete knowledge of the truth that Rwanda can step toward reconciliation. Full and complete participation by all sectors of society is therefore necessary. Rwandans need to come to terms with their past and build their country into a united one. Unless all citizens in Rwanda have a government which they believe represents them, instability and strife will continue. Paving the way to an inclusive democracy will be a critical step in dealing with the past and halting the continuing violence and division which haunts Rwanda.

Profile / Profil

Georges Abi-Saab

LAURENCE BOISSON DE CHAZOURNES*

Réunis dans le spacieux bureau de Georges Abi-Saab à l'Institut universitaire de hautes études internationales (aussi connu sous l'acronyme "IUHEI"), nous faisons face au lac Lemman, dont les couleurs miraient les camaïeux bleu-gris d'un ciel enveloppant. En cet après-midi genevois, où la lumière blanche et diffuse nous rappelait que nous étions encore en hiver, les clameurs des rues du Caire firent soudain irruption dans notre tranquille torpeur. J'avais demandé à Georges Abi-Saab de me parler de lui.

Le lac fit immédiatement place à la Méditerranée, à ses couleurs, à ses senteurs et à ses bruits. Même après ses années d'étude en Europe et aux Etats-Unis, et près de quarante ans passés en Suisse, Georges Abi-Saab reste méditerranéen dans son âme et dans son être. C'est dans ce contexte qu'il se dévoile: un espace dont la diversité révèle ce que peut être l'universalité, un espace marqué de la complexité du temps et du lieu, un espace de la relativité des choses qui enseigne que nul ne détient la vérité, un espace qui est le produit de très nombreuses histoires et quêtes humaines et culturelles, tant de composantes qui composent un univers véritablement unique. Georges Abi-Saab, homme de ces lieux, est égyptien, méditerranéen et épris de l'international. Sa vie est nourrie de rencontres et de découvertes. Il aime les idées et les relations humaines. Il aime à évoquer ses mentors, sa femme Rosemary, ses amis et ses "enfants", les très nombreux étudiants avec lesquels se sont développés des liens intellectuels et affectifs. Georges Abi-Saab est un maître. Parler de lui et avec lui donne le privilège de se promener dans sa vie au gré de son humeur, et rencontrer ceux qui lui sont chers et ce qu'il aime dans le monde qui nous entoure.

Il est né à Héliopolis, un faubourg du Caire où la ville s'implante à la lisière du désert. Son enfance et son adolescence y sont douces, imprégnées de rencontres et d'une vie culturelle et artistique riche. Le Caire, et Alexandrie pendant les vacances d'été, sont des métropoles où s'arrêtent et séjournent artistes, écrivains et chanteurs renommés de l'époque, apportant avec eux le cosmopolitisme d'autres capitales du monde arabe et de l'Europe. Georges Abi-Saab y développe sa passion pour le cinéma,

*Directrice (Département de droit international public et organisation internationale) et Professeur à la Faculté de droit de l'Université de Genève; Professeur invitée à l'Institut universitaire de hautes études internationales. L'auteur tient à remercier de sa collaboration M. J.F. Gareau, assistant et candidat au doctorat de l'IUHEI.

les images et les mots qui lui permettent de s'échapper d'une éducation scolaire un peu trop stricte à son goût. Ses résultats au baccalauréat sont néanmoins brillants. Il réussit la prouesse extrême d'obtenir la note maximale au concours de philosophie. Il a alors seize ans, s'intéresse à la justice sociale et voudrait acquérir un métier de la plume. Après avoir envisagé des études en lettres, il s'inscrit à la Faculté de droit du Caire afin de recevoir "l'éducation de l'honnête homme", me dit-il, en rappelant aussi qu'un grand nombre de penseurs, politiciens, dramaturges, romanciers ou journalistes de l'époque ont étudié le droit. Là se révèlent à lui les pistes et des outils qui deviendront ensuite les siens. Il retient de ses cours d'économie l'approche rationaliste et progressiste qui lui offre un système d'explication de la société et de ses ressorts dynamiques. Il est en même temps très attiré par la rationalité formelle du droit civil.

Sa rencontre avec le droit international se fait lors de sa deuxième année. Le jeune professeur Abdallah El Erian, fraîchement bardé d'un doctorat de Columbia University, vient d'arriver à l'Université du Caire. Ses méthodes sont nouvelles. Il crée une société de droit international dont la condition d'admission est la rédaction d'une recherche (une nouveauté dans un monde académique soumis au rite de l'acquisition passive du savoir transmis par les maîtres). Georges Abi-Saab, alors en deuxième année de licence, rédige un essai sur la Déclaration universelle des droits de l'homme, instrument que l'Assemblée générale n'a que très récemment adopté. On saisit déjà la contemporanéité du chercheur qui a toujours tenté d'appréhender les visages de l'actualité à la lumière du prisme du droit. Cet essai lui vaut le grand honneur d'être présenté personnellement par son premier mentor aux autres professeurs de droit de l'Université du Caire, et d'entrer à la Société égyptienne de droit international. Il découvre alors une passion pour le droit international, qui le fascine de par le rapport symbiotique que ce droit entretient avec son environnement politique. C'est "un droit sans peau", précise-t-il, d'où toute la difficulté à l'appréhender de manière scientifique.

Le droit musulman retient aussi son attention: ce qui l'attire est sa logique inhérente. En effet, il s'est édifié, sur la cinquantaine de versets que le Coran consacre au droit, un édifice jurisprudentiel impressionnant, équivalent, si ce n'est plus, au droit romain. Georges Abi-Saab veut en faire une radioscopie. C'est une méthode qui lui est chère et qu'il éprouvera par la suite à de nombreuses reprises. Comprendre et expliquer sont parmi ses maîtres-mots.

La licence lui permettait de choisir la voie de la carrière de magistrat ou d'avocat. Il la refuse, et choisit de poursuivre ses études dans les meilleures universités étrangères de l'époque. Il fait tout d'abord un court séjour à Paris, dont il garde le souvenir de Jean Rivero, qui y enseigne le droit administratif et représente celui-ci comme "l'exercice du pouvoir au quotidien", ainsi que des cours tout en subtilité de Paul Reuter sur le droit des organisations internationales, allant toujours au-

delà du visible et du prévisible. Une bourse lui permet ensuite de passer à l'Université du Michigan, où les événements politiques le rattrapent: la crise de Suez ayant éclaté dès son arrivée sur le campus américain, il s'active à expliquer le point de vue du monde arabe. Préparant un doctorat en économie, il n'en fréquente pas moins les cours de droit international et de systèmes juridiques du Moyen-Orient à la faculté de droit, où il acquiert une réputation de fin connaisseur du droit musulman.

On lui offre alors une autre bourse, cette fois pour la Harvard Law School. Il y rencontrera son deuxième mentor, Richard Baxter, qui lui enseigne la méthode du traitement de cas, poussant l'analyse au-delà de l'espèce sans toutefois la déraciner des faits. Georges Abi-Saab aime à préciser que son passage à Cambridge (Mass.) lui a permis de polir non pas tant son "savoir" que son "savoir-faire" juridique.

On lui octroie un "Humanitarian Trust Fellowship" qui lui permet, avec en poche les grades de LL.M. et de S.J.D., de partir à Cambridge (Royaume-Uni). Enseigne à la vénérable institution celui qui sera son troisième mentor, Sir Robert – ou, plus familièrement, "Robbie" – Jennings, avec qui il partage, en sus de sa passion pour le droit international, l'amour des chats.

Il ne peut plus échapper à l'emprise du droit international. S'intéressant aux aspects distributifs de l'économie, il a commencé une thèse sur le rôle du secteur public dans l'économie égyptienne, mais son travail devient sans objet avec les nationalisations conduites par Nasser en 1961. Il se concentre alors sur sa thèse juridique. Ses recherches le conduisent à Genève, qui deviendra sa ville d'adoption: recommandé par le professeur Jennings à Paul Guggenheim, il décroche une bourse qui lui permet d'y fréquenter l'IUHEI, où il soutiendra quelques années plus tard sa thèse sur les exceptions préliminaires dans la procédure de la Cour internationale de Justice. Genève est aussi la ville de sa rencontre avec Rosemary, elle aussi futur docteur de l'Institut, et de leur mariage.

Cet adepte de l'école sociologique du droit, partisan des thèses progressistes, qui se proclame anti-kelsénien, entamera justement sa carrière de professeur au cœur même du cénacle du grand juriste autrichien, à l'IUHEI de Genève. Pour ce féru de la quête intellectuelle, une nouvelle étape commence, après une période de sa vie qu'il qualifie d'"idéale", celle des dix dernières années où il fut jeune adulte, curieux, heureux... et sans beaucoup de responsabilités susceptibles de freiner son exploration du monde et sa quête de savoir. Georges Abi-Saab est néanmoins resté jeune, curieux, passionné et amateur de rencontres et de discussions. Il a tissé autour de lui de très nombreux liens professionnels, et compte énormément d'amis.

Sa contribution à la science du droit international est significative, substantielle et traversée par différentes lignes de force. Partisan d'une justice plus égalitaire et plus participative, à l'aune du mouvement de décolonisation puis de la quête d'émancipation des pays du Tiers-monde, il souligne le rôle du droit comme

instrument de justice et d'intégration sociale, par l'identification et la promotion de valeurs et intérêts communs à tous les membres de la communauté internationale. Ce rôle, toutefois, ne saurait être rempli que dans les limites de la capacité et le respect de la cohésion logique du système. Cette notion de système juridique international compte justement parmi les idées maîtresses de la pensée de Georges Abi-Saab. Celui-ci va sans cesse chercher à en identifier et analyser les bases et les principes régulateurs. Les fonctions exécutive, législative ou judiciaire seront appréhendées sous leurs diverses facettes, que ce soit sous l'angle du concept d'organisation internationale, sous celui du maintien de la paix ou encore par le biais de la codification. La Cour internationale de Justice fera aussi l'objet de nombreux écrits, tant à titre de prisme de l'évolution du système international que parce qu'elle est investie du rôle de garante du respect de la règle de droit dans cet ordre juridique particulier.

Ce système sera d'ailleurs admirablement disséqué et étudié dans le cours général donné par Georges Abi-Saab à l'Académie de droit international de La Haye en 1987. Cette large fresque constitue une synthèse magistrale de sa pensée. Les auditeurs qui ont eu le privilège d'assister à ladite session ne s'y sont d'ailleurs pas trompés: la rumeur publique rapporte qu'ils ont réservé à leur professeur, en guise de remerciement, une ovation debout de plus de quinze minutes, indubitablement un fait rare dans l'histoire de cette respectable institution !

Georges Abi-Saab le juriste se déclare optimiste. Il veut voir jouer au droit international un rôle de garant du respect des intérêts de tous, et pour le moins, de bouclier contre les risques de dégradation du système. Il observe toutefois que les organisations internationales, envisagées comme vecteurs de progrès social sur la scène internationale, n'ont pas emprunté cette voie dans la pratique, malgré certains signes décelables de ci de là. Or, c'est un univers qu'il connaît bien, l'ayant analysé dans nombre d'écrits, disséqué comme professeur dans ses cours et séminaires, et fréquenté comme participant actif. Ainsi, appelé à rédiger les deux premiers Rapports du Secrétaire général des Nations Unies sur le "Respect des droits de l'Homme dans les conflits armés" (1969-1970), il a ensuite joué un rôle actif à la Conférence d'experts gouvernementaux et à la Conférence diplomatique de 1974-77 sur la "Réaffirmation et le développement du droit international humanitaire". Il a pu contribuer tant à la formulation des normes de droit humanitaire – notamment aux règles applicables aux guerres de libération nationale, objet d'un premier cours à La Haye en 1974 – qu'à leur mise en œuvre, veillant, à titre de juge au Tribunal pénal international pour l'ex-Yougoslavie, à ce que les violations massives de ce droit ne restent pas impunies.

Les années 1970-80 le verront s'intéresser également à la quête d'affranchissement économique de nombre de pays dits "en voie de développement", et à sa

conceptualisation en termes juridiques. C'est l'ère de la revendication d'un "nouvel ordre économique international" et de la promotion d'un droit au développement, prolongeant le droit à l'autodétermination: les travaux de Georges Abi-Saab permettent d'en mieux cerner les contours juridiques. Ces changements lui offrent aussi la possibilité de développer et d'affiner sa perception des sources du droit international, notamment en ce qui a trait au rôle joué par les résolutions des organisations internationales dans la formation des normes.

La vie professionnelle de Georges Abi-Saab, outre ses activités académiques, est tout aussi bien remplie: la Cour internationale de Justice le voit ainsi non seulement plaider, mais aussi siéger par deux fois en tant que juge ad hoc. Il est juge au Tribunal international pour les crimes commis dans l'ex-Yougoslavie lors des premières années d'établissement de cette institution pionnière, et participe ainsi à l'édification de sa stature dans l'ordre juridique contemporain. Il agit comme conseil, expert ou arbitre à plusieurs reprises, et remplit plusieurs missions pour le compte d'organisations internationales. Et très récemment, il est membre de l'organe d'appel de l'Organisation Mondiale du Commerce (OMC). Sa carrière est riche, pleine et surtout stimulante, pour lui-même certes, mais aussi et surtout pour ceux et celles, étudiants, collègues ou autres, qui viennent à lui pour mieux comprendre les rouages complexes de la société internationale et de son droit. Directeur d'un grand nombre de thèses, Georges Abi-Saab encourage ceux qu'il se plaît à dénommer "ses enfants", qui ont bénéficié de ses conseils et continuent à partager ses engagements: une famille vaste et diverse, dispersée aux quatre coins du monde, dont maints membres assument aujourd'hui d'importantes responsabilités. C'est là que réside la plus grande fierté de Georges Abi-Saab, qui revendique comme héritage d'avoir su inspirer ces personnes, lesquelles, en retour, peuvent se targuer d'assurer à la pensée de leur mentor un continuel retentissement que sa justesse et sa pertinence justifient amplement.

Comme tant d'autres, je dois beaucoup à Georges Abi-Saab; comme tant d'autres, je lui suis reconnaissante de m'avoir éclairé dans ma quête de compréhension, et d'avoir su m'aider à grandir dans ma réflexion; comme tant d'autres, je lui sais gré de sa disponibilité, de sa passion. Lorsque je lui ai demandé, au terme de notre discussion, s'il y a un message qu'il lui semble important de transmettre, il a alors pris avec un sourire, le livre rouge consignant son cours général à La Haye et lu à haute voix l'une des dernières phrases de cet ouvrage:

Si j'ai pu, à travers ces quelques leçons, vous transmettre l'idée que le droit est avant tout un certain regard ou une certaine manière de voir, plutôt qu'une somme de connaissances, je ne vous aurai pas fait perdre votre temps. Car comme le dit le proverbe chinois: "si vous donnez un poisson à quelqu'un vous le nourrissez pour un jour; si vous lui apprenez à pêcher, vous le nourrissez pour la vie".

Work in Progress / Travaux en cours

The Precautionary Principle: From Paradigm to Rule of Law

JAYE ELLIS*

In the context of my doctoral dissertation, which is to be submitted to the Faculty of Law at McGill University, Montreal, Canada, I explore the role and function of the precautionary principle in the development and application of international environmental law. This question is one aspect of the larger dissertation project, which focuses on a series of soft law norms, including the common concern of humankind, common but differentiated obligations, and permanent sovereignty over natural resources. In the dissertation, I seek to trace the normative influence of these principles on the development of environmental law in the contexts of Antarctic environmental protection, protection of the ozone layer, the control of trade in endangered species, and high seas fisheries conservation.

The recent elevation of the precautionary principle to the level of a binding obligation in a series of international environmental conventions¹ has been widely heralded as a major achievement. However, it raises questions concerning the effectiveness that the principle, as a binding rule of international law, is likely to have. In pursuing this inquiry, the principle may be considered in three different guises: as an influential paradigm; as an aspirational norm; and finally as a rule of law.

On one level, the precautionary principle signifies a new approach to environmental decision-making. It represents a recognition that the environmental effects

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¹ See, for example, the Convention for the Protection of the Marine Environment of the North-East Atlantic, 1992 (entered into force 25 March 1998); the Convention on the Protection of the Marine Environment of the Baltic Sea Area, 1992 (will enter into force on 17 January 2000); the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, (not yet in force); the Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Waste and Other Matter, 1972 (not yet in force); the Protocol on Biosafety to the Convention on Biological Diversity, 2000 (not yet in force).

of human actions are wide-ranging and unpredictable, and that environmental protection considerations must be incorporated, along with other goals, into decision-making processes. The notion of precaution has potentially far-reaching effects in that it calls for a rethinking of the division of labour between science and policy. It has long been understood that science cannot establish acceptable levels of risk of environmental impacts or determine the priority to be granted to environmental protection as compared with other objectives. These are political and normative questions. By requiring decision-makers to act in the absence of conclusive scientific evidence of the necessity of action, the principle essentially exhorts them to undertake the difficult but necessary task of assessing competing interests and objectives and seeking to find among them a common interest or acceptable compromise, based on scientific data but also on the interests and values of those who will be affected by the final decision. The influence of this approach as a paradigm may be observed in light of the evolution of international environmental law and policy over the course of the last three decades. This influence does not depend on the principle's normative or legal validity, but rather on a range of factors, including but certainly not limited to its persuasiveness and soundness.

Second, the precautionary principle may be contemplated as a norm that identifies a set of goals or aspirations and calls on actors to strive for their attainment, particularly through the progressive development of international law. Its capacity to guide legal development depends in large measure on its normative power, an elusive quality that arises from the principle's persuasiveness, its acceptance by a large number of actors in a wide range of forums, and its perceived validity as a guiding principle. The principle serves as a reference point against which the legitimacy of actions, decisions or rules may be evaluated. The effect of this normative power may be traced by examining the manner in which the precautionary principle is deployed in discourse about legal rules, and by considering the compatibility of resulting rules or instances of their interpretation with the principle.

It is generally assumed that the power of the precautionary principle will be enhanced through its articulation as a legally binding rule. This is likely to be the case, but not because it will henceforth be possible to identify and sanction its violation. By expressing the principle in the imperative rather than the conditional, its status is enhanced but its function remains essentially unchanged: the principle continues to serve as a reference point to evaluate the appropriateness or legitimacy of rules, decisions and behaviour within a treaty regime, but it becomes much more difficult for parties to avoid its invocation when they are seeking to justify their actions (or inaction). By taking steps to specify the principle's meaning and application in the context of a given treaty regime, the parties do not capture the

principle itself and render it concrete and substantive; rather, reference to the principle is made in order to guide the processes of rule-making. The principle itself retains its generality and flexibility, and remains available for other such exercises in law- and policy-making.

The precautionary principle thus makes its most important contribution to international law by providing a framework within which law is developed, interpreted and applied. The principle does not identify prescribed or proscribed behaviour in particular circumstances or establish unacceptable thresholds of risk; nor is this its purpose. Like all legal principles, the principle of precaution guides discourse and decision-making, legitimates certain approaches or solutions and de-legitimizes others, and establishes a set of objectives against which particular roles or the results of particular decision-making processes may be evaluated. The difficult and controversial balancing processes that environmental decision-making inevitably entails cannot be avoided through the crafting of more specific, detailed laws, although such laws may render the process more effective and may enhance its fairness. Like scientific data, legal rules can shape and circumscribe the process of decision-making, but cannot assume the full responsibility for that process.

By tracing the influence of the precautionary principle as a paradigm, as an aspirational norm, and as a rule of law, I seek to accomplish two things. First, I am interested in better understanding the impact of the principle on the evolution of rules and processes in international environmental law. Second, I wish to consider the role and function of principles of soft international law generally, so as to gain insight into the creation and application of international environmental law.

As this project is ongoing, I welcome comments and suggestions, and would be pleased to share information with others working in this and related fields.

Conference Scene / Le tour des conférences

Arbitral Tribunals or State Courts – Who must defer to whom?

BABAK BARIN and MARIE-CLAUDE RIGAUD*

On 27-28 January 2000, the Swiss Arbitration Association and the International Bar Association presented a joint conference in Zurich featuring distinguished speakers from around the world. As revealed by the topic, the conference focussed on the interaction between State courts and arbitral tribunals and raised some very interesting questions relating to, among others, the principles of *lis pendens* and *res judicata*.

Rumour has it that the topic was chosen as an aftermath to the Peruvian case *Compania Minera Condensa SA and Compania de Minas Buenaventura SA v. BRGM-Pérou SAS* (1997), which made its way into Switzerland and reached this country's highest court. The facts of the Peruvian case which involved principally the violation of a shareholder's right of first refusal were summarised in 13 Mealey's International Arbitration Report (1998, no. 9) as follows.

In 1984, Compania de Minas Buenaventura SA (Buenaventura) and the French state agency Bureau de Recherche Géologique et Minières (BRGM) negotiated the participation of the Buenaventura group in Cedimin SA, a Peruvian daughter company of BRGM owned by Société d'Etudes de Recherches et d'Exploitation Minières, known as BRGM-Pérou SAS (BRGM-Pérou). In 1985 Buenaventura, BRGM-Pérou and Cedimin SA signed an agreement and they also agreed that the Statutes of Cedimin SA would be modified to include a pre-emption right for the shareholding companies. The agreement and the modified statutes both contained a clause calling for ICC arbitration in Switzerland.

In 1996, BRGM sold a substantial part of its shares in BRGM-Pérou to an Australian company. In response, Buenaventura and Compania Minera Condensa SA (Condensa) began court proceedings in Lima alleging violation of a pre-emption right. BRGM-Pérou's objection that the dispute ought to be referred to arbitration was rejected by the Court of Appeal in Lima. In the meantime, BRGM-Pérou commenced arbitration proceedings in Switzerland. Buenaventura and Condensa contested the arbitral tribunal's jurisdiction and raised the issue of *lis pendens*.

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In an interim award, the arbitral tribunal found that it had jurisdiction over the dispute. It also found that the principle of *lis pendens* “only regulates the relationship between two equally competent State courts.” Buenaventura and Condensa sought annulment of the award. The Swiss Federal Tribunal denied this request, finding:

The Lima Court of Appeal, in its decision of 16 December 1996, rejected the objection based on the arbitration agreement essentially because [the Australian company] and [Cedimin SA], to which the arbitration clause could not be opposed, would participate in the proceedings – with Buenaventura on the side of the claimants; with BRGM on the side of the defendants. However, a decision in this dispute would affect all parties, so that they must have the possibility to participate in the arbitration... The mere danger of contrasting decisions rendered in different proceedings does not, according to the [New York] Convention, make the arbitration clause inoperative or incapable of being performed or exclude the jurisdiction of the arbitral tribunal . . . Under these circumstances the parties should have been referred to arbitration, . . .

As expected therefore, among the questions raised at the conference were: Should the decisions of arbitrators regarding the existence and validity of an arbitration clause have priority over those of competent State courts? Does Article II (3) of the New York Convention apply only to the court which has to decide on the issue of the validity of the arbitration clause or is the court which is called to recognise the arbitral award also bound by this provision? Should there be a European Convention on recognition and enforcement of arbitral awards providing for a uniform, possibly even a fast track procedure for enforcement? Should all activities relating to Conventions on arbitration be left to UNCITRAL or to some other UN organ? Does issue preclusion (as opposed to claim preclusion) apply to decisions from two different forums, the first of which is arbitration?

Concepts such as *lis pendens* and *res judicata* have for long puzzled lawyers all around the world. Add to these principles the elements of a consensual jurisdiction, the complexities of varying systems of law and then submit them for determination to two very different forums for dispute resolution and the result – as one of the conference organisers put it – can not be straightforward and likely to result in a number of contradictory answers. In recent years, academic and judicial discussion about these issues have been fuelled by a growing desire to achieve consistency and predictability. These efforts, however, have not been without controversy and ensuing discussion.

One of the most interesting papers presented at the conference and illustrative of the above point was that of Professor François Perret. According to Professor Perret, decisions of arbitrators regarding their jurisdiction ought to be given priority

over those of State Courts, “subject to the application to set aside the award before the competent State Court.” Take for example, the situation where an action is brought before a State Court in breach of an arbitration clause. Professor Perret and others argue that faced with such a situation the State Court must first, “decide on the issue of whether or not the said clause is valid and binding prior to assess[ing] its jurisdiction in application of the conflict of law rules regarding international jurisdiction.” Professor Perret maintains, “this issue being a preliminary one, the State Court’s ruling cannot have a “*res judicata*” effect since it will be part of the motivation of the judgment which has no effect. Consequently, a case of *lis pendens* can not exist if one of the two jurisdictions is called to rule on a preliminary issue which means that the mere existence of parallel actions cannot constitute an obstacle barring an Arbitral Tribunal subsequently seized of the dispute, to rule on its jurisdiction, . . .”

Evidentiary traces of the controversy referred to earlier can be found in comparing the above views to the *obiter dictum* of the Swiss Federal Tribunal in *Compagnie de Navigation et Transports SA v. Mediterranean Shipping Company SA* (1995), where the court remarked:

According to certain authors, the State court cannot decide on the question of jurisdiction if arbitral proceedings are already pending or can be commenced with no special difficulty . . . or, faced with an objection in favour of arbitration, the court may only summarily ascertain whether there is a *prima facie* arbitration agreement, in order not to give a preliminary decision on jurisdiction with respect to the arbitral tribunal. [This opinion], pertaining to the scope of *lis pendens*, cannot be shared; it is incompatible with the principle according to which the court shall decide on its own jurisdiction in virtue of its duty to do justice, or with Art. 7 PILA, which provides that a State court must rule on the arbitration objection and, hence must make a preliminary ascertainment of the jurisdiction of an arbitral tribunal to the exclusion of its own, as it would do with respect to another State court.

The conference also offered some creative solutions for the participants’ consideration. One speaker for example, suggested the desirability of having uniform rules for the interpretation of the validity of arbitration clauses, while another recommended the inclusion “in the concept of contradictory decisions as per article 27(5) of the Brussels/Lugano Convention, the inconsistency of a State Court’s decision with a prior arbitral award.” By far, however, the most interesting solution proposed (for the first time at the occasion of the 40th anniversary of the 1958 New York Convention in New York), was the creation of a model law for legislation implementing the New York Convention.

**International Council for Commercial Arbitration (ICCA)
Conference 2000
“International Arbitration and National Courts: A Never
Ending Story”
New Delhi 2-4 March, 2000**

JUDITH GILL*

ICCA selected a delightful location for its most recent conference. India must rank as one of the most interesting countries on the planet, although driving out there is taking your life in your hands and is certainly not for the faint hearted. The delegates greatly enjoyed the colour and entertainment of the venue and the Indian Council of Arbitration is to be congratulated on hosting a very successful event.

Down to Business

It is 25 years since ICCA last met in India. In the intervening period ICCA has continued to develop as a forum which encourages informed and interesting debate on transnational issues in the arbitration field. The focus chosen for this conference, the never ending story of the relationship between arbitration and the courts, was particularly appropriate given the widely recognised difficulties encountered in the host jurisdiction in the past. It is of course also a truly international topic of real and immediate importance in many jurisdictions around the world.

The working sessions covered the life-span of an arbitration case from arbitration agreement to enforcement of the award. Topics considered included the validity and effectiveness of the contractual provision, the arbitrator's responsibilities for the proper conduct of proceedings and the role of the courts in providing support and supervision. The roles of arbitrators and the courts in the context of applications for interim relief and the enforcement and setting aside of awards were also considered.

What developments to report?

It seemed from the first session that mediation was a subject of real interest to many of the delegates. There was a lively discussion of so called “med-arb” practices with a perhaps not surprising difference of view between those from common law and civil law jurisdictions. Those with a common law background often have difficulty in reconciling the combined role of mediator and arbitrator and those

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with a civil law background generally do not see why the combination of the roles should give rise to problems. As the debate continued it once again was demonstrated that “mediation” means different things to different people. In any event the underlying message was undoubtedly that arbitration must continue to develop and be responsive to users’ needs and demands or its days are likely to be numbered. Mediation appears to be growing in popularity and will be swift to fill the void if arbitration does not meet the expectations of the modern disputant.

Have things really changed in India?

Many of us had a real interest in knowing whether the “dark days” of Indian arbitration were truly over and whether their reforming Arbitration and Conciliation Act of 1996 really was working in practice. Perhaps inevitably the answer depended on who you spoke to. The overall message was that things have greatly improved, but that Indian arbitration practitioners are not yet confident of having been rescued completely from judicial attempts to control the arbitration process, nor indeed from the exploitation by reluctant respondents of the residual judicial willingness to interfere.

What else did we learn in New Delhi?

ICCA conferences provide a fertile ground for comparative analysis of arbitration in different jurisdictions and this brings to light interesting contrasts. For example we were told that in the Czech Republic only courts can grant interim measures, whilst for arbitration before the Kuala Lumpur Regional Arbitration Centre the Tribunal is the only source of such relief. In Kuala Lumpur the exclusion of the courts’ jurisdiction pursuant to the rules of the Centre includes the power to grant interim measures. Beyond such snippets it is difficult to say that many innovative solutions were found to the issues that beset modern arbitration, though, as might be expected, there was no shortage of problems identified. Some had a flavour of the technological revolution currently underway, namely whether an arbitration agreement contained in an email would constitute an agreement in writing or whether examination of witnesses could be accommodated within an on-line arbitration process. Other problems identified were more familiar, such as the inter-relationship between Articles V.1.(e) and VII.1 of the New York Convention and how a court at the place of enforcement of an award should respond to the setting aside of that award at the place of arbitration.

It would perhaps be asking too much of a forum of this nature to find solutions to all these problems. A rather optimistic intervenor suggested that one of the functions of such a conference might be to instigate statutory development. That may be a rather ambitious objective.

It was a telling tribute to the generally high standard of contributions that the conference hall was still full for the final session on Saturday afternoon and those who stayed were rewarded with a particularly interesting session. Lord Mustill bemoaned the disappearance of the culture of compliance with arbitration awards. This may be a matter for regret, but on the other hand it has given rise to some fascinating case law highlighting that even the New York Convention of 1958, which has stood the test of time so well, is developing some cracks.

The Bookshelf / La bibliothèque

of Wouter de Vos*

It is perhaps not too far-fetched to suggest that the continued existence of the traditional book might come under threat in the Information Age. As a traditionalist in this regard I, therefore, take delight in writing a contribution for a column called *The Bookshelf*. I do not wish to deny the great advantages of Information Technology, such as the availability of information on the internet, but I still have a preference for books in their traditional form. To discover a book of interest on a bookshelf remains a special experience for me.

The aim of this contribution is to select a few books that have exercised an important influence on my thinking and in my profession. As a procedural scholar it is natural for me to give a prominent place to the writings of Prof. Mauro Cappelletti, who is generally regarded as one of the greatest proceduralists and comparativists of the 20th century. Over a period of approximately 30 years he produced numerous penetrating studies on the judicial process, with special emphasis on civil procedural law and constitutional law in their comparative contexts. Some of the outstanding publications in which he was involved – as writer and/or editor – include: the classical work entitled *Fundamental Guarantees of the Parties in Civil Litigation* (1973); the monumental study consisting of four volumes under the broad title *Access to Justice* (1978-1979), which was followed by *Access to Justice and the Welfare State* (1981); *International Encyclopaedia of Comparative Law Vol. XVI Civil Procedure* (1987); and *The Judicial Process in Comparative Perspective* (1989). These writings taught me that there is more to civil procedure than pure form. It is not a mere technique without any theoretical foundations. All the technical rules of practice owe their very existence to certain fundamental rights or guarantees of the parties, which have developed over millennia in a quest for procedural justice. These guarantees are, therefore, the “raison d’être” of the specific rules, and constitute the theoretical basis of civil procedure. Cappelletti’s studies also made me aware of the close link between civil procedure and the socio-political characteristics of society.

I had the privilege about eight years ago to act as host to Mauro Cappelletti in Johannesburg and to establish a special relationship with him. Sadly, my contact with him, as well as his academic activity, came to an end a few years later as a result of the serious deterioration of his health. Fortunately, his intellect and

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eminence as a procedural scholar still speak from his writings. In the words of Sir Jack Jacob, Prof. Cappelletti was one of those precious few in the field of comparative procedural law who “transcend[ed] [his] compeers in [having been] immensely more active and articulate as well as more imaginative, more creative as well as more critical, more innovative as well as more inspiring” (*The Judicial Process in Comparative Perspective Foreword V*).

To conclude the procedural picture I briefly mention three books that played a major role in my research in this field. The classical book entitled *History of Continental Civil Procedure* (1928) by Engelmann helped me to trace the development of European procedural systems from the Middle Ages to the 20th Century. And the monumental work entitled *European Civil Practice* (1989) by O’Malley & Layton provided me with an authoritative overview of present-day civil procedure in England and several other European countries. Finally, *Procédure Civile* (1981 and, more recently, 1994) by Vincent and Guinchard, the authoritative guide on French civil procedure, opened the doors for me to this domain of French law.

Further afield, as regards the law in general, I take a keen interest in legal history, foreign legal systems and the influence of language on the law. The outstanding book that comes to mind in this context is *History of English Law* (1968) by Pollock & Maitland, a comprehensive work consisting of two volumes. Through this book I discovered the fascinating story of the birth of the jury in Medieval England. It is a story shrouded in mystery, since the important events occurred whilst darkness was still hanging over England and Europe. However, what emerges clearly from this study is that the jury, in embryo form, made its way to England from French soil under influence of the Norman Kings who ruled England at the time. And during the long reign of Henry II, in the latter half of the 12th Century, this procedure developed into a prominent royal institution. In essence it was an inquest, for purposes of obtaining information, which was held at the behest of the King. Henry II had ascended to the throne after a period of great turmoil and strife and he found this procedure very useful to obtain information from his subjects for purposes of keeping the peace. It is well known that over the next eight centuries the jury developed into a hallmark of the Anglo-American judicial process. But it is perhaps less known that this palladium of individual liberties “is in its origin not English but Frankish, not popular but royal” (*History of English Law* 142).

Another historical fact of great interest that came to my knowledge through *History of English Law* is the profound impact of the French language on the English legal system. Since French was the language of the conquerors and all influential people, it gradually became the sole language in which the courts and lawgiver conducted their business. And even when the dominance of “law-French” came to a gradual end, the irreversible influence of French on English legal terminology

remained. To this day there are many English legal terms that owe their origin to French terminology.

To conclude, I mention three books on humanity, each of which left a certain imprint on my mind. Reading the epic novel entitled *The Pillars of the Earth* (1989) by Ken Follett was an unforgettable experience. This mammoth story, which spans forty years in 12th century England, evokes a vivid picture of different walks of life, and gives a fascinating account of the social chaos that prevailed on the eve of Henry II's ascension to the throne. Although this is a novel I found it most instructive in regard to the birth of the jury. Insight into the anarchy prior to Henry II's assumption of power gives one a clear understanding of the reasons for the employment of the Norman inquest, which was destined to become the jury. It was important, for restoring the peace, to obtain information from reliable subjects about who had been dispossessed of land and who was responsible for crime and atrocities.

My fascination with the history of mankind inevitably attracted me to *Fingerprints of the Gods* (1996) by Graham Hancock, a compelling study of the origins of the known ancient civilisations, which calls all traditional learning in this regard into question. In essence Hancock advances the theory of a highly developed civilisation, existing well before the known ancient civilisations, that was destroyed by a planetary catastrophe. But some traces of life survived this cataclysm, which served as a stimulus for the development of future civilisations. Hancock's theory is most controversial, but in the words of two critics it is "[a]n astonishing journey into the past," and it "is too comprehensive and . . . too rational to be easily dismissed".

My love for France, my adopted country through my marriage, brought me in contact with *Life World Library: France* (1960). It is, of course, outdated by now and I am not suggesting that it is the most authoritative guide on the country and its people. But it contains the most eloquent statement on the riches of this beautiful land that I know. In the "Introduction" Sir Arthur Bryant states:

There is no land more lovely and none which man over the ages has so enriched . . . There is more in France of what can delight and content the heart of man than anywhere in the world. Not to have enjoyed and loved her is to have missed the full reach of humanity.

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Sur la couverture

Pour son deuxième volume, le Comité de rédaction a choisi une sculpture, oeuvre d'Edmée Guyon, intitulée "La Paix". L'artiste en met gracieusement la photo à la disposition du FORUM.

"Chacune des sculptures d'Edmée Guyon est comme la synthèse d'un mouvement où s'unissent forme physique et aspiration spirituelle" a écrit Jean Selz, historien d'art.

La Paix a été inspirée à l'artiste par les femmes du désert qui, assises par terre, forment un triangle avec leurs voiles et leur robe. La sérénité et l'épure qui se dégagent de cette image, révélée par la sculpture, lui ont donné son titre. Qu'elle inspire le travail du Comité de rédaction durant cette deuxième année d'existence.

Edmée Guyon peut être jointe au 18, rue Henri Barbusse, 75005 Paris (tel: +33.1.43.26.34.79).

On the Cover

The Editorial Board has chosen to illustrate the cover of its second volume with a sculpture by Edmée Guyon entitled "*La Paix*", a photograph of which the artist has kindly made available to the FORUM.

According to the art historian, Jean Selz, "each of Edmée Guyon's sculptures is like a synthesis of motion, uniting physical form with spiritual aspiration".

The artist's inspiration for *La Paix* was the triangle formed by the veils and garments of desert women, seated on the ground. The title of the sculpture is attributable to the serenity and purity emanating from it.

Edmée Guyon can be reached at 18, rue Henri Barbusse, 75005 Paris (tel: +33.1.43.26.34.79).

Information for Authors

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