

International Justice, Accountability and Reconciliation: Diminishing Impunity in International Law

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1. INTRODUCTION

States take unilateral measures to protect citizens in the interests of national and international security.* Since September 11, 2001, our preoccupation with the 'War on Terror' has caused us to lose focus on "a much more lethal and widespread form of terror: terror that is sponsored by states".† State-sponsored terrorism has occurred in China, Cuba, Iran, Iraq, Libya, North Korea, Sudan and Syria. Many other countries such as Argentina, Cambodia, Chile, El Salvador, Rwanda and Sierra Leone continue the struggle toward achieving accountability for gross violations of human rights that occurred under the state apparatus.

Impunity for those who are perpetrators of gross violations of human rights in past authoritarian regimes continues to fuel the struggle between accountability and

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* In Canada, former Prime Minister Jean Chrétien and former Minister of Foreign Affairs Lloyd Axworthy launched the "International Commission on Intervention and State Sovereignty (ICISS)" in 2000 in order to address the problem of state sovereignty and international responsibility. The ICISS devised a report entitled "The Responsibility to Protect" whereby they canvas the idea that sovereign states have a responsibility to protect their own citizens from avoidable catastrophe, but when such a state is unable or unwilling to do so, the burden falls upon the international community (online: <<http://www.dfait-maeci.gc.ca/iciss-ciise/report-en.asp>>).

† Patricia Marchak, *Reigns of Terror* (Montreal: McGill-Queen's University Press, 2003) at vii.

social reconciliation around the globe.[‡] Various incoming governments have granted amnesty or impunity to the authors, under previous governments, of gross violations of human rights, ostensibly in order to ensure a smooth transition of power from dictatorships to new democracies. In this transitional justice context, impunity is a backward looking issue involving how to come to terms with the past, and evaluate gross violations of human rights under previous military regimes.[§]

Recent events indicate there is an emerging trend in international law toward universal jurisdiction, providing a culture of accountability, and reflective of diminishing impunity for human rights abuses. For example, the establishment of international tribunals such as the International Criminal Court, the International Criminal Tribunal for Former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, the *Ad Hoc* Human Rights Tribunal for East Timor, and the Special Tribunal for Cambodia are indicative of a global effort toward furthering accountability.^{**}

Other legal instruments have surfaced that reflect the current view that the international community will no longer tolerate widespread impunity for gross violations

[‡] Many scholars refer to these transitions to democracy that have occurred throughout Latin America and Eastern Europe as a "wave of democratization". See generally Jamal Benomar, "Confronting the Past: Justice after Transitions" (1993) 4:1 *Journal of Democracy* 3; Francisco Panizza, "Human Rights in the Processes of Transition and Consolidation of Democracy in Latin America" (1995) 43 *Political Studies* 168 at 175; Alejandro M. Garro, "Nine Years of Transition to Democracy in Argentina: Partial Failure or Qualified Success?" (1993) 31:1 *Colum. J. Transnat'l L.* 1; Stanley Cohen, "State Crimes of Previous Regimes: Knowledge, Accountability, and the Policing of the Past" (1995) 20:1 *Law & Soc. Inquiry* 7; and Juan E. Méndez, "In Defence of Transitional Justice" in A. James McAdams, ed., *Transitional Justice and the Rule of Law in New Democracies* (Notre Dame: University of Notre Dame Press, 1997) at 1.

[§] Kai Ambos, "Impunity and International Criminal Law: A Case Study on Colombia, Peru, Bolivia, Chile and Argentina" (1997) 18:1-4 *Hum. Rts. L.J.* 1 at 2.

^{**} Peter Burns, Q.C., "The Convention Against Torture and Diminishing Impunity", in *The Changing Face of International Criminal Law, Selected Papers*, June 2001 (Vancouver: The International Centre for Criminal Law Reform and Criminal Justice Policy, 2002) at 149.

of human rights, including truth and reconciliation commissions, and prosecutions under the concept of universal jurisdiction. Landmark cases, such as that of the former Chilean dictator General Augusto Pinochet, serve as an impetus and aid in setting a new international precedent in the struggle against impunity and reflect the trend toward universal criminal jurisdiction over crimes in international law.^{††}

This paper will consider the definition of impunity, the context of transitional justice and the emerging norm in international law that requires successor regimes to investigate, prosecute and provide redress for gross violations of human rights.

2. IMPUNITY

Impunity generally refers to the "inability to prosecute and/or punish due to limited financial resources and a minimally-effective judicial system, or simply a lack of political will manifested by the exchange of amnesties or pardons borne out of complacency of *realpolitik*".^{‡‡} Louis Joinet, Special Rapporteur to the United Nations, defines impunity as: "the impossibility, *de jure* or *de facto*, of bringing the perpetrators of human rights violations to account... since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims".^{§§}

^{††} For a brief history of the Pinochet case, see Kriangsak Kittichaisaree, *International Criminal Law* (Oxford: Oxford University Press, 2002) at 56-61, 260, and 298; and Jenny Pearce, "Impunity and Democracy: The Law of Chile" in Rachel Sieder, ed., *Impunity in Latin America* (Institute of Latin American Studies, 1995) at 45. See also "The Pinochet Case: Timeline" *BBC News Special Report*, online: BBC News <http://news.bbc.co.uk/1/hi/special_report/1998/10/98/the_pinochet_file/232499.stm> for a timeline of events in the Pinochet case.

^{‡‡} Mary Margaret Penrose, "Impunity – Inertia, Inaction, and Invalidity: A Literature Review" (1999) 17:2 B.U. Int'l L.J. 269 at 275-276.

^{§§} *Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities*, Revised Final Report on the Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political), E/CN.4/Sub.2/1997/20/Rev.1, UN ESCOR, 49th Sess. (1997).

Impunity has both factual and normative dimensions.^{***} Factual dimensions refer to the particular circumstances and internal political-social conditions that permit gross human rights violators to evade prosecution, whereas normative dimensions are often tied to the presence of a military justice system and various national impunity or amnesty laws.^{†††} Furthermore, impunity exists in both practice and law. Impunity in practice is a result of strong military justice systems and weak civil governments, whereas impunity in law involves impunity laws (constitutional and general criminal law, amnesties and pardons, and special provisions exempting certain individuals), military justice (offences, jurisdiction, organizational structure, fair trial principles, substantive and procedural obstacles), and states of emergency.^{†††}

One author makes a distinction between "contemporaneous impunity" and "impunity for past actions".^{§§§} The former refers to the "breakdown of domestic mechanisms for securing accountability", whereas the latter refers to the specific issue of how to deal with past violations of human rights when there is a political transition from an authoritarian to a democratic regime.^{****}

Scholars have suggested the term accountability as the "antithesis of impunity", or the "effort aimed at curtailing impunity".^{††††} In the context of transitional justice, the

^{***} Ambos, *supra* note 4; Christopher C. Joyner, "Redressing Impunity for Human Rights Violations: The Universal Declaration and the Search for Accountability" (1998) 26:4 *Denv. J. Int'l L. & Pol'y* 591 at 611.

^{†††} *Ibid.*

^{†††} Ambos, *ibid.* at 2-5.

^{§§§} Françoise Hampson, "Impunity and Accountability" in Sieder, *supra* note 6 at 8.

^{****} *Ibid.*

^{††††} Penrose, *supra* note 7 at 272; and Cherif M. Bassiouni, "Searching for Peace and Achieving Justice: The Need for Accountability" (1996) 59 *Law & Contemp. Probs.* 9 [Bassiouni, "Searching for Peace"] at 19 and 26.

notion of accountability raises complex questions of international theory and practice, and must be considered in light of the specific circumstances of each government.

3. TRANSITIONAL JUSTICE

3.1 Accountability in the Wake of Gross Violations of Human Rights

The question of whether and how "fledgling democratic governments" should hold accountable those accused of having committed gross violations of human rights in the pre-democratic period has sparked a "vigorous debate" among international human rights scholars.^{††††}

Scholars have argued varying approaches to accountability, resulting in the emergence of three schools of thought. Some argue that new democracies should take an aggressive approach by adopting policies aimed at emphasizing punishment and condemning the perpetrators.^{§§§§} Others argue a more lenient approach that would emphasize forgiveness and social reconciliation.^{*****} Yet others support a middle-ground approach favouring policies aimed at balancing numerous goals, including punishment, reconciliation, and the establishment of an accurate historical record.^{†††††} Mark Freeman, Senior Associate for the International Centre for Transitional Justice in New York City, argues that strict adherence to any of these approaches is dangerous given the fragility of a transitional justice context.^{†††††}

^{††††} Mark Freeman, "Transitional Justice: Fundamental Goals and Unavoidable Complications" (2000) 28 *Man. L.J.* 113 at para. 1; Diane F. Orentlicher, "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime" (1991) 100:8 *Yale L.J.* 2537 at 2539.

^{§§§§} Freeman, *ibid.* at para. 2.

^{*****} *Ibid.*; and Panizza, *supra* note 3 at 171.

^{†††††} Freeman, *ibid.*

^{†††††} *Ibid.*

Freeman suggests six fundamental goals of transitional justice: (1) accountability, (2) truth, (3) social reconciliation, (4) victim recognition, (5) compensation for victims, and (6) institutional reform.^{§§§§§} Each of these goals raises moral, political and legal considerations that will inevitably vary in any given context.^{*****}

Transitional justice often requires trade-offs and contradictory considerations that will vary from one context to another. Freeman lists the six principal constraints related to the implementation of the goals of transitional justice (with accompanying examples):

(1) *Capacity* complications and the threat of a return to widespread violence (as was the case in Chile even after General Augusto Pinochet ceded power, and in Argentina when newly elected President Raúl Alfonsín attempted to take an aggressive approach toward retroactive justice immediately after taking power);

(2) *Costs* of retroactive justice programs (for example, in Rwanda, there were over 90,000 people being held in detention awaiting trials);

(3) *Program trade-offs* and priority of transitional programs (for example, in South Africa, the government adopted a controversial approach involving granting amnesty to perpetrators of human rights violations in exchange for truthful disclosure of their participation);

(4) Complications of *interdependence* and interconnecting goals (for example, in El Salvador, the truth and reconciliation commission was made up of foreigners from other Latin American countries as the government thought the presence of nationals on the commission might undermine the process);

(5) Complications of *timing* (for example, in the Philippines, newly elected President Corazon Aquino attempted to take an aggressive approach to justice at the beginning of the transitory period and this resulted in seven attempted coups during her first term in office); and

(6) Dilemmas of *legality and fairness* (for example, in 1992 in Hungary, President Goncz asked the court to decide on the constitutionality of a proposed law that attempted to restart the statute of limitations for selected crimes committed between 1944 and 1990, but the court decided the law was unconstitutional on the basis that it placed political convenience ahead of basic legal standards of fairness).^{†††††}

^{§§§§§} *Ibid.* at para. 4.

^{*****} *Ibid.* at paras. 4-10.

^{†††††} *Ibid.* at paras. 11-21.

In conclusion, new democratic governments have the difficult task of balancing the goals of transitional justice with political, economic, social and legal realities.

3.1.1 *Challenges of a Successor Government*

For successor governments, transitions from authoritarian to democratic rule represent "an opportunity and a hazard".^{††††††} A nascent democracy's primary concern is to establish the rule of law and build human rights safeguards into the new government that will prevent future violations.^{§§§§§§} The issue of whether to hold accountable those accused of human rights violations under a previous regime therefore has legal, ethical, political, and practical dimensions.^{*****}

The successor government faces both ethical principles that ought to be pursued, and actual political opportunities or constraints that ought to be taken into account.^{††††††} The question of how to adequately deal with justice in a transitional situation presents the first test in the establishment of democracy and the rule of law.^{††††††} Scholars agree that the failure to prosecute those responsible for committing gross violations of human rights

^{††††††} Steven R. Ratner, "Judging the Past: State Practice and the Law of Accountability", Book Review of *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* by Neil Kritz, ed. (1998) 9:2 E.J.I.L. 412.

^{§§§§§§} Rachel Sieder, "Introduction", in Sieder, *supra* note 6 at 1.

^{*****} Juan E. Méndez, "Accountability for Past Abuses" (1997) 19 Hum. Rts. Q. 255 at 256; Bassiouni, "Searching for Peace", *supra* note 14 at 23; José Zalaquett, "Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints" in *State Crimes: Punishment or Pardon: Papers and Report of the Conference, November 4-6, 1988 Wye Center, Maryland* (Queenstown, Maryland: The Aspen Institute, 1989), reprinted in Neil Kritz, "The Dilemmas of Transitional Justice" in Neil Kritz, ed., *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (Volumes I-III) (Washington: U.S. Institute of Peace Press, 1995) at 3 (Volume I); Panizza, *supra* note 3 at 170; Jaime Malamud-Goti, "Transitional Governments in the Breach. Why Punish State Criminals?" (1990) 12:1 Hum. Rts. Q. 1 at 13; and Freeman, *supra* note 15 at paras. 4-10.

^{††††††††} José Zalaquett, "Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations" (1992) 43 Hastings L.J. 1425 [Zalaquett, "Balancing"] at 1430; Panizza, *ibid.* at 176; and Luc Huyse, "Justice after Transition: On the Choices Successor Elites Make in Dealing with the Past" (1995) 20:1 Law & Soc. Inquiry 51 at 54-55.

^{††††††††} Kritz, *supra* note 25 at xxxi.

could seriously "undermine the legitimacy" of the newly elected government.^{§§§§§§} A nascent democracy should therefore strive to make a clean break with the previous regime and demonstrate its commitment to the protection of human rights through the implementation of new policies to this effect.

3.1.2 *The Debate Concerning Accountability and Prosecutions*

The basic question confronting transitional governments is whether to undertake measures to prosecute the perpetrators of the ousted regime that committed human rights violations and to what extent.^{*****}

Four arguments given by scholars in favour of accountability for past actions in the specific Latin American context include:^{††††††††} (1) *deterrence* – in the event there is a return to instability, the military and police forces will know they will or may be held accountable for human rights atrocities, (2) the need to *individualize responsibility* so that newly constituted military and police forces will not be all deemed responsible, and because victims need to know who was responsible, and that that specific individual has been punished, (3) to *demonstrate a qualitative change* in the political system that is

^{§§§§§§} Benomar, *supra* note 3 at 4. Human rights groups believe that impunity remains one of the main contributing factors to continuing patterns of violence and have published policy statements to this effect - see generally, Amnesty International, "Policy Statement on Impunity" in *Oral Statement by Amnesty International before the United Nations Commission on Human Rights, Sub-Committee on Prevention of Discrimination and Protection of Minorities* (Amnesty International, International Secretariat, August 1991). For another example of an international human rights organizations views on accountability, see Human Rights Watch, "Policy Statement on Accountability for Past Abuses" in *Special Issue: Accountability for Past Human Rights Abuses*, No. 4 (New York: Human Rights Watch, December 1989).

^{*****} Kritz, *supra* note 25 at xxxi.

^{††††††††} Hampson, *supra* note 12 at 9. For a further detailed discussion on why perpetrators of egregious violations of human rights should be prosecuted and punished, see Panizza, *supra* note 3 at 170-171; Malamud-Goti, *supra* note 25 at 11-12; Huyse, *supra* note 26 at 55-57; Richard Lewis Siegel, "Transitional Justice: A Decade of Debate and Experience" (1998) 20:2 Hum. Rts. Q. 431 at 439; Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Norman: University of Oklahoma Press, 1991) at 213-214; and Ruti G. Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2000) at 28-30.

committed to respecting the rule of law, and (4) the need to subject certain conduct, due to its intrinsic nature, to *universal condemnation*, irrespective of surrounding political circumstances.

On the other hand, advocates of a more conciliatory policy offer six counter-arguments to legal accountability for past abuses:⁺⁺⁺⁺⁺ (1) the need for a *fresh start* after a period of upheaval, (2) trials create martyrs and villains, when *everyone should bear a measure of responsibility* for what occurred, (3) at a time of new beginnings, *consensus has to be built up* and nurtured and institutions created (it is seen as a time to look forward and not backward), (4) sometimes the general population prefers a '*clean break*', (5) the *military and police forces need to be educated* achieving greater changes in attitude than the punishment of a few, and (6) *trials cannot be fair* because not all perpetrators will be tried and there is no fair basis for selection. This school of thought considers that adopting a policy of national reconciliation and amnesties for past abuses are the best methods for preserving democracy and human rights.^{§§§§§§§§}

In sum, two criteria emerge from these conflicting arguments surrounding the concept of accountability: effectiveness and fairness.^{*****} A successor government must attempt to strengthen the nascent democracy while balancing the goals of transitional justice with the political and economic realities of the country. Given the fragility of this transitional context, a political compromise between truth and justice is

⁺⁺⁺⁺⁺ Hampson, *ibid.* at 10.

^{§§§§§§§§} *Ibid.* For a further detailed discussion on why perpetrators of egregious violations of human rights should not be prosecuted and punished, see Huyse, *supra* note 26 at 57-64; Siegel, *supra* note 30 at 438; and Huntington, *supra* note 30 at 214.

^{*****} Hampson, *ibid.*

often required.

3.2 Truth Commissions Serving Transitional Justice

Truth and reconciliation commissions are emerging as the current trend toward accountability, and present an alternative to strict prosecution in international human rights law. In particular, truth commissions became the primary method in the inquiries of the fate of the disappeared after the fall of dictatorships.^{††††††††}

3.2.1 Purpose and Underlying Rationale

Truth commissions have emerged as "impunity's antidote" and "amnesty's analogue" originating in Latin America, and spreading to Africa, Europe and Asia.^{††††††††} They are official, non-adversarial bodies set up on an *ad hoc* basis with a mandate to investigate, document, and record historic patterns of alleged violations of human rights during a specific time period, in a particular country.

Usually these commissions are set up after there has been a transition from an authoritarian regime to a democratic government.^{§§§§§§§§} They operate under the assumption that in order to come to terms with the past and prevent future violations of human rights, societies must seek to uncover the truth in order to understand what

^{††††††††} Panizza, *supra* note 3 at 173.

^{††††††††} Teitel, *supra* note 30 at 79. To date, there have been truth and reconciliation commissions in Argentina, Bolivia, Burundi, Chad, Chile, Cyprus, East Timor, Ecuador, El Salvador, Germany, Guatemala, Haiti, Honduras, Malawi, Nepal, Nigeria, Panama, the Philippines, Serbia, Sierra Leone, South Africa, South Korea, Sri Lanka, Uganda, Uruguay, and Zimbabwe. Recent developments indicate that truth commissions will likely be set up in Bosnia, Burma, Cambodia, Colombia, the Congo, Indonesia, Kosovo, and Peru. See United States Institute of Peace, Truth Commissions Digital Collection, online: <<http://www.usip.org/library/truth.html#tc>>.

^{§§§§§§§§} Priscilla B. Hayner, "International Guidelines for the Creation and Operation of Truth Commissions: A Preliminary Proposal" (1996) 59 *Law & Contemp. Probs.* 173.

happened and why, and under whose command or orders.***** Their aim is not to prosecute and punish, but to investigate the fate of individuals under a previous regime.††††††††††

Truth commissions can be established at the national, regional, or international level with either a strict mandate to discover the truth in its entirety, or only a portion of the truth.†††††††††† They can run in conjunction with prosecutions, or independently thereof, but "should not be deemed a substitute for prosecution for the four *jus cogens* crimes of genocide, crimes against humanity, war crimes, and torture". §§§§§§§§§§ Truth commissions have restorative and preventative dimensions, combining the notion of restorative justice with the search for truth.*****

3.2.2 *Strengths and Weaknesses*

Arguments in support of truth commissions tend to be centred on a victim healing-catharsis theory. Through truth commissions, victims and their families are afforded the opportunity to relate their story and be heard in public. The victims are empowered by relating their testimony with the end result emphasizing reconciliation and healing.†††††††††† Other strengths of truth commissions include: aiding in re-establishing, implementing, and strengthening the rule of law in a transitional justice

***** Robert I. Rotberg, "Truth Commissions and the Provision of Truth, Justice, and Reconciliation" in Robert I. Rotberg & Dennis Thompson, eds., *Truth v. Justice* (Princeton: Princeton University Press, 2000) at 6.

†††††††††† Huyse, *supra* note 26 at 53.

†††††††††† Bassiouni, "Searching for Peace", *supra* note 14 at 20.

§§§§§§§§§§ *Ibid.*

***** Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston: Beacon Press, 1998) at 56; Rotberg, *supra* note 37 at 3.

†††††††††† Minow, *ibid.* at 58.

context, serving as means to discover the truth, serving as a public platform for victims (with regard to accountability and punishment), contributing to compensation, restitution, or reparation programs for victims, aiding in institutional reform and long-term development and democratization, and aiding in reconciliation ranging from healing, restoration, and mutual forgiveness.††††††††††

However, the very nature of a transitory justice context makes truth commissions vulnerable and somewhat limited. Some scholars argue that it is not enough to discern the truth – truth commissions must go further and the truth should be accessible to the public.§§§§§§§§§§ The issue of 'naming names' has come up many times and some truth commissions have decided not to publicly name those perpetrators of human rights abuses.***** Others argue that truth commissions have insufficient material resources, inadequate numbers of trained and qualified staff, lack of power or courage to proceed against members of the police and military, and are often under tight time limitations.††††††††††

Some consider the limited power of truth commissions to compel testimony and document production as a major obstacle to effective investigation of alleged violations of human rights.†††††††††† Truth commissions lack the ability to call witnesses, lack

†††††††††† David A. Crocker, "Truth Commissions, Transitional Justice, and Civil Society" in Rotberg & Thompson, *supra* note 37 at 105-108.

§§§§§§§§§§ *Ibid.* at 101.

***** For example, in Argentina, names were secretly leaked to the press when the government opted against publishing the names of those military personnel responsible for committing gross violations of human rights.

†††††††††† Minow, *supra* note 41 at 57-61.

†††††††††† Naomi Roht-Arriaza, "Conclusion: Combating Impunity" in Naomi Roht-Arriaza, ed., *Impunity and Human Rights in International Law and Practice* (Oxford: Oxford University Press, 1995) at 284.

power to subpoena and cross-examine testimonies, cannot perform search and seizures, and cannot independently corroborate witness testimony.^{§§§§§§§§§§} Truth commissions are also limited with respect to revealing the complete truth since the truth commission must narrow the number of cases to investigate down from possible thousands to a few hundred.^{*****}

Regardless of these obstacles, the overwhelming success of various national truth and reconciliation commissions in certain countries, like Argentina and South Africa, has prompted the international community to use this model in similar transitional justice contexts.^{††††††††††}

3.2.3 *Movement toward an Alternative Form of Accountability*

The movement toward a system of accountability has been gaining momentum in the international arena. Truth commissions reflect the current view that the international community will no longer tolerate widespread impunity for gross violations of human rights and have been used in dozens of countries.^{‡‡‡‡‡‡‡‡‡‡‡‡} The circumstances of each transitional justice context will inevitably vary from one country to another, and there is no set model upon which to construct a truth commission. However, truth commissions cannot act as a substitute for a state's obligations under international law.

^{§§§§§§§§§§} Crocker, *supra* note 43 at 101.

^{*****} *Ibid.*

^{††††††††††} Méndez, *supra* note 25 at 269.

^{‡‡‡‡‡‡‡‡‡‡‡‡} See *supra* note 35.

Conventions and include:

[W]ilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly. *****

State parties to the Conventions have an obligation in international law to search for, prosecute, and punish perpetrators of grave breaches, unless that state chooses to turn over perpetrators for trial to another state party. †††††††††††††††††††† This obligation is limited to conflicts of an international character. †††††††††††††††††††† However, crimes against humanity, genocide and torture would entail a duty to investigate and prosecute irrespective of the nature of the conflict. §§§§§§§§§§§§§§§§§§§§

Nevertheless, common Article 3 of the Conventions establishes minimum humanitarian safeguards for non-international conflicts, without an explicit requirement to prosecute crimes stemming from this type of conflict. ***** *Additional*

***** *Convention I*, Article 50; *Convention II*, Article 51; *Convention III*, Article 130; and *Convention IV*, Article 147.

†††††††††††††††††††† Michael Scharf, "The Letter of the Law: The Scope of the International Obligation to Prosecute Human Rights Crimes" (1996) 59 *Law & Contemp. Probs.* 41 at 44 quoting the *Geneva Conventions* (*Convention I*, Article 51; *Convention II*, Article 52; *Convention III*, Article 131; and *Convention IV*, Article 148).

†††††††††††††††††††† Common Article 2 of the *Geneva Conventions* states: "In addition to the provisions which shall be implemented in peace-time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them".

§§§§§§§§§§§§§§§§§§§§ Bassiouni, "Searching for Peace", *supra* note 14 at 15.

***** Common Article 3 of the *Geneva Conventions* states:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the following provisions:

1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

Protocol II sets out the obligations of state parties to non-international armed conflicts. Article 6(5) of the Protocol allows for amnesties to be granted in certain circumstances, providing: "At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained". Amnesties and international law will be the subject of further discussion below.

(b) *The Genocide Convention*

The *Convention on the Prevention and Suppression of the Crime of Genocide*⁺⁺⁺⁺⁺ makes genocide an international crime and establishes universal jurisdiction over its perpetrators. Article 1 provides an absolute obligation on states to prevent, punish, and prosecute those individuals responsible for committing acts of genocide.⁺⁺⁺⁺⁺ Article 2 defines genocide as any acts:

- (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
 - (b) Taking of hostages;
 - (c) Outrages upon personal dignity, in particular, humiliating and degrading treatment;
 - (d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
2. The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

However, Roht-Arriaza notes that the distinction between international and non-international conflicts as set out in the *Geneva Conventions* is becoming "increasingly blurred" as domestic violence reaches the status of international crimes (see "Sources", *supra* note 52 at 25).

⁺⁺⁺⁺⁺ Adopted 9 December 1948, G.A. Res. 260A (II), 78 U.N.T.S. 227 (entered into force 12 January 1951).

⁺⁺⁺⁺⁺ Article 1 of the *Genocide Convention* states: "The Contracting Parties confirm that genocide, whether committed in time of peace or war, is a crime under international law which they undertake to prevent and punish".

such as Argentina where the human rights abuses were directed against perceived political opponents deemed "subversives".

(c) *The Torture Convention*

The *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment****** makes torture an international crime and establishes universal jurisdiction over its perpetrators. It also requires states to investigate, prosecute, and compensate victims of torture. Article 1(1) of the Convention defines torture as:

...[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination or any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Unlike other treaties, this Convention is not limited to international conflicts and it applies to a state's treatment of its own nationals. Article 2 requires state parties to take effective measures to prevent torture in any territory under their jurisdiction. Article 4(2) obliges states to provide "appropriate penalties" and Article 7(1) requires states to extradite or prosecute those responsible for acts of torture. Articles 12 and 13 of the Convention explicitly require state parties to investigate complaints from alleged victims. Article 14(1) requires states to provide redress for acts of torture. Finally, the Committee against Torture ("CAT") is established under Article 17 to investigate alleged violations

***** Adopted 10 December 1984, G.A. Res. 39/46, 39 U.N. GAOR, Supp. (No. 51), U.N. Doc. A/39/51 (1984), at 197 (entered into force 26 June 1987). G.A. Res. 39/46, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984).

One author notes the Allied powers based the Nuremberg tribunal's jurisdiction on two main rationales: "crimes against humanity could be punished because they violated elementary principles of humanity, and because they threatened world peace".[†] Another author states the "core principle" of the law relating to crimes against humanity is widely accepted: "atrocious acts committed on a mass scale against racial, religious, or political groups must be punished".[‡]

Crimes against humanity have become part of customary international law and have been included in various international treaties mentioned throughout this section. A state's failure to punish these acts would be a derogation of its duty under customary law.[§]

(b) *Jus Cogens and Obligatio Erga Omnes*

International law recognizes certain peremptory norms from which no state can derogate. These norms carry with them certain obligations since they affect the international community as a whole: *Jus cogens* refers to the legal status that certain international crimes reach, and *obligatio erga omnes* pertains to the legal implications arising out of a certain crime's characterization as *jus cogens*.^{**}

[†] Roht-Arriaza, "Non-Treaty Sources", *supra* note 114 at 50.

[‡] Orentlicher, *supra* note 15 at 2594.

[§] Naomi Roht-Arriaza, "Special Problems of a Duty to Prosecute: Derogation, Amnesties, Statutes of Limitation, and Superior Orders", in Roht-Arriaza, *supra* note 47 at 67; and Orentlicher, *ibid.* at 2593 where she states the *Nuremberg Charter* provided permissive jurisdiction for prosecutions for crimes against humanity, but it did not require states to prosecute; However, subsequent UN resolutions and treaties support an obligation to prosecute such crimes.

^{**} M. Cherif Bassiouni, "International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*" (1996) 59 *Law & Contemp. Probs.* 63 [Bassiouni, "International Crimes"]. At 68, Bassiouni states that the legal basis for treating a crime as *jus cogens* consists of: (1) international pronouncements reflecting the recognition that these crimes are deemed part of customary international law (*opinio juris*), (2) language in preambles or other provisions of treaties applicable to these crimes which indicates these crimes have a higher status in

Crimes deemed *jus cogens* are reflective of the "core constitutive values and commitments of the international community".^{††} Certain international crimes, such as aggression, genocide, crimes against humanity, war crimes, piracy, slavery and slave-related practices, and torture have risen to the level of *jus cogens* and states are therefore under an obligation in international law to extradite or prosecute those responsible for these crimes.^{‡‡}

(c) *Practice at the United Nations*

Activities at the UN and other intergovernmental organizations reflect the trend that states have a duty under customary international law to investigate, prosecute, and provide redress for gross violations of human rights.

[R]eports prepared by Special Rapporteurs, Special Representatives, and Working Groups appointed by the Commission on Human Rights of the United Nations to report on human rights conditions in particular countries or on particular types of human rights violations have repeatedly condemned governments' failure to punish torture, disappearances, and extra-legal executions.^{§§}

The UN Human Rights Committee ("UNHRC") was established to monitor compliance with the *International Covenant* and to hear individual cases under the *First Optional Protocol* to the Covenant.^{***} The UNHRC issues comments on

international law, (3) the large number of states which have ratified treaties related to these crimes, and (4) the *ad hoc* international investigations and prosecutions of perpetrators of these crimes.

^{††} Steven R. Ratner & Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (Oxford: Oxford University Press, 2001) at 20.

^{‡‡} Bassiouni, "International Crimes", *supra* note 121 at 63, 65-66 and 68.

^{§§} Orentlicher, *supra* note 15 at 2583. For example, the UN General Assembly has stated that extrajudicial, summary and arbitrary executions, and torture constitute flagrant violations of human rights (see generally U.N. Resolution No. 53/147 on "Extrajudicial, Summary or Arbitrary Executions", adopted on December 9, 1998, and Resolution No. 55/89 on "Torture and other Cruel, Inhuman or Degrading Treatment or Punishment", adopted on February 22, 2001, as quoted in International Commission of Jurists et al., *supra* note 103 at para. 9).

^{***} *Optional Protocol to International Covenant*, adopted 16 December 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16), U.N. Doc. A/6316 (entered into force 23 March 1976), Article 1.

communications received from individuals alleging they have suffered violation of enumerated rights in the Covenant. The Committee has developed an extensive set of comments regarding impunity, finding that the *International Covenant* requires state parties to investigate allegations of human rights abuses, bring those perpetrators to justice, and ensure such acts are not repeated in the future.^{†††} Some scholars rely on these "authoritative interpretations" by the UNHRC to support the notion that states have a duty to investigate, prosecute, and provide redress for human rights violations.^{‡‡‡}

For example, in a General Comment issued in 1982 interpreting Article 7 of the *International Covenant* the UNHRC stated:

[I]t is not sufficient for the implementation of [article 7] to prohibit [torture or other cruel, inhuman or degrading] treatment or punishment or to make it a crime. Most States have penal provisions which are applicable to cases of torture or similar practices. Because such cases nevertheless occur, it follows from article 7, read together with article 2 of the Covenant, that States must ensure an effective protection through some machinery of control. *Complaints about ill-treatment must be investigated effectively by competent authorities. Those found guilty must be held responsible*, and the alleged victims must themselves have effective remedies at their disposal, including the right to obtain compensation.^{§§§}

In another General Comment issued in 1992 interpreting the same Article, the UNHRC made it clear that states have a duty to investigate allegations of torture and hold the perpetrators responsible, over and above the duty to provide victims with an effective remedy.^{****} As such, the Committee issued a statement that amnesties covering acts of torture "are generally incompatible with the duty of States to investigate such acts; to

^{†††} Naomi Roht-Arriaza, "Combating Impunity: Some Thoughts on the Way Forward" (1996) 59 *Law & Contemp. Probs.* 93 [Roht-Arriaza, "Thoughts"] at 95.

^{‡‡‡} Scharf, *supra* note 58 at 48.

^{§§§} Report of the Human Rights Committee, 37 U.N. GAOR Supp. (No. 40) Annex V, General Comment 7(16), U.N. Doc. E/CN.4/Sub.2/Add.1/963 (1982), at para. 1 (emphasis added), as reprinted in Orentlicher, *supra* note 15 at 2572.

^{****} Human Rights Committee, General Comment No. 20 (44) on Article 7, U.N. Doc. CCPR/C21/Rev.1/Add.3 (April 1992) at para. 15. See also Orentlicher, *ibid.*

guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future".^{††††}

In a further interpretation in 1995, the UNHRC stated that Argentina's amnesties and pardons that were granted after the country's "dirty war" "impeded investigations" and are inconsistent with the *International Covenant* because they create "promote an atmosphere of impunity" and "deny effective remedy to victims".^{‡‡‡‡}

One author comments that this so-called "authoritative interpretation rationale" is based on the "overstretched" notion that state parties to *International Covenant* are also bound by interpretations rendered by the UNHRC.^{§§§§} Nonetheless, the author agrees that "an increasing number of commentators, as well as the state-parties themselves, seem to consider the Committee's comments as Covenant jurisprudence...", but in his opinion, the Committee's comments do not support an obligation to prosecute violated rights of the *International Covenant*, but simply "urge" countries "should" bring violators to justice.^{*****}

However, another author argues the language used by the UNHRC may be the result of its mandate "to forward its 'views' to the states concerned rather than to adjudicate cases", and although the interpretations do not explicitly require prosecution, the Committee, through one decision in particular, has suggested that with regard to gross

^{††††} *Ibid.* at para. 15.

^{‡‡‡‡} Comments of the Human Rights Committee, Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, U.N. Doc. CCPR/C/79/Add.46 (1995) (Comments on Periodic Report by Argentina), at para. 10.

^{§§§§} Scharf, *supra* note 58 at 49.

^{*****} *Ibid.* at 49-50.

violations of human rights, anything short of criminal prosecution would be in breach of the *International Covenant's* duty to ensure rights.^{†††††}

In light of these comments, one can conclude that the body designated to interpret the Covenant, the UNHRC, has issued declarations in further support of the existence of a norm in international law requiring states to investigate, prosecute, and provide redress for gross violations of human rights. The UN Commission on Human Rights has also turned its attention to the issue of impunity by appointing Special Rapporteurs and creating different Sub-Commissions and Working Groups.^{†††††}

4.2 Amnesties and International Law

Even though there is an established, or at least emerging, norm in international law requiring states to investigate, prosecute, and provide redress for gross violations of human rights, how does international law treat amnesties granted in the wake of a transition to democracy? Are treaty-based rights set out in the *Geneva Conventions*, *Genocide Convention*, and *Torture Convention* derogable?^{§§§§§} Furthermore, is the duty to investigate and prosecute overcome by certain domestic considerations in a transitional justice context?^{*****}

In general, states can only derogate from the duty to investigate, prosecute, and

^{†††††} Roht-Arriaza, "Thoughts", *supra* note 126 at 95. The UNCHR decision Roht-Arriaza is referring to was Communication No. 563/1993, Views of the U.N. Human Rights Committee (Oct. 27, 1995) concerning a Colombian political activist who was kidnapped and assassinated by armed men.

^{†††††} *Ibid.* at 96. For example, there is a Working Group on Enforced or Involuntary Disappearances, a Working Group on Arbitrary Detention, a Sub-Commission on Prevention of Discrimination and Protection of Minorities, and a Sub-Commission on the Promotion and Protection of Human Rights. For further detail on Working Groups, Sub-Commissions and Special Rapporteurs, see the U.N. Human Rights Commission website online: <<http://www.unhchr.ch/>>.

^{§§§§§} Roht-Arriaza, "State Responsibility", *supra* note 52 at 483.

^{*****} *Ibid.* at 485.

provide redress if the failure to do so falls within an accepted exception listed in the treaty.^{†††††} Treaty law provides the defence of "public emergency" to a derogation of treaty rights.^{†††††} For example, Article 4(1) of the *International Covenant* permits a state to derogate from its obligation under the Covenant "in a time of public emergency which threatens the life of a nation...provided that such measures are not inconsistent with their obligations under international law." Article 27(1) of the *American Convention* allows a similar derogation "in time of war, public danger, or other emergency" so long as the state party remains in conformity with its obligations under international law.

Customary international law provides the defence of "necessity" in which a state may derogate from its obligations under customary law. However, for a state to invoke necessity, "it must show that there were no alternative measures of confronting the posed danger and that by derogating from customary law, the state did not create a further danger and that the amnesty is not prohibited by a treaty".^{§§§§§}

Nevertheless, scholars generally agree that amnesties for gross violations of human rights, including international crimes such as torture, execution and forced disappearance, can never be justified under international law or on policy grounds.^{*****}

Human rights groups argue that amnesties "help to create a climate of impunity for the perpetrators of human rights violations and undermine efforts to re-establish respect for

^{†††††} *Ibid.* at 484.

^{†††††} *Ibid.* at 505.

^{§§§§§} *Ibid.* at 505.

^{*****} *Ibid.* at 485; Kritz, *supra* note 25 at xxxii; Ambos, *supra* note 4 at 11; Joyner, *supra* note 9 at 613. For further discussion on amnesties and international law, see generally Douglass Cassel, "Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities" (1996) 59 *Law & Contemp. Probs.* 197 and Jessica Gavron, "Amnesties in the Light of Developments in International Law and the Establishment of the International Criminal Court" (2002) 51 *I.C.L.Q.* 91.

human rights and the rule of law" which would be in violation of a state's obligations under the *International Covenant*.^{††††††††} Louis Joinet, Special Rapporteur to the UN, suggested that international crimes such as torture, forced disappearances, and summary executions may be crimes for which amnesty should not be granted.^{††††††††}

However, several scholars argue that the wording in Article 4 of the *Torture Convention* to provide "appropriate penalties" may allow for some type of amnesties, whereas the wording in Articles 3 and 4 of the *Genocide Convention* that those who commit genocide "shall be punished" contains direct support for the notion of an existing duty to investigate and prosecute gross violations of human rights.^{§§§§§§§§}

Professor Peter Burns analyzes to what extent general or specific amnesties be regarded as a breach of a state party's obligations under the *Torture Convention*.^{*****}

He concludes that general amnesties, "by their very nature", would constitute a breach of the Convention, since they are usually proclaimed by an ousted oppressive regime.^{††††††††}

However, specific amnesties granted to certain individuals who have committed human rights violations present a more complex case, especially if the amnesty is granted in exchange for participation in a process of fostering national reconciliation, like testifying at a truth and reconciliation.^{††††††††}

^{††††††††} International Commission of Jurists et al., *supra* note 103 at para. 42.

^{††††††††} *Study on Amnesty Laws and their Role in the Safeguard and Promotion of Human Rights, Preliminary Report* by Mr. Louis Joinet, Special Rapporteur, U.N. Comm'n on Hum. Rts. (Provisional Agenda Item 9(a)), U.N. Doc. E/CN.4/Sub.2/1985/15 (1985), as quoted in Roht-Arriaza, "State Responsibility", *supra* note 52 at 487.

^{§§§§§§§§} Scharf, *supra* note 58 at 46.

^{*****} Burns, *supra* note 5 at 156.

^{††††††††} *Ibid.*

^{††††††††} *Ibid.* at 157.

In such cases where the amnesty is conditional upon the perpetrator admitting his or her guilt, Professor Burns concludes that the granting of an amnesty, even for the purposes of national reconciliation, may not meet the obligations specified in the *Torture Convention*.^{§§§§§§§§} On the other hand, if the truth commission was created with the power to order prosecutions or amnesties, the granting of an amnesty could be regarded as part of the investigatory process, and would therefore meet the statutory obligations under the Convention.^{*****}

That is not to say that every amnesty is incompatible with international law. As mentioned above, provisions of certain treaties permit derogation of the rights enumerated therein in the case of a "public emergency".^{††††††††} Article 6(5) of the *Additional Protocol II to Geneva Conventions* allows for the granting of amnesties in a non-international conflict.^{††††††††} However, evidence suggests this provision allows states a limited power to grant amnesties.^{§§§§§§§§} For example, the International Committee of the Red Cross has officially interpreted the scope of Article 6(5) narrowly, concluding this provision is inapplicable to amnesties that extinguish penal responsibility for persons who have violated international law: "The *travaux préparatoires* of 6(5) indicate that this provision aims at encouraging amnesty, i.e., a sort of release at the end hostilities. It does not aim at an amnesty for those having violated international

^{§§§§§§§§} *Ibid.*

^{*****} *Ibid.* at 157-158.

^{††††††††} See *supra* note 139.

^{††††††††} See *supra* note 55.

^{§§§§§§§§} Naomi Roht-Arriaza, & Lauren Gibson, "The Developing Jurisprudence on Amnesty" (1998) 20(4) *Hum. Rts. Q.* 843 at 863-864.

humanitarian law".*****

Another argument presented against the granting of amnesties is that allowing amnesties for human rights abuses that occurred during non-international armed conflicts is contrary to the stated goal "to ensure more protection for victims" of *Protocol II* to the *Geneva Conventions*.†††††††††

In conclusion, states cannot, in principal, grant amnesties for certain grave violations of human rights, such as torture, extra-legal executions, and forced disappearance. While an international norm permitting amnesties exists in limited circumstances, an amnesty cannot be granted for non-derogable rights and would never apply to gross violations of human rights.†††††††††

5. COMBATING IMPUNITY

In the wake of gross violations of human rights, transitional governments face difficult and often conflicting legal, ethical and political choices. Successor regimes struggle to nurture democratic institutions while they also attempt to foster peaceful relations. At the same time, states must respect their obligations arising out of international law.

There is an emerging trend in both international criminal law and international human rights law toward universal jurisdiction, providing a culture of accountability for

***** Letter dated 1995 from the International Committee of the Red Cross to the Prosecutor of the Criminal Court for the Former Yugoslavia and as repeated in another communication from the International Committee of the Red Cross dated April 15, 1997 (reprinted in International Commission of Jurists et al., *supra* note 103 at para. 48). See also Roht-Arriaza & Gibson, *ibid.* at 864.

††††††††† Roht-Arriaza & Gibson, *ibid.* at 866.

††††††††† Joyner, *supra* note 9 at 613.

gross violations of human rights. Not only do international treaties, human rights instruments, customary international law, and regional systems for the protection of human rights support the notion of an existing duty to investigate, prosecute, and punish perpetrators of gross violations of human rights, but there is also a growing domestic court practice concerned with the issue of impunity and international law obligations. §§§§§§§§§§

Impunity laws and the state practice of impunity are therefore contrary to international law. Recent international events indicate that the national and international communities are demanding the veil of impunity be lifted in those countries that have long provided safe havens to perpetrators of gross violations of human rights. For example, Hissène Habré, former Head of State of Chad, who had been living in exile in Senegal since 1990, was indicted and charged with murder and torture of his own subjects during his rule from 1982 to 1990 by the Dakar Regional Court of Senegal. This marks the first time a former African head of state has been charged with human rights violations by a court of another state. ***** Other recent events include Argentina's historic repeal of the 1986 and 1987 amnesty laws that were granted in the wake of the "dirty war" and shielded hundreds of the military *junta* from prosecution for human rights abuses during the 'dirty war'. ††††††††††

In conclusion, international human right scholars and activists agree that impunity

§§§§§§§§§§ Roht-Arriaza, "Thoughts", *supra* note 126 at 93-94.

***** Kittichaisaree, *supra* note 6 at 60.

†††††††††† "Argentina Scraps Amnesty Laws" *BBC News* (21 August 2003), online: BBC News <<http://news.bbc.co.uk/go/pr/fr/-/2/hi/americas/3169297.stm>>.

laws, such as self-amnesties and pardons, are violations of the existing duty under international law to prosecute gross violations of human rights. These laws therefore lack legitimacy in international law if they apply to crimes against humanity, crimes of aggression, crimes of war, genocide, and torture.††††††††††

†††††††††† Ambos, *supra* note 4 at 11.