Transitional Justice

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Abstract and Keywords

This chapter examines the different transitional justice mechanisms established to respond to serious international crimes that have occurred in the context of armed conflict. These transitional mechanisms include truth-seeking mechanisms such as truth commissions, commissions of inquiry, and judicial fact-finding. This chapter considers the problems that may arise in the interaction among different transitional justice mechanisms such as protection of the rights of the accused. It also argues that transitional justice requires a coordinated approach among a plurality of mechanisms to assist a society in transitioning from a state of armed conflict in which serious international crimes were committed, to a peaceful and reconciled future.

Keywords: transitional justice mechanisms, serious international crimes, armed conflict, truth commissions, commissions of inquiry, judicial fact-finding, rights of the accused

1 Introduction

*'TRANSITIONAL justice' has been defined as 'a response to systematic or widespread violations of human rights […] [it] is not a special form of justice but justice adapted to societies transforming themselves after a period of pervasive human rights abuse'.[1] The term encompasses a number of different judicial and non-judicial mechanisms designed to assist the affected population in addressing large-scale violations of human rights and international humanitarian law (IHL), and in 'transitioning' towards national reconciliation, and in some cases, in the establishment of democracy.[2] Central (p. 841) to the notion of transitional justice is the idea that a comprehensive approach encompassing a number of complementary mechanisms and tailored to the needs of the particular state in question, is required to bring about a stable and ultimately successful transition.[3] These mechanisms may include the establishment of truth commissions, reparation for victims, criminal prosecutions, and penal and other sanctions for the perpetrators of violations.[4]

At first blush, transitional justice appears to be primarily reactive insofar as it directly responds to past violations of IHL and human rights. However, it is important to note the preventive rationale underlying the mechanisms that it encompasses. For example, the criminal prosecution of individuals suspected of having committed a crime that falls under the jurisdiction of the International Criminal Court, is grounded on the logic that such a judicial process will eventually 'contribute to the prevention of such crimes',[5] by acting as a deterrent to future offenders.[6] Similarly, in addition to examining past events, truth commissions also look to the future by providing a government with recommendations on institutional and policy reforms needed to prevent further violations.[7] Ultimately, transitional justice is about adequately and appropriately addressing past events in order to strengthen the prospect for national reconciliation and sustainable peace.

Transitional justice is entwined with broader post-conflict peace-building issues. Indeed, transitional justice mechanisms are often premised on, or they are intended to help bring about, fundamental institutional and policy changes and the establishment of the rule of law within a society, which may involve the participation of international organizations such as the United Nations and other international actors. This Chapter does not address transitional justice in this broader context, including the lustration and vetting of persons from official positions, the vast array of issues that fall under the heading of the 'responsibility to rebuild',[8] the role played (p. 842) by UN peace operations in post conflict situations,[9] and the UN Peacebuilding Commission.[10]

This Chapter focuses on transitional justice mechanisms that are established to respond to serious international crimes that have occurred in the context of armed conflict. For the purposes of this Chapter, a 'serious international crime' is a crime that falls under the jurisdiction of the International Criminal Court. Transitional justice mechanisms that are established in order to address human rights violations committed in the context of a repressive predecessor regime of governance, outside the context of armed conflict, are not addressed. Before examining a number of different transitional justice mechanisms, Part 2 of this Chapter addresses an issue that underpins the implementation of transitional justice in general, namely the relationship between peace and justice. Whereas peace and justice were once thought divisive, they are now usually considered to be complementary. Concretely this means that there is no need for transitional justice mechanisms to be put on hold in order for peace processes to go ahead; justice processes should accompany peace processes. Part 3 looks at the transitional justice mechanism of truth-seeking, and it focuses on three different truth-seeking processes: truth commissions, commissions of inquiry, (p. 843) and truth-seeking as part of the judicial process. Part 4 analyses the emerging culture of the end of impunity for perpetrators of serious international crimes with respect to treaty obligations that require states to prosecute and punish the perpetrators of such crimes including the legality of amnesties, exercises of the International Criminal Court's jurisdiction, and exercises of universal jurisdiction. Finally, Part 5 analyses the issue of reparation for past atrocities.

2 Peace and Justice: Once Thought Divisive, Now Considered Complementary

Peace and justice were once generally considered divisive; that in order to broker a peace agreement between warring parties, sometimes justice had to be sacrificed. Concretely, this meant that in order to bring an armed conflict to an end and achieve short-term peace, forms of impunity—such as amnesties—had to be placed squarely on the negotiating table for individuals suspected of having committed serious international crimes in the course of an armed conflict. In addition to the unlikelihood of criminal investigations and prosecutions being pursued for the alleged commission of such crimes, an application of a 'peace versus justice' approach also meant that other transitional justice mechanisms were equally unlikely to see the light of day. Although Prince Zeid Ra'ad Zeid Al Hussein does not agree with the 'peace versus justice' approach, he aptly captured the frame of mind of those who may feel they are faced with a 'peace versus justice' dilemma, in the following terms:

Whatever the origins of [an] initial contact [among warring parties], which subsequently clears the way for a ceasefire or a condition we define as 'post-conflict', the challenge then confronting the parties, the international community, or a third party mediator, is how do they preserve it, hold on to that contact, how do they strengthen and enliven it, lest it be lost and the sides revert to another round of hostilities, and possibly the commission of further crimes. The means by which the parties can most easily lock a peace process into place, is if the party exercising sovereignty offers to its adversaries an amnesty for crimes thought to have been committed during the course of the conflict […] Moreover, with the end of bloody conflict, a wounded nation must, it is often said, find rest […] And this can be accomplished through a simple and official burial of facts, under layers of silence. So all and every effort on the part of a transitional government focuses instead on binding the citizenry in the fulfilment of a common aim: that of building peace and concentrating on what lies ahead.[11]

(p. 844)

The 'peace versus justice' approach is outdated. The establishment of the International Criminal Court can be said to have brought about a 'paradigm shift', according to which there is now 'a positive relation between peace and justice'.[12] Indeed, it is now common to speak of justice reinforcing peace; that 'we cannot have peace without justice'.[13] In 2004 UN Secretary-General Kofi Annan affirmed that '[j]ustice and peace are not contradictory forces. Rather, properly pursued, they promote justice and sustain one another'.[14] The compatibility of peace with justice has been acknowledged by the Security Council which has recognized '[…] that ending impunity is important in peace agreements, and can contribute to efforts to come to terms with past abuses and to achieve national reconciliation to prevent future conflict',[15] and it 'attaches vital importance to promoting justice and the rule of law, including respect for human rights, as an indispensable element for lasting peace'.[16] It has also been recognized in the 2005 Nuremberg Declaration on Peace and Justice, circulated among members of the UN General Assembly.[17] At the open-

ing session of the Review Conference of the International Criminal Court in Kampala in 2010, UN Secretary-General Ban Ki-Moon called the perceived 'balance between peace and justice' a 'false choice'.[18]

Moreover, a 'peace with justice' approach is reflected in the practice of the Security Council, which has responded to situations of armed conflict amounting to threats to international peace and security by taking concrete measures in the pursuit of justice. For example, the Security Council established the International Criminal Tribunal for the former Yugoslavia (ICTY) during the armed conflict in the former Yugoslavia;[19] it referred the situation in Darfur to the International Criminal Court pursuant to Article 13(b) of the Rome Statute,[20] which has been described as a case (p. 845) in which 'justice is only viewed as instrumental for peace';[21] it referred the situation in Libya of ongoing political violence to the International Criminal Court;[22] and it adopted a Resolution in relation to the transfer of Charles Taylor to The Hague to be tried by the Special Court for Sierra Leone.[23] It is also reflected in the issuance of indictments against key political figures in the former Yugoslavia by successive Chief Prosecutors of the ICTY,[24] and the issuance of arrest warrants against the President of Sudan by the Pre-Trial Chamber of the International Criminal Court,[25] which illustrate that justice should not be sacrificed at the expense of the possibility of brokering peace agreements with key political figures.

The paradigm shift from 'peace versus justice' to 'peace with justice' is grounded on a definition of long-term, sustainable peace and an expansive understanding of justice. The following definitions of these terms were agreed upon by representatives of States and scholars who participated in the drafting of the 2005 Nuremberg Declaration on Peace and Justice:

'Peace' is understood as meaning sustainable peace. Sustainable peace goes beyond the signing of an agreement. While the cessation of hostilities, restoration of public security and meeting basic needs are urgent and legitimate expectations of people who have been traumatized by armed conflict, sustainable peace requires a long-term approach that addresses the structural causes of conflict, and promotes a sustainable development, rule of law and governance, and respect for human rights, making the recurrence of violent conflict less likely.

'Justice' is understood as meaning accountability and fairness in the protection and vindication of rights, and the prevention and redress of wrongs. Justice must be administered by institutions and mechanisms that enjoy legitimacy, comply with the rule of law and are consistent with international human rights standards. Justice combines elements of criminal justice, truth-seeking, reparations and institutional reform as well as the fair distribution of, and access to, public goods, and equity within society at large. Justice may be delivered by local, national and international actors.[26]

In addition to the pursuit of justice benefiting long-term peace, short-term peace—in the form of a peace agreement—could even be achieved more quickly in some cases by pursuing justice. The former Chief Prosecutor of the ICTY, Richard (p. 846) Goldstone, recount-

ed how an indictment he issued against Radovan Karadžić did not hamper, but rather assisted, in brokering the Dayton peace agreement:

> In my experience the threat of prosecutions and the issue of indictments against senior political players have aided rather than retarded peace negotiations. In July of 1995, as Chief Prosecutor of the Yugoslav Tribunal, I issued indictments charging Radovan Karadžić […] with crimes against humanity […] [He] was the self-appointed President of the Bosnian Serb enclave called Republika Srbska […] Two months later the Bosnia Serb Army massacred over 8 000 Muslim men and boys near Srebrenica. In November 1995, the United States called a meeting in Dayton, Ohio, of leaders of the former Yugoslavia to discuss an end to the Balkan war that began in 1991. There can be no doubt that had Karadžić been a participant at Dayton, the Bosniak leaders, a mere two months after the massacre, would not have been prepared to attend the meeting. That was indeed confirmed in my presence some months later by the then Bosnian Foreign Minister, Mohamed Sacirbey. The indictment issued against Karadžić effectively prevented his attendance at Dayton […] The Dayton meeting put an end to the war […] I might add that I issued a second indictment against Karadžić […] while the Dayton meeting was actually in progress. That indictment included a count of genocide arising from the Srebrenica massacre. The first indictment enabled the meeting to proceed and the second in no way inhibited the peace negotiations.[27]

However, it is not always clear-cut whether criminal indictments against key political figures have directly assisted the settlement of peace agreements in the short-term. For example, the issuance of an indictment against the former President of Liberia, Charles Taylor, by the Chief Prosecutor of the Special Court for Special Leone disrupted the peace negotiations that were ongoing at that time under the auspices of the United Nations in Accra, Ghana.[28] Although both the criminal trial of Mr Taylor before the Special Court for Sierra Leone and peace negotiations later successfully went ahead, this example raises the delicate question of timing in the joint pursuit of peace and justice processes. As the UN Secretary-General Kofi Annan noted in 2004, '[t]he question […] can never be whether to pursue justice and accountability, *but rather when and how*.'[29]

There is debate about the timing of efforts to achieve both peace and justice: should these efforts be carried out concurrently? Should one be postponed in order to pursue the other? It could be argued that in cases in which the interests of peace and justice appear to come into conflict with one another, steps towards justice should be carefully calibrated in order not to negatively adversely impact on steps towards peace. However, great care should be taken not to allow the outdated (p. 847) 'peace versus justice' approach to re-enter current debates through the backdoor of a question of timing, and for this old doctrine to effectively be re-instated through an indefinite postponement of justice processes. Kenneth Roth noted during the Review Conference of the International Criminal Court in Kampala in 2010 that the sequencing of peace and justice mechanisms 'had been successful in some cases, but had resulted, in others, in *de facto* amnesties'.[30] In principle, there is nothing to prevent both peace and justice processes being carried out simultane-

ously in many contexts. Practice evinces that long-term peace can only be achieved with justice. It is clear that sensitivity and tact are required to ensure that both peace and justice processes move ahead smoothly,[31] but '[t]he problem is not one of choosing between peace and justice, but of the best way to interlink the one with the other, in light of specific circumstances, without ever sacrificing the duty of justice'.[32]

Regrettably, justice processes continue to be dogged by calls to give way to peace processes in almost all circumstances. The Chief Prosecutor of the International Criminal Court, Luis Moreno Ocampo, noted that:

> […] for each situation in which the ICC is exercising jurisdiction, we can hear voices challenging judicial decisions, their timing, their timeliness, asking the Prosecution to use its discretionary powers to adjust to the situation on the ground, to indict or withdraw indictments according to short term political goals. We also hear officials of States Parties calling for amnesties, granting of immunities and other ways to avoid prosecutions, supposedly in the name of peace; we can hear voices portraying the ICC as an impediment to progressing further with Peace processes.[33]

In this respect, it is worth noting that the power of the Prosecutor under Articles 53(1)(c) and 53(2)(c) of the Rome Statute to conclude that there is no reasonable basis to proceed with an investigation or prosecution because it is not in, or would not serve, the interests of justice, is not viewed by the Office of the Prosecutor (OTP) as a discretionary power that should be used in order to further peace negotiations (p. 848) with persons suspected of having committed crimes that fall under the jurisdiction of the Court.[34] In a policy paper issued in 2007 the OTP stated that 'there is a difference between the concepts of the interests of justice and the interests of peace and that the latter falls within the mandate of institutions other than the [OTP]'.[35] Attempts like those made by members of the Lord's Resistance Army in Uganda to bargain their way to the negotiating table in exchange for assurances that they will not be investigated or prosecuted by the International Criminal Court in the future are not likely to be heeded by the OTP. As the Deputy Prosecutor stated on 17 August 2010, '[w]e can see from some of the situations before the Court that ignoring justice will not help peace efforts. In Northern Uganda, the international community was for a long time keen to appease Joseph Kony both before and after the warrant of the International Criminal Court. Kony, however, was only interested in impunity and repeatedly took advantage of peace talks to re-group and re-arm his forces'.[36]

A potential mechanism for temporarily stalling justice processes before the International Criminal Court (ICC) in order to favour peace processes is Article 16 of its Statute, which allows the Security Council to defer an investigation or prosecution for a period of twelve months, renewable, by adopting a resolution under Chapter VII of the Charter to that effect.[37] According to some commentators, the drafting history of Article 16 confirms the Security Council's 'decisive role in dealing with situations where the requirements of peace and justice seem to be in conflict'.[38] However, the Security Council's primary responsibility for the maintenance of international peace and security, consecrated under

the UN Charter, is not a role that *prima facie* conflicts with justice processes undertaken in the framework of the International Criminal Court. As explained above, peace can only be achieved (p. 849) with justice. To this end, a decision to defer an investigation or prosecution by the Security Council should take into account 'the current activity of the Court, and particularly the cases pending before it […] [T]he evaluation of the existence of a threat to the peace, and of the appropriateness of a deferral as a measure under Chapter VII […] [must be] determined by [giving due consideration to] the effect of the continuation of specific proceedings before the Court'.[39] The Security Council may consider not making use of its powers under Article 16 of the Rome Statute where a state claims that it is willing and able to prosecute an individual suspected of committing crimes that fall under the jurisdiction of the Court, and the Security Council attaches certain conditions to the temporary suspension of proceedings before the International Criminal Court.

3 Truth-Seeking as a Form of Justice

At the end of hostilities, and after a peace settlement, a society torn apart by serious international crimes committed during the course of an armed conflict may be tempted to simply turn the page; to forget, to forgive, and to move on. Nobel peace prize laureate Elie Weisel, reflecting upon our ability to both forget and remember, stated in his Nobel Lecture that '[o]f course we could try to forget the past. Why not? Is it not natural for a human being to repress what causes him pain, what causes him shame? Like the body, memory protects its wounds […] [However] [r]emembering is a noble and necessary act'.[40] Placing systematic or widespread violations on record in order to address them is necessary because although memory can be repressed, it cannot be stifled indefinitely. It has been noted in this vein with respect to the establishment of the Extraordinary Chambers in the Courts of Cambodia (ECCC), many years after the atrocities committed by the Khmer Rouge took place, that the establishment of the ECCC 'constituted a long-awaited response to the demands for justice from the victims, who had never forgotten what they had endured, even if their voices had not been heard for a long time'.[41] Truth-seeking processes may also (p. 850) constitute prophylactic antidotes to future societal unrest and violence '[…] where mass crimes are not addressed, where the truth is not told, in short where there is no transitional justice, the embers of those conflicts remain, and it is often only a matter of time before they are rekindled'.[42]

The process of truth-seeking is thus a useful transitional justice tool for establishing an accurate and impartial account of past atrocities for a transitional society. In some cases transitional governments may have positive obligations to investigate what happened to victims, and to inform their relatives of their fate.[43] States may be under a general obligation 'to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies'.[44] Philip Alston has noted that '[a]rmed conflict and occupation do not discharge the State's duty to investigate'.[45]

Truth-seeking may constitute a stand-alone transitional justice mechanism in the form of truth commissions (Part A). In other cases, truth-seeking may constitute a preliminary

step for other transitional justice mechanisms. For example, truth-seeking undertaken by an independent commission of inquiry may lead to the recommendation that criminal investigations be opened with a view to prosecuting individuals (Part B). Finally, there is an element of truth-seeking integral to other transitional justice mechanisms, such as criminal trials conducted both at the domestic and international levels, where a judicial account of past events is recorded (Part C). All forms of truth-seeking processes during and following an armed conflict face enormous challenges in the gathering of evidence for the purpose of documenting past atrocities, (p. 851) both in terms of logistics, and concerning serious ethical dilemmas that may arise. It is not within the scope of this Chapter to address these difficulties.[46]

A. Truth commissions

Truth commissions have been defined as 'official, temporary, non-judicial fact-finding bodies that investigate a pattern of abuses of human rights or humanitarian law, usually committed over a number of years'.[47] They usually examine a broad spectrum of past events, and various issues that may arise in connection with these events. Since the mid-1970s to the present day, some 40 truth commissions have been established.[48] It is to be expected that there is great divergence among truth commissions because each truth commission should be 'unique [and] country-specific'.[49] The core activities of many truth commissions include the collecting of statements from victims, witnesses, and perpetrators; researching and investigating the root causes of an armed conflict; holding public hearings; engaging in outreach programs; and issuing a final report that summarizes the truth commission's findings and recommendations.[50]

The most celebrated example of a truth commission is the South African Truth and Reconciliation Commission.[51] Controversially, the Amnesty Committee of the South African truth commission had the power to grant amnesties to individuals suspected of having committed serious crimes.[52] The legal basis for the granting of amnesties by the truth commission in post-apartheid South Africa was the Promotion of National Unity and Reconciliation Act No 34 of 1995, which in turn was based on the amnesty agreement contained in a 'postamble' to the interim Constitution of 1993.[53] The 'postamble' to the 1993 Constitution provided that (p. 852) '[…] gross violations of human rights, the transgression of humanitarian principles in violent conflicts and the legacy of hatred, fear, guilt and revenge […] can now be addressed on the basis that there is a need for understanding but not of vengeance, a need for reparation but not for retaliation […] In order to advance such reconciliation and reconstruction, amnesty shall be granted […].'[54]

The South African truth commission is arguably one of the most successful truth commissions to date, thus warranting considerable scholarly attention. However, because it is exceptional in many respects, too much emphasis on this truth commission can lead to a distorted view of the activities of other truth commissions. Indeed, there is a common misperception that a key function of truth commissions is to grant amnesties to persons suspected of having committed serious international crimes. Whilst some truth commissions have operated in contexts where amnesties were already in place, such as in Sierra

Leone and in Ghana, and regrettably a blanket amnesty was put in place in El Salvador after the truth commission issued its report, '[m]ost truth commissions have no formal or informal relationship to amnesties. Those that have the power to recommend amnesty usually are proscribed from doing so for serious international crimes'.[55] For example, in exchange for testifying at a public hearing, the Kenyan Truth, Justice and Reconciliation Commission may grant an individual amnesty, except 'if the act, omission or offence to which the application relates is an act, omission or offence that constitutes crimes against humanity or genocide within the meaning of international human rights law'.[56] The legality of amnesties is addressed in greater detail in Part 4(A)(2) below.

The truth-seeking function of truth commissions means that they may become privy to evidence indicating that serious international crimes may have been committed during the armed conflict under examination. An important issue that arises in this respect is the relationship between truth commissions and other transitional justice mechanisms. Among the recommendations provided in the final reports of truth commissions is sometimes the proposal that the transitional government pursue criminal investigations and prosecutions against individuals suspected of having committed serious crimes. For example, the National Commission for Truth and Reconciliation in Chile concluded its report by stating that:

[…] as an indispensable element for achieving national reconciliation and avoiding the repetition of the deeds that have occurred, the State must exercise fully its powers of prosecution. Human rights can only be effectively protected under the true rule of law. And the rule of law presupposes that all citizens are subject to the law and to the courts of justice, which (p. 853) involves the application of the penalties provided in criminal legislation, on an equal basis, to all those who violate the standards that govern respect for human rights.[57]

The relationship between truth commissions and the criminal prosecution of individuals raises delicate questions in relation to the presumption of innocence, the rights of the accused, and evidentiary matters. For example, it is uncertain how the rights of an accused are to be adequately protected if such an individual participates in a truth commission—which may offer incentives for testifying and for confessing to having committed crimes—and this same individual is later indicted before a criminal court with respect to the same matters. Conversely, truth commissions may be in the possession of potentially exculpatory evidence relevant to the criminal trial of an individual. Where witnesses have furnished the truth commission with such evidence under the assurance of confidentiality, it is unclear what recourse a prosecutor, a defence counsel, or a criminal court could have to such evidence.

Some of these concerns may be raised with respect to the dual functioning of the Sierra Leonean Truth and Reconciliation Commission and the Special Court for Sierra Leone. To date there has never been a request made by the Special Court for Sierra Leone for evidence obtained by the Commission on a confidential basis. However, the Commission outlined its concerns that 'at some time in the future, the Special Court for Sierra Leone […]

will seek to obtain information from its archives held under condition of confidentiality', and that for this reason the Commission recommended that 'Parliament should never authorise access by criminal justice mechanisms, either directly or indirectly, to information in the archives of the Commission that was provided on a confidential basis'.[58] Regrettably, and despite calls from the UN Secretary-General for the two mechanisms to 'operate in a complementary and mutually supportive manner, fully respectful of their distinct but related functions',[59] the relationship between the Sierra Leonean Truth and Reconciliation Commission and the Special Court for Sierra Leone was never formalized, leading to a lack of cooperation and no detailed discussion on how to address some of the concerns outlined above. (p. 854)

A future case of interaction between a truth commission and a criminal court is potentially the relationship between the ICC and the Kenyan Truth, Justice and Reconciliation Commission. For his part, the Chief Prosecutor of the ICC has indicated that he 'aims to liaise with the different organizations set up by the Kenyan Government, including the Truth, Justice and Reconciliation Commission'.[60] It remains to be seen how these two transitional justice mechanisms will cooperate with one another in order to bring perpetrators of serious international crimes to justice, whilst ensuring that the rights of the accused, and the interests of witnesses, are protected.[61]

B. Commissions of inquiry

Like truth commissions, commissions of inquiry are temporary mechanisms the primary purpose of which is truth-seeking, and the outcome of their work is also a report which includes conclusions and recommendations. Unlike truth commissions, commissions of inquiry are often viewed as a preliminary step to the establishment of transitional justice mechanisms, rather than as a transitional justice mechanism in their own right. Compared with truth commissions, commissions of inquiry often operate in tighter time constraints, and consequently they place less emphasis on the participation of victims, and more emphasis on providing a general overview of the events that took place. A commission of inquiry may be established at the international level, typically under the auspices of the United Nations or another international organization, or at the domestic level.

Commissions of inquiry may have very narrow scopes of inquiry. In some cases they may only inquire into one particular event that occurred within the broader context of an armed conflict that took place over the course of many months, or even years. For example, The Bloody Sunday Inquiry was established by the House of Commons to inquire into the events of one day—30 January 1972—when 13 people were killed by military forces in Londonderry, Northern Ireland.[62] In other cases, commissions of inquiry may have mandates with wider temporal and spatial scopes. For example, the Independent International Fact-Finding Mission on the Conflict in Georgia established by the Council of the European Union, had to investigate 'the origins and the course of the conflict in Georgia'.[63] (p. 855)

It is essential that commissions of inquiry are perceived to be impartial and independent in their examination of past atrocities, and that they have not been set up in order 'to give legal cover to governments and justify or minimise their actions, while constructing an official version or "memory" that denies the original abuse'.[64] To this end, commissions of inquiry are often comprised of persons who are reputed to be independent and impartial, in many cases current or former judges. Some domestic commissions of inquiry may even be comprised of a majority of members who are nationals of other states. The Bloody Sunday Inquiry included two international members: Judge Hoyt of the Court of Appeal, New Brunswick, Canada, and Judge Toohey of the High Court of Australia.

The facts established in reports issued by commissions of inquiry may play an important role in criminal prosecutions and other judicial processes. The terms of reference of the Independent International Fact-Finding Mission on the Conflict in Georgia included the investigation of both inter-state violations, and violations committed by individuals during the course of the armed conflict that could be characterized as serious international crimes.[65] With respect to serious international crimes committed by individuals during the armed conflict, these were contained in Volume II of the Report, which contains 'findings and opinions […] [that] do not necessarily reflect the views of the Mission'.[66] It is interesting to note that after reaching the conclusion that there was no evidence to support allegations of genocide, a recommendation contained in Volume II of the Report was the dissemination of this information 'to ensure that unfounded allegations of genocide do not further fuel tensions or revengeful acts'.[67] The potential evidentiary weight of the Report in judicial contexts was recognized by the Mission, which recommended that the Report 'be made public in order to provide information in the context of judicial proceedings' before the International Court of Justice, the European Court of Human Rights, and possibly even potential proceedings before the International Criminal Court.[68]

The factual findings of some commissions of inquiry have served to directly assist criminal investigations before the International Criminal Court. Both a domestic commission of inquiry, and an international commission of inquiry, may be cited in this respect. The former is the Commission of Inquiry into Post-Election Violence ('Waki Commission'), established in Kenya in order to examine the violence precipitated by the 2007 Presidential elections. The latter is the International Commission (p. 856) of Inquiry on violations of international humanitarian law and human rights in Darfur, chaired by Judge Antonio Cassese. Another example of a commission of inquiry that served to directly assist criminal investigations is the United Nations International Independent Investigative Commission (UNIIIC), established to assist the Lebanese authorities in their investigation of the bombing on 14 February 2005 that killed former Lebanese Prime Minister Rafik Hariri and 22 others.[69] The series of reports published by the UNIIIC have proved useful to the work of the Special Tribunal for Lebanon.

An issue that arose in the context of the Waki Commission was whether it should 'name names', and include in its final report a list of individuals alleged to have committed serious international crimes in the context of the violence it investigated. The Waki Commission placed the names of individuals in a sealed envelope together with supporting evi-

dence, and it gave this envelope to the Panel of African Eminent Personalities, chaired by the former UN Secretary-General Kofi Annan. It recommended that this information be passed onto either a yet to be established special tribunal, or '[i]n default of setting up the Tribunal, consideration will be given by the Panel to forwarding the names of alleged perpetrators to the special prosecutor of the International Criminal Court in the Hague to conduct further investigations'.[70] The list of names of alleged perpetrators, together with the supporting evidence, was transferred to the Prosecutor of the International Criminal Court. It is possible that these names and the supporting evidence could have assisted the Court in deciding to respond favourably to the Prosecutor's request to open an investigation in Kenya.[71] On 18 February 2010, the Chief Prosecutor of the International Criminal Court stated that '[t]here is more information from the Waki Commission including names that we can share with the Judges'.[72]

The Darfur Commission was established by the UN Secretary-General at the request of the Security Council to 'investigate reports of violations of international humanitarian law and human rights law in Darfur'.[73] It acted as a fact-finding body by both soliciting information, and by collecting information during visits to Sudan, including the Darfur region; it characterized violations of human rights law and humanitarian law to determine if these violations amounted to genocide under international criminal law; it identified individual perpetrators; (p. 857) and it provided recommendations on how to hold these individuals accountable.[74] Among the recommendations set out in its final report, the Darfur Commission 'strongly recommend[ed] that the Security Council refer the situation in Darfur to the International Criminal Court pursuant to article 13(b) of its Statute' because '[m]any of the alleged crimes documented in Darfur have been widespread and systematic. They meet all the thresholds set in the Statute. The Sudanese justice system has demonstrated its inability and unwillingness to investigate and prosecute the perpetrators of these crimes'.[75] In line with this recommendation, the Security Council referred the situation in Darfur to the International Criminal Court in a Resolution adopted under Chapter VII of the Charter, in which it took note of the Commission's report in the preamble.[76] On 5 April 2005, the Office of the Prosecutor of the International Criminal Court received 2,500 items of evidence collected by the Commission, and the names of persons contained in a sealed envelope that the UN Secretary-General passed on to the OTP from the Commission.[77]

C. Truth-seeking in the criminal justice process

Unlike truth commissions and commissions of inquiry, truth-seeking by a court of law, at the domestic or international level, is of course a judicial process. Even if the temporal scope of judicial inquiries into past events may be broader in some instances than the temporal scope of inquiry by a commission of inquiry or even certain truth commissions, judicial truth-seeking in the context of criminal law is limited in many other respects. This form of truth-seeking is undertaken with the specific purpose of prosecuting individuals for certain crimes, and past events will be viewed within the legal parameters required to prove and disprove such crimes. Due to logistical and financial constraints, fewer crimes can be prosecuted at the international level than at the domestic level. Depending on the

international or internationalized criminal court or tribunal in question, these may include serious international crimes such as genocide, crimes against humanity, war crimes, and in some cases also specific domestic crimes.[78] Furthermore, the international criminal (p. 858) prosecutor exercises greater prosecutorial discretion than her or his national counterpart, thereby further narrowing the scope of past events that will be examined in the course of the judicial process from the outset.

Despite the partial account of past events offered by a process of truth-seeking in the criminal justice context, this mechanism has certain characteristics that arguably ensure that a particularly reliable account of what has occurred will be obtained. These characteristics include the fact that the accused is provided with legal representation and legal assistance in the preparation of her or his defence, thereby ensuring that her or his account of events is presented in a rigorous manner; there are detailed rules in place pertaining to matters of proof and evidence, including the admissibility of certain forms of evidence, standards of proof, and burdens of proof; and there is a large body of procedural rules in place to ensure the fairness of judicial proceedings. It has been commented in the context of transitional justice that '[…] a society would be better served were the truth to find its origins in, and emerge from, a judicial process',[79] because a judicial account of past events may offer 'unassailable "pockets of truth"'.[80]

Courts of law cannot examine past atrocities with the breadth that truth commissions and some commissions of inquiry are able to do. It has been noted in the context of the International Criminal Court, that the Court 'will not be in a position to take down and analyse thousands of statements of victims as, for example, a Truth Commission might do'.[81] However, judicial accounts of past atrocities may go into greater depth of detail and allow otherwise reluctant victims to participate in the truth-seeking process due to the ability of courts and tribunals to address the needs of vulnerable witnesses through well-developed frameworks of witness protection. Indeed, some truth commissions and commissions of inquiry have acknowledged that certain witnesses may have declined to provide them with information due to personal safety concerns. For example, the Waki Commission of Inquiry (Kenya) noted in its Final Report that 'we did not have a reliable witness protection program which might have given greater solace to [some individuals] who avoided speaking to us'.[82] The challenge in the judicial context is in ensuring that demanding measures taken to protect witnesses, such as the suppression of names and voice and image distortion in recorded testimonies, do not unduly place the accused at a disadvantage in defending her or his rights, and ultimately in ensuring the accurate judicial recording of past events. (p. 859)

There are many challenges faced by criminal courts and tribunals in obtaining and securing evidence during or following an armed conflict, particularly at the international level where international and internationalized criminal courts and tribunals rely on the cooperation and assistance of states and organizations. The assistance provided to the ICTY by the Kosovo Force (KFOR), the military component of the international administration established by the Security Council in Kosovo, and the NATO-led Stabilisation Force in Bosnia and Herzegovina (SFOR, replaced by European Forces in Bosnia and Herzegovina

(EUFOR) in 2005), on the basis of a broad obligation to cooperate with the ICTY, has been highly valuable to the work of the ICTY in fulfilling its truth-seeking role. The type of assistance provided to the ICTY has included—in relation to KFOR—finding and securing the sites of mass graves,[83] providing aerial surveillance of reported mass grave sites,[84] assisting in mass grave exhumations,[85] and other investigative activities.[86] In relation to SFOR, it amounted to providing security for the ICTY Prosecutor's investigation missions,[87] assisting in investigation missions,[88] and assisting in mass grave exhumations.[89]

The International Criminal Court may be assisted by evidence supplied to it by commissions of inquiry, as discussed above with respect to the situations in Kenya and in Darfur, Sudan. It is important to stress that although commissions of inquiry may provide significant amounts of material evidence to the OTP, and they may even suggest the names of persons they consider could have committed serious international crimes that fall within the jurisdiction of the International Criminal Court, the Prosecutor will operate independently. The OTP will thus 'conduct its own independent investigations, in accordance with the Rome Statute and the policies of the Office, in order to determine those persons bearing greatest responsibility for the crimes to be prosecuted by the Court', and the names of persons suspected of having committed serious international crimes, submitted to the Prosecutor by a commission of inquiry, are considered by the OTP merely to (p. 860) 'represent the conclusions of the Commission'.[90] Similarly, although the OTP of the Special Tribunal for Lebanon continues the investigative function carried out by the UNIIIC, the factual findings made by the UNIIIC are not binding on the OTP, although they serve to assist the work carried out by the OTP.

4 The Emerging Culture of the End of Impunity for Perpetrators of the Most Serious International Crimes

For a society in transition, it is crucial that there is no impunity for individuals suspected of having committed the most serious international crimes. Impunity has been defined as 'the exemption from accountability, penalty, or punishment for perpetrators of illegal acts'.[91] The UN Security Council has affirmed that '[…] ending impunity is essential if a society in conflict or recovering from conflict is to come to terms with past abuses committed against civilians affected by armed conflict and to prevent future such abuses'.[92] With respect to perpetrators of the most serious international crimes, the last 20 years have witnessed the emergence of a culture of the end of impunity that builds on the pioneering work of the Nuremberg and Tokyo tribunals at the beginning of the twentieth century.[93] This is evidenced by concerted efforts taken by the international community of states, and a great many dedicated individuals, in the establishment and functioning of different international and internationalized criminal courts and tribunals,[94] culminating in a permanent (p. 861) international criminal court of potential universal reach, the International Criminal Court.[95] It is also evidenced in more recent years—in line with the prin-

ciple of ‘complementarity’ within the framework of the International Criminal Court—by a shift in focus from the prosecution of perpetrators of serious international crimes at the international level, to the primary responsibility of states to end impunity for these individuals within the framework of their domestic legal systems. The treaty-based obligations that require states to prosecute and punish perpetrators of the most serious international crimes are addressed in Section A, below.

For states parties to the Rome Statute, this primary responsibility to exercise criminal jurisdiction is complemented by the jurisdiction of the International Criminal Court where a state party is unable or unwilling to exercise its primary responsibility. However, there is also a positive aspect to states parties’ conduct concerning the principle of complementarity. This ‘positive complementarity’ arises where a state is willing, but unable, to exercise its primary territorial criminal jurisdiction. In such cases, it was remarked that ‘[i]t would appear that States, in particular States parties to the Statute, should make every effort, either individually or collectively, to give appropriate *assistance* to such a State in building its capacities, with a view to the establishment of a functioning criminal justice system in that State. Such assistance represents—politically, not legally speaking—an “extension” of the complementarity principle: states enable other states to better fulfil their primary responsibility under the Rome Statute to investigate and prosecute the most serious crimes.’[96] This ‘positive complementarity’ was consecrated on 8 June 2010 when the Review Conference of the Rome Statute adopted a Resolution that recognized ‘the desirability of States to assist each other in strengthening domestic capacity to ensure that investigations and prosecutions of serious crimes of international concern can take place at the national level’.[97] The role of the International Criminal Court in the culture of the end of impunity for persons suspected of having committed serious international crimes is addressed in Section B, below. (p. 862)

Exercises of ‘positive complementarity’ can assist a willing albeit unable state party to the Rome Statute ultimately to carry out criminal investigations and prosecutions in line with its primary responsibility to exercise criminal jurisdiction with respect to serious international crimes. For transitional societies, where institutional structures may be in disarray or in need of reform, it will be particularly important to ensure that the state in question is assisted in establishing a robust and effective legal system. However, in cases where a non-state party to the Rome Statute is unwilling to investigate and prosecute suspected perpetrators of serious international crimes, and where such persons are beyond the reach of the jurisdiction of the Court, including in cases where no recourse to Article 13 of the Rome Statute is envisaged by the Security Council, there arise gaps of impunity in the fabric of the emerging culture to bringing alleged perpetrators to trial. It is arguable that in such instances other states could exercise universal criminal jurisdiction in order to bring suspected perpetrators of serious international crimes to justice. This argument is addressed in section C, below.

A. Individual criminal responsibility at the domestic level

The emerging culture of the end of impunity for perpetrators of serious international crimes is manifested in two respects at the domestic level. On the one hand, states must take 'effective action to combat impunity',[98] in line with their existing responsibilities. There exist different treaty obligations to prosecute and punish individuals suspected of having committed serious international crimes that may be binding on states. These obligations are addressed in section (i). On the other hand, a corollary to the obligation to take effective action to combat impunity for serious international crimes is the prohibition on granting amnesties to the suspected perpetrators of such crimes. The granting of amnesties may also conflict with human rights obligations binding on states. The issue of amnesties for the commission of serious international crimes is addressed in section (ii).

(i) Obligations to prosecute and to punish

It remains controversial whether—and to what extent—there exists a general obligation binding on states, either under customary international law or as a general principle of law, to prosecute and punish those persons suspected of having committed the most serious international crimes.[99] According to the Basic (p. 863) Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, submitted to the UN General Assembly, '[i]n cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violation and, if found guilty, the duty to punish her or him'.[100] The Security Council has limited itself to emphasizing '[…] the responsibility of States *to comply with their relevant obligations* to end impunity to prosecute those responsible for war crimes, genocide, crimes against humanity and serious violations of international humanitarian law, while recognizing, for States in or recovering from armed conflict, the need to restore or build independent national judicial systems and institutions'.[101]

Although the existence of a general obligation is debatable, it is clear that some states are bound by treaty obligations to prosecute and punish suspected perpetrators of serious crimes that have been committed on their territory. There is no obligation contained in the operative parts of the Rome Statute, according to which states parties must prosecute individuals suspected of having committed serious international crimes that fall under the jurisdiction of the International Criminal Court. However, it is arguable that on the basis of Article 17 of the Statute (principle of complementarity), read together with paragraphs 4 to 6 of the preamble, states parties to the Rome Statute have a primary obligation to prosecute and punish individuals suspected of having committed crimes contained in the Statute, namely war crimes, crimes against humanity, genocide, and possibly aggression, on their territory.[102] Pursuant to the very *raison d'être* of the International Criminal Court set out in paragraphs 4 to 6 of the preamble to its Statute, states parties affirm 'that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level', they express their determination 'to put an end to impuni-

ty for the perpetrators of these crimes […]', and they recall 'that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'.[103] (p. 864)

States parties to the Convention on the Prevention and Punishment of the Crime of Genocide have undertaken—in addition to their obligation to prevent genocide—to punish genocide.[104] Concretely, this means that states parties to this Convention must exercise their criminal jurisdiction, to ensure that '[p]ersons charged with genocide or any of the other acts enumerated in article III [of the Genocide Convention] shall be tried by a competent tribunal of the State in the territory of which the act was committed […]'.[105] This obligation to prosecute under the Genocide Convention is limited to exercises of territorial jurisdiction. However, this does not prevent states parties to the Genocide Convention from conferring other forms of jurisdiction on their domestic criminal courts, even though they are not obliged to do so. The International Court of Justice has noted in this respect that '[a]rticle VI [of the Genocide Convention] only obliges the Contracting Parties to institute and exercise territorial criminal jurisdiction; while it certainly does not prohibit States, with respect to genocide, from conferring jurisdiction on their criminal courts based on criteria other than where the crime was committed which are compatible with international law, in particular the nationality of the accused, it does not oblige them to do so'.[106]

States parties to the 1949 Geneva Conventions, and Additional Protocol I to the Geneva Conventions, arguably have a broader obligation to prosecute or extradite those persons suspected of having committed grave breaches of the Geneva Conventions that extends beyond conferring territorial criminal jurisdiction on their domestic courts.[107] Once a state party to the Geneva Conventions 'is aware that a person on its territory has committed such an offence, it is its duty to see that such person is arrested and prosecuted without delay'.[108] Similarly, in accordance with the *aut dedere aut judicare* obligation contained in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),[109] states parties have an obligation to either submit a case concerning torture to their relevant (p. 865) prosecutorial authorities, or to extradite the person, in line with the provisions of the Convention Against Torture.[110] Furthermore, Article I of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity provides that no statutory limitation applies to war crimes, crimes against humanity and genocide, irrespective of the date of the commission of such crimes, and 'even if such acts do not constitute a violation of the domestic law of the country in which they were committed'.[111] It has been argued that this treaty 'by necessary implication places an obligation on States to prosecute' these crimes.[112]

Two remarks are warranted with respect to obligations to prosecute and punish persons suspected of having committed serious international crimes in the context of a transitional society. First, it could be argued that the prosecution and punishment of individuals suspected of committing past abuses could destabilize a fragile, newly established democracy. However, rather than undermining progress towards national reconciliation, such criminal trials conducted in the public sphere may serve as a vehicle for reconciliation.

Luis Moreno Ocampo noted in the context of Argentina that '[c]ivil society was strengthened as a result of the investigations and public trials, which increased the public's commitment to, and respect for, democracy and permitted—through the newly-created free press—a constructive public debate'.[113] Secondly, it is important to stress the need for an equal application of the law. The prosecution of individuals suspected of serious international crimes, regardless of their current or past membership or allegiance to an armed group or a regime of governance is desirable. The Security Council noted with regard to Haiti in 2004 that 'an end to impunity is key to national reconciliation in Haiti. The Council stresses that justice should apply equally to all citizens in that country and be carried out by an independent judicial system with the support of a reformed correctional system. The Council expresses its strong concern at reports of double standards in the administration of justice'.[114]

(ii) Amnesties

Amnesties are domestic laws the purpose of which is to provide persons suspected of having committed unlawful conduct in the past with prospective criminal (p. 866) impunity and civil indemnity. The attitude of the international community towards amnesties has drastically changed over the years. In the 1960s and 1970s, human rights advocates and legal scholars actively supported amnesties for political prisoners, particularly in the context of dictatorial regimes of governance. The non-governmental organization Amnesty International even went so far as to adopt the notion as part of its name.[115] In the context of crimes committed during armed conflict, Article 6(5) of Additional Protocol II to the Geneva Conventions famously provides that '[a]t the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained'.[116]

Nowadays there is general consensus that 'unconditional amnesties' or 'blanket amnesties', ie amnesties that cover any crime committed in the past, are unacceptable. The reason for this is that a prohibition of amnesties for persons suspected of having committed serious international crimes is a logical corollary of the emerging culture of the end of impunity for perpetrators of such crimes. Amnesties may also be incompatible with other obligations binding on states, such as human rights obligations.[117] The Nuremberg Declaration on Peace and Justice asserts that 'amnesties must not be granted to those bearing the greatest responsibility for genocide, crimes against humanity and serious violations of international humanitarian law'.[118]

Although there is general consensus that amnesties for serious international crimes are unacceptable under international law, it is acknowledged from the outset that there are instances where amnesties for other crimes may not only be acceptable, but desirable. In the context of transitional societies, where large parts of the population may have participated in a non-international armed conflict without having committed serious international crimes, amnesties may be an appropriate mechanism to assist the reintegration of such persons into society by granting them impunity for the domestic crime of participation in the conflict, in line with Article 6(5) of AP II.[119] In this vein, the Nuremberg Declaration

on Peace and Justice (p. 867) noted that '[a]mnesties, other than for those bearing the greatest responsibility for genocide crimes against humanity and war crimes, may be permissible in a specific context and may even be required for the release, demobilization and reintegration of conflict-related prisoners and detainees'.[120] Similarly, the UN has recognized that '[i]t may be necessary and proper for immunity from prosecution to be granted to members of the armed opposition seeking reintegration into society as part of a national reconciliation process'.[121]

The practice of the United Nations provides a guide to the changing attitude towards amnesties for perpetrators of serious international crimes. Although the United Nations may have harboured concerns about amnesties being granted to persons suspected of having committed serious international crimes in the early to mid-1990s, it stopped short of outright condemning them. For example, in response to a general amnesty that was adopted by El Salvador one week after the release of the El Salvador Commission on the Truth's report, the UN Secretary-General did not expressly condemn this measure. Rather, he noted in his Report in 1993 that 'I expressed my concern at the haste with which this step had been taken and my view that it would have been preferable if the amnesty had been promulgated after creating a broad degree of national consensus in its favour'.[122] Similarly, when the Abidjan Agreement between the Government of the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone was signed on 30 November 1996, it contained an Article granting amnesty to 'any member of the RUF/SL in respect of anything done by them in pursuit of their objectives as members of that organization up to the time of the signing of this Agreement'.[123] The UN Special Envoy who witnessed the signing of the Abidjan Agreement did not raise the issue of the blanket amnesty contained therein. The UN Secretary-General simply noted in his Report that the 'political provisions of the Accord […] also include the provision of amnesty for members of the RUF […]'.[124] (p. 868)

Although the United Nations did not openly condemn amnesties during the early and mid-1990s, this period marked a shift in attitude of the international community towards amnesties as a result of the developing culture of the end of impunity for perpetrators of serious international crimes, which in turn impacted upon UN practice. In 1992, the UN General Assembly adopted a 'Declaration on the Protection of All Persons from Enforced Disappearance', containing the principle that '[p]ersons who have or are alleged to have committed [acts of enforced disappearance] shall not benefit from any special amnesty law or similar measures that might have the effect of exempting them from any criminal proceedings or sanction'.[125] Furthermore, it was during this same decade that the UN Security Council established two ad hoc international criminal tribunals: the ICTY on 25 May 1993 and the International Criminal Tribunal for Rwanda (ICTR) on 8 November 1994.

Although the Statutes of these tribunals make no reference to amnesties, it is clear that they were established '[…] for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law',[126] and '[…] for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international

humanitarian law',[127] respectively. The Trial Chamber of the ICTY in the case of *Prosecutor v Anto Furundžjia* stated that the granting of amnesty laws with respect to the commission of torture would have the legal effect of 'international legal [non-]recognition'.[128] The 1990s also marked growing calls for unconditional amnesties to be prohibited by a number of human rights bodies because of the bar that amnesties pose to the protection of certain human rights.[129] In 1994, the UN Human Rights Committee stated in its General Comment No 20 concerning Article 7 of the International Covenant on Civil and Political Rights,[130] that '[a]mnesties are generally incompatible with the duty of States to investigate […] acts [of torture]'.[131]

One of the most significant developments in the 1990s in the emerging culture of the end of impunity for perpetrators of serious international crimes occurred in (p. 869) 1998 with the adoption of the Rome Statute, a criminal court of potential universal jurisdiction. This occurred with the support of the UN Secretariat, which acted as the Secretariat of the Preparatory Committee until 31 December 2003. The adoption of the Rome Statute put all perpetrators of serious international crimes on notice that once the Rome Statute entered into force, the International Criminal Court could potentially exercise its jurisdiction in large parts of the world by virtue of its various forms of jurisdiction from the date of entry into force of its Statute.[132] It thus tolled the bell for amnesties being granted in relation to serious international crimes that fall under its jurisdiction.

By 1999, it had become apparent that the position of the United Nations was to henceforth take positive steps in expressing its non-acceptance of amnesty provisions contained in peace treaties that would cover serious international crimes. According to paragraph 12 of the 1999 Guidelines for United Nations Representatives on Certain Aspects of Negotiations for Conflict Resolution, UN representatives were put on notice that 'the United Nations cannot condone amnesties regarding war crimes, crimes against humanity and genocide or foster those that violate treaty obligations of the parties in this field'.[133] This practice was first manifested when the Lomé Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone was signed on 3 June 1999. The Representative of the UN Secretary-General, when signing the Lomé Peace Agreement, penned the following statement next to his signature: 'The United Nations holds the understanding that the amnesty provisions of the Agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law'.[134] Although no legal obligations from peace agreements are opposable to the United Nations, the implication of a UN representative witnessing such a peace agreement is 'an indication of a moral or political support for the principles contained therein', and '[a]s far as the United Nations is concerned, a signature as a witness is a "stamp of legitimacy" of a kind'.[135] (p. 870)

The following year, in 2000, the UN Secretary-General stated in a report on the establishment of the Special Court for Sierra Leone that '[w]hile recognizing that amnesty is an accepted legal concept and a gesture of peace and reconciliation at the end of a civil war or an internal armed conflict, the United Nations has consistently maintained the position that amnesty cannot be granted in respect of international crimes, such as genocide,

crimes against humanity or other serious violations of international humanitarian law […]'.[136] Article 10 of the Statute of the Special Court for Sierra Leone makes clear that there is no amnesty for crimes falling under the jurisdiction of the Special Court.[137] The mounting international condemnation of amnesties for perpetrators of serious international crimes led a respected legal scholar to conclude in 2002 that '[a]lthough international law does not—yet—prohibit the granting of amnesty for international crimes, it is clearly moving in that direction'.[138]

In 2006, the Legal Counsel of the UN stated during a meeting of the Security Council that '[…] amnesty for international crimes has been regarded as unacceptable in international practice. Today, its rejection must be enshrined as a standard to be enforced'.[139] Legal advice issued by the UN Secretariat in 2006 for UN envoys to regions where an amnesty law for persons indicted by the International Criminal Court was in place, stipulated that '[…] in the event that the Special Envoy is called upon to conduct, facilitate or otherwise participate in negotiations of a permanent cease-fire or a peace agreement, especially if the Agreement includes an amnesty clause, the following should be borne in mind. It has been a long-standing position of the United Nations not to recognize, let alone condone any amnesties for the crime of genocide, crimes against humanity, war crimes and other serious (p. 871) violations of international humanitarian law'.[140] Similarly, an interoffice memorandum provided:

> The United Nations does not recognize any amnesty for genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law. This principle, which reflects a long-standing position and practice, applies to peace agreements negotiated or facilitated by the United Nations, or otherwise conducted under its auspices. In the event that such a peace agreement nevertheless grants amnesty for such crimes, the United Nations representative, when witnessing the agreement on behalf of the United Nations, shall affix a declaration next to his or her signature, stating that 'the United Nations does not recognize amnesty for genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law'.[141]

There is now general consensus that amnesties for serious international crimes are unacceptable under international law, and that persons suspected of having committed such crimes should be prosecuted. It remains debatable whether the act of granting amnesties for serious international crimes per se is unlawful under international law. It is clear, however, that the granting of amnesties conflicts with obligations binding on states to prosecute perpetrators of serious international crimes, as well as other human rights obligations including a duty to investigate human rights violations. The unacceptable nature of unconditional amnesties has developed in direct proportion to the emergence of the culture of the end of impunity for serious international crimes. Furthermore, with respect to transitional societies, the Security Council has called on amnesties not to be granted for sexual crimes. In 2008, it

stress[ed] the need for the exclusion of sexual violence crimes from amnesty provisions in the context of conflict resolution processes, and *call[ed] upon* Member States to comply with their obligations for prosecuting persons responsible for such acts, to ensure that all victims of sexual violence, particularly women and girls, have equal protection under the law and equal access to justice, and *stress[ed]* the importance of ending impunity for such acts as part of a comprehensive approach to seeking sustainable peace, justice, truth, and national reconciliation.[142]

(p. 872)

B. Individual criminal responsibility at the international level

International and internationalized criminal courts and tribunals play a pivotal role in the emerging culture of the end of impunity for perpetrators of serious international crimes.[143] There are some advantages to prosecuting those persons most responsible for serious international crimes before international and internationalized criminal courts and tribunals, rather than before national courts. Institutional reforms may need to take place before criminal trials can be held within the framework of a domestic court system. The highly charged political environment in a post-conflict transitional society may mean that a criminal trial at the domestic level would raise serious safety concerns for the accused, members of the court, witnesses, and the general public. Indeed, the political environment in the region may be of such intensity that even a criminal trial of a former political leader before an international or internationalized criminal court or tribunal may need to take place on the territory of a state far removed from the region. For example, instead of taking place in Freetown, Sierra Leone, the criminal trial of the former President of Liberia, Charles Taylor, is being conducted by the Special Court for Sierra Leone in The Hague, the Netherlands, initially at the premises of the International Criminal Court, and subsequently at the premises of the Special Tribunal for Lebanon.

The future of international criminal prosecutions is the system created by the Rome Statute, to which an impressive and steadily increasing number of states are parties. It should be emphasized from the outset that unlike other international and internationalized criminal courts and tribunals, which exercise primary jurisdiction over domestic courts in relation to the crimes that fall under their respective jurisdictions, the International Criminal Court functions on the basis of the principle of ‘complementarity’, meaning that it can only exercise its jurisdiction in situations in which a state is unable or unwilling to exercise its primary, domestic criminal jurisdiction. As explained above, the notion of complementarity extends beyond the primary responsibility of states to exercise their domestic criminal jurisdictions, and it includes ‘positive complementarity’, namely assistance that states and international organizations can provide to other states in building the capacity of domestic legal systems to ensure the criminal prosecution of suspected perpetrators of serious international crimes.

‘Positive complementarity’ may also be viewed within the broader context of the notion of the ‘responsibility to protect’, and in particular, the ‘responsibility to prevent’. In 2005,

the UN General Assembly adopted a Resolution in which states agreed that '[t]he international community should, as appropriate, encourage and (p. 873) help States to exercise this responsibility [to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity] and support the United Nations in establishing an early warning capability'.[144] According to Sheri Rosenberg, this 'collective responsibility to take coordinated action' also 'implies individual state responsibility to take reasonable steps to prevent the acts it seeks to prohibit'.[145] There is thus a need both for individual states, and the international community of states as a whole, to provide assistance in the form of capacity-building to those states struggling to fulfil their primary obligations to prevent and punish the commission of serious international crimes. The kinds of assistance that may be provided to individual states include:

[…] (a) ensuring that donors place on their agenda the need for legal reform, such as domestication of the Rome Statute and implementing legislation; (b) adopting a whole government approach to complementarity, i.e. aligning development cooperation projects with other forms of bilateral technical cooperation such as among police forces; […] (c) creating a support community that consists of international justice and humanitarian actors on the one hand, and development and peace-building efforts on the other […] [and (d)] developing a comprehensive tool kit on complementarity as well as developing a roster of expertise comprising ex-tribunal personnel to be administered by some mechanism.[146]

It is debatable whether the notion of 'positive complementarity' also extends to assistance that the International Criminal Court itself may provide to state parties. The Office of the Prosecutor has adopted a strategy that is 'a *positive approach* to complementarity, meaning that it encourages genuine national proceedings where possible, relies on national and international networks and participates in a system, of international cooperation'.[147] This 'positive' prosecutorial strategy does not equate with assistance in the form of capacity-building. Rather, it is more aptly defined as 'a managerial concept that organizes the relationship between the court and domestic jurisdictions on the basis of three cardinal principles: the idea of shared burden of responsibility, the management of effective investigations and prosecutions, and the two-pronged nature of the cooperation regime'.[148] To avoid confusion with the notion of 'positive complementarity' as consecrated in a Resolution adopted by the Review Conference of the Rome Statute in 2010,[149] a prosecutorial strategy of the International Criminal Court that serves to positively encourage states parties (p. 874) to fulfil their primary responsibility to prosecute suspected perpetrators of serious international crimes at the domestic level is perhaps more appropriately referred to as 'proactive complementarity'.[150]

The success of the International Criminal Court is dependent upon the cooperation of states parties with the Court. The Rome Statute obliges states parties to cooperate with the Court in various respects. There exists both a general obligation to cooperate under Article 86 of the Statute, and a number of specific obligations contained under Part IX thereof. Additionally, states parties to the Genocide Convention have a distinct treaty obligation to cooperate with the International Criminal Court contained under Article VI

of the Genocide Convention, which requires states parties to cooperate with 'all international criminal courts created after the adoption of the Convention […] of potentially universal scope, and competent to try the perpetrators of genocide',[151] thus including the International Criminal Court. The Security Council may also require non-states parties to the Rome Statute to cooperate with the Court in a binding resolution adopted under Chapter VII of the UN Charter, as occurred in relation to the Government of Sudan,[152] and in relation to the Libyan authorities.[153]

Although the UN Organization is not, and cannot become, a party to the Rome Statute, it does have an obligation to cooperate and assist the International Criminal Court as stipulated in the Relationship Agreement between the United Nations and the International Criminal Court.[154] From its terms it is clear that '[…] the Relationship Agreement does not oblige the United Nations to support any policy or strategy decision of the ICC'.[155] However, the UN Secretariat has insisted that '[t]he United Nations should, if possible, avoid any action that would undermine or counteract key ICC policies and strategies'.[156] In practice this means that considerable tact should be exercised by representatives of the United Nations who may come into contact with persons indicted by the International Criminal Court in the context of their work. According to a legal opinion issued by the UN Secretariat in 2006, if a UN Special Envoy cannot avoid direct contact with persons indicted by (p. 875) the International Criminal Court in carrying out his or her mandate, then such contact should 'be limited to what is strictly required for carrying out [the] mandate. The presence of the Special Envoy in any ceremonial or similar occasions should be avoided. We should also add that when contacts with the [Rebel Group] are necessary, an attempt should be made to interact with *non-indicted [Rebel Group] leaders*, if at all possible'.[157]

C. Filling the 'impunity gap' through exercises of universal criminal jurisdiction

The steady increase in the number of states parties to the Rome Statute is leading to a greater jurisdictional reach of this international judicial body. Pending this future development, there arise 'gaps of impunity' in the fabric of the culture of the end of impunity in cases in which a non-state party to the Statute is unable or unwilling to investigate and prosecute suspected perpetrators of serious international crimes, and when the International Criminal Court does not have jurisdiction. It has been argued that in such cases the domestic criminal courts of other states should exercise universal criminal jurisdiction with regard to the suspected perpetrators.[158] It is important to recall in this respect that the establishment of international and internalized criminal courts and tribunals has not replaced the role of the domestic courts of other states in the fight against impunity. Judges Higgins, Kooijmans, and Buergenthal noted in relation to exercises of universal criminal jurisdiction that the fight against impunity for perpetrators of serious international crimes has not been '[…] "made over" to international treaties and tribunals, with national courts having no competence in such matters'.[159]

'Universal criminal jurisdiction' refers to exercises of domestic jurisdiction 'based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, (p. 876) or any other connection to the state exercising such jurisdiction'.[160] Exercises of this form of jurisdiction—where there is no connecting factor to the forum—are highly controversial.[161] Some scholars advocate exercises of universal jurisdiction only in those cases in which the accused is found on the territory of the state wishing to prosecute, because '[o]therwise, we may be faced with the Belgian situation, where judges are flooded with complaints against dictators and generals from everywhere in the world'.[162] Courts exercising universal jurisdiction must surmount challenges during the judicial process that could be exacerbated by the distance of the court from the scene of the crime, and the court's lack of powers of enforcement in the territory where the serious international crimes occurred, such as the securing of evidence and the protection of witnesses.

Conversely—and to some extent, counter-intuitively—it may be the case that certain aspects of the judicial process are enhanced by virtue of the fact that a court outside the forum is conducting the criminal proceedings. Witnesses reluctant or unable to testify in the forum state may be willing to travel to another state in order to testify. For example, in relation to the exercise of universal criminal jurisdiction by Spanish courts concerning events that took place in Argentina under the dictatorship regime, Judge Garzón was able to hear 'the testimonies of a large number of witnesses, including family members of the disappeared, and victims of torture and other acts of state repression'[163] who had travelled to Spain in order to take part in the proceedings.

There is no general obligation binding on states to confer universal criminal jurisdiction on their domestic courts. However, some states may have treaty-based obligations to extend their criminal jurisdiction in different ways, such as on the basis of the principles of active or passive nationality. For example, under Article 5 of CAT, states parties must establish criminal jurisdiction for acts of torture committed in the jurisdiction of the forum state,[164] when the alleged offender is a national of the forum state,[165] when the victim is a national of the forum state 'if that State (p. 877) considers it appropriate',[166] and when the alleged offender is on the territory of the forum and is not extradited pursuant to other provisions of the Convention Against Torture.[167] In line with the *Case of the S.S. 'Lotus'* before the Permanent Court of International Justice, states are arguably free to extend their criminal jurisdiction in any way that does not violate international law.[168]

Unlike international and internationalized criminal courts and tribunals, a domestic court may be barred from exercising criminal jurisdiction with respect to foreign state representatives who enjoy immunity. Thus, even though a state may have conferred universal criminal jurisdiction on its domestic courts pursuant to a treaty obligation to prosecute and punish serious international crimes, this jurisdiction cannot be exercised by the domestic courts of that state with respect to incumbent Heads of State, Ministers for Foreign Affairs, and other state representatives who enjoy immunity from criminal jurisdiction. The International Court of Justice stated in the *Arrest Warrant* case that:

[…] although international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law […] These remain opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions.[169]

Immunity from jurisdiction provides legal protection from prosecution for foreign state representatives, thereby ensuring the day-to-day functioning of states and stability in international relations. This is understandable, but nevertheless frustrating in those situations in which a Head of State suspected of having committed serious international crimes is able to travel freely to other countries without risk of being held accountable for these crimes. The International Court of Justice has taken care to distinguish immunity from impunity, noting that '[j]urisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility'.[170] It may come to pass that although the domestic criminal courts of a state are barred from exercising jurisdiction *vis-à-vis* an incumbent foreign state representative for serious international crimes committed over a certain period of time, once this person ceases to hold office, the state may be free to prosecute this person based on universal criminal jurisdiction in relation to 'acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity'.[171] (p. 878)

5 Justice for Victims in the Form of Reparation

Reparation is premised on 'a principle of international law, that a breach of an engagement involves an obligation to make reparation in an adequate form'.[172] Reparation has been identified as a key component of a holistic approach to transitional justice. According to the Basic Principles and Guidelines, '[a]dequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law'.[173] Reparation to victims of serious international crimes may take the form of either individual or collective reparation.[174] Emphasis is placed here on individual reparation.

It is debatable whether there is a right to reparation for victims of serious international crimes,[175] and if so, the scope of this right. In relation to an obligation binding on states to provide reparation to victims, states parties to the 1907 Hague Convention (IV) and the 1977 Additional Protocol I have an obligation to provide reparation to other states parties to these treaties for IHL violations.[176] According to a traditional understanding of these treaty provisions, this means that only states—and not individual victims—can invoke these treaty obligations in a claim for (p. 879) reparation.[177] Thus, through diplomatic protection, a state may bring a claim against another state in a judicial forum, or via another mechanism for the peaceful settlement of disputes, and claim reparation for the injury suffered by its nationals.[178] However, a state is not obligated under international law to

bring such a claim; it may do so at its discretion. Furthermore, any reparation obtained will pass directly to the claimant state, which may—if it wishes—subsequently transfer some portion of it to the individual victim(s) concerned.

Some scholars have argued that individual victims should be able to directly claim reparation from a state party on the basis of the aforementioned treaties. In this vein, Riccardo Pisillo Mazzeschi argues that '[i]n our opinion, Article 3 [of the] Hague Convention No. IV and Article 91 of Protocol I should […] be jointly interpreted as rules providing for an obligation of reparation in favour both of states and of injured individuals'.[179] This argument is consonant with the progressive development of international law. However, there remain concrete impediments to its full realization. One of the difficulties that this argument must overcome is determining the forum in which an individual victim could bring such a claim for reparation directly against a foreign state. National courts are barred from examining the merits of a claim for reparation brought by an individual victim against a foreign state for serious international crimes on the basis of the jurisdictional bar of state immunity.[180] There is limited practice in the national courts in Greece and Italy of allowing such claims to reach the merits stage on the basis of the *jus cogens* nature of the norm(s) allegedly violated.[181] Further clarification on the international law (p. 880) governing state immunity may be provided by the International Court of Justice in due course.[182]

Although state immunity may pose an insurmountable hurdle to claims brought by individuals against foreign states, there is no such jurisdictional bar under international law for claims brought against a state concerning serious international crimes committed by this state in the forum, before this same state's national courts. According to the Basic Principles and Guidelines, '[i]n accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law'.[183] Some international legal obligations stipulate that there is a requirement for states to provide reparation within the framework of their domestic legal systems. These include the right of reparation for those who have suffered discrimination under Article 6 of the Convention on the Elimination of All Forms of Racial Discrimination,[184] and the right for victims of torture to obtain compensation under Article 14 of the Convention Against Torture.[185]

Aside from national courts, victims of serious international crimes may also be able to bring claims for reparation against a state before human rights courts,[186] once domestic remedies have first been exhausted. Pursuant to Article 41 of the European Convention on Human Rights,[187] '[i]f the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party'. Similarly, Article 63(1) of the American Convention on Human Rights provides that '[i]f the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appro-

priate, that the consequences of the measure or situation that constituted the (p. 881) breach of such right or freedom be remedied and that fair compensation be paid to the injured party'.[188]

Reparation may also be obtained from a state for victims of serious international crimes via mechanisms established at the international level with the assistance of the United Nations. For example, the UN Compensation Commission was created in 1991 as a subsidiary organ of the UN Security Council in Resolution 692 of 20 May 1991, and pursuant to Resolution 687 of 3 April 1991, in which the Security Council established that 'Iraq [was] liable for any […] injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait'. Reparation could also be obtained from a state after the state establishes, of its own volition, mechanisms for providing reparation to victims of serious international crimes with reparation, as Germany provided to some victims of the Holocaust.

Rather than bring a claim against a state, individual victims of serious international crimes may choose to bring claims directly against the individual suspected of having committed the serious international crime.[189] Claims may be brought before the national courts of a state, either as part of the criminal proceedings against the suspected perpetrator where the victim may participate as a '*partie civile*' in the proceedings—as is the case in many civil law countries—or as a separate judicial process, as is the case in common law countries. Reparation may also be obtained from the individual perpetrator in the institutional context of an international or internationalized criminal court or tribunal. For example, under Article 75(2), of the Rome Statute of the International Criminal Court, the Court may make an order against a convicted person for reparation to victims that may include restitution, compensation, and rehabilitation.[190] Claims could also be brought against individuals before national courts of a foreign state, depending on the enabling domestic legislation of that state. For example, the US Aliens Tort Claims Act[191] allows US courts to hear civil suits brought by any foreigner who alleges a violation of the 'law of nations'. (p. 882)

Reparation may also be envisaged in the context of non-judicial transitional justice mechanisms, such as truth commissions (discussed above), and traditional justice mechanisms. In relation to traditional justice mechanisms, Rwanda established *Gacaca* courts in order to address the significant number of individuals allegedly involved in the commission of serious international crimes. It was simply not feasible to prosecute every suspect within the framework of the domestic criminal justice system nor before the ICTR, which—in line with the exercise of prosecutorial discretion and the institutional capacity of the Tribunal, including financial constraints—can only prosecute a small number of individuals deemed to be those most responsible. Only very limited forms of reparation are available for genocide survivors before *Gacaca* courts in the form of restitution of property, or symbolic reparation in the form of the provision of information leading to locating the remains of genocide victims.[192]

In cases in which individual perpetrators are unable to provide reparation to their victims, it may be appropriate for the transitional government in the state in question to step in and provide such reparation. However, there is no legal obligation binding on the state to do so. To this end, the Final Report submitted to the UN Commission on Human Rights by Special Rapporteur Bassiouni on the right to restitution, compensation, and rehabilitation for victims of gross violations of human rights and fundamental freedoms, states that '[i]n the event that the party responsible for the violation is unable or unwilling to meet these obligations, the State *should* endeavour to provide reparation to victims […] To that end, States *should* endeavour to establish funds for reparation to victims and seek other sources of funds wherever necessary to supplement these'.[193] Similarly, the Basic Principles and Guidelines provide that 'States *should endeavour* to establish national programmes for reparation and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations'.[194] (p. 883)

6 Conclusion

Transitional justice demands a coordinated approach among a plurality of mechanisms to assist a society in transitioning from a state of armed conflict in which serious international crimes were committed, to a peaceful and reconciled future. This Chapter has provided on overview of a non-exhaustive number of transitional mechanisms, including the truth-seeking mechanisms of truth commissions, commissions of inquiry, and judicial fact-finding; the criminal prosecution of individuals at the international and national levels within the context of the emerging culture of the end of impunity for suspected perpetrators of serious international crimes; and forms of reparation for victims of serious international crimes. On a theoretical level it is not difficult to demand a coordinated approach among different transitional justice mechanisms. However, it is challenging to achieve such coordination in practice. This Chapter has addressed some of the difficulties that may arise in the interaction among different transitional justice mechanisms, such as protection of the rights of the accused, and of witnesses that may arise in the relationship between a truth commission and a criminal court or tribunal. (p. 884)

Notes:

(*) The reader is advised that this chapter was completed in 2011.

(1) International Center for Transitional Justice, 'What is Transitional Justice?', available at <http://www.ictj.org/static/TJApproaches/WhatisTJ/ICTJ_WhatisTJ_pa2008_.pdf>. See also the definition provided by UN Secretary-General Kofi Annan in his report on 'The rule of law and transitional justice in conflict and post-conflict societies', 23 August 2004, UN Doc S/2004/616, § 8.

(2) UN Secretary-General Kofi Annan stated in his report on 'The rule of law and transitional justice in conflict and post-conflict societies', that '[j]ustice, peace and democracy are not mutually exclusive objectives, but rather mutually reinforcing imperatives', 23 August 2004, UN Doc S/2004/616, 1. On the adoption of democratic forms of governance in

post-conflict transitional societies, see S. Ratner, 'New Democracies, Old Atrocities: An Inquiry in International Law', 87 *Georgetown Law Journal* (1999) 707–48.

(3) Nuremberg Declaration on Peace and Justice, annexed to the letter dated 13 June 2008 from the Permanent Representatives of Finland, Germany, and Jordan to the United Nations addressed to the Secretary-General, 19 June 2008, UN Doc A/62/885, recommendation 3.3, at 7.

(4) A. La Rosa and X. Philippe, 'Transitional Justice', in V. Chetail (ed), *Post-Conflict Peacebuilding: A Lexicon* (New York: Oxford University Press, 2009), 368–79.

(5) Preamble of the Rome Statute of the International Criminal Court, 17 July 1998, entered into force on 1 July 2002, A/CONF.183/9, 2187 UNTS 3.

(6) J. Méndez, Special Advisor to the Prosecutor of the International Criminal Court on Crime Prevention, 'Quantative analysis of the deterrence impact', annexed to 'The Importance of Justice in Securing Peace', Review Conference of the Rome Statute, 30 May 2010, RC/ST/PJ/INF.3, at 8–11.

(7) P. Hayner, *Unspeakable Truths. Transitional Justice and the Challenge of Truth Commissions* (2nd edn, Oxon: Routledge, 2011), 23; Office of the United Nations High Commissioner for Human Rights, 'Rule-of-Law Tools for Post-Conflict States. Truth Commissions', UN Doc HR/PUB/06/1, 2006, 2.

(8) The development of this notion can be traced in a chronological reading of the following documents: Report of the International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, Ottawa, International Development Research Centre, December 2001, §§ 39–45; Report of the UN Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, September 2005, UN Doc A/59/2005; UN Secretary-General, *Implementing the responsibility to protect. Report of the Secretary-General*, 12 January 2009, UN Doc. A/63/677; UN Secretary-General, *Report of the Secretary-General on the protection of civilians in armed conflict*, 29 May 2009, UN Doc S/2009/277.

(9) See 'Report of the Panel on United Nations Peace Operations', annexed to identical letters dated 21 August 2000 from the Secretary-General to the President of the General Assembly and the President of the Security Council, 21 August 2000, UN Doc A/55/305; Report of the High-level Panel on Threats, Challenges and Change, *A more secure world: our shared responsibility*, UN Doc A/59/565, 2 December 2004; Report of the UN Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, September 2005, UN Doc A/59/2005; UNGA Resolution 60/1, 'World Summit Outcome', 24 October 2005; UN Secretary-General, 'Uniting our strengths: Enhancing United Nations support for the rule of law', Report of the Secretary-General, 14 December 2006, UN Docs A/61/636-S/2006/980; UN Secretary-General, 'Strengthening and coordinating United Nations rule of law activities', Report of the Secretary-General, 6 August 2008, UN Doc A/63/226; UN Secretary-General, 'Annual report on strengthening and co-

ordinating United Nations rule of law activities', Report of the Secretary-General, 17 August 2009, UN Doc A/64/298; Statement by the President of the Security Council, 12 February 2010, UN Doc S/PRST/2010/2.

(10) See UN Secretary-General, *An Agenda for Peace. Preventative diplomacy, peacemaking and peace-keeping*, Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 21 January 1992, 17 June 1992, UN Docs A/47/277–S/24111; Report of the High-level Panel on Threats, Challenges and Change, *A more secure world: our shared responsibility*, UN Doc A/59/565, 2 December 2004, §§ 224–30; UNGA Resolution 60/1, 'World Summit Outcome', 24 October 2005; UNSC Resolution 1645 (2005), 'Post-conflict peacebuilding', 20 December 2005; UNGA Resolution 60/180, 'The Peacebuilding Commission', 20 December 2005; UN Secretary-General, 'Uniting our strengths: Enhancing United Nations support for the rule of law', Report of the Secretary-General, 14 December 2006, UN Docs A/61/636–S/2006/980; UNSC Resolution 1820 (2008), 19 June 2008; UN Secretary-General, *Report of the Secretary-General on peacebuilding in the immediate aftermath of conflict*, 11 June 2009, UN Docs A/63/881–S/2009/304; UN Secretary-General, 'Women's participation in peacebuilding', Report of the Secretary-General, 7 September 2010, UN Docs A/65/354–S/2010/466. See also V. Chetail, 'Introduction: Post-conflict Peacebuilding—Ambiguity and Identity', in V. Chetail (ed), *Post-Conflict Peacebuilding: A Lexicon* (New York: Oxford University Press, 2009), 1–33.

(11) Remarks by Prince Zeid Ra'ad Zeid Al Hussein, 'Peace v. Justice: Contradictory or Complementary', 100 *American Society of International Law Proceedings* (2006) 361–73 at 364.

(12) Remarks by K. Roth, Executive Director of Human Rights Watch and Moderator of the stock- taking exercise on the issue of peace and justice at the Review Conference of the Rome Statute of the International Criminal Court, in *Official Records of the Review Conference*, RC/11, Annex V(b), 'Stocktaking on international criminal justice. Peace and justice. Moderator's Summary', 106, § 29. See also remarks by D. Tolbert, President of the International Center for Transitional Justice, in *Official Records of the Review Conference*, RC/11, Annex V(b), 'Stocktaking on international criminal justice. Peace and justice. Moderator's Summary', 103, § 4.

(13) Remarks by C. Bassiouni, 'Effectuating International Criminal Law through International and Domestic Fora: Realities, Needs and Prospects', 91 *American Society of International Law Proceedings* (1997), 259–62 at 262.

(14) Report of the UN Secretary-General, 'The rule of law and transitional justice in conflict and post-conflict societies', 23 August 2004, UN Doc S/2004/616, 8, § 21.

(15) Statement by the President of the UN Security Council, 12 July 2005, UN Doc S/PRST/2005/30, 1.

(16) Statement by the President of the UN Security Council, 22 June 2006, UN Doc S/PRST/2006/28.

(17) Nuremberg Declaration on Peace and Justice, annexed to the letter dated 13 June 2008 from the Permanent Representatives of Finland, Germany, and Jordan to the United Nations addressed to the Secretary-General, 19 June 2008, UN Doc A/62/885.

(18) Statement by Mr Ban Ki-Moon, Secretary-General of the United Nations, 'An Age of Accountability', Address at the Review Conference on the International Criminal Court, 31 May 2010, available at <http://www.un.org/sg/selected-speeches/statement_full.asp?statID=829>.

(19) UN Security Council Resolution 827 (1993), 25 May 1993.

(20) UN Security Council Resolution 1593 (2005), 31 March 2005.

(21) V. Gowlland-Debbas, 'Security Council Change. The Pressure of Emerging International Public Policy', 65 *International Journal* (2009–10), 119–139 at 130.

(22) UN Security Council Resolution 1970 (2011), 26 February 2011.

(23) UN Security Council Resolution 1688 (2006), 16 June 2006.

(24) Indictments were brought against the key political and military figures Radovan Karadžić (Case No IT-95-5/18), Ratko Mladić (Case No IT-09-92), and Slobodan Milošević (Case No IT-02-54). Mr Karadžić and Mr Mladić are currently being tried before the ICTY, while Mr Milošević died in detention on 11 March 2006.

(25) *Prosecutor v Omar Hassan Ahmad Al Bashir ('Omar Al Bashir')*, Warrant of Arrest for Omar Hassan Ahmad Al Bashir, 4 March 2009, Pre-Trial Chamber I, Case No ICC-02/05-01/09; *Prosecutor v Omar Hassan Ahmad Al Bashir ('Omar Al Bashir')*, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, 12 July 2010, Pre-Trial Chamber I, Case No ICC-02/05-01/09.

(26) Nuremberg Declaration on Peace and Justice (n 17), 4.

(27) R. Goldstone, 'Peace versus Justice', address delivered at the Law School of the University of Las Vegas on 15 October 2005, reprinted in 6 *Nevada Law Journal* (2005) 421–4 at 421 and 422.

(28) Remarks by M. Wierda, 'Peace v. Justice: Contradictory or Complementary', 100 *American Society of International Law Proceedings* (2006) 361–73 at 369. See also D. Crane, '"Back to the Future"—Reflections on the Beginning of the Beginning: International Criminal Law in the Twentieth Century', 32 *Fordham International Law Journal* (2009) 1761–9 at 1767.

(29) Report of the UN Secretary-General, 'The rule of law and transitional justice in conflict and post-conflict societies', 23 August 2004, UN Doc S/2004/616, at 8, para 21 (emphasis added).

(30) Remarks by K. Roth, Executive Director of Human Rights Watch and Moderator of the stockingtaking exercise on the issue of peace and justice at the Review Conference of the Rome Statute of the International Criminal Court, in *Official Records of the Review Conference*, RC/11, Annex V(b), 'Stocktaking on international criminal justice. Peace and justice. Moderator's Summary', 106, § 30.

(31) On some of the issues to be taken into account, see P. Hayner, 'Managing the Challenges of Integrating Justice Efforts and Peace Processes', Review Conference of the Rome Statute, 30 May 2010, RC/ST/PJ/INF.4.

(32) Remarks by Mr N. Michel, Under-Secretary-General for Legal Affairs and Legal Counsel of the United Nations, UN Security Council, 5474th meeting, 22 June 2006, UN Doc S/PV.5474, 4. See also the address by Mr K. Annan, Review Conference of the Assembly of State Parties to the Rome Statute of the International Criminal Court, Kampala, Uganda, 31 May 2010, available at <http://www.kofiannanfoundation.org/newsroom/speeches/2010/05/review-conference-assembly-states-parties- to-rome-statute-international>, § 54.

(33) L. Moreno Ocampo, 'Building a Future on Peace and Justice: The International Criminal Court', in K. Ambos, J. Large, and M. Wierda (eds), *Building a Future on Peace and Justice. Studies in Transitional Justice, Peace and Development. The Nuremberg Declaration on Peace and Justice* (Berlin/Heidelberg: Springer-Verlag, 2009), 9–13 at 11.

(34) An overview of the different doctrinal positions taken to interpreting the meaning of 'interests of justice' is provide by K. Ambos, 'The Legal Framework of Transitional Justice: A Systematic Study with a Special Focus on the Role of the ICC', in K. Ambos, J. Large, and M. Wierda (eds), *Building a Future on Peace and Justice. Studies in Transitional Justice, Peace and Development. The Nuremberg Declaration on Peace and Justice* (Berlin/Heidelberg: Springer-Verlag, 2009), 19–103 at 82–6.

(35) Office of the Prosecutor of the ICC, 'Policy Paper on the Interests of Justice', September 2007, available at <http://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPInterestsOfJustice.pdf>, 1.

(36) Ms F. Bensouda, Deputy Prosecutor of the International Criminal Court, 'Peace and Justice, Friends or Foes?', Keynote address at the 74th Conference of the International Law Association, *De iure humanitatis; Peace, justice and international law*, The Hague, 17 August 2010, available at <http://www.icc-cpi.int/nr/exeres/2386f5cb-b2a5-45dc-b66f-17e762f77b1f.htm>.

(37) Article 16 of the Statute of the International Criminal Court reads: 'No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the

Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.'

(38) M. Bergsmo and J. Pejić, 'Article 16. Deferral of investigation or prosecution', in O. Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court. Observer's Notes, Article by Article* (2nd edn, München: C.H. Beck, 2008), 595–604 at 598.

(39) L. Condorelli and S. Villalpando, 'Referral and Deferral by the Security Council', in A. Cassese, P. Gaeta, and J. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002), 627–55 at 647.

(40) E. Wiesel, 'Hope, Despair and Memory', Nobel Lecture, 11 December 1986, available at <http://nobelprize.org/nobel_prizes/peace/laureates/1986/wiesel-lecture.html>.

(41) Remarks by Y. Chhang, Director of the NGO Documentation Center of Cambodia, Review Conference of the Rome Statute of the International Criminal Court, in *Official Records of the Review Conference*, RC/11, Annex V(b), 'Stocktaking on international criminal justice. Peace and justice. Moderator's Summary', 105, § 18.

(42) D. Tolbert and M. Wierda, 'Stocktaking: Peace and Justice', International Center for Transitional Justice briefing paper, May 2010, available at <http://ictj.org/publication/stocktaking-peace-and-justice-rome-statute-review-conference>, 2.

(43) See the treaty-based human rights obligations addressed by R. Pisillo Mazzeschi, 'Responsabilité de l'état pour violation des obligations positives relatives aux droits de l'homme', 333 *RCADI* (2008) 175–506 at 345–51 ('obligation d'avoir un appareil adéquat d'enquête sur les violations des droits de l'homme'); D. Orentlicher, 'Independent Study on Best Practices, Including Recommendations, to Assist States in Strengthening their Domestic Capacity to Combat All Aspects of Impunity', 27 February 2004, UN Doc E/CN.4/2004/88, paras 14–23 ('the right to know'); D. Orentlicher, 'Report of the independent expert to update the Set of Principles to combat impunity', 18 February 2005, UN Doc E/CN.4/2005/102, §§ 17–35 ('the right to know').

(44) Human Rights Committee, General Comment No 31, 'Nature of the legal obligation on States Parties to the Covenant', 29 March 2004, UN Doc CCPR/C/21/Rev.1/Add.13, § 15. See also UN General Assembly Resolution 55/111 (2001), 'Extrajudicial, summary or arbitrary executions', 4 December 2000, § 6; Inter-American Court of Human Rights, *Velasquez Rodriguez Case*, Judgment of 29 July 1988 (Ser. C) No 4, § 176 '[t]he State is obligated to investigate every situation involving a violation of the rights protected by the Convention'; European Court of Human Rights, *Aksoy v Turkey*, Judgment of 18 December 1996, App No 00021987/93, § 98 '[article 13 of the European Convention on Human Rights imposes] an obligation on States to carry out a thorough and effective investigation of incidents of torture'; Human Rights Committee, *Bautista de Arellana v Colombia*, Comm No 563/1993, UN Doc CCPR/C/55/D/563/1993 (1995), § 8.6 '[t]he Committee nevertheless considers that the State party is under a duty to investigate thoroughly alleged

violations of human rights, and in particular forced disappearances of persons and violations of the right to life’.

(45) UN Special Rapporteur on Extra-judicial, Summary or Arbitrary Executions, Report of the Special Rapporteur, P. Alston, 8 March 2006, UN Doc E/CN.4/2006/53, § 36.

(46) A publication by the International Center for Transitional Justice provides useful guidelines for addressing some of the logistical and ethical problems that may be encountered in the process of truth-seeking in general: L. Bickford, P. Karam, H. Mneimneh, and P. Pierce, ‘Documenting Truth’, International Center for Transitional Justice, 2009, available at <http://ictj.org/publication/documenting-truth>.

(47) D. Orentlicher, ‘Report of the Independent Expert to update the Set of Principles to combat Impunity: Addendum’, 8 February 2005, UN Doc E/CN.4/2005/102/Add.1, 6.

(48) These are analysed in detail by P. Hayner, *Unspeakable Truths. Transitional Justice and the Challenge of Truth Commissions* (2nd edn, Oxon: Routledge, 2011).

(49) Office of the United Nations High Commissioner for Human Rights, ‘Rule-of-Law Tools for Post-Conflict States. Truth Commissions’, UN Doc HR/PUB/06/1, 2006, 5.

(50) UN Doc HR/PUB/06/1, 2006, 17–20.

(51) The full report of the South African Truth and Reconciliation Commission is available at <http://www.info.gov.za/otherdocs/2003/trc/>.

(52) See the detailed study on the work of the South African truth commission by A. du Bois-Pedain, *Transitional Amnesty in South Africa* (Cambridge: Cambridge University Press, 2007).

(53) Constitution of the Republic of South Africa, Act 200 of 1993. The amnesty provisions in the 1993 interim Constitution were preserved in Sch 6, s 22, of the Constitution of the Republic of South Africa Act No 108 of 1996.

(54) Constitution of the Republic of South Africa, Act 200 of 1993, Postamble. See P. van Zyl, ‘Dilemmas of Transitional Justice: The Case of South Africa’s Truth and Reconciliation Commission’, 52 *Journal of International Affairs* (1999) 647–67.

(55) P. Hayner, *Unspeakable Truths. Transitional Justice and the Challenge of Truth Commissions* (2nd edn, Oxon: Routledge, 2011), 104.

(56) The Truth, Justice and Reconciliation Commission Bill, 2008, Part III, § 34.

(57) Report of the Comisión Nacional de Verdad y Reconciliación (‘Rettig Report’), February 1991, vol 2, 868. The original Spanish version of the Rettig Report is available at <http://www.ddhh.gov.cl/ddhh_rettig.html>. An English translation of the above cited paragraph is found in Inter-American Commission on Human Rights, Report No 36/96, Case No 10.843, Chile, 15 October 1996, available at <http://www.cidh.org/annualrep/

96eng/Chile10843.htm>, para 76. A full English version of the Rettig Report is available on the website of the United States Institute of Peace at <http://www.usip.org/publications/truth-commission-chile-90>, however the wording in this translation of the above cited paragraph differs from the translation provided by the Inter-American Commission on Human Rights, with the latter being preferred.

(58) Report of the Sierra Leone's Truth and Reconciliation Commission, available at <http://www.sierra-leone.org/TRCDocuments.html>, vol 3B, 381, § 68.

(59) Letter dated 12 January 2001 from the Secretary-General addressed to the President of the Security Council, 12 January 2001, UN Doc S/2001/40, 3, § 9.

(60) 'Press Conference by the Prosecutor of the International Criminal Court, Luis Moreno-Ocampo', Nairobi, Kenya, 7 November 2009, 3.

(61) For a consideration of some of the issues that may arise, see A. Bisset, 'Rethinking the Powers of Truth Commissions in Light of the ICC Statute', 7(5) *Journal of International Criminal Justice* (2009) 963–82.

(62) The Report of The Bloody Sunday Inquiry is available at <http://www.bloody-sunday-inquiry.org/index.html>.

(63) The full report of the Independent International Fact-Finding Mission on the Conflict in Georgia is available at <http://www.ceiig.ch/Report.html>.

(64) A. Hegarty, 'The Government of Memory: Public Inquiries and the Limits of Justice in Northern Ireland', 26 *Fordham International Law Journal* (2003) 1148–92 at 1151. See also C. Bell, 'Dealing with the Past in Northern Ireland', 26 *Fordham International Law Journal* (2003) 1095–1147 at 1105.

(65) Council of the European Union, Council Decision 2008/901/CFSP, 'Concerning an independent international fact-finding mission on the conflict in Georgia', 2 December 2008.

(66) Report of Independent International Fact-Finding Mission on the Conflict in Georgia, vol II, 1.

(67) Report of Independent International Fact-Finding Mission on the Conflict in Georgia, vol II, 429.

(68) Report of Independent International Fact-Finding Mission on the Conflict in Georgia, vol II, 437.

(69) UN Security Council Resolution 1595 (2005), 7 April 2005.

(70) Report of the Commission of Inquiry into Post-Election Violence ('Waki Commission'), 15 October 2008, available at <http://www.usip.org/publications/truth-commission-kenya>, 18.

(71) International Criminal Court, Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, ICC-01/09-19.

(72) Statement by Prosecutor Moreno-Ocampo in relation to the 18 February 2010 Pre-Trial Chamber II decision regarding the situation in Kenya, 18 February 2010, available at <http://www.icc-cpi.int/nr/exeres/2386f5cb-b2a5-45dc-b66f-17e762f77b1f.htm>.

(73) UN Security Council Resolution 1564, 18 September 2004.

(74) Report of the International Commission of Inquiry on Darfur to the Secretary-General, annexed to Letter dated 31 January 2005 from the Secretary-General addressed to the President of the Security Council, UN Doc S/2005/60.

(75) UN Doc S/2005/60, 174, § 647.

(76) UN Security Council Resolution 1593 (2005), 31 March 2005.

(77) Office of the Prosecutor of the International Criminal Court, 'First Report of the Prosecutor of the International Criminal Court, Mr. Luis Moreno Ocampo, to the Security Council Pursuant to UNSCR 1593 (2005)', 29 June 2005, 2.

(78) See Arts 2–5 of the Statute of the ICTY; Arts 2–4 of the Statute of the International Criminal Tribunal for Rwanda; Arts 2–5 of the Statute of the Special Court for Sierra Leone; Arts 3–7 of Cambodian Law NS/RKM/1004/006 with respect to the Extraordinary Chambers in the Courts of Cambodia; Arts 5–8 of the Statute of the International Criminal Court; Art 2 of the Statute of the Special Tribunal for Lebanon.

(79) Remarks by Prince Zeid Ra'ad Zeid Al Hussein (n 11), 366.

(80) Remarks by Prince Zeid Ra'ad Zeid Al Hussein (n 11), 363.

(81) J. Lindenmann, 'Transitional Justice and the International Criminal Court: Some Reflections on the Role of the ICC in Conflict Transformation', in M. Kohen (ed), *Promoting Justice, Human Rights and Conflict Resolution through International Law/La promotion de la justice, des droits de l'homme et du règlement des conflits par le droit international. Liber Amicorum Lucius Caflisch* (Leiden: Koninklijke Brill, 2007), 315–38 at 325.

(82) Report of the Commission of Inquiry into Post-Election Violence ('Waki Commission'), 15 October 2008, available at <http://www.dialoguekenya.org/docs/PEV%20Report.pdf>, 9.

(83) 'Report 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', 7 August 2000, UN Docs A/55/273–S/2000/777, 29, § 184.

(84) UN Docs A/55/273–S/2000/777, 29, § 184.

(85) ‘Report 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’, 4 September 2002, UN Docs A/57/379–S/2002/985, 40, § 230.

(86) UN Docs A/57/379–S/2002/985, 40, § 230.

(87) UN Docs A/57/379–S/2002/985, 40, § 230.

(88) ‘Report 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’, 20 August 2003, UN Docs A/58/297–S/2003/829, 55, § 248.

(89) ‘Report 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’, 4 September 2002, UN Docs A/57/379–S/2002/985, 40, § 230.

(90) Office of the Prosecutor of the International Criminal Court, ‘First Report of the Prosecutor of the International Criminal Court, Mr. Luis Moreno Ocampo, to the Security Council Pursuant to UNSCR 1593 (2005)’, 29 June 2005, 2.

(91) S. Opotow, ‘Psychology of Impunity and Injustice: Implications for Social Reconciliation’, in M. Cherif Bassiouni (ed), *Post-Conflict Justice* (Ardsley: Transnational Publishers, 2002), 201–16 at 202.

(92) UN Security Council Resolution 1674 (2006), ‘Protecting civilians in armed conflict’, 28 April 2006, § 7.

(93) It has even been argued that there is an emerging norm to end impunity for perpetrators of genocide, crimes against humanity, and war crimes: see *Nuremberg Declaration on Peace and Justice* (n 34), 4.

(94) ICTY, established by UN Security Council Resolution 827 (1993) of 25 May 1993; ICTR, established by UN Security Council Resolution 955 (1994) of 8 November 1994; Special Court for Sierra Leone, established by an agreement between the United Nations Organization and the government of Sierra Leone of 16 January 2002; Extraordinary Chambers in the Courts of Cambodia, established by Cambodian law NS/RKM/1004/006, promulgated on 27 October 2004 by Cambodian law NS/RKM/0801/12 KRAM; Special Tribunal for Lebanon, established by an agreement between the United Nations Organization and Lebanon, the provisions of which entered into force by virtue of UN Security Council Resolution 1757 (2007).

(95) Rome Statute of the International Criminal Court, 17 July 1998, entered into force on 1 July 2002.

(96) J. Lindenmann, 'Transitional Justice and the International Criminal Court: Some Reflections on the Role of the ICC in Conflict Transformation', in M. Kohen (ed), *Promoting Justice, Human Rights and Conflict Resolution through International Law/La promotion de la justice, des droits de l'homme et du règlement des conflits par le droit international. Liber Amicorum Lucius Caflisch* (Leiden: Koninklijke Brill, 2007), 315–38 at 334 (original emphasis). See also remarks by Mr N. Michel, Under-Secretary-General for Legal Affairs and Legal Counsel of the United Nations, UN Security Council, 5474th meeting, 22 June 2006, UN Doc S/PV.5474, 4.

(97) Review Conference of the Rome Statute of the International Criminal Court, Resolution RC/Res 1, 'Complementarity', 8 June 2010, § 5 (adopted by consensus). See also International Center for Transitional Justice, 'Complementarity after Kampala: The Way Forward', Meeting Summary of the Retreat, 19 November 2010, available at <http:// ictj.org/publication/complementarity-after- kampala-meeting-summary>.

(98) D. Orentlicher, 'Report of the Independent Expert to update the Set of Principles to Combat Impunity: Addendum', 8 February 2005, UN Doc E/CN.4/2005/102/Add.1, 7.

(99) K. Ambos, 'The Legal Framework of Transitional Justice: A Systematic Study with a Special Focus on the Role of the ICC', in K. Ambos, J. Large, and M. Wierda (eds), *Building a Future on Peace and Justice. Studies in Transitional Justice, Peace and Development. The Nuremberg Declaration on Peace and Justice* (Berlin/Heidelberg: Springer-Verlag, 2009), 19–103 at 30.

(100) 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' annexed to UN General Assembly Resolution 60/147, 'Basic Principles and Guidelines on the Right to a Remedy', 21 March 2006, § 4.

(101) UN Security Council Resolution 1674 (2006), 'Protecting civilians in armed conflict', 28 April 2006, § 8 (emphasis added). See also Statement by the President of the Security Council, 12 July 2005, UN Doc S/PRST/2005/30, 1; Statement by the President of the Security Council, 22 June 2006, UN Doc S/PRST/2006/28, 2.

(102) Articles 5–8 of the Rome Statute of the International Criminal Court. For the definition of the crime of aggression, see Annex 1 'Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression' to Review Conference of the Rome Statue of the International Criminal Court, Resolution RC/Res 6, 11 June 2010 (adopted by consensus).

(103) §§ 4 to 6 of the preamble to the Rome Statute of the International Criminal Court.

(104) Article I of the Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, entered into force on 12 January 1951, 78 UNTS 277.

(105) Article VI of the Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, entered into force on 12 January 1951, 78 UNTS 277.

(106) *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, [2007] ICJ Rep 158–9, § 442. For a critique of the Court's narrow reading of the obligation to prosecute and punish under the Genocide Convention, see O. Ben-Naftali, 'The Obligations to Prevent and to Punish Genocide', in P. Gaeta (ed), *The UN Genocide Convention. A Commentary* (Oxford: Oxford University Press, 2009), 27–57, at 46–52.

(107) Article 49 of GC I; Art 50 of GC II; Art 129 of GC III; Art 146 of GC IV; Art 85 of AP I. See also J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, vol I (Cambridge: International Committee of the Red Cross/Cambridge University Press, 2005), 607 (Rule 158).

(108) Commentary GC I, 365–6.

(109) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, entered into force on 26 June 1987, 1465 UNTS 85.

(110) See generally M. Nowak and E. McArthur, *The United Nations Convention Against Torture. A Commentary* (Oxford: Oxford University Press, 2008), 344–67 (Article 7).

(111) Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 26 November 1968, entered into force on 11 November 1970, 754 UNTS 73.

(112) J. Dugard, 'Possible Conflicts of Jurisdiction with Truth Commissions', in A. Cassese, P. Gaeta, and J. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002), 693–704 at 696.

(113) L. Moreno Ocampo, 'Beyond Punishment: Justice in the Wake of Massive Crimes in Argentina', 52 *Journal of International Affairs* (1999) 669–89 at 670.

(114) Statement by the President of the Security Council, 10 September 2004, UN Doc S/PRST/2004/32, 2.

(115) A history of Amnesty International is available at <http://www.amnesty.org/en/who-we-are/history>.

(116) Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, entered into force on 7 December 1978, 1125 UNTS 609.

(117) See D. Momtaz, 'De l'incompatibilité des amnisties inconditionnelles avec le droit international', in M. Kohen (ed), *Promoting Justice, Human Rights and Conflict Resolution through International Law/La promotion de la justice, des droits de l'homme et du règlement des conflits par le droit international. Liber Amicorum Lucius Caflisch* (Leiden: Koninklijke Brill, 2007), 353–68.

(118) Nuremberg Declaration on Peace and Justice, annexed to the letter dated 13 June 2008 from the Permanent Representatives of Finland, Germany, and Jordan to the United Nations addressed to the Secretary-General, 19 June 2008, UN Doc A/62/885, 4.

(119) F. Bugnion, 'L'amnistie entre l'exigence de justice et l'indispensable réconciliation: lorsque les armes se taisent, que faire des crimes qui ont été commis à l'occasion d'un conflit armé?', in W. Kälin, R. Kolb, C. Spenlé, and M.D. Voyaume (eds), *International Law, Conflict and Development. The Emergence of a Holistic Approach in International Affairs* (Leiden: Martinus Nijhoff, 2010), 385–409 at 403.

(120) Nuremberg Declaration on Peace and Justice (n 34), recommendation 2.6 at 6. See also The Princeton Principles on Universal Jurisdiction (Princeton: Office of University Printing and Mailing, 2001), available at <http://lapa.princeton.edu/hosteddocs/unive_jur.pdf>, Principle 7(1), 31: 'Amnesties are generally inconsistent with the obligation of states to provide accountability for serious crimes under international law'.

(121) Guidelines for United Nations Representatives on Certain Aspects of Negotiations for Conflict Resolution (1999), reproduced in *United Nations Juridical Yearbook* (2006), 495–7 at 497.

(122) Report of the Secretary-General on the United Nations Observer Mission in El Salvador, 21 May 1993, UN Doc S/25812, 2, § 6.

(123) Article 14 of the Peace Agreement between the Government of the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone ('Abidjan Peace Agreement'), 30 November 1996, annexed to Letter dated 11 December 1996 from the Permanent Representative of Sierra Leone to the United Nations addressed to the Secretary-General, 11 December 1996, UN Doc S/1996/1034.

(124) UN Doc S/1996/1034, § 6.

(125) UN General Assembly Resolution 47/133, 'Declaration on the Protection of All Persons from Enforced Disappearance', 18 December 1992, Art 18.

(126) UN Security Council Resolution 827 (1993), 25 May 1993, § 2.

(127) UN Security Council Resolution 955 (1994), 8 November 1994, § 1.

(128) ICTY, *Prosecutor v Anto Furundžjia*, Trial Chamber, Judgment of 10 December 1998, Case No IT-95-17/1-T, 60, § 155.

(129) See UN Commission on Human Rights, Revised final report prepared by Mr Louis Joinet pursuant to Sub-Commission decision 1996/119, 'Question of the impunity of perpetrators of human rights violations (civil and political)', 2 October 1997, UN Doc E/CN.4/Sub.2/19997/20/Rev.1, § 32.

(130) International Covenant on Civil and Political Rights, 19 December 1966, entered into force on 23 March 1976, 999 UNTS 171.

(131) UN Human Rights Committee, General Comment No 20, Art 7 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev.1 (1994), § 15.

(132) Article 11 of the Rome Statute of the International Criminal Court.

(133) Guidelines for United Nations Representatives on Certain Aspects of Negotiations for Conflict Resolution (1999), reproduced in *United Nations Juridical Yearbook* (2006), 495–7 at 497.

(134) This statement does not appear in Peace Agreement between the Government of Sierra Leone and the Revolutionary Front of Sierra Leone, 3 June 1999 (Lomé Peace Agreement), annexed to Letter dated 12 July 1999 from the Chargé d'affaires ad interim of the Permanent Mission of Togo to the United Nations addressed to the President of the Security Council, 12 July 1999, UN Doc S/1999/777. It is reproduced in the fifth preambular paragraph to UN Security Council Resolution 1315 (2000), 14 August 2000.

(135) 'Electronic message to the United Nations Mission in the Sudan, regarding the implications for the United Nations to sign a peace agreement as a witness', Selected Legal Opinions of the Secretariat of the United Nations and Related Intergovernmental Organizations, 4 June 2007, *United Nations Juridical Yearbook* (2007), 457–8 at 458, § (d).

(136) Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, 4 October 2000, UN Doc S/2000/915, 5, § 22. The same year, the UN Security Council called on states to exclude amnesties and to prosecute those persons responsible for genocide, crimes against humanity, and war crimes in the context of the Democratic Republic of the Congo: UN Security Council Resolution 1325 (2000), 'Women, Peace and Security', 31 October 2000, § 11.

(137) Statute of the Special Court for Sierra Leone, annexed to the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone, 16 January 2002. See *Prosecutor v Morris Kallon and Brima Bazzy Kamara*, 'Decision on Challenge to Jurisdiction: Lomé Accord Amnesty', Special Court for Sierra Leone, Appeals Chamber, 13 March 2004, SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E); *Prosecutor v Moinina Fofana*, 'Decision on Preliminary Motion on Lack of Jurisdiction: Illegal Delegation of Jurisdiction by Sierra Leone', Special Court for Sierra Leone, 25 May 2004, SCSL-2004-14-AR72(E); *Prosecutor v Augustine Gbao*, 'Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court', Special Court for Sierra Leone, 25 May 2004, SCSL-2004-15-AR72 (E); *Prosecutor v Allieu Kondewa*, 'Decision on lack of jurisdiction/ abuse of process: Amnesty provided by the Lomé Accord', Special Court for Sierra Leone, 25 May 2004, SCSL-2004-14-AR72(E).

(138) J. Dugard, 'Possible Conflicts of Jurisdiction with Truth Commissions', in A. Cassese, P. Gaeta, and J. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002), 693–704 at 698.

(139) Remarks by N. Michel, Under-Secretary-General for Legal Affairs and Legal Counsel of the United Nations, UN Security Council, 5474th meeting, 22 June 2006, UN Doc S/PV.5474, 4.

(140) 'Note to the Under-Secretary-General for Political Affairs regarding guidance on activities of the Special Envoy in [Rebel Group]-affected areas', Selected Legal Opinions of the Secretariat of the United Nations and Related Intergovernmental Organizations, 31 August 2006, *United Nations Juridical Yearbook* (2006), 493–7 at 494, § 7.

(141) 'Interoffice memorandum relating to the United Nations position on peace and justice in post-conflict societies', Selected Legal Opinions of the Secretariat of the United Nations and Related Intergovernmental Organizations, 25 September 2006, *United Nations Juridical Yearbook* (2006), 498–500 at 499.

(142) UN Security Council Resolution 1820 (2008), 19 June 2008, § 4.

(143) See Remarks by Ambassador de La Sablière (France), UN Security Council, 5474th meeting, 22 June 2006, UN Doc S/PV.5474, 18.

(144) UN General Assembly Resolution 60/1, '2005 World Summit Outcome', 24 October 2005, 30, § 138.

(145) S. Rosenberg, 'Responsibility to Protect: A Framework for Prevention', 1 *Global Responsibility to Protect* (2009) 442–77 at 450.

(146) International Center for Transitional Justice, 'Complementarity after Kampala: The Way Forward' (n 97), § 13.

(147) Office of the Prosecutor of the International Criminal Court, 'Report on Prosecutorial Strategy', 14 September 2006, 5 (emphasis added).

(148) C. Stahn, 'Complementarity: A Tale of Two Notions', 19 *Criminal Law Forum* (2008) 87–113 at 113.

(149) Review Conference of the Rome Statute of the International Criminal Court, Resolution RC/Res 1, 'Complementarity', 8 June 2010, § 5 (adopted by consensus).

(150) W. Burke-White, 'Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice', 49(1) *Harvard International Law Journal* (2008) 53–108 at 56.

(151) International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment of 26 February 2007, 159, § 445.

(152) UN Security Council Resolution 1593 (2005), 31 March 2005.

(153) UN Security Council Resolution 1970 (2011), 26 February 2011, § 5.

(154) Relationship Agreement between the United Nations and the International Criminal Court, 22 July 2004, entered into force on 4 October 2004.

(155) 'Interoffice memorandum relating to the United Nations position on peace and justice in post-conflict societies', Selected Legal Opinions of the Secretariat of the United Nations and Related Intergovernmental Organizations, 25 September 2006, *United Nations Juridical Yearbook* (2006), 498–500 at 500.

(156) *United Nations Juridical Yearbook* (2006), 498–500 at 500.

(157) 'Note to the Under-Secretary-General for Political Affairs regarding guidance on activities of the Special Envoy in [Rebel Group]-affected areas', Selected Legal Opinions of the Secretariat of the United Nations and Related Intergovernmental Organizations, 31 August 2006, *United Nations Juridical Yearbook* (2006), 493–7 at 494, § 4 (original emphasis). See also 'Interoffice memorandum relating to the United Nations position on peace and justice in post-conflict societies', Selected Legal Opinions of the Secretariat of the United Nations and Related Intergovernmental Organizations, 25 September 2006, *United Nations Juridical Yearbook* (2006), 498–500 at 500.

(158) J. Lindenmann, 'Transitional Justice and the International Criminal Court: Some Reflections on the Role of the ICC in Conflict Transformation', in M. Kohen (ed), *Promoting Justice, Human Rights and Conflict Resolution through International Law/La promotion de la justice, des droits de l'homme et du règlement des conflits par le droit international. Liber Amicorum Lucius Caflisch* (Leiden: Koninklijke Brill, 2007), 315–38 at 334.

(159) *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium), Judgment*, [2002] ICJ Rep, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, 78–9, § 51.

(160) The Princeton Principles on Universal Jurisdiction (n 120), Principle 1(1), at 28.

(161) Universal criminal jurisdiction was an issue that arose in separate cases between the Republic of the Congo and Belgium, and between the Republic of the Congo and France, initiated by the former against the two latter states before the International Court of Justice. The case concerning *Certain Criminal Proceedings in France (Republic of the Congo v France)* was discontinued by the Republic of the Congo and removed from the List of cases by the Court on 16 November 2010 before hearings on the merits could be held. Some aspects of the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* are discussed below.

(162) A. Cassese, 'The Role of Internationalized Courts and Tribunals in the Fight Against International Criminality', in C. Romano, A. Nollkaemper, and J. Kleffner (eds), *Internationalized Criminal Courts. Sierra Leone, East Timor, Kosovo, and Cambodia* (Oxford: Oxford University Press, 2004), 3–13 at 12.

(163) D. Rothenberg, '"Let Justice Judge": An Interview with Judge Baltasar Garzón and Analysis of His Ideas', 24 *Human Rights Quarterly* (2002) 924–73 at 931.

(164) Article 5(1)(a) of CAT. See generally M. Nowak and E. McArthur, *The United Nations Convention Against Torture. A Commentary* (Oxford: Oxford University Press, 2008), 253–327.

(165) Article 5(1)(b) of CAT.

(166) Article 5(1)(c) of CAT.

(167) Article 5(2) of CAT.

(168) *The Case of the S.S. 'Lotus'*, PCIJ Series A, No 10, Judgment, 7 September 1927.

(169) *Arrest Warrant* (*n 159*), 25, § 59.

(170) *Arrest Warrant of 11 April 2000* (n 159), 25, § 60.

(171) *Arrest Warrant of 11 April 2000* (n 159), 25, § 61. On whether 'acts committed during the period of office in a private capacity' encompass serious international crimes, see eg *R v Bow Street Metropolitan Stipendiary Magistrate: Ex Parte Pinochet Ugarte*, (*No 3)* [1999] 2 All ER 97, 119 ILR 135.

(172) Permanent Court of International Justice, *Case concerning the Factory at Chorzów*, Series A, No 9, Judgment, 26 July 1927, 21.

(173) 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' annexed to UN General Assembly Resolution 60/147, 'Basic Principles and Guidelines on the Right to a Remedy', 21 March 2006, § 15.

(174) On collective reparation, see F. Rosenfeld, 'Collective Reparation for Victims of Armed Conflict', 92 *International Review of the Red Cross* (2010) 731–46.

(175) In relation to the existence of a customary international law obligation to provide reparation to victims, Riccardo Pisillo Mazzeschi is cautious in noting that '[…] one could perhaps maintain that a customary rule is *slowly developing* in the field of human rights. In contrast, in the field of humanitarian law the conclusion should be more pessimistic because, at least for the time being, both international and domestic case law on reparation is still lacking' (R. Pisillo Mazzeschi, 'Reparation Claims by Individuals for State Breaches of Humanitarian Law and Human Rights: An Overview', 1 *Journal of International Criminal Justice* (2003) 339–47 at 347 (original emphasis)).

(176) Convention (IV) respecting the Laws and Customs of War on Land, 18 October 1907, entered into force on 26 January 1910 (Art 3 provides: 'A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces'); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, entered into force on 7 December 1979, 1125 UNTS 3 (Art 91 provides: 'A Party to

the conflict which violates the provisions of the Convention or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces'). See eg International Court of Justice, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda), Judgment*, [2005] ICJ Rep, 168.

(177) R. Pisillo Mazzeschi, 'Reparation Claims by Individuals for State Breaches of Humanitarian Law and Human Rights: An Overview', 1 *Journal of International Criminal Justice* (2003) 339–47 at 341.

(178) For example, Eritrea and Ethiopia brought claims against one another before the Eritrea–Ethiopia Claims Commission for violations of international humanitarian law committed against their respective nationals.

(179) Riccardo Pisillo Mazzeschi (n 177), 342.

(180) See eg *Al-Adsani v United Kingdom*, 35763/97, European Court of Human Rights, 21 November 2001.

(181) *Prefecture of Voiotia v Federal Republic of Germany*, Case No 137/1997, Court of First Instance of Leivadia, Greece, 30 October 1997, excerpts reprinted in M. Gavouneli, 'War Reparation Claims and State Immunity', 50 *Revue Hellénique de Droit International* (1997) 595–608; see also I. Bantekas, 'Case Report: Prefecture of Voiotia v. Federal Republic of Germany', 92 *American Journal of International Law* (1998) 765–8; *Prefecture of Voiotia v Federal Republic of Germany*, Case No 11/2000, Areios Pagos, 4 May 2000, 476. See M. Gavouneli and I. Bantekas, 'Case Report: Prefecture of Voiotia v. Federal Republic of Germany', 95 *American Journal of International Law* (2001) 198–204. However, following this judgment, the Greek Special Highest Court held that Germany enjoyed immunity: *Federal Republic of Germany v Miltiadia Margellos*, Special Highest Court of Greece, Case No 6/17-9-2002, 17 September 2002, discussed in K. Bartsch and B. Elberling, '*Jus Cogens* vs. State Immunity, Round Two: The Decision of the European Court of Human Rights in the *Kalogeropoulou et al. v. Greece and Germany* Decision', 4(5) *German Law Journal* (2003) 477–91 at 481. *Ferrini v Federal Republic of Germany*, Cass. Sez. Un. 5044/04, reproduced in 87 *Rivista di diritto internazionale* (2004) 539. See A. Gattini, 'War Crimes and State Immunity in the *Ferrini* Decision', 3 *Journal of International Criminal Justice* (2005) 224–42.

(182) International Court of Justice, *Case concerning Jurisdictional Immunities (Federal Republic of Germany v Italian Republic)*. See in this volume, C. Tomuschat, 'State Responsibility and the Individual Right to Compensation before National Courts'.

(183) 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law', annexed to United Nations General Assembly Resolution 60/147, 15 December 2005, § 15.

(184) International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, entered into force on 4 January 1969, 660 UNTS 195.

(185) Convention Against Torture and Other Cruel. Inhuman or Degrading Treatment or Punishment, 10 December 1984, entered into force on 26 June 1987, 1465 UNTS 85.

(186) See C. Tomuschat, 'La protection internationale des droit des victimes', in J.-F. Flauss (ed), *La Protection internationale des droits de l'homme et les droits des victimes. International protection of human rights and victims' rights* (Brussels: Bruylant, 2009), 1–29 at 12–20.

(187) Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, entered into force on 3 August 1953, 213 UNTS 221.

(188) American Convention on Human Rights, 22 November 1969, entered into force on 18 July 1978, 1144 UNTS 123.

(189) This Chapter does not address the possibility for victims to bring claims against collectives of natural persons, such as non-state armed groups, or other legal persons, such as corporations. See A. Clapham, 'Extending International Criminal Law Beyond the Individual to Corporations and Armed Opposition Groups', 6(5) *Journal of International Criminal Justice* (2008) 899–926; and articles in the Special Issue on transnational business and international criminal law in 8(3) *Journal of International Criminal Justice* (2010).

(190) For an overview of the reparation framework of the International Criminal Court, see M. Henzelin, V. Heiskanen, and G. Mettraux, 'Reparations to Victims before the International Criminal Court: Lessons from International Mass Claims Processes', 17 *Criminal Law Forum* (2006) 317–44. See also C. Ferstman, 'The Reparation Regime of the International Criminal Court: Practical Considerations', 15 *Leiden Journal of International Law* (2002) 667–86.

(191) 28 USC § 1350 (1994).

(192) P. Clark, *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda* (New York: Cambridge University Press, 2010), 254. See also L. Waldorf, 'Goats & Graves: Reparations in Rwanda's Community Courts', in C. Ferstman, M. Goetz, and A. Stephens (eds), *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity. Systems in Place and Systems in the Making* (Leiden: Martinus Nijhoff, 2009), 515–39.

(193) UN Commission on Human Rights, Final Report of the Special Rapporteur Mr M. Cherif Bassiouni, 'The right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms', 18 January 2000, UN Doc E/CN.4/2000/62, 10, § 18 (emphasis added).

(194) 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of In-

ternational Humanitarian Law', annexed to United Nations General Assembly Resolution 60/147, 15 December 2005, § 16 (emphasis added).

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