Transitional Justice in Africa: Between the Fight Against Impunity and Peace Maintenance

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Contents

1 Preliminary Remarks 136
2 The Different Approaches to Transitional Justice: No Peace Could Be Achieved Without Justice 137
3 Justice May Prevent Peace and Reconciliation 140
4 Transitional Justice Experiences in the African Continent 142
5 States' Duty to Punish Crimes Under Treaty Law 149
6 Is the Treaty Duty to Punish Crimes Incompatible with Amnesties and Traditional TJ Mechanisms? 152
7 The Customary Duty to Punish International Crimes 154
8 International Crimes and National Law Granting Amnesties 157
9 The Relationship Between Transitional Justice Traditional Mechanisms and the Customary Duty to Punish International Crimes 161
References 164

Abstract The chapter examines the different transitional justice (TJ) strategies followed in the African continent within the controversial relationship between national reconciliation/peace restoration and justice.

In order to build reconciliation and peace before justice, African States normally use traditional (extra judicial and quasi-judicial) mechanisms, including TRCs, to contribute to a negotiated settlement of the dispute. Such traditional mechanisms usually deal with less serious crimes, while the most responsible perpetrators and the most heinous crimes are tried before domestic courts, complemented by hybrid or international tribunals.

Thus, the chapter analyses whether this use of extra-judicial or quasi-judicial structures to deal with international crimes is in compliance with international law.

To this purpose, the paper first addresses the issue of whether a duty to punish the perpetrators of international crimes exists under international law. Finally, it ascertains whether such a duty can only be correctly and thoroughly implemented

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through judicial trials, and if a customary norm, providing as unlawful amnesties granted for international crimes, has developed or, at least, is going to develop.

In order to establish whether the African TJ mechanisms are consistent with international law, the paper also takes into account the ICC Prosecutor policies, which suggest that, even for the most serious crimes of international concern referred to in the ICC Statute, the Prosecutor may find that it is in the interest of justice to endorse alternative non-judicial and extra-judicial justice mechanisms, and to decide not to commence an investigation or a trial, if this choice satisfies the interest of victims.

1 Preliminary Remarks

The term transitional justice (TJ) was coined to describe the strategies adopted by Latin American and Eastern European Governments in the late 1980s and early 1990s to address abuses by former regimes, to cut definitively with the past, and to strengthen political and institutional reforms towards democracy and peace.

Experience has shown that there is no single formula for dealing with a past marked by mass crimes and human rights violations; thus, as the UN Secretary-General stated, TJ currently refers to 'the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuse, in order to secure accountability, serve justice and achieve reconciliation'.[1]

Although these processes and mechanisms can be different and/or combined differently, they generally include the following initiatives: truth commissions (to investigate atrocities and discover what happened, who committed crimes, and where the victims lie); criminal prosecutions (to punish perpetrators of mass atrocities); reparations programs (to redress victims for the harm suffered); gender justice (to pay due attention to the harms suffered by women, as they are disproportionately affected in conflicts); security system reform (to make the military, police, judiciary, and related State institutions respect the rule of law and human rights); memorialization efforts (to preserve, through museums and memorials, the public memory of victims and raise moral consciousness about past abuse). Vetting or lustration and amnesties often complement TJ mechanisms and processes to address the purposes of compensating victims and building a bulwark against crime recurrence alike.

The choice between these different TJ mechanisms has always been guided by the political intent to achieve national reconciliation, peace and justice. However, as we will show, the idea that justice could be an obstacle to reconciliation has

[1]Report of the Secretary-General, The Rule of Law and Transitional Justice in Conflict and Post-Conflicts Societies, UN Doc. S/2004/616, 23 August 2004, para. 8.

sometimes prevailed, although the opposite position—that no peace could be achieved without justice—is significantly supported.[2]

2 The Different Approaches to Transitional Justice: No Peace Could Be Achieved Without Justice

Definitely, since the Nuremberg Trial declared for the first time individual criminal responsibility for perpetrators of crimes against peace, war crimes, and crimes against humanity, such a principle has been strengthened, and in the last decades the fight against impunity and for respect for victims' rights has become an essential purpose of the international community.[3] Within this framework, criminal punishment appears as the most effective insurance against future violations and abuses. Indeed, sending the message that no perpetrator of crimes can escape justice, prosecutions may significantly foster respect for democratic institutions and may contribute to the rehabilitation of victims and society itself.[4] As we will stress, the fight against impunity has been further improved by the creation of the International Criminal Court (ICC), whose Statute affirms that 'the most serious crimes of concern to the international community as a whole must not go unpunished,' and recalls 'the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes' (Preamble, paras 4 and 6).[5]

Nevertheless, judicial measures, including trials, may not always be a completely adequate answer for victims, most notably in cases of mass crimes.

On the one hand, in transitional democracy judges are often limited in number and may also not be adequately prepared to deal with international crimes and due process standards.[6] They may sometimes be corrupt or involved in the past regime; they could sometimes be perceived as administering 'one-sided justice'; and they

[2]For a detailed overview of the issue at stake, Cassese (2007), p. 1 et seq.

[3]See, for all, Orentlicher (1991), p. 2537 et seq; Mendez (1997), p. 255 et seq; Cryer (2005), p. 267 et seq.

[4]See the UN High Commissioner for Human Rights Zeid Ra'ad Al Hussein's statements on the judgement delivered by the ICC in the case of Jean-Pierre Bemba (ICC: Zeid welcomes judgement in Jean-Pierre Bemba case, 21 March 2016) and on the ICTY verdict against Radovan Karadzic (Zeid lauds the 'hugely significant' conviction of Radovan Karadzic, 24 March 2016); the Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, regarding the conviction of Mr Jean-Pierre Bemba (at www.icc-cpi.int); the Statement of the Office of the Prosecutor on the Conviction of Radovan Karadžić (at www.icty.org), all affirming that criminal justice may contribute to preventing the recurrence of heinous violations of human rights. See also ICTY, *Prosecutor* v. *Miroslav Deronjić*, case No. IT-02-61-S, Sentencing Judgment (Trial Chamber), 30 March 2004, para. 49.

[5]*Infra*, para. 7.

[6]The reference is to the basic human rights of the defendant, as laid down in all major human rights treaties, and as upheld in most countries of the world and before international and hybrid criminal tribunals. For all, see Safferling (2008), p. 227 et seq.

have often been accused of trying the vanquished while the victors remain sheltered from judicial scrutiny.

The ICC, the international criminal tribunals, and the hybrid tribunals were born to solve some of the problems related to the administration of justice and in the fight against impunity for international crimes. But their impact on victims can be weak: since they are often located abroad and their work is not always known in the most interested countries, they can appear to be an 'imposed' form of justice.[7] Moreover, even when they are perceived by the local population (and by the victims and their families) as a means to combat impunity and to repair sufferings, their jurisdiction is limited to 'the most responsible' persons by their Statutes or by their policies.

On the other hand, the ICC has been considered by some critics as an obstacle to peace negotiations,[8] and the causal connection between justice and prevention of future crimes is disputed as well.[9]

Thus, especially in cases of mass crimes, traditional forms of justice can be a useful tool to satisfy victims' expectations of justice, truth and reparation.

Focusing on the establishment of truth and, where possible, on the social reintegration of perpetrators, traditional mechanisms show a preference for a restorative approach to justice. They are based on rituals and ceremonies with the participation of victims and perpetrators. The latter appear before a large, representative portion of the community and, usually, confess to their crimes, apologize, and offer reparations for the harm they have caused. The reparations can sometimes assume the form of compensation to the whole community (i.e. restitution of lands), or it can result in a measure of benefits for both sides of the conflict (sharing of land and cattle, development of community projects, etc.) alike.

However, when these mechanisms are not associated with any judicial measure, they may prevent any real accountability for the perpetrators of gross human rights violations, and they grant no individual reparation to the crime victims. In other words, they can become a reward for perpetrators and a last (further) harm to victims' dignity and rights, whose aspirations to retributive justice are definitively sacrificed.[10]

The same could be true for mechanisms like reforming institutions, purging, or vetting those who have been involved in the past regime and in the commission of heinous crimes. Although these strategies can provide security, prevent recurrence of abuses, and regain the confidence and trust of citizens in the new regime, when they are not accompanied by any attempt to satisfy victims' individual legitimate

[7]For a critical overview of the legacy of the international criminal tribunals and of their impact on victims and national reconciliation, Kamatali (2003), p. 115 et seq; Kendall and Nouwen (2016), Milanović (2016a, b, c).

[8]This is the case, i.e., of Sudan or Uganda. See Waddell and Clark (2008). See, also for other references, Clark (2011), p. 521 et seq.

[9]On this issue, see Jenks and Acquaviva (2014), p. 775 et seq; Stahn (2015).

[10]See, in this regard, the critics to the Uganda and Mali TJ strategies in Rose and Ssekandi (2007) and Ladisch (2014).

expectations of retributive justice, they could undermine accountability, and thus endanger a real national reconciliation.

Following this rationale, the UN bodies are stressing that 'Justice, peace and democracy are not mutually exclusive objectives, but rather mutually reinforcing imperatives',[11] and are encouraging 'a comprehensive approach to transitional justice, including promotion of healing and reconciliation,' with the purpose of consolidating peace and preventing countries from relapsing into conflict.[12]

This comprises significant rule of law components[13] addressing constitutional, judicial and institutional reforms, justice mechanisms, displacement, disarmament, demobilization and reintegration of ex-combatants as part of a transitional justice programme within multidimensional peacekeeping and peacebuilding operations.[14] But, first and foremost, this includes effective reparation[15] programmes that *complement* truth mechanisms and trials.[16]

Numerous European Union statements endorse the position that justice, peace and reconciliation are mutually linked.[17]

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[11]UN Doc. S/2004/616, summary, para. 2.

[12]See the resolution 2282, unanimously adopted by the Security Council on 27 April 2016, Review of United Nations Peacebuilding Architecture, para. 12. See also the joint communiqué released by the Secretary-General's Special Representative on Sexual Violence in Conflict, Zainab Hawa Bangura, at the end of her first visit to Mali, to serve as a framework for cooperation towards peace and national reconciliation (UN News Centre, *Addressing sexual violence central to Mali peace process, UN envoy says*, 18 April 2016). The communiqué outlined three key areas of action: the fight against impunity, since it is essential for prevention; legislative reform and strengthening of the justice system; and, specific plans for the army and police. The lack of adequate medical, psychosocial and other services for survivors is also listed as one of the critical gaps that must be addressed.

[13]On the relationship between transitional justice and the rule of law, see the mentioned report of the UN Secretary-General, S/2004/616; UNDP, Strengthening the Rule of Law in Conflict/Post-Conflict Situations. A UNDP Global Programme for Justice and Security, 2008–2011, at www.unrol.org; UNDP, Strengthening the Rule of Law in Crisis-Affected and Fragile Situations, A UNDP Global Programme for Justice and Security, II Phase, 2011–2015, at www.undp.org. Among scholars, see Sharp (2015), p. 150 et seq, and for a critical approach to linking transitional justice and rule of law, Mihr and Sriram (2015).

[14]On the role of institutional reforms and justice in peacebuilding, see, among the others, Teitel (2003), p. 69 et seq.

[15]See UN Doc. S/2011/634, Report of the Secretary-General, The rule of law and transitional justice in conflict and post-conflict societies, 12 October 2011, para. 26, that states that reparation is a means of promoting justice, reconciliation and confidence, and it also has an important preventive and deterrent effect in relation to future violations. As to victims' rights to reparation, see *inter alia* Carta (2011), p. 523 et seq.

[16]Guidance Note of the Secretary-General, United Nations Approach to Transitional Justice, March 2010.

[17]See, among others, the European Union Statement—United Nations General Assembly: Thematic Debate on the Role of International Criminal Justice in Reconciliation, 10 April 2013 (at eu-un.europa.eu), according to which, 'International criminal justice and reconciliation go hand in hand, and ignoring justice simply puts peace and reconciliation in a fragile situation. We know, in the light of historical events, that when peace is achieved by ignoring justice, it is not

3 Justice May Prevent Peace and Reconciliation

While the UN is vigorously supporting an overall transitional justice strategy, *without sacrificing* retributive justice,[18] scholars who argue that transitional justice would essentially achieve stability through reconciliation insist that amnesties (and, therefore, no trials mechanisms) are fundamental to achieving that purpose.[19]

According to this view, countries emerging from wars and/or dictatorships are often fragile democracies that could be weakened by prosecutions. Thus, since, just like prosecutions, an official account of past violations stigmatizes those responsible for atrocious crimes and prevents future violations,[20] democratic consolidation could be fostered by an amnesty law covering past violations, supplemented by an official enquiry to investigate atrocities and establish the truth.

As we will see, although such an approach has been meaningfully illustrated,[21] it has been gradually (at least officially) abandoned.

More recently, to improve efforts toward enhancing national reconciliation, the latest developing trend in TJ aims to address all human rights violations, including economic, social and cultural rights,[22] so as to remove the forms of discrimination that affected, in particular, the victims of violations, causing or influencing their victimization. Since the Euro-centric (and the UN) cultural approach to transitional

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sustainable. As ICC Prosecutor Bensouda recently wrote: 'The road to peace should be seen as running via justice, and thus peace and justice can be pursued simultaneously'. And the Secretary-General of the United Nations recently said that the ICC 'is our chance and our means to advance justice, reduce suffering and prevent international crimes'. We fully agree with these statements. There can be no lasting peace without justice and due attention to victims'.

[18]See, among others, the UN Security Council S/RES/2256, 22 December 2015, on the ICTY and the ICTR, para. 2, and the statements celebrating the completion of the judicial work and the official closure of the ICTR, UN News Centre, *UN tribunal on Rwandan genocide formally closes—major role in fight against impunity*, 31 December 2015. See also the Statement attributable to the Spokesperson of the Secretary-General on judgment of the International Criminal Court regarding Jean-Pierre Bemba, 22 March 2016, noting that the judgment is a significant step towards bringing justice to the victims of these horrendous crimes in the Central African Republic and underlining the importance of addressing impunity for past crimes in both the Central African Republic and the Democratic Republic of the Congo to ensure lasting and sustainable peace.

[19]Zalaquett (1992), p. 1425 et seq; Mallinder (2008).

[20]In the sense that an official truth telling process might obviate, or at any rate diminish, the need for prosecutions, see Teitel (2000). *Contra*, Orentlicher (1991), p. 2546, note 32: 'Whatever salutary effects it can produce, an official truthtelling process is no substitute for enforcement of criminal law through prosecutions. Indeed, to the extent that such an undertaking purports to replace criminal punishment (rather than to promote distinct goals that punishment cannot serve), it diminishes the authority of the legal process; it implicitly concedes that the machinery of justice is powerless to punish even those crimes that any civilized society views as most pernicious. Further, the most authoritative rendering of the truth is possible only as a result of judicial inquiry, and major prosecutions can generate a comprehensive record of past violations'.

[21]*Infra*, para. 4.

[22]See, e.g., Arbour (2007), p. 1 et seq; Transitional Justice and Development (2008); Sharp (2014); Sharp (2015), p. 150 et seq.

justice—based on the retributive justice mechanisms, and focusing more on criminal accountability and censure—fails to take into account the collective factors which contribute to mass violence, the mentioned TJ strategy gives preference to the use of traditional forms of justice that guarantee the full participation of the population to restore justice without revenge.[23] In this framework, adequate reparation to the victims should respond to their basic needs (house, land deprivation, employment, poverty, education for their children, etc.) and improve socio-economic and political conditions in the country.[24]

This position is meaningfully supported by the African Union (AU). Notably, the African Transitional Justice Policy Framework (ATJF) (commissioned by the AU to a Panel of Wise in 2009[25] to balance African values and international norms) and its follow up (developed in further consultations of the African Union main bodies)[26] are critical of retributive justice. Although they accept that peace and justice are interrelated, they endorse the idea that in an ongoing conflict the most urgent desire of the affected population is to cease hostilities and restore peace and security. According to this rationale, the choice and timing of the different TJ mechanisms should take into account the historic situation of each single State so that it could temporarily sacrifice or eliminate trials.[27]

Given these premises, this paper will examine the different TJ approaches followed in the African continent, since they highlight the complex issues related to the controversial relationship between national reconciliation/peace restoration and justice.

[23]See, also for other references, Mutua (2011), pp. 31 et seq and 44.

[24]De Greiff and Duthie (2009); Gready and Robins (2014), pp. 339 et seq and 346–348. See also Chinkin (2007).

[25]The ATJF is a product of recommendations contained in a report by the Panel of the Wise, Non-Impunity, Justice and National Reconciliation (at reliefweb.int). It is intended to identify and reiterate the constitutive elements of an African Transitional Justice Policy Framework as essential in achieving sustainable peace and development in the continent, drawing lessons from various experiences across Africa. The framework is also intended to consolidate Africa's contribution to the emerging field of transitional justice and international law by broadening understanding and approaches to impunity and justice.

[26]The last Consultative Meeting on the Implementation of the AU Transitional Justice Policy Framework as part of the Action Plan of the Human Rights Strategy for Africa was held in December 2015.

[27]See also AU High-Level Panel on Darfur (AUPD) of October 2009, Darfur: The Quest for Peace, Justice and Reconciliation, PSC/AHG/2(CCVII), 29 October 2009. In this regard, the ATJF also maintains that the African understanding of justice is broader than legal justice and includes socio-economic issues to face the root causes of conflicts and abuses. Finally, it emphasizes the link between TJ and development when designing nation building, reconciliation and reparations programs. Such TJ programmes could include: accountability for large scale economic and social rights violations; positive actions to counteract discrimination; systematic deprivation or denial of development on the basis of regional/ethnic/indigenous origin; land dispossession; etc. The emerging link between reparations and development could also uphold the choice to give preference to collective reparation over individual reparation.

Indeed, although from a political point of view the real challenge seems to be in finding the proper sequencing and timing for the implementation of peace processes, TJ strategies, elections, and rule of law reforms, it is worth remembering that all the countries' plans to address past injustices shall first and foremost comply with international standards and norms, even when set in accordance with domestic legal traditions and national aspirations.

Notably, the issue that arises is whether the use of extra-judicial or quasi-judicial (domestic and traditional) structures to deal with international crimes is in compliance with international law.

Thus, this paper will first address the issue of whether a duty to punish the perpetrators of international crimes exists under international law; then, it will ascertain whether such a duty—if it exists—can only be correctly and thoroughly implemented through judicial trials.

4 Transitional Justice Experiences in the African Continent

The African TJ experience shows a trend combining a (sometimes limited) form of retributive justice with traditional mechanisms[28] that may undermine individual accountability in the name of national reconciliation.

As it is known, the most common instrument to achieve a more comprehensive reconstruction of the truth related to past atrocities is the creation of a commission of enquiry, usually known as a truth and reconciliation commission (TRC).[29]

Their mandates may be different. While all have the power to investigate crimes committed, some may have the power to investigate violations of economic and social rights, since these abuses have been prominent in and characteristic of some conflicts (Liberia, Sierra Leone, Kenya). Some TRCs may hold public hearings

[28] As regards a detailed overview of traditional mechanisms, with their lights and shadows, see Villa-Vicencio (2009), p. 33 et seq.

[29] After the establishment of the first one in Uganda in 1974, to investigate enforced disappearances under President Idi Amin's government, in the African continent we count about 25 TRCs since 1991. According to the Office of the United Nations High Commissioner For Human Rights (*Rule Of Law Tools For Post-Conflict States. Truth Commission*, 2006, p. 2, at www.ohchr.org), 'the work of the commission can help a society understand and acknowledge a contested or denied history, and in doing so bring the voices and stories of victims, often hidden from public view, to the public at large'. On TRCs, see Hayner (2011), and the report Challenging the Conventional. Can Truth Commissions Strengthen Peace Processes? (ICTJ: Kofi Annan Foundation, June 2014), available online. See also Illuminati et al. (2000); Schabas and Darcy (2004); Scovazzi (2008a), p. 599 et seq.

(Ghana), make recommendations for reparations to victims (Morocco,[30] Ghana,[31] Uganda, Kenya),[32] and for prosecution of perpetrators, or may call for institutional and policy reforms (South Africa, Sierra Leone); some can name the names of perpetrators (South Africa); some others can grant or recommend amnesties (i.e., South Africa, Congo, Uganda). Their final reports have not always been officially released (Zimbabwe, Nigeria),[33] but in the most successful cases they have been delivered in an official version and in a reduced one, in the official national language and in tribal languages alike,[34] so as to be accessible to the whole population.

The most famous TRC is the South African one established in 1995 by the *Promotion of National Unity and Reconciliation Act* and mandated to document a complete picture of the causes, nature, and extent of the gross human rights violations committed under the apartheid regime from March 1960 to December 1993 (later extended to May 1994) through investigations and hearings. Since the revealed truth about past abuses could itself represent a kind of reparation to the victims and guarantee national reconciliation, the Commission could offer amnesty in exchange for full disclosure of the truth and for the perpetrators' admission of their individual responsibilities.[35]

Unfortunately, the Government failed to grant all the recommended reparations to victims, and it reduced the amount finally paid. It has also been noted that in South Africa there have been few prosecutions of those who did not receive amnesty.[36]

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[30]The Moroccan Equity and Reconciliation Commission (2004) was the world's first truth commission with the power to grant reparations directly, and distinguished itself for providing payments for victims' wives and daughters equal to those of victims' male relatives, and to take into account the additional harm that women suffered because of their status in the patriarchal society.

[31]In Ghana, the truth-seeking process started after the consolidation of democratic rule with the establishment of the National Reconciliation Commission Act (2002) and the reparation measures recommended by the Commission were all implemented in some form by the Government.

[32]Under the Truth, Justice and Reconciliation Commission Act (2008), the Commission could put in place special arrangements and adopt specific mechanisms and procedures to address the experiences of women, children, persons with disabilities, and other vulnerable groups. And indeed, the final report focused on gender crimes, sexual abuse, and crimes affecting children. For a comment, see Ndungú (2014).

[33]Similarly, Uganda had two truth commissions in the 1970s and 1980s to investigate the past abuses, but the second commission's report was never made public.

[34]For instance, the Sierra Leone TRC worked with the United Nations Children's Fund (UNICEF) to publish a 50-page 'child-friendly' version of its report for a complete dissemination of its final work.

[35]The Commission offered conditional amnesties, as it could grant them only to persons who made full disclosure of the crimes committed and when the crimes had had a political objective. The procedure followed the one applied in judicial trials; the victims could speak or present written declarations; the final decisions were written and published in the South African Official Journal. For a comment, see, among others, Cassin (2006), p. 235 et seq; Scovazzi (2008b), p. 615 et seq.

[36]See the final Report of the Commission released in 1998, pp. 90 et seq and 96. Among scholars, Cassin (2006), p. 244 et seq; Sooka (2006), pp. 311 et seq and 316.

And indeed, notwithstanding that the South African TRC is usually presented as a successful example of a TJ non-judicial means of providing national reconciliation, it has remained an isolated case, as it is considered to have been necessary and useful within a very special context: the one that existed in South Africa after the end of the apartheid regime.[37]

The most recent African TJ experiences seem to otherwise depart from the idea that justice could prevent peace, since they usually provide a combination of TRCs with national and traditional criminal prosecutions, as Rwanda's strategy meaningfully shows.

Since the Rwandan government opted for a retributive approach to TJ, in 1996, the Rwandan National Assembly passed the Organic Law, creating several categories of crime and associated punishments ranging from particularly cruel behaviour to simple property offences, to be prosecuted by special domestic tribunals.[38] But the domestic trials were criticized since they lacked due process standards and showed the weakness of the Rwandan judicial system.[39]

The government then assigned to an alternative judicial process (the *gacaca*)[40] the task of dealing with lower and less heinous levels of participation in the genocide, with the aim of facilitating truth telling about the genocide, alleviating prison overcrowding, and rebuilding reconciliation.[41] The process concluded with a

[37]For a detailed analysis of the disputed role played by the South African TRC to grant reconciliation, Gross (2004), p. 47 et seq.

[38]As it is known, 'persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994,' have also been tried by the International Criminal Tribunal for Rwanda (ICTR), established by Security Council resolution 955 of 8 November 1994. The ICTR, having concurrent jurisdiction with and primacy over the national courts for the crimes enshrined in its Statute, closed its activities on 31 December 2015. A United Nations Mechanism for the International Criminal Tribunal has been established to preserve and promote its legacy, as well as that of the other UN criminal tribunals.

[39]UN Doc A/52/486, annex, Report of the United Nations High Commissioner for Human Rights on the Human Rights Field Operation in Rwanda, 16 October 1997, para. 64.f; decision 5(53) of the Committee for the Elimination of Racial Discrimination, 18 August 1998, para. 10.

[40]Originally, the *gacaca* was a dispute-resolution mechanism used in precolonial Rwanda to adjudicate communal disputes linked to property issues, personal injury, or inheritance problems. During the proceedings, respected community figures (the local leaders or elders) served as 'judges' and the entire community was actively involved. In that spirit, perpetrators were encouraged to confess and obtain a reduced sentence, while victims were urged to forgive.

[41]The Transitional National Assembly of Rwanda adopted Organic Law No. 40/2000 of 16 January 2001 on the Establishment of '*Gacaca* Jurisdiction' and the Organization of Prosecution for Offences Constituting the Crime of Genocide or Crimes Against Humanity between 1 October 1990 and 31 December 1994. The law was modified in 2001, 2004, 2006, and 2007. The original *gacaca* law distinguished four categories of crimes; the 2004 version reduced the number of categories to three, abolishing the distinction between murders and serious attacks committed with intent and those committed without intent. The first category of crimes included the planning of the genocide and crimes committed by people in positions of authority and war reserved to the ICTR, the second one included murder and bodily harm, and the third one comprised property crimes. In 2008, most of the crimes included in the first category were transferred to *gagaca* by Rwanda's Parliament.

judgment which could condemn to imprisonment those found guilty and order them to compensate victims for the harm suffered, and/or to perform community service, depending on the nature of the crimes and on the perpetrators' behaviour during the proceedings.

Thus, despite the fact that some scholars have criticized *gacaca* for failing to meet international standards for fair trials[42] and have suggested that it fostered justice and reconciliation in some communities while increasing tensions in others,[43] other scholars have presented *gacaca* as a successful way to combine African values with international law standards and provisions in TJ.[44]

In order to avoid the risk of trials held before national (and special) courts that are unable to effectively, impartially and independently investigate international crimes, in some African Countries, hybrid tribunals, having a mixed composition (with both international and national prosecutors and judges), have complemented (or are complementing) TRCs.

The first case was in Sierra Leone, where a truth commission,[45] coexisting with the Special Court for Sierra Leone (SCSL), was established pursuant to an agreement between the Sierra Leone Government and the UN.[46]

The two institutions were supposed to fill complementary roles and, although their relationship has been characterized by some problems,[47] they both have contributed to document human rights violations and to create an authoritative

[42]On the general issue that the application of traditional justice must be carefully framed so that the rights of individuals and the fairness of procedures are ensured, see Orentlicher (2007), p. 10 et seq.

[43]On the lights and shadows of the *gacaca* process, see Schabas (2005), p. 879 et seq; Powers (2011).

[44]See Clark (2009), who definitively expresses a positive evaluation of the *gacaca* process.

[45]Pursuant to the Lomé Peace Agreement of 7 July 1999, the Parliament of Sierra Leone established a TRC, passing the Sierra Leone Truth and Reconciliation Commission Act 2000. The TRC was called to provide justice in all cases of 'violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone,' to 'create an impartial historical record' of such violations and abuses, and to 'investigate and report on the causes, nature and extent' of the violations and abuses (Truth and Reconciliation Commission Act 2000**,** Art. 6.1).

[46]The Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone was signed on 16 July 2002. The Court, composed of judges appointed by both the Sierra Leone Government and the UN, was mandated to try 'the most responsible' perpetrators of 'serious violations of international humanitarian law and Sierra Leone law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone' (Article 1.1 Statute).

[47]Tensions between the two bodies have appeared, for example, in relation to the amnesty included in the Lomé agreement, in relation to the exchange of information between the two bodies, and in the possibility that alleged perpetrators who were prosecuted by the Special Court would appear before the TRC at a public hearing (*Norman* case). On these issues, see Schabas (2003), p. 1035 et seq; Schabas (2004), p. 1082 et seq.

historical record of the abuses and of the suffering of the Sierra Leonean population.[48]

More recently, in the Central African Republic (CAR), a hybrid tribunal is going to be established with a mandate to prosecute serious violations of human rights and international humanitarian law committed in the territory of the CAR since 1 January 2003, namely crimes of genocide, crimes against humanity, and war crimes.[49]

A similar independent hybrid judicial body is provided by the Agreement on the Resolution of the Conflict in the Republic of South Sudan, signed on 19 August 2015, establishing a Transitional Government of National Unity[50] to investigate and prosecute individuals responsible for violations of international law and/or applicable South Sudanese law committed from 15 December 2013 through the end of the Transitional Period. The Tribunal—to be known as the Hybrid Court for South Sudan—will be established by the African Union Commission.[51]

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[48]The TRC Final Report (March 2004) focuses in particular on crimes committed by children aged under 18 (while the SCSL Prosecutor declared that he was not interested in prosecuting child offenders), and on sexual crimes. This positive legacy and the fact that many recommendations contained in the report have been implemented by the Sierra Leone Government are likely to make the TRC a positive tool for the transformation of Sierra Leone.

As regards the SCSL, there is some dispute as to whether it has been helpful in building the capacity of the national judiciary, but some scholars have pointed out that it has furnished an important lesson for domestic tribunals (mainly for witnesses' protection), and that the record of the events of the war and of the crimes committed is preserved in its archives against every denial of the suffering of the Sierra Leone population. On the issue at stake, see Report on the Special Court for Sierra Leone Submitted by the Independent Expert, Antonio Cassese, appointed by the UN Secretary-General, 12 December 2006. On the SCSL legacy, see also the 8th Annual Report of the President of the Special Court for Sierra Leone (2011), and, among scholars, Open Society Justice Initiative (2011); Donlon (2013), p. 857 et seq; Jalloh and Morgan (2015), p. 452 et seq.

[49]Organic Law No. 15-003 on the Creation, Organization and Functioning of the Special Criminal Court, 3 June 2015. The Special Criminal Court—established in Bangui for a renewable period of 5 years—shall be composed of national and international judges; the last shall be appointed upon proposition of the Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA). The Court shall enjoy primacy over national jurisdictions and its budget shall be supported by the international community in consultation with the government of the CAR.

[50]Chapter V, *Transitional Justice, Accountability, Reconciliation and Healing*, provides that in order to 'independently promote the common objective of facilitating truth, reconciliation and healing, compensation and reparation,' the mentioned hybrid Tribunal shall be complemented by a Commission for Truth, Reconciliation and Healing and a Compensation and Reparation Authority.

[51]In South Sudan, the UN High Commissioner of Human Rights (Report to the Human Rights Council, Assessment mission by the Office of the United Nations High Commissioner for Human Rights to improve human rights, accountability, reconciliation and capacity in South Sudan, A/HRC/31/49 of 10 March 2016, presented pursuant to Human Rights Council resolution 29/13) has also recommended the creation within the national judiciary of a specialized judicial structure: a hybrid unit responsible for the investigation, prosecution and adjudication of violations and abuses amounting to international crimes, to complement the work of the establishing mentioned Hybrid Court, since—given the experiences of the other hybrid and international tribunals—the

This is not the first time that the AU is actively involved in the process of creating special tribunals to try perpetrators of the most heinous crimes committed in Africa.

The Extraordinary African Chambers, which have been tasked with the prosecution of former Chadian dictator Habré for his international crimes, were established through an agreement between the AU and Senegal,[52] and are presented as an attempt to consolidate the AU commitment to combat impunity, promote justice, and foster peace and reconciliation, as enshrined in Article 4 of its 2000 Constitutive Act.[53]

In Sudan, in October 2009, after the AU High-Level Panel on Darfur released a report recommending the revitalisation of the Sudanese judicial system, including national legal reform and the use of a hybrid court, the Special Criminal Court on the events in Darfur introduced AU-appointed international judges into its chambers.[54]

The AU's effort to give Africa a leading role in fighting impunity for crimes committed therein is also fostered through the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, which—once in force—will grant a new international criminal jurisdiction to the envisaged

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last one will probably only have capacity to investigate and prosecute a limited number of those responsible.

[52]Following international pressure from human rights groups (and notably Belgium, which sought his extradition to face prosecution for torture and crimes against humanity under its universal jurisdiction law), in July 2006 the AU requested that Senegal prosecute Habré. But it was only after the ICJ judgment of 20 July 2012, *Questions Relating to the Obligation to Prosecute or Extradite* (*Belgium* v. *Senegal*), which, in response to a suit brought by Belgium, found that Senegal had failed to meet its obligations under the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and ordered Senegal to prosecute Habré 'without further delay' if it did not extradite him, that negotiations resumed between Senegal and the AU. The Agreement to create the Extraordinary African Chambers to conduct proceedings within the Senegalese judicial system was signed on 22 August 2012; on 17 December 2012, the Senegalese National Assembly adopted a law establishing the Extraordinary Chambers; on 8 February 2013, the Extraordinary African Chambers, mandated to prosecute 'the person or persons most responsible' for international crimes committed in Chad between 7 June 1982 and 1 December 1990, were inaugurated in Dakar. The AU appointed the presidents of the trial and appeals courts from other African countries. On 30 May 2016, the Extraordinary Chambers sentenced the former Chadian dictator to life imprisonment for crimes against humanity, war crimes, and torture, including sexual violence and rape. On the African Extraordinary Chambers, see Nalin (2013), p. 545 et seq.

[53]Article 4 of the Constitutive Act of the AU provides 'The Union shall function in accordance with the following principles: . . . (h) the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity; . . . (o) respect for the sanctity of human life, condemnation and rejection of impunity . . .'.

[54]The Sudan Government established a Special Criminal Court on the events in Darfur, dealing with crimes under Sudanese law and any charges as determined by the chief justice or related to international humanitarian law, in 2005.

African Court of Justice and Human Rights.[55] The new African Court will probably make unnecessary the exercise of the ICC's jurisdiction in many cases since, under the principle of complementarity, a case is admissible before the ICC only when the State having jurisdiction over it fails to act (even in the name of peace and national reconciliation) or is unwilling or unable genuinely to carry out the investigation or prosecution (Article 17 Rome Statute).[56]

In this regard, it is worth noting that in numerous African countries, although past abuses are prosecuted before domestic tribunals and special national chambers, TJ is also managed by the ICC, as the Court has been referred by the State concerned (Uganda, Congo, CAR, Mali), or by the UN Security Council (Darfur-Sudan, Libya), or the ICC Prosecutor has initiated the investigation *proprio motu* (Kenya, Cote d'Ivoire).[57]

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[55]The AU Constitutive Act provided for an African Court of Justice to be established as one of the AU's principal organs. The Protocol of the Court, adopted in July 2003, entered into force in February 2009, but the Court did not become operational. In 2008, the AU Assembly adopted the Protocol on the Statute of the African Court of Justice to merge the African Court on Human and Peoples' Rights and the Court of Justice of the African Union, which provides the African Court of Justice and Human Rights with jurisdiction over all cases and legal disputes that relate to the interpretation and application of the Constitutive Act, Union treaties and all subsidiary legal instruments, the African Charter, and any question of international law (Article 28). In June 2014, the Assembly adopted a further Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, which provides the Court with criminal jurisdiction over, among others, genocide, war crimes, and crimes against humanity (Articles 28A, 28B, 28C, 28D). But the Protocol—which must be ratified by 15 States to come into force—on 1 April 2016 had only five ratifications.

[56]See, *inter alia*, Greppi (2008), p. 63 et seq.

[57]Unfortunately, after the referral or the commencement of the investigation, the relationships between the ICC and the States concerned are not always friendly. The cases of Uganda, Sudan and Kenya are meaningful and problematic from this point of view. Notably, Uganda and Sudan have been accused of creating special tribunals (the International Crimes Division as a special Division of the High Court of Uganda, tasked with prosecuting alleged perpetrators of war crimes in the two-decade conflict in northern Uganda, and the Special Criminal Court on the events in Darfur) to undermine the ICC jurisdiction under the complementarity principle. Furthermore, Kenyan judicial proceedings in *Ruto* and *Kenyatta* cases have been judged by the ICC as inadequate to challenge the ICC jurisdiction (*Prosecutor* v. *Ruto, Kosgey & Sang*, case No. ICC-01/09-02/11-101, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(2)(b) of the Statute, 30 May 2011; *Prosecutor* v. *Muthaura, Kenyatta & Ali*, case No. ICC-01/09-02/11-96, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(2)(b) of the Statute, 30 May 2011; *Prosecutor* v. *Ruto, Kosgey & Sang*, case No ICC-01/09-01/11-307, Judgment on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II, 30 May 2011, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(2)(b) of the Statute; *Prosecutor* v. *Muthaura, Kenyatta & Ali*, case No. ICC-01/09-02/11-274, Judgment on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II, 30 May 2011, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(2)(b) of the Statute), although the ICC has finally withdrawn the charges in both cases. Moreover, a new challenge to African Countries and ICC relationship has come from non-compliance with the Court's arrest warrant against the President of Sudan, Al Bashir. After South Africa's failure to

In conclusion of this brief (and not thorough) overview of TJ mechanisms implemented in Africa, we can argue that traditional (extra judicial and quasi-judicial) mechanisms, including TRCs, are used to contribute to a negotiated settlement of the dispute in order to build reconciliation and peace before justice. Such traditional mechanisms usually deal with less serious crimes, and they are normally followed or complemented by judicial trials, held at the national or international level, to prosecute high-level crimes.

Hence, the issue becomes whether this TJ experience fulfils correctly and thoroughly the obligation to punish the perpetrators of international crimes, if it exists.

5 States' Duty to Punish Crimes Under Treaty Law

Numerous human rights treaties oblige State Parties to punish and prosecute perpetrators of particular abuses,[58] often as an alternative to the obligation to extradite the alleged perpetrator (*aut dedere aut iudicare*).

The reference is to the 1948 UN Convention on the Prevention and Punishment of the Crime of Genocide[59] and to the 1984 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[60] both providing an

arrest Al-Bashir, South Africa, Gambia and Burundi have begun the process to withdraw from the ICC and, in January 2017, the AU Assembly passed a resolution adopting the ICC Withdrawal Strategy, and calling on Member States to implement such a recommendation (at www.hrw.org). Although the Strategy is not legally binding, it is worth noting that Namibia declared it would withdraw in support of the AU position, while Nigeria, Senegal, and Cape Verde entered formal reservations to the AU's decision, and Liberia entered a reservation to the paragraph that adopts the Withdrawal Strategy; finally, Malawi, Tanzania, Tunisia and Zambia requested more time to study it. Gambia delivered the rescission of its withdrawal to UN on January 2017. On the issue at stake, see the chapter of Ivan Ingravallo in this volume.

[58]Since the ICC Statute (Preamble, para. 6) recalls the existence of a duty for States to punish all international crimes under international (treaty and customary) law, but it does not seem to provide any specific duty to punish for States Parties, it will be further analyzed to ascertain whether it reflects, or whether it influences or has influenced the establishment of a customary duty to punish (para. 7).

[59]According to Article IV, persons 'committing genocide or any of the other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals'; moreover Article V requires States Parties to enact legislation necessary to give effect to the Convention and 'to provide effective penalties for persons guilty of genocide,' and Article VI requires States in whose territory genocide is committed to try alleged perpetrators.

[60]Article 4 commits States Parties to 'ensure that all acts of torture are offences under [their] criminal law . . . and make these offences punishable by appropriate penalties'; pursuant to Article 5, under specified circumstances, States shall undertake measures to establish jurisdiction over such offenses. Article 7 requires that States Parties either extradite an alleged torturer or 'submit the case to [their] competent authorities for the purpose of prosecution'. On the relationship between the two obligations, see the mentioned ICJ judgment of 20 July 2012, *Questions Relating to the Obligation to Prosecute or Extradite* (*Belgium* v. *Senegal*). It is worth noting that General

international obligation to investigate, prosecute and punish with appropriate penalties in relation to genocide and torture.

Similarly, the Apartheid Convention of 30 November 1973 and the Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, of 7 September 1956, require States Parties to punish as criminal offences, and with severe penalties, specific acts in violation of their treaty provisions.[61]

Moreover, the four 1949 Geneva Conventions on international humanitarian law also impose on States Parties the obligation to: prosecute 'grave breaches' of the Conventions; to 'enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches' to the Conventions; to search for persons alleged to have committed, or to have ordered to be committed, grave breaches; and to bring such persons, regardless of their nationality, before its own courts if they do not extradite the alleged perpetrator.[62]

Comment No. 3 to the UN Convention against torture (UN Doc. CAT/C/GC/3, 19 November 2012, *Implementation of Article 14 by States*) argues that all forms of satisfaction for the victims are '*in addition to* the obligations of investigation and criminal prosecution under Articles 12 and 13 of the Convention' (para. 16; italics added). Thus, in order to guarantee non-repetition of acts of torture, it is essential that States Parties undertake measures to combat impunity through enacting effective legislative measures to prevent and punish torture and allow for individuals to exercise their right to redress, while a State's failure 'to investigate, criminally prosecute or to allow civil proceedings related to allegations of acts of torture . . . may constitute a *de facto* denial of redress' (*ibid*., paras 17–20).

[61]The Apartheid Convention provides that 'International criminal responsibility shall apply, irrespective of the motive involved, to individuals, members of organizations and institutions and representatives of the State, whether residing in the territory of the State in which the acts are perpetrated or in some other State, whenever they: (a) commit, participate in, directly incite or conspire in the commission of the acts mentioned in Article II of the present Convention; (b) directly abet, encourage or co-operate in the commission of the crime of apartheid' (Article III); that 'The State Parties to the present Convention undertake: (b) to adopt legislative, judicial and administrative measures to prosecute, bring to trial and punish in accordance with their jurisdiction persons responsible for, or accused of, the acts defined in Article II of the present Convention . . .' (Article IV), and that 'Persons charged with the acts enumerated in Article II . . . may be tried by a competent tribunal of any State Party to the Convention which may acquire jurisdiction over the person of the accused or by an international penal tribunal having jurisdiction with respect to those States Parties which shall have accepted its jurisdiction' (Article V).

According to the Convention for the Abolition of Slavery, 'Those of the High Contracting Parties whose laws do not at present make adequate provision for the punishment of infractions of laws and regulations enacted with a view to giving effect to the purposes of the present Convention undertake to adopt the necessary measures in order that severe penalties may be imposed in respect of such infractions' (Article 6).

[62]Articles 49, 50, 129, 146, respectively, I, II, III and IV Geneva Conventions of 12 August 1949; see also Article 86, I Additional Protocol to the Geneva Conventions, relating to the Protection of Victims of International Armed Conflicts, of 8 June 1977, according to which, 'The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do'.

Finally, as regards torture and inhuman and degrading treatment, summary and arbitrary killings, and enforced disappearance, although the main human rights Conventions are silent about an obligation to punish the alleged perpetrators, the treaty bodies have found that prosecution and punishment are the most effective means to ensure the States Parties' affirmative obligation to guarantee the rights set forth in the Conventions, and to ensure that individuals whose rights are violated have an effective remedy before a competent body, even if the violation is committed by someone acting in an official capacity.[63]

[63]See Human Rights Committee, General Comment No. 31, UN Doc. CCPR/C/21/Rev.1/Add.13, 29 March 2004, Nature of the General Legal Obligation on States Parties to the Covenant, according to which, 'The requirement under Article 2, paragraph 2, to take steps to give effect to the Covenant rights is unqualified and of immediate effect .... A failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant .... As with failure to investigate, failure to bring to justice perpetrators of ... violations could in and of itself give rise to a separate breach of the Covenant. These obligations arise notably in respect of those violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment (Article 7), summary and arbitrary killing (Article 6) and enforced disappearance (Articles 7 and 9 and, frequently, 6). Indeed, the problem of impunity for these violations, a matter of sustained concern by the Committee, may well be an important contributing element in the recurrence of the violations. When committed as part of a widespread or systematic attack on a civilian population, these violations of the Covenant are crimes against humanity (see Rome Statute of the International Criminal Court, Article 7). ... States parties should also assist each other to bring to justice persons suspected of having committed acts in violation of the Covenant that are punishable under domestic or international law' (paras 14, 15 and 18). See also the Inter-American Court of Human Rights judgment of 29 July 1988, *Velásquez Rodríguez* v. *Honduras*, according to which 'Article 1 (1) ... charges the States Parties with the fundamental duty to respect and guarantee the rights recognized in the Convention. ...' (para. 164) so that, as a consequence of this obligation, the States must prevent, investigate and punish any violation of those rights (para. 166). For the European Court of Human Rights see, among the others, *Cestaro* v. *Italy*, judgment of 7 April 2015, para. 204 et seq; *Nasr* and *Ghali* v. *Italy*, judgment of 23 February 2016, para. 262 et seq, and the mentioned case law. For a detailed overview of the European Court case law, Background Paper for Seminar. Opening of the Judicial Year, January 2016, International and National Courts Confronting Large-Scale Violations of Human Rights—Genocide, Crimes against Humanity and War crimes, at www.echr.coe.int. Finally, the African Commission on Human and Peoples' Rights (*Social and Economic Rights Action Center et al.* v *Nigeria*, communication No. 155/96; *Mouvement Burkinabé des Droits de l'Homme et des Peuples* v *Burkina Faso*, communication No. 204/97) considers investigation, criminal prosecution and compensation as essential parts of the obligations imposed by the African Charter on Human and Peoples' Rights (Banjul Charter) on States Parties. For a comment on the issue at stake, Francioni (2008), p. 37 et seq.

6 Is the Treaty Duty to Punish Crimes Incompatible with Amnesties and Traditional TJ Mechanisms?

Since the duty to punish and prosecute perpetrators of international crimes is provided for under numerous treaties, the issue becomes whether such a duty may be fulfilled through traditional non-judicial or quasi-judicial means, or whether it can only be accomplished through some form of retributive justice (namely, judicial criminal trial). As was already stated, African States' TJ strategies make use of TRCs as a general means to discover what happened and to recommend measures to guarantee it will not happen anymore, so as to furnish a first (and sometimes unique) redress to the victims for the harm suffered. Traditional extra-judicial mechanisms usually deal with less serious crimes as, in such cases, it suffices that the right to remedy and reparations is somehow guaranteed (even through non-judicial mechanisms). The most responsible perpetrators and the most heinous crimes are otherwise tried before domestic courts, complemented by hybrid or international tribunals. In other words, African States' TJ strategies do not usually exclude individual criminal accountability at all.

Thus, pursuant to the aforementioned treaty provisions as interpreted by the treaty bodies, we can argue that the African TJ practices fulfil the duty to punish, except where the human rights Conventions require States to prosecute *any* perpetrator of abuses before criminal tribunals, and to punish him/her with adequate penalties. In other words, the treaty duty to punish may well be accomplished through traditional mechanisms, as long as they are complemented by judicial proceedings for the most responsible persons and the most heinous crimes,[64] and except when a form of retributive justice is specifically imposed by the treaty provisions.

The last is the case of the Genocide, Torture, Apartheid, and Slavery Conventions; punishment is always required for perpetrators of grave breaches under the 1949 Geneva Conventions as well.

Our interpretation is also to be supported by some treaty bodies' attitudes towards national laws granting amnesty.

Notably, the Committee against Torture has stressed that amnesties that preclude prompt prosecution and punishment of perpetrators of torture or ill-treatment violate the peremptory prohibition of torture, and that they contribute to creating a climate of impunity.[65]

As regards international humanitarian law, Article 6.5 of Protocol II to the Geneva Conventions invites the authorities in power to grant the broadest possible amnesty to persons who have participated in a non-international armed conflict, or

[64]For a similar view, Orentlicher (1991), p. 2601 et seq.

[65]UN Doc CAT/C/GC/2, 24 January 2008, General Comment No. 2 to the UN Convention against Torture, Implementation of Article 2 by States Parties, para. 5. According to the Committee against torture, granting amnesties or immunity for torture is also a clear denial of the obligation to provide redress to victims (UN Doc. CAT/C/GC/3, paras 41–42).

to those deprived of their liberty for reasons related to such an armed conflict, whether they are interned or detained, so 'to encourage gestures of reconciliation which can contribute to re-establishing normal relations in the life of a nation which has been divided'.[66] However, the provision is commonly understood as excluding persons suspected of, accused of, or sentenced for war crimes.[67]

Finally, the main human rights treaty bodies consider amnesties to be incompatible with the Conventions as they deny victims' rights to an effective remedy and reparations,[68] Moreover, in the case of torture and inhuman and degrading treatment, extrajudicial, summary or arbitrary execution, slavery, and enforced disappearance, they also consider amnesties incompatible with the States' obligation to investigate gross violations of non-derogable human rights, to proceed against the authors of such atrocities, to impose adequate sanctions against those found guilty,[69] and to establish the truth about violations committed.[70]

[66]ICRC (1987), para. 4618.

[67]See Henckaerts and Doswald-Beck (2012), p. 611 et seq, also for the references to national laws and national and international jurisprudence excluding amnesties for crimes committed in international and non-international armed conflicts.

[68]According to the UN Human Rights Committee, blanket amnesty laws and pardons are inconsistent with the Covenant on Civil and Political Rights since they create 'a climate of impunity' and they deny the victims this 'right to a remedy' (CCPR/C/79/Add.46, adopted at Meeting No. 1411, 53rd. Session, 5 April 1995, Item 10; General Comment No. 31, paras 15–16). Similarly, the African Commission on Human and Peoples' Rights 'is of the view that an amnesty law adopted with the aim of nullifying suits or other actions seeking redress that may be filed by the victims . . . cannot shield that country from fulfilling its international obligations under the Charter' (*Malawi African Association et al.* v. *Mauritania*, communications Nos. 54/91, 61/91, 98/93, 164/97 to 196/97 and 210/98, 11 May 2000, para. 83; see also the African Commission on Human and Peoples' Rights in its Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa); thus the Commission has the right to review the validity of such an amnesty law under the Banjul Charter.

[69]See the judgment of the Inter-American Court of Human Rights in the *Barrios Altos* v. *Peru* case (14 March 2011), according to which amnesties for torture, summary executions and forced disappearance are in contrast with the general obligations enshrined in Articles 1 and 2 of the Conventions (providing that the States Parties are obliged to take all measures to ensure that no one is deprived of judicial protection and the exercise of the right to a simple and effective recourse), and thus 'are manifestly incompatible with the aims and spirit of the Convention'; but, what is more, they 'are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution, and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law' (para. 41). See also the UN Human Rights Committee's General Comment on Article 7 of the International Covenant on Civil and Political Rights (prohibition of torture) which states that amnesties are incompatible with the duty of States to investigate violations of non-derogable human rights.

[70]Under international treaty law the existence of a right to the truth is specifically recognized with reference to a narrow list of human rights violations. Article 24 of the International Convention on the Protection of all Persons from Enforced Disappearances, of 20 December 2006, establishes the right of victims to 'know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person'; Articles 32, 33 and 34, of Additional Protocol I to the Geneva Conventions provide that families of missing persons

As all these gross human rights violations can also constitute international crimes under customary law, the duty to punish shall be regarded further in the next pages.

7 The Customary Duty to Punish International Crimes

Since the Security Council established the ICTY and the ICTR acting under Chapter VII of the Charter,[71] the UN has always called on States to punish perpetrators of the most heinous crimes.

Notably, as regards TJ, maintaining that justice and peace are not 'contradictory forces,' the UN bodies and human rights institutions have argued that 'the question, then, can never be whether to pursue justice and accountability, but rather when and

have the right to know the fate of their loved ones and it establishes the obligations to be fulfilled by each party to the conflict. The International Committee of the Red Cross (ICRC) has interpreted these last provisions as norms of customary international law applicable in both international and non-international armed conflict, according to which 'each party to the conflict must take all feasible measures to account for persons reported missing as a result of armed conflict and must provide their family members with any information it has on their fate' (Henckaerts and Doswald-Beck 2012, p. 421 et seq). Nevertheless, the Human Rights Committee, the Inter American Court of Human Rights, the European Court of Human Rights, and the African Commission on Human and Peoples' Rights have all acknowledged the existence of such a right in cases of gross human rights violations (for instance torture and extrajudicial executions), often in connection with the State's duty to conduct effective investigations into serious violations of human rights and to the right to an effective judicial remedy and to redress. See: for the Human Rights Committee, CCPR/C/77/D/887/1999, 24 April 2003, para. 11, and CCPR/C/83/D/973/2001, 13 April 2005, para. 9 (according to which the right of truth is part of the right to effective remedies in cases of enforced disappearance); for the Inter-American Court of Human Rights, the judgments of 7 September 2004, *Tibi* v. *Ecuador* (that considers that the right to the truth is not limited to cases of enforced disappearances but also applies to any kind of gross human rights violation). According to that Court, such a right to the truth is also based in the State's duty to respect and guarantee human rights and, in particular, its duty to conduct an effective investigation into gross human rights violations. For the European Court of Human Rights, see Background Paper for Seminar (according to which the continuing obligation to carry out an effective investigation remained in force even if the humanitarian aspect of the case under Article 3—suffering of families—had been resolved); for the African Commission on Human and Peoples' Rights, see Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, DOC/OS(XXX) 247, para. C (Right to an Effective Remedy). Moreover, all these treaty bodies have considered that the failure to give information about the fate and whereabouts of disappeared persons, the circumstances of an execution, and the exact place of burial of the executed persons can amount to torture or ill-treatment. See also Article 7.2.a of the International Convention for the protection of All Persons from Enforced Disappearance, which provides that the disclosure of the violations committed cannot exempt the perpetrator from his/her criminal responsibility but, at least, may produce a reduction of sanctions.

[71] See Security Council resolution 827 of 25 May 1993 for the ICTY and 955 for the ICTR.

how'.[72] Hence, any time the UN is involved in peace negotiations and/or in designing TJ strategies, they always require States to punish the most serious international crimes.

Moreover, the ICJ itself has inferred the existence of a customary duty of all States to cooperate to prevent and punish genocide from the universal and fundamental character of the related prohibition.[73] Similarly, international (and hybrid) criminal tribunals have endorsed individual accountability and the fight against impunity for the crimes enshrined in their Statute, and have fostered States to punish these international crimes, to cooperate with international and hybrid tribunals, or to allow the exercise of universal jurisdiction by States entitled to do it. As genocide, crimes against humanity[74] and war crimes—in whichever conflicts they are committed[75]—offend the most basic human values of the whole international community and can be considered violations of *erga omnes* obligations and of *ius cogens* norms alike,[76] States' general obligation to cooperate and punish may well entail a 'general duty to set up appropriate judicial mechanisms or procedures for the universal repression of those crimes'.[77]

Thus, we can argue that a customary duty to punish international crimes (namely genocide, war crimes, crimes against humanity) has already been established, although it is still disputed whether this duty implies that States are under an obligation to punish only crimes allegedly committed in their territory, or by their

[72]See, for all, the report of Secretary-General S/2004/616, para. 21, and the mentioned Guidance Note, para. 2.

[73]See ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion of 28 May 1951, p. 23; *Case Concerning Application of The Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections Judgment of 11 July 1996, para. 31; *Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction of the Court and Admissibility of the Application Judgment of 3 February 2006, para. 64.

[74]See for all Lattanzi (1983), p. 402 et seq; Bassiouni (1999), p. 227 et seq; Cassese (2008), p. 303.

[75]In the sense that it is undisputed that not only the duty *aut dedere aut iudicare* enshrined in the Geneva Conventions for grave breaches has acquired customary *status*, but that a duty to investigate and punish war crimes committed in international and non-international armed conflicts is also provided by a norm of customary international law, see Henckaerts and Doswald-Beck (2012), p. 607 et seq, and, on the peremptory nature of the obligation *aut dedere aut iudicare*, the ICTY judgment of 29 October 1997, *Blaskiç*, case IT-95-14-AR 108 *bis*, para. 29. See also for other references, Meron (1995), p. 554 et seq; ICRC (1952, 2016); Henckaerts and Doswald-Beck (2012), p. 551 et seq.

[76]See ICJ, *Case Concerning The Barcelona Traction, Light And Power Company, Limited (New Application: 1962) (Belgium* v. *Spain)*, Second Phase Judgment of 5 February 1970, para. 34; and the International Law Commission Commentary on Draft Articles on States Responsibility for Internationally Wrongful Acts (2001), p. 112 et seq.

[77]Cassese (2008), p. 303.

armed forces, or by their nationals or against their nationals, or whether they are required to exercise universal jurisdiction.[78]

The mentioned views and practices have been particularly strengthened after the approval of the ICC Statute.

Although the Rome Statute does not impose an obligation to incorporate international crimes into domestic law, nor to exercise criminal jurisdiction over those crimes,[79] the establishment of the ICC has provided the occasion for States Parties to pass laws criminalizing international crimes and to assert their jurisdiction over them, possibly in order to satisfy the complementarity test. The same is true for third States: since the ICC could exercise jurisdiction over their nationals, whenever they have committed crimes enshrined in its Statute in the territory of a State Party, or the Security Council refers the situation to the Court (Article 12 Statute), they are often criminalizing and punishing international crimes.

To this purpose, it is also worth noting that the Preamble of the ICC Statute *recalls* that 'it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes' (para. 6), and that it *affirms* 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 and by enhancing international cooperation' (Preamble, para. 4). Since the legal significance of the Preamble is 'to describe the main purposes of the Statute and *results* of the negotiation process *which form the basis for the acceptance of the Statute*, as well as to *reiterate*—and perhaps specify—*the obligations of States in certain respects*',[80] it may be understood to mirror the *opinio iuris* of the (main) part of the international community, i.e. of the 124 States Parties the Rome Statute.[81]

The same is true for the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. Adopted and proclaimed by the General Assembly without a vote and with the aim to 'identify mechanisms, modalities, procedures and methods for the implementation of *existing* legal obligations under international human rights law and international humanitarian law',[82] these Guidelines *recall* 'that international law contains the

[78]In the sense that States are *entitled* to exercise universal jurisdiction, see for all ICTY, *Prosecutor* v. *Anto Furundzija*, case No. IT-95-17/1-T, judgment of 10 December 1998, para. 156, which also recalled that 'As stated in general terms by the Supreme Court of Israel in Eichmann, and echoed by a USA court in Demjanjuk, "it is the universal character of the crimes in question [i.e. international crimes] which vests in every State the authority to try and punish those who participated in their commission"'.

[79]On the issue at stake, see Robinson (2002), p. vol. II, 1849 et seq, 1860.

[80]Triffterer (2008), pp. 1 et seq and 4.

[81]See the UN Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (UN Doc. E/CN.4/2005/102/Add. 1, 8 February 2005, principles 20 and 21) as regards the view that the duty to punish may be correctly fulfilled by all the means mentioned in the text.

[82]UN Doc. A/RES/60/147, 16 December 2005, Preamble para. 7; italics added.

obligation to prosecute perpetrators of *certain* international crimes *in accordance with international obligations of States* and the requirements of national law or as provided for in the applicable statutes of international judicial organs'.[83]

8 International Crimes and National Law Granting Amnesties

The question that arises is whether such a customary duty to punish international crimes may be derogated by amnesty law, or whether granting amnesties for international crimes is prohibited under customary law.

Indeed, in the *AZAPO* case the Constitutional Court of South Africa maintained the constitutionality of the conditional amnesty granted by the South African TRC on the view that amnesties were necessary to persuade perpetrators to confess their crimes and that they were not blanket amnesties, namely that they were granted under specific conditions and only for certain crimes.[84]

In the mentioned ATJF, supporting the idea that peace should come *before* justice, the AU, on the one hand, has expressed disapproval for blanket amnesties; on the other, it has recognized that conditional amnesties may furnish a potential contribution to reconciliation. In other words, the AU has acknowledged that it may be necessary for reasons of peace to sacrifice (at least temporarily) judicial proceedings (and retributive justice), and give preference to traditional dispute settlement means and an overall strategy. To this purpose, conditional amnesties can be an important tool to achieve national reconciliation. This rationale has been confirmed by the technical experts' consultation to review the African Transitional Justice Policy Framework, held in 2013.

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[83] *Ibid.*, Preamble, para. 8, italic added. For a comment, see van Boven (2010). See also the UN Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, which affirms that 'the duty of every State under international law to respect and to secure respect for human rights requires that effective measures should be taken to combat impunity'; and that this duty implies 'to take appropriate measures in respect of perpetrators, particularly in the area of justice, by ensuring that those suspected of criminal responsibility are prosecuted, tried and duly punished' (UN Doc. E/CN.4/2005/102/Add. 1, 8 February 2005, Preamble, para. IV, and principle 1; in the same sense, see also principle 19, entitled *Duties of States with Regard to the Administration of Justice*). Although those Principles are guidelines and are not legally binding standards, they are reconstructed by an independent expert appointed by the UN Commission on Human Rights to reflect developments in international law and practice, including international jurisprudence and State practice (see Report of the Independent Expert to Update the Set of Principles to Combat Impunity, Diane Orentlicher, submitted pursuant to UN Commission on Human Rights Resolution 2004/72, UN Doc. E/CN.4/2005/102, 18 February 2005).

[84] *The Azian Peoples Organization et al.* v. *The President of the Republic of South Africa et al.*, 25 July 1996.

Hence, since (transitional) States' practices stress that prosecutions can sometimes be delayed or even denied in the interest of international peace and national reconciliation, except for the reconstruction of the truth,[85] some scholars have argued that customary international law does not to recognize that amnesty laws are, as such, illegal.[86]

Nonetheless, the actual practice shows that a customary norm providing as unlawful amnesties granted for international crimes has developed or, at least, is going to develop.

And indeed, the UN vigorously maintains that amnesties for international crimes are illegal under international law, regardless of whether they are given in exchange for a confession or apology.[87] Hence, stressing that experience has proven that the climate of impunity that follows amnesties definitely prevents reconciliation and peace,[88] the peace agreements endorsed by the United Nations 'never promise

[85]Among scholars, see Mendez (1997), according to whom 'In the first place, true reconciliation cannot be imposed by decree; it has to be built in the hearts and minds of all members of society through a process that recognizes every human being's worth and dignity. Second, reconciliation requires knowledge of the facts'; moreover 'Forgiveness cannot be demanded (or even expected) unless the person who is asked to forgive knows exactly what it is that he or she is forgiving. . . . It seems to add a new unfairness to the crimes of the past to demand forgiveness from the victims without any gesture of contrition or any acknowledgment of wrongdoing from those who will benefit from that forgiveness'. See also Starita (2003), p. 317 et seq, who argues that no obligation to punish the perpetrators of crimes exists for transitional justice States, but that they have only the obligation to establish the truth.

[86]On the legality of amnesties, see Starita (2003), p. 317 et seq. See also Schabas (2011), who argues that '(t)he right of victims to justice and to a remedy for a serious violation of human rights, which is the foundation of the condemnation of amnesties by the human rights tribunals, may be limited or tempered by other rights and priorities,' namely by the search for peace 'which is itself grounded in fundamental rights'. Similarly, Della Morte (2011), p. 266, maintains that amnesties should be balanced with the interest in not having other victims, even if taking into account the interest of the ones who have been already harmed by similar crimes.

[87]The same position is endorsed by the International Commission of Inquiry on Darfur as regards amnesties granted to perpetrators of serious violations of human rights and humanitarian law: 'Even though these amnesties were granted in exchange for public confessions by the perpetrators, they generally—and correctly so in the Commission's opinion—have been considered unacceptable in international law. They have also been widely considered a violation of the accepted United Nations position that there should be no amnesty for genocide, war crimes and crimes against humanity' (Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004, 25 January 2005, para. 618). As regards *soft law*, the UN Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity provides that TRCs never constitute an alternative to the role of judiciary in giving effect to the right to know, and that the disclosure of the violations committed cannot exempt the perpetrators from his/her criminal responsibility but, at most, may produce a reduction of sanctions (principles 5 and 28).

[88]'Where serious crimes have been committed, pursuing international justice during mediation can generate considerable tension and affect the outcome, since indicted parties may cease cooperation and actively obstruct the process. Ignoring the administration of justice, however, leads to a culture of impunity that will undermine sustainable peace' (Report of the Secretary-General on enhancing mediation and its support activities, UN Doc. S/2009/189, 8 April 2009, para. 37). And indeed, the

amnesties for genocide, war crimes, crimes against humanity or gross violations of human rights'.[89]

Following the same rationale, numerous TRCs have been prevented from granting amnesty to perpetrators of international crimes, as in Congo and Kenya.[90]

Moreover, international courts and domestic tribunals have asserted that amnesty provisions may be inconsistent with customary law or with *emerging* principles of customary international law, which *impose* on States the duty to protect humanity against gross human rights violations and to prosecute and punish perpetrators.[91]

Notably, although admitting that the amnesty for international crimes provided in the Lomé Peace Agreement does not violate customary international law since a rule providing the prohibition of similar amnesties is just now developing, the SCSL has maintained that it was entitled 'to attribute little or no weight to the grant of such an amnesty which *is contrary to the direction in which customary international law is developing* and which *is contrary to the obligations* in certain treaties and conventions *the purpose of which is to protect humanity*'.[92]

Similarly, the European Court of Human Rights has considered unfounded the violation of the *ne bis in idem* principle (Article 4, Protocol No. 7), despite the fact that the applicant had been prosecuted twice for the same offences, since he had been improperly granted an amnesty for acts that amounted to grave breaches of fundamental human rights protected by Articles 2 and 3 of the Convention (right to life and prohibition of torture).[93] Indeed, the Court found that the growing tendency in international law is to see such amnesties as unacceptable because they are

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1999 Lomé Peace Agreement amnesty provision not only failed to end armed conflict in Sierra Leone, but also did not deter further atrocities. Furthermore, former Yugoslav President Slobodan Milosević agreed to withdraw Serbian Force from Kosovo, although in May 1999 the ICTY Prosecutor issued an indictment against him. More recently, see UN Doc A/HRC/29/L.8, Human Rights Council, Fact-finding mission to improve human rights, accountability and reconciliation for South Sudan, 30 June 2015.

[89]S/2004/616, para. 10. See Stahn (2002), p. 191 et seq, for a detailed overview of the changes in the UN attitude towards amnesties and alternative forms of justice.

[90]The Democratic Republic of the Congo Truth Commission, established in 2004, has the power to 'accept or refuse' an amnesty application for 'acts of war, political crimes and crimes of opinion,' except in the case of crimes against humanity or genocide. The same exception, extended to the persons most responsible, is provided in the Kenya Truth and Justice Reconciliation Commission's mandate (2008).

[91]Among scholars, in the sense that amnesty laws can be used to promote national reconciliation only if they do not cover atrocious crimes which international law requires States to punish, see Fornasari (2013), p. 178 et seq.

[92]Special Court for Sierra Leone, *Prosecutor* v. *Morris Kallon* (case No. SCSL-2004-15-AR72(E)) and *Brima Bazzy Kamara* (case No. SCSL-2004-16-AR72(E)), *Decision on Challenge to Jurisdiction: Lomé Accord Amnesty*, 13 March 2004, paras 82–84, italics added.

[93]European Court of Human Rights, *Marguš* v. *Croatia*, application No. 4455/10, judgment of 27 May 2014.

incompatible with the *unanimously recognised* obligation of States to *prosecute* and *punish* grave breaches of fundamental human rights.

With regard to the African experience, reversing the 2011 Constitutional Court judgment granting Thomas Kwoyelo full amnesty for the crimes he had committed, the Ugandan Supreme Court has considered that the Amnesty Act does not provide for blanket amnesties and does not extend to war crimes.[94] Thus, in the opinion of the Court, the indictment of Thomas Kwoyelo under Article 147 of the Geneva Conventions (related to grave breaches) does not violate the Constitution of Uganda. Answering to the defence of the accused, the Court has further specified that the defendant has not suffered discrimination or unequal treatment under the law, since certain crimes remain ineligible for the amnesty.

For the same purpose, it also appears meaningful that the Côte d'Ivoire Laws modifying and completing the Criminal and Criminal Procedure Code, in order to ensure implementation of the ICC Statute and complementarity with the ICC,[95] have abolished the 10-year statute of limitations for prosecuting war crimes, crimes against humanity, and genocide, and have established that amnesty, mitigating circumstances, suspended offences and statutes of limitations are not applicable to those crimes.

It is also worth noting that, pursuant to the *jus cogens* character of the rules prohibiting and criminalizing conducts that amount to international crimes, scholars have recognized that foreign and international courts are not bound by domestic legislation barring prosecution of those crimes.[96] In other words, as international crimes offend universal values and the whole international Community, no single State could cancel the legal consequences of such heinous violations under customary international law.

As is known, this view is supported by the ICTY. Stressing the peremptory character of the prohibition of torture, the *ad hoc* Tribunal has already argued that amnesty law cannot preclude the right of third States and international courts to exercise jurisdiction in such a case.[97] The same principle is also stipulated in Article 10 of the Statute of the SCSL and Article 40 of the Cambodian Bill on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecutions of Crimes Committed during the Period of the Democratic Kampuchea, since they both provide that granting an amnesty for the crimes falling under the Courts' jurisdiction could not be a bar to prosecution.

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[94]Uganda Constitutional Appeal No. 01 of 2012, *Thomas Kwoyelo alias Latoni* v. *Uganda*, Supreme Court, 11 April 2015.

[95]Law No. 2015-133 modifying and completing Bill No. 60-366 of 14 November 1960 instituting the Penal Procedure, Code Law No. 2015-134 modifying and completing Law No. 81-640 of 31 July 1981 instituting the Penal Code, 9 March 2015.

[96]See, for all, Cassese (2004), pp. 1130 et seq and 1140.

[97]See ICTY, *Furundzija*, para. 155, which states that national measures authorising or condoning torture or absolving its perpetrators through an amnesty law would not be accorded international legal recognition, so that perpetrators could be prosecuted abroad or by international criminal tribunals.

9 The Relationship Between Transitional Justice Traditional Mechanisms and the Customary Duty to Punish International Crimes

In conclusion, African TJ practice confirms the existence of a duty to punish international crimes under customary international law, since African States' TJ strategies provide for the prosecution of the most heinous abuses and of the most responsible perpetrators.

Moreover, combining retributive justice with traditional mechanisms dealing with less heinous crimes, African TJ practices are contributing to establishing and strengthening the idea that, even under international customary law, the obligation to punish international crimes is correctly fulfilled when the most responsible persons or the most serious crimes are prosecuted within national, international or hybrid tribunals, as long as the truth is established for all other crimes and lower ranking perpetrators, even by non-judicial means.[98] Hence, the African TJ mechanisms are consistent with customary international law if they are not built with the intent (for the purpose) of substituting for trials, but rather to *complement* prosecutions. In this framework, amnesties are incompatible with the aforementioned duty to punish if they are applied in the case of the most responsible persons or the perpetrators of the most heinous crimes.

Such a view is also supported by a general appreciation—shared by the UN bodies and human rights institutions[99]—of the fundamental role played by TRCs and other transitional justice mechanisms to establish the truth so as to ensure justice and reparation for victims. Since experience has shown that criminal courts may only prosecute a limited number of crimes and perpetrators, notably in cases of mass crimes, it is recognized that the establishment of truth, the imposition of repairing measures, and the implementation of institutional reforms become the essential (and best) tools to satisfy victims' expectations of justice and reparation.

However, first and foremost, our interpretation is especially proven by the ICC policy which is applied whenever States decide not to prosecute but instead give preference to other (traditional) extra-judicial or quasi-judicial mechanisms to address past abuses.

As the ICC, pursuant to the principle of complementarity, may exercise jurisdiction over the most serious crimes of international concern if the State having jurisdiction fails to act or is unwilling or unable genuinely to carry out the investigation or prosecution (Articles 1 and 17, Rome Statute), the Office of the Prosecutor's Policy Paper on Preliminary Examinations has clarified that 'inactivity in relation to a particular case may result from numerous factors, including the absence of an adequate legislative framework; the existence of laws that serve as a

[98] Among scholars, Orentlicher (1991), p. 2598 et seq; Robinson (2003), p. 493; White (2005), pp. 463 et seq and 476, who all argue that a customary duty to punish may well be accomplished in the way suggested in the text.

[99] For all, see S/2004/616, paras 26, 47 and 50.

bar to domestic proceedings, *such as amnesties* (. . .); *the deliberate focus of proceedings on low-level or marginal perpetrators despite evidence on those more responsible; or other*, more general issues related to the lack of political will or judicial capacity'.[100]

The mentioned Statute provisions are to be read in conjunction with Articles 20 of Statute itself (*ne bis in idem*), which prevents the ICC from trying a person who has been tried by another court with respect to the same conduct, unless the proceedings in the other court were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court, or were not conducted independently or impartially.

Under Article 20, the term court refers to judicial bodies[101]; therefore, the admissibility test under the principle of complementarity requires that the Prosecutor conducts a thorough analysis of all judicial activities in the State concerned, including traditional domestic dispute settlement, if the body administering justice could be considered a court, and if it satisfies the principles of impartiality and due process enshrined in its Statute.[102]

Hence, an investigation may be opened in the absence of *any criminal judicial proceedings* relating to the cases on which the Office is likely to focus (for instance, whenever the State passes a law granting amnesties for past abuses or establishes *exclusively* non-judicial mechanisms to address the international crimes perpetrated),[103] or whether the domestic criminal tribunals lack due standard process.

Furthermore, pursuant to Article 53(2)(c) of the Statute, even where the requirements of jurisdiction and admissibility are met, the ICC Prosecutor may conclude that there is not a sufficient basis to proceed because it 'is not in the interests of justice,' taking into account all the circumstances, including the *gravity of the crime* and *the interests of victims*.

In this regard, the Office of the Prosecutor has always excluded the possibility that the interest of peace and reconciliation may influence its decision to prosecute under Article 53, as 'such an outcome would run contrary to the explicit judicial

[100]The ICC Prosecutor's Policy Paper on Preliminary Examination, November 2013, para. 48, italics added.

[101]As regards the interpretation of the term 'court' in Article 20.3 as purely referring to judicial structures, so that *ne bis in idem* cannot work towards extra-judicial mechanisms, see Scharf (1999), pp. 507 et seq and 525; Holmes (2002), pp. 667 et seq and 674; van den Wyngaert and Ongena (2002), pp. 705 et seq and 727; Tallgren and Reisinger Coracini (2008), pp. 669 et seq and 685.

[102]See The Office of the Prosecutor Report on the activities performed during the first 3 years (June 2003–June 2006), 12 September 2006 The Hague (at www.icc-cpi.int).

[103]As regards unwillingness to proceed and States' non-judicial strategies to deal with crimes, see Schabas (2007), p. 185 et seq (according to whom 'genuine truth commission projects amounts to a form of investigation that does not suggest "genuine unwillingness"' of the State concerned and may sometimes suggest to the Prosecutor not to proceed); Robinson (2003), pp. 481 et seq and 498, who lists the essential requirements for TRC to satisfy the complementarity test pursuant to Article 17.1.b. *Contra*, Holmes (1999), pp. 41 et seq and 77. As regards the relationship between TRC and the ICC see, among the others, Hayner (2011), p. 110 et seq; Flory (2015), p. 19 et seq.

functions of the Office and the Court as a whole'.[104] And indeed, according to the Statute, it is up to the Security Council to request that the ICC suspend or not commence an investigation or prosecution for a period of 12 months, in a resolution under Chapter VII of the Charter, i.e., for the maintenance of international peace and security (Article 16 Statute).

Although interpreting the interest of justice narrowly with reference to the motives of peace and reconciliation, the Office has stressed that, as set out in the Office of the Prosecutor's *Policy Paper on the Interests of Justice*,[105] the interests of victims—mentioned in Article 53—include but are not limited to the victims' interest in seeing justice done. Hence, in order to establish whether or not to proceed 'in the interest of justice,' the Prosecutor shall take into account the valuable role that domestic prosecutions, truth seeking, reparations programs, institutional reform, and traditional justice mechanisms may play in dealing with large numbers of offenders and in addressing the impunity gap, in the pursuit of a broader justice 'in the interest of the victims'.[106] This view has been recently validated in the Office of the Prosecutor's Policy Paper on Case Selection and Prioritisation of 15 September 2016.[107]

In other words, the Prosecutor may find that it is in the interest of justice to endorse alternative non-judicial and extra-judicial justice mechanisms, even for the most serious crimes of international concern referred to in its Statute, and to decide not to commence an investigation or a trial, if this choice satisfies the interest of victims; the interest of the victims will be established taking into account the will of the victims.[108]

Certainly, bearing in mind the Court's purpose to fight against impunity and, thus, to contribute to the prevention of the most serious international crimes,[109] such a decision not to proceed on the basis of the interests of justice is always

[104]The ICC Prosecutor's Policy Paper on Preliminary Examination, para. 69. See also the mentioned Report of the Secretary-General S/2009/189, para. 37: 'Now that the International Criminal Court has been established, mediators should make the international legal position clear to the parties. They should understand that, if the jurisdiction of the International Criminal Court is established in a particular situation, then, as an independent judicial body, the Court will proceed to deal with it in accordance with the relevant provisions of the Rome Statute and the process of justice will take its course'.

[105]Office of the Prosecutor's Policy Paper on the Interests of Justice, September 2007. For a critical examination of this Office of the Prosecutor's Policy, Ludwin King (2013), p. 85 et seq.

[106]Office of the Prosecutor's Policy Paper on the Interests of Justice, p. 7. Among scholars, the same reading seems to be supported by Dugard (2002), pp. 693 et seq and 703; Stahn (2005), p. 695 et seq; Williams and Schabas (2008), pp. 605 et seq and 618.

[107]Office of the Prosecutor's Policy Paper on Case Selection and Prioritisation, 15 September 2016, p. 5.

[108]In order to establish what the interests of the victims are, the Office takes into account, in particular, the views expressed by the victims themselves, as well as by trusted representatives and other relevant actors such as community, religious, political or tribal leaders, States, and inter-governmental and non-governmental organisations.

[109]ICC Statute, Preamble, para. 4 et seq.

subject to review and judicial determination by the Pre Trial Chamber (Article 53.3 Statute) and, furthermore, according to the Office of the Prosecutor Policies, it shall be considered of last resort.[110] In any case, it appears particularly meaningful as regards our thesis.

Indeed, given the aforementioned purpose, the ICC may endorse TJ mechanisms alternative to prosecutions (extra-judicial or quasi-judicial mechanisms) for lower perpetrators or less serious crimes, whenever they are part of an overall TJ strategy requiring judicial measures for the most responsible or the most heinous crimes, and as long as they are in compliance with due process standards and with the victims' rights.

As is known, the choice to prosecute only the most responsible persons and the most serious crimes before international and hybrid tribunals, leaving the other perpetrators and crimes to domestic trials, has already characterized the UN *ad hoc* tribunals' completion strategy,[111] and is provided in Article 1 of the SCSL Statute and in the ICC Statute (Article 17.1.d).

In addition, the current African practice, as endorsed by the ICC Prosecutor policies, suggests that, in cases of mass crimes or in exceptional circumstances, the duty to punish these kind of crimes and perpetrators could well be improved through extra-judicial means, as long as the victims' interests are better satisfied through the traditional (and not retributive) forms of justice (alternative forms of justice). Thus, in this framework, amnesties for lower level perpetrators and less heinous international crimes could constitute a bar to prosecution before the ICC, if they are not blanket amnesties, nor generally granted. This view will probably influence the definition of the content of the (developing) customary norm prohibiting amnesties for international crimes.

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[110] Office of the Prosecutor's Policy Paper on the Interests of Justice, para. 4.

[111] See Security Council resolutions 1503 of 28 August 2003, 1534 of 26 March 2004, 1966 of 22 December 2010. For details on the ICTY completion strategy: www.icty.org; for the ICTR completion strategy: unictr.unmict.org.

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