



TRANSITIONAL JUSTICE AND THE PRINCIPLES OF ACCOUNTABILITY FOR VIOLATIONS OF LAWS OF ARMED CONFLICT

Hagler Okorie*

ABSTRACT

Transitional justice has emerged as a critical framework for addressing grave violations of the laws of armed conflict (LOAC) committed during periods of civil strife, international warfare, and internal disturbances. Rooted in the pursuit of accountability, reconciliation, and sustainable peace, transitional justice encompasses judicial and non-judicial mechanisms designed to confront past atrocities and prevent future recurrence. This paper critically examines the relationship between transitional justice processes and the principles of accountability for LOAC violations, arguing that accountability is both a legal imperative and a moral necessity under international humanitarian law (IHL). The study explores how international and hybrid criminal tribunals, truth commissions, domestic prosecutions, reparations regimes, and institutional reforms serve as complementary tools for enforcing individual and state responsibility for war crimes, crimes against humanity, and other serious breaches of IHL. The abstract outlines the complexities that arise when transitional justice is deployed in fragile post-conflict contexts—particularly the tension between peace negotiations and demands for prosecution, the problem of weak judicial institutions, politicisation of justice mechanisms, and the struggle to integrate victim-centred approaches. It further examines the normative foundations of accountability in LOAC, including command responsibility, universal jurisdiction, and the duty to investigate and prosecute grave breaches. By evaluating case studies from Rwanda, Sierra Leone, Colombia, the former Yugoslavia, and ongoing armed conflicts in Africa, the research demonstrates how different accountability models either strengthen or undermine the broader goals of transitional justice. Ultimately, the study concludes that accountability for LOAC violations must be embedded within a holistic transitional justice framework that balances retributive and restorative approaches while safeguarding victims' rights to truth, justice, and reparation. It recommends a hybridised accountability model that integrates criminal trials with truth-seeking, reparative justice, and security sector reform, thereby ensuring that transitional justice not only punishes perpetrators but also contributes to structural transformation and long-term peacebuilding.

KEYWORDS: Accountability, Law of Armed Conflict, Trials, Transitional Justice, Violations.

1. INTRODUCTION

Armed conflicts, whether international or non-international, continue to generate widespread violations of the laws of armed conflict (LOAC), including war crimes, crimes against humanity, sexual violence, enforced disappearances, torture, and deliberate attacks on civilians. These atrocities undermine not only human dignity but also the stability of post-

*Hagler Okorie, PhD, FCarb, FICMC, Notary Public & Justice of the Peace is a Professor at the Faculty of Law, Abia State University, Umuahia Campus. He is the Head of Department of Private and Property Law (PPL).
Email-hagler.okorie@abiastateuniversity.edu.ng; haglersoco@gmail.com; haglerokorie@nigerianbar.ng; 08032253813.



conflict societies, making accountability an indispensable component of any meaningful justice agenda. Transitional justice has thus evolved as a multidisciplinary framework that seeks to address legacies of mass violence through judicial and non-judicial measures such as criminal prosecutions, truth commissions, reparations, institutional reform, and guarantees of non-recurrence.¹ As states emerge from conflict, the demand for accountability for LOAC violations becomes central to rebuilding the rule of law, restoring public trust, and recognising the suffering of victims.

The principles of accountability under International Humanitarian Law (IHL) impose clear obligations on states to prevent, investigate, and prosecute serious violations of LOAC. These obligations have been codified in various instruments, including the Geneva Conventions of 1949, their Additional Protocols, and customary IHL rules requiring individual criminal responsibility and command responsibility for grave breaches.² The post-Cold War era witnessed an expansion of accountability processes through the establishment of ad hoc tribunals such as the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), which significantly contributed to the clarification of legal norms, strengthened jurisprudence on war crimes, and reaffirmed the duty to prosecute perpetrators of mass atrocities.³ The creation of the International Criminal Court (ICC) in 1998 further institutionalised a permanent mechanism for enforcing accountability where domestic systems are unable or unwilling to prosecute.⁴

Despite these developments, the integration of transitional justice mechanisms with accountability for LOAC violations remains complex and contested. Post-conflict governments often face political pressures to prioritise peace negotiations over prosecutions, leading to amnesties or selective justice that undermine victims' rights.⁵ In many cases, weak institutions, lack of technical capacity, insecurity, and political interference hinder robust investigations and trials. Truth commissions may uncover patterns of violations but often lack enforcement

¹UN Secretary-General, *Guidance Note on the United Nations Approach to Transitional Justice* (2010).

²Geneva Conventions (1949), Common Article 1; Additional Protocol I (1977), arts.86–87; ICRC Customary IHL Study (2005).

³A Cassese, *International Criminal Law* (Oxford University Press, 2008).

⁴Rome Statute of the International Criminal Court (1998), arts. 1 and 17.

⁵L Mallinder, “Amnesties and Inclusive Political Settlements” (2018) Transitional Justice Institute Research Paper.



powers, while domestic courts may struggle to balance restorative justice approaches with the legal obligation to prosecute serious crimes.⁶ These tensions raise important questions about how accountability can be effectively aligned with transitional justice in a way that promotes reconciliation without sacrificing the rule of law.

This paper critically examines the interface between transitional justice and accountability for violations of LOAC, arguing that accountability must be located at the core of transitional justice to ensure credible, victim-centred, and sustainable peacebuilding. It evaluates the legal foundations, institutional mechanisms, and practical challenges involved in prosecuting LOAC violations within transitional contexts. Drawing from comparative experiences in Rwanda, Sierra Leone, Colombia, Uganda, and the former Yugoslavia, the study demonstrates that hybrid accountability models—combining criminal trials, truth-seeking, reparations, and institutional reforms—offer a more holistic and legitimate approach to addressing mass atrocities. Ultimately, the chapter contends that transitional justice without genuine accountability risks entrenching impunity, weakening democratic consolidation, and perpetuating cycles of violence.

Transitional justice is a concept with wide currency nowadays. Regarded as a mechanism allowing a shift - transition - from an authoritarian system in which there is no rule of law to a democratic regime that respects human rights, it is nevertheless highly ambiguous as regards both the philosophy that subtends it and the methods it employs.

The avowed aims of transitional justice are at once to restore victims Dignity, build confidence between warring groups and foster the institutional changes needed to bring about a new relationship within the population, in order to usher in the rule of law without endorsing practices that amount to total or partial impunity. The various measures that make up transitional justice generally combine "healing measures of restorative justice (truth and reconciliation commissions) with a parallel system of punitive justice (in particular with regard to those chiefly responsible for and the perpetrators of the most serious crimes).⁷ Moreover,

⁶Priscilla Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*, Routledge, 2011.

⁷ For a definition of transitional justice, Alex Boraine, President of the International Centre for Transitional Justice, "La justice traditionnelle: un nouveau domaine", Colloquium "Réparer les effets du passé. Réparations et transitions vers la démocratie", Ottawa, 11 March 2004, <www.idrc.ca/uploads/user-



transitional justice arrangements set out to reform institutions by restoring the primacy of law and making sure that the judicial bodies are operational for the future. At the same time, they work to ensure that the crimes committed during the previous era do not go unpunished.

Transitional justice therefore pursues manifold aims in a post-conflict situation in which those in government are faced with other pressing needs such as disarming fighting forces, improving civilian security, compensating victims and relaunching the economy of a society in ruins.

2. OBSTACLES TO SETTING UP TRANSITIONAL JUSTICE ARRANGEMENTS

Does the end of a conflict always present all the conditions necessary for transitional justice arrangements to be put in place? Disarmament, demobilization and reintegration as top priorities viewed in the light of demands of transitional justice: the case of the Democratic Republic of the Congo. The Democratic Republic of the Congo (DRC) experienced one of the longest lived dictatorships on the African continent. Colonel Mobutu, who seized power in 1965, was to cling on to it until the war of “liberation” in 1996-7 in which Uganda and Rwanda took part. The combined death toll of that war and the subsequent one, which broke out in 1998, was some three to four million depending on the source, over and above the countless victims of the Mobutu regime.⁸

As of today, almost half the fighters have been processed through disarmament measures, but in terms of justice the transition has achieved virtually nothing. Plans for an international tribunal for the DRC have not come to fruition and the International Criminal Court has indicted and brought to trial only one accused. Moreover, the Truth and Reconciliation Committee provided for under the Comprehensive and All-Inclusive Agreement has proved incapable of doing its job, even in the context of reparation measures for victims.

S/10899187131Discours_d'Alex_Boraine.doc> Accessed 10 July 2025. Marc Freeman and Dorothée Marotiné, “Qu'est-ce que la justice transitionnelle ?”, International Centre for Transitional Justice, 19 November 2007, <www.ictj.org/images/content/7/5/752.pdf>; the observations of Juan Méndez in the amicus curiae brief submitted to the Colombian Constitutional Court on the Justice and Peace Act (Law 975) on 17 January 2007, analyzing the requirements of transitional justice on the basis of various experiences. <www.ictj.org/en/news/press/release/767.html> last visited 10 July 2025.

⁸ The PopulationData.net Centre lists two studies by the International Rescue Committee dated April 2003 and December 2004 on the number of war casualties in the DRC at the end of the 1990s. The first reports 3.3 million dead and the second 3.8 million. Available at www.populationdata.net/humanitaire/guerre_bilan_rdc2004.html (last visited 10 July 2025).



As demonstrated by the Second International Conference on Disarmament, Demobilization and Reintegration (DDR) and Stability in Africa, held in Kinshasa from 12 to 14 June 2007, the lack of progress made by transitional justice in the DRC can be explained in the terms of the priority given to the DDR process.⁹ In order to disarm, demobilize and reintegrate the 330,000 or so fighters involved in the conflicts, it proved necessary not only to give warlords guarantees of impunity but also to reintegrate (and even promote) them so that they would encourage their troops to disarm. Furthermore, the "mixing that is going on has by no means broken down all the tribal loyalties of the reintegrated soldiers."¹⁰

Against such a background, DDR operations not only fail to serve transitional justice (because there is a deliberate policy of not passing on information obtained so as to allow the violations committed to be investigated), they constitute a twofold obstacle.

First, they do not allow justice - of any kind- to deal with cases arising from the past and, second, they create a deep sense of injustice among the victims, who see that the international community not only guarantees that the perpetrators go unpunished but devotes vast amounts of money to reintegrating the main human rights violators by allowing them to take up high-level positions within the public security forces, even as these are being reorganized; at the same time, they are forced to recognize that this same international community is not in a position to provide the victims with adequate compensation. The purpose of this paper here is not to deny military necessities. DDR operations in the aftermath of wars such as those which ravaged the DRC in the 1990s are necessary and extremely complex. Without them, conflict would rage on for decades and would eventually jeopardize the state's very existence and its ability to Perform its most fundamental roles, which is what we are currently witnessing in Somalia. The question is rather whether transitional justice really offers an alternative in a context of this kind.

A still more gloomy picture can be painted in the case of Burundi. Despite several genocides (1966-1972 and 1993), as documented for instance in the report drawn up by B. Whitaker for

⁹ "DDR and Transitional Justice", issue paper, Second International Conference on DDR and Stability in Africa, Kinshasa, Democratic Republic of the Congo, 12-14 June 2007, UN/ISAA and the Government of the Republic of the Congo.

¹⁰*Ibid.*



the Sub-Commission on Human Rights (1984),¹¹ those of the Special Rapporteur on Burundi¹² and the documents of the UN Council¹³ the transition towards a return to peace (if not to normality) has not been accompanied by any efforts to achieve justice, be it retributive or restorative for these extremely grave violations.¹⁴

In neighboring Rwanda, however, under pressure from public opinion. The 1994 genocide was not only recognized by the United Nations and the African system, but prompted the establishment of an ad hoc tribunal with the mandate to bring to trial those responsible for the massacres and other serious violations perpetrated in this context. Moreover, Rwandan justice also made use of local traditional courts to try those who had taken part in the genocide either at close range or at a distance. It is a pity that the United Nations did not decide to deal with the Burundi and Rwanda situations as a whole within the framework of the same proceedings. One outbreak of genocide can in no way justify another, and the Tutsi victims massacred by the Hutus in Rwanda must not be weighed against the Hutu victims massacred by the Tutsis. But when instances of genocide occur in two neighboring countries, apparently with very similar if not identical causes, it is shocking to see one being given the attention it deserves whilst the others are simply ignored. This difference in treatment by international community

¹¹ Whitaker Report, Revised and updated report on the question of the prevention and punishment of the crime of genocide, United Nations Economic and Social Council, Commission on Human Rights, Sub- Commission on the Prevention of Discrimination and Protection of Minorities, Thirty-eighth session item 4 of the provisional agenda, <UNDoc.E/CN.4/Sub.2/1985/6-2> Accessed July 1985.

¹² Paulo Sergio Pinheiro, Special Rapporteur on Burundi, described the situation in Burundi in 1995 as genocide. <UNDoc. E/CN.4/1996/ 16/Add.1> Accessed 27 February 1996.

¹³ The Security Council set up a Preparatory Fact-finding Mission (Report UN Doc. S/1995/157, 20 May 1994); a Mission (Report UN Doc. S/1995/163 of 9 March 1995) and an International Commission of Enquiry (Report UN Doc. S/1996/682). In its conclusions, the Commission of Enquiry considered that the evidence was sufficient to establish that acts of genocide against the Tutsi minority had taken place in Burundi. It also considered that the evidence showed that indiscriminate killing of Hutu men, women and children had been carried out by members of the Burundian army and gendarmerie, and by Tutsi civilians. It found that, although no evidence was obtained to indicate that the repression was centrally planned or ordered, it was an established fact that no effort was made by the military authorities at any level of command to prevent, stop, investigate or punish such acts. In its final report, the International Commission of Inquiry on Human Rights Violations in Burundi since 21 October, commissioned by a number of humanitarian organizations (Human Rights Watch/Africa Watch (New York, Washington) the Fédération Internationale des Droits de l'Homme (FIDH, Paris), La Ligue des Droits de la Personne dans la Région des Grands lacs (LDGL Kigali), L'Organisation Mondiale contre la Torture (OMCT/SOS Torture, Geneva), Le Centre National pour la Coopération au Développement (Brussels) and NOVIB (Amsterdam)), drew markedly more serious conclusions as to the role of the Burundi army and gendarmerie, which were essentially made up of Tutsis.

¹⁴ In "The International Criminal Tribunal for Rwanda: justice betrayed", Montreal, October 1995, John Philpot, associate secretary-general of the American Association of Jurists, denounced the limitations that prevented the tribunal from delivering justice worthy of the name in the wider context of the conflict.



cannot be explained either by the scale of the massacres or their nature. It must be ascribed mainly to geopolitical considerations which led certain power, in particular the United States, to advocate that the Rwandan genocide should be dealt with but that at the same time neither the genocide in Burundi nor the crimes committed by Kagame's army should be examined.¹⁵ This discriminatory treatment can only lead to fresh tension in the region. Despite all the imperfections of the Arusha tribunal and the *gacaca* courts, it might be considered that an initiative for justice has been made in Rwanda which should help the transition towards a society with greater respect for law. However, the neglect of the situation in Burundi can only reinforce the impression of the country's Hutu victims that the violations committed against them are not perceived by the international community as being as serious as those suffered by the Tutsis in Rwanda.

In Cambodia the genocide,¹⁶ referred to by some as an “auto-genocide”,¹⁷ carried out between 1975 and the end of 1978 by the Khmers Rouges ended only with the intervention of Vietnam in December 1978. The figures generally accepted put the number of dead in the massacres at a third of the population. The question of justice was forgotten for various reasons.

The United States, China and their allies allowed the Pol Pot regime to survive artificially for fourteen years on the pretext that a change of regime brought about by foreign intervention was unacceptable. This made any international action impossible. The international community paid no attention to the depredations documented within Democratic Kampuchea, because during all that time it was the Khmer Rouge ambassador who sat in the United Nations condemned the violations committed by the Vietnamese invader.¹⁸ In 1979 the Human Rights Commission refused to get involved in the matter of massive violations perpetrated by the

¹⁵ Florence Hartmann, spokesperson for Carla del Ponte at the International Criminal Tribunal for the former Yugoslavia from 2000 to 2006, in *Paix et Châtiment, Les guerres secrètes de la politique et de la justice internationale*, Flammarion, Paris, 2007, unveils the role played by the United States in ousting the Prosecutor in August 2003.

¹⁶ As regards the definition of genocide, it is noted that, although the relevant articles of the Convention make it possible to establish fairly precisely what constitutes genocide and which situations do not fulfill the legal definition, in practice recognition of genocide more frequently depends on political factors.

¹⁷ In Gerard Chaliand and Jean Lacouture, *Voyage dans le demi-siècle: Entretiens croisés avec André Versaille*, Editions Complexe Bruxelles, Paris, 2001, Lacouture confirms that he was the first use this concept but he stresses its inherent ambiguities. The term was borrowed by Elisabeth Beeker for the title of her work *Les larmes du Cambodge, l'histoire d'un autogénocide*, Presse de la Cité, Paris, 1988.

¹⁸ Raoul-Marc Jennar, Cambodia: Khmer Rouge in court", *Le Monde diplomatique*, Archives, October 2006, available at <http://mondediplo.com/2006/10/11/Cambodia> (last visited 10 July 2025).



Khmers Rouges¹⁹ and for more than a decade national institutions systematically refused to bring to trial those responsible for the genocide. Subsequently, peace negotiations opened in 1989 aimed to include the Khmers Rouges in the talks, which clearly would exclude any reference to crimes they had committed against humanity. Not until the Paris Agreement was in 1991 was any reference made to the politics and practices of the past.

Other hand, two attempts to bring cases for atrocities committed during the Pol Pot era have run into difficulties which have so far not been overcome.²⁰ The people's revolutionary tribunal which tried Pol Pot and Ieng Sary in 1979²¹ was not accepted or recognized by the people of Cambodia, who perceived it as a system of justice imposed by the Vietnamese liberator/invader.

In 2003 the United Nations and the government of Cambodia decided to schedule a trial for 2007. The plan was to set up a tribunal consisting of seventeen Cambodians and eight international members.²² Their brief is to try breaches of Cambodian criminal law and violations of human rights and humanitarian law.²³ There is a risk that the judgment will concern only the last survivors, since the chief culprits, including Pol Pot, are dead. Only five accused have been arrested. Although they bear enormous responsibility, they are only a handful out of the many responsible for the atrocities committed and will be answering for crimes committed over thirty years ago. The small number of persons accused and the fact that they will be tried for crimes committed against victims from the previous generation are two factors that run counter to the avowed aims of transitional justice, which sets out to deal with the legacies of the past in full and as promptly as possible.

These few cases would tend to indicate that transitional justice, like its "ordinary" counterpart, does not provide a suitable response to all post-conflict situations and also that it is paralyzed by obstacles associated with the both the domestic situation and the international context. We

¹⁹Report of the UN Human Rights Commission's 35th Session.

²⁰ Centre de droit international de l'Université de Bruxelles, 'intervention du Vietnam au Kampuchéa en 1978-1979', for a compilation of the positions of states.

<www.ulb.ac.be/droit/cdi/Site/Vietnam%20Kampuchea%201978-1979.html> Accessed 10 July 2025.

²¹<<http://droit.francofonie.org/df-web/publication.do?publicationId=4278>> 10 July 2025.

²²34th Session of the UN General Assembly, UN Doc.A/34/491> 10 July 2025; Trial Watch Saloth Sar, <www.trial-ch.org/de/trial-watch/profill_db/facts/saloth_sar_659.html> Accessed 10 July 2025.

²³"Law on the establishment of extraordinary chambers in the courts of Cambodia for the prosecution of crimes committed during the period of democratic Kampuchea", <www.derechos.org/human-rights/seasia/doc/krlaw.html> Accessed 10 July 2025.



may therefore question its suitability when it implies substantial derogations from certain principles of international law, particularly in connection with measures of punitive justice. The judgments delivered in a transitional justice system have the same force as those handed down by "classical" courts according to classical" laws. The principle of *ne bis in idem* or the application of the most favourable criminal law could therefore be relied on by their beneficiaries.

3. TRANSITIONAL JUSTICE OR TRANSITIONAL POLICY?

According to Mark Freeman, transitional justice focuses on the question of how societies in transition from authoritarian rule to democracy, or from war to peace, address a history of massive human rights abuse. It is concerned primarily with gross human rights violations understood as torture, summary executions, forced disappearances, slavery, and prolonged arbitrary detention, as well as certain international crimes, including genocide, crimes against humanity and serious violation of the laws and customs applicable in armed conflicts, whether of a national or international character.²⁴

The author lists a number of characteristics which distinguish traditional justice as a "*distinct field*" (emphasis added). They include: transitional justice focuses on legacies of past human rights crimes. While the main approaches to transitional justice have important forward-looking aims such as building trust between and among victims, citizens and institutions, these mechanisms are primarily concerned with accountability for human rights crimes committed in the past; transitional justice does not call for retroactive justice at any cost. There is an understanding that in transitional societies the demand for transitional justice be balanced with the need for peace, democracy, equitable development and the rule of law. Others are; the different measures of transitional justice are not meant to be implemented in isolation but to complement each other; and transitional justice prioritizes a victim-based approach. Mark Freeman states, "The legitimacy of transitional justice mechanisms is measured by the extent to which victims oppose or support them, and the degree to which they are able to participate in and benefit from them."²⁵ First, it would appear that among the four characteristics

²⁴ M Freeman, "What is Transitional Justice?", International Center for Transitional Justice, 2003, no published - quoted in DDR and Transitional Justice, issue paper, Second International Conference on DDR and Stability in Africa, Kinshasa, Democratic Republic of the Congo, 12-14 June 2007, <UN/ISAA>.

²⁵ (n 24).



distinguishing transitional justice as a distinct field, only the second and fourth introduce any specific new elements.

The first characteristic - the fact that transitional justice focuses on violations of human rights committed at a time when the mechanisms which would dispense justice under the rule of law were either paralyzed or non-existent - is in fact a piece of information with no specific content. At least since Nuremberg, justice that cannot be dispensed at a given moment is deferred until things return to normal or until it is possible to give a ruling on the basis of the law which was already in existence, in particular international customary law.

The third characteristic poses the principle of holistic justice, which is not in itself an original idea, since injustice cannot be content merely to punish, with no attempt to redress the situation, return to the status quo ante or compensate the victims and restore institutions. Points 2 and 4, on the other hand, introduce variables which might fall within the order of justice or might be considered as arising from purely political imperatives.

The contention that transitional justice does not argue for retroactive justice is on the face of it a source of confusion. It is not a question of the retroactive implementation of a law enacted after the crime was committed which would be incompatible with the principle of legality of sanctions – but rather of the implementation, when it becomes possible, of the law that was in existence before the crime was committed.

4. VIOLATIONS OF THE MOST FUNDAMENTAL RIGHTS

The scope of transitional justice is limited to "gross" violations of human right and certain international crimes such as genocide, crimes against humanity and grave breaches of the laws and customs of war. It therefore focuses essentially on a category of crimes which, according to the International Law Commission, "assailed sacred principles of civilization and, as it were, fell under *jus cogens*".²⁶ This rules out the possibility of any rule, national or international, under which the impugned practice would be defined as non-criminal.

²⁶ Extract from the Yearbook of the International Law Commission, 1983, Vol. I, Summary 1755th meeting A/CN.4/SR.1755.



Moreover, since the adoption of the Rome Statute setting up the International Criminal Court, the crimes concerned all fall under the jurisdiction of that court.²⁷ The definition of these crimes is to be found in Articles 67 and 8, and the penalties incurred are set out in Articles 77 and 78. The establishment of the International Criminal Court was rightly perceived as a major step forward in terms of international justice and as a new weapon in the fight to end impunity in order to protect the rule of law. However, in his second point, Mark Freeman Suggests that the demand for transitional justice must be balanced with the need for peace, democracy, equitable development and the rule of law."

This idea of balance seems to me particularly dangerous to the extent that makes an act of justice conditional on political imperatives. It will doubtless be very places where societies and those who compose them are incapable of achieving peace and democracy. Is pointed out that, in practice, impunity is rife in those very it not logical, then, to foster the establishment of conditions that will allow a return to the rule of law, at the risk of failing to punish the crimes of the past, putting off their punishment till a later date or limiting the penalties inflicted on the perpetrators? In political terms, the reasoning is perfectly acceptable, but can it be considered an element of justice, whatever name we use to describe it?

The fourth criterion seems to take care of this objection by affirming that the legitimacy of transitional justice mechanisms is to be measured in terms of their acceptance by the victims, the more So Since this criterion is to be combined with the third, which refers to complementary measures as part of a holistic approach. One can therefore imagine that measures combining punitive and restorative justice while ensuring that those aims are balanced against the need for peace and democracy would be legitimate provided that they enjoyed a degree of acceptance on the part of the victims. Is reconciliation between tormentors and victims, which may desirable but is rarely attained in reality, a matter of justice in the strict sense? How far can we go in balancing the two forms of justice and can we countenance amnesty measures in some circumstances where the victims are in agreement?

5. CONDITIONAL AMNESTY - ON WHAT CONDITIONS?

So far, South Africa is the country where the victims have been most willing to accept the need to limit punitive justice and to accept amnesties. The pre-1994 apartheid regime was based on

²⁷Rome Statute of International Criminal Court, 1st July, 2002 (Last Amended 2010), art 5.



a system of institutionalized racism which, although it was far from unique in history, had started to become intolerable, not only for the country's black community but also for a growing portion of South Africa's white minority and the international community. In November 1973 the international community adopted an international convention outlawing apartheid and providing for its punishment.²⁸ Article II of this Convention defines the crime of apartheid and Article I states that it is a crime against humanity.

Following years during which they refused to countenance reform and perpetrated acts of repression entailing the worst violations of human rights, the extremist white minority, under pressure on both the national and international fronts, finally made a U-turn and invited the leaders of the black majority to take part in a transition towards a system based on equality among citizens."²⁹ That process led to the election of a president from among the black majority. In that case, the term transition referred not to a slow and gradual process of change, but rather to the manner in which powers were transferred and to the way in which the new authorities assumed those powers to keep the country unified.

In fact, once the white majority agreed to share power with the black minority, the cause of the conflict disappeared. A new social order in which all were recognized as equal was set up immediately. The question in that case was how to dispense justice, that is, how to punish serious human rights violations of the past whilst conserving the major institutional *acquis* represented by an end to apartheid and without causing widespread conflict.

The South African authorities favoured a system of restorative justice placing the emphasis on finding the truth and granting total or partial amnesties to offenders who co-operated with that quest for truth. However, these amnesties, the aim of which was to avoid a bloody confrontation, were the results of bargaining process. The victims generally had no way of finding out what become of their family members other than through the confessions and cooperation of those responsible for their fate. Faced with the choice of never knowing or accepting that the perpetrator would go unpunished, many placed his value on truth than

²⁸ International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted and opened for signature, ratification by General Assembly Resolution 3068 (XXVIII) of 30 November 1973, entry into force 18 July 1976, in accordance with Article XV, <www.unhcr.ch/html/menu3/b/9.htm> Accessed 10 July 2025.

²⁹ Elise Colette, "Fin de l'apartheid", *Jeune Afrique*, 26 June 2005.



on punishment. This “choice” is an experience shared by many relatives of people who have disappeared: anything is preferable to the torment of uncertainty. In such cases the decision not to prosecute the perpetrator(s) is not so much a result of balancing the needs of justice against those involved in bringing about a reconciled society as a choice between Scylla and Charybdis.³⁰ Moreover, the remission of penalties and above all amnesties by no means won the approval of all the victims' families, and some, such as that of Steve Biko,³¹ held out in vain against arrangements of that kind.

From a legal point of view, there are two remarks to be made. First of all, these amnesties run counter to the principle of international law that there should be no amnesty for the most serious human rights violations, and in particular crimes against humanity, of which apartheid is one.

As in other countries, the concept of forgiveness has sometimes been put forward to justify the dropping of proceedings against a perpetrator on the grounds that the consent of the victim makes a solution of this kind acceptable. Forgiveness and reconciliation are powerful forces for reconstructing a society riven by conflict; they need to be facilitated within the framework of ad hoc commissions. But these commissions and their work cannot be a substitute for justice. As recalled by the Inter-American Commission on Human Rights³² and as pointed out by Louis Joinet in his Principles,³³ even forgiveness by a victim cannot exonerate the perpetrator. The damage done to the victims and society through Violation of the rules that protect fundamental rights gives rise to an obligation on the part of the state to prosecute and punish the perpetrator.

³⁰ In Homer's *Odyssey*, when passing through the straits of Messina Odysseus is forced to choose which monster to confront while passing through the strait: Scylla, who was a creature who dwelt in a rock, had six heads and ate people, or Charybdis, who had a single gaping mouth that sucked in huge quantities of water and belched them out, thus creating whirlpools. The phrase “between Scylla and Charybdis” has come to mean being in a state where one is between two dangers and moving away from one will cause you to be in danger from the other.

³¹ Leader of the anti-apartheid movement who died under torture on 12 September 1977.

³² Angelika Rettberg, *Entre el Perdón y el Paredón: Preguntas y Dilemas de la Justicia Transicional*, Universidad de los Andes, Bogotá, 2005, available at www.idrc.ca/openbooks/190-6/ (last visited 10 July 2025). See also Pronunciamentos OACNUDH-UNHCHR Ponencia del Director 2004-02-10, “Derechos humanos: la verdad, a la justicia y a la reparación integral en caso de graves violaciones a los Derechos humanos” <www.hchr.org.co/publico/pronunciamentos/ponencias/po0435.pdf> Accessed 10 July 2025.

³³ In two annexes to his final report *L'administration de la justice et les droits de l'homme des détenus: Question de l'immunité des auteurs des violations des droits de l'homme (civils et politiques)*, <UNDoc.E/CN4/Sub.2/1997/20/Rev.1> Accessed 2 October 1997.



Transitional justice theorists do concede that these two parallel sets of measures belong to different spheres, but when they claim that they balance two imperatives as part of a justice system with a new dimension, they weaken the very of justice even though they do facilitate the transition process. We could therefore speak rather of transitional "policies" and make it clear that, through these measures, we are attempting to guarantee a minimum level of justice in dealing with past violations. What sorts of punishment are appropriate during the transition process? Several solutions have been put forward: a sequential solution; a system that restricts itself to vouchsafing the truth and compensating victims; a conviction on lesser charges under a special law; and a conviction followed by remission measures.

6. JUSTICE "DEFERRED"

In Argentina, the dictatorship (1976-82) imposed an extreme nationalist and fascist system after eliminating representatives of the forces of the left and democratic organizations by means of assassination and forced disappearance. Also subject to international pressure, but above all faced with economic difficulties which it could not resolve, the junta tried to mobilize public opinion in a great "national cause" - the recovery of the Falkland (Malvinas) Islands, which were under British rule. Severely defeated, those responsible for the policy which led to the conflict lost all credibility. Dissent broke out even among the armed forces, who found themselves constrained to hand over power to a civilian government.³⁴

Successive democratic governments have tried to limit the role of the armed forces in order to provide a better foundation for democratic structures whilst avoiding a head-on confrontation. In 1985, following the military defeat, the junta was put on trial and the chief members were sentenced³⁵, but over the next two years the Full Stop Law in 1986 and the Due Obedience

³⁴ Zeisler, N., "La guerre des Malouines dans la société argentine depuis 1983 jusqu'à nos jours: EPIcentre - études politiques internationales," <http://etudespolitiquesinternationales.blog-spot.com/2006/11/Ma-mmoire-des-malouines.html> (Accessed 10 July 2025).

³⁵ Once democracy was restored in 1983, indictments were brought against the main junta leaders for the crimes committed between

1976 and 1983. The Cámara Federal en lo Criminal y Correccional handed down Verdicts in 1985 which were subsequently confirmed by the Supreme Court, for example against Videla in 86. Following the presidential pardons bestowed by Carlos Menem, other charges were brought against some of these former leaders. For Videla see Causa Nro 33714, Videla Jorge R. s/ procesamiento", "Sentencia confirmando el procesamiento del General Jorge Rafael Videla en la causa Plan Cóndor", Buenos Aires, 23 May 2002, available at www.derechos.org/nizkor/arg/doc/videla2.html last visited 10 July 2008). For Galtieri see "Leopoldo Galtieri", Encyclopedia aRiKaH, <www.arikah.net/enciclopedia-espanola/> Leopoldo_Galtieri Accessed 10 July



Law in 1987 guaranteed impunity to those who committed the acts and those with intermediate responsibility.³⁶

As in South Africa, but operating in a different manner, the new Argentine authorities tried to consolidate the new regime, although the army, albeit weakened, still posed a serious threat. But, whereas South Africa favoured truth and restoration, Argentina placed the emphasis on sentencing and punishment but confined its attentions to the main perpetrators.

By adopting a system that guaranteed impunity for thousands of middle ranking officials by means of laws that could be revoked, Argentina appeared to be protecting the future. In August 2003 its parliament repealed the Full Stop and Due Obedience laws and in June 2005 the Supreme Court ruled that the amnesty laws, which had guaranteed impunity to a thousand or so military personnel guilty of serious human rights violations during the period of the dictatorship, were unconstitutional.³⁷

However, courts hearing cases brought by victims who want to see the perpetrators convicted and obtain redress for the injustices they themselves have suffered were confronted by a fresh, albeit somewhat less intractable obstacle in the form of reactions by the defendants. A real law of silence"was imposed on prisoners implicated in cases of mass violations by their fellow perpetrators, and witnesses and plaintiffs found themselves under serious threat. It is worth noting in this context that in September 2006 a former detainee from one of the junta camps, Jorge Julio López, disappeared the day after he gave evidence before the La Plata Court, and there is no news of him to this day.³⁸ Everything indicates that he was murdered by the people he had denounced. Actions brought by hundreds or victims come up against threats from former perpetrators, showing that even more than twenty-five years after the events it is still

2008. "Decisión de la Cámara en lo Criminal y Correccional Federal de la Argentina, en el proceso contra Massera y Otros", Expdte. 30514, Massera, s. Excepciones, J. 7/S. 13, Buenos Aires, 9 September 1999, available at <www.derechos.org/nizkor/arg/ley/massera.html> Accessed 10 July 2025.

³⁶ On the content of laws no. 23492 (Full Stop) and 23521 (Due Obedience), see José Balla "Leyes de Punto final y Obediencia Debida", <www.monografias.com/trabajos/puntofinal/puntof:-nal.shtml> Accessed 10 July 2025.

³⁷ "Les droits de l'homme", published by the Embassy of the Argentine Republic in France following the commemoration of the 30th anniversary of the Coup d'état, 24 March 2006 <www.ambassadeargentine.net/derechoshumanos.htm> Accessed 10 July 2025.

³⁸ OMCT urgent appeal ARG 260906 and press release of 3 October 2006 <www.omct.org/index.php?id=APP&lang=eng&articleSet=Press&articleId=6308&PHPSESSID=b784778ae05123c03c20844114f2de9> Accessed 10 July 2025).



problematical for them to reveal the whole truth and seek to have the guilty punished in the Argentina of 2007.

Despite these grave difficulties, the public in Argentina has been able to learn the truth, the victims have been - at least partially - compensated and the main perpetrators of violations have been tried and punished. Nevertheless, over the past twenty-five years successive democratic governments have been unable to reduce the influence of the middle-ranking officials from the time of the dictatorship, some of whom have managed to reinforce their positions within the state structure, thanks to laws which protected them until recently. The fact that many victims are now taking legal action against these perpetrators reveals dissatisfaction with impunity and the limits of a sequential system.

7. THE RIGHT TO TRUTH ON VIOLATIONS PERPETRATED BY PERSONS UNKNOWN

Morocco is an interesting example. Regarded as one of the most repressive regimes during the years of lead", the country is now held up as a 'champion' of human rights in the region.³⁹ Towards the end of his reign, King Hassan II realized that the repressive, authoritarian monarchical regime he had instituted during the 1960s could not survive for long. He therefore decided to open up the political arena by appointing as prime minister a man sentenced to death in his absence by that regime, and making provision for victims to obtain compensation. A new policy, continued and enhanced under King Mohamed VI, led to the freeing of political prisoners and mediation by the Equity and Reconciliation Commission in the most serious cases.⁴⁰ That Commission made it possible to bring to light the situation of political prisoners

³⁹ The appointment of Abderrahmane Youssoufi, whose human rights record is uncontested, as prime minister of Morocco in 1998; the appointment of Driss Benzekri, a victim of the Years of Lead and a leader in the struggle for human rights, as chair of the advisory council on human rights; and the prominent role played by the Moroccan representatives, both in the UN Commission on Human Rights and in the UN General Assembly in the adoption of the 1998 Declaration on Human Rights Defenders, were perceived by the international community as signs of a major change. See statement by Rosalyn Higgins, President of the International Court of Justice, on 20 September 2007

<www.magharebia.com/cocoon/awi/xhtml1/en_GB/news/awi/newsbriefs/general/2007/09/21/newsbrief-03> Accessed 10 July 2025; Christine Daure-Serfaty, *Le Maroc vers les droits de l'homme à petits pas*, 9 December 2004, available at <www.yabiladi.com/article-politique-196.html> Accessed 10 July 2025).

⁴⁰ First report of the Moroccan advisory council on human rights (CCDH) under the UPR (Universal Periodic Review) procedure, <http://lib.ohchr.org/HRBodies/UPR/Documents/Session1/MA/CCDH_MAR_UPR_SI_2008ConseilConsultatif desDroitsdelHomm e_urpsubmission.pdf> Accessed 10 July 2025.



and the suffering endured during the harshest years of King Hassan II's repressive regime. Thus it performed one of the essential functions of restorative justice, which is to allow the community to see what has happened and the victims to give evidence about the reasons for their struggle and the repression suffered (right to truth). It also opened up the possibility of compensating victims for the violations perpetrated on them.

On the other hand, there was no real questioning of the perpetrators' role and, above all, those mainly responsible have still not been punished, contrary to the Principle that those who have committed serious crimes should pay for their actions.

Morocco now faces a twofold challenge. First, as regards the transition itself, it was not the intention of the monarchy to introduce a democratic system in the western sense of the term, but to strengthen a modernized and enlightened monarchy. In that system, the king not only remains the main source of power but is regarded as holy (Commander of the Believers) and, as the courts brutally reminded us in summer 2007, any criticism of the king's statements in the press may result in long prison sentences for the journalists concerned.⁴¹ In other words the aim of the transition is to grant human rights to the population whilst maintaining the royal prerogatives which are still the cornerstone of the system. In the context of Morocco, the fact that the transition was of the top-down variety and that it was aimed at modernizing a monarchical system whilst preserving the basic elements of the previous regime largely explains the limited extent to which justice has been brought to bear on the legacy of the past.⁴² Similar observations may be made about Bahrain, another monarchy in which a transition has provided an opportunity to modernize the state by introducing from the top down' a whole range of legislative innovations supposed to guarantee human rights, but where political parties remain outlawed and those responsible for depredations go unpunished.

In Chile, the dictatorship of General Pinochet set up following the 1973 coup d'état was obliged to undergo a gradual transformation under pressure from international quarters and national public opinion. Greater independence was given to the courts and more open elections were

⁴¹ 'Two journalists on the weekly *Nichane* were in January 2007 sentenced to three years in prison for insulting Islam' <www.algerie-dz.com/article7825.html> Accessed 10 July 2008; 'One journalist from *Al Watal Al An* was sentenced to eight months in prison and another to a six-month suspended sentence in August 2007' <http://tempsreel.nouvelobs.com/actualites/medias/20070815.OBS0676/prison_ferme_pour_un_journaliste_marocain.html> 10 July 2025.

⁴² Pierre Hazan, "The Nature Of Sanctions: The Case Of Morocco's Equity and Reconciliation Commission"



able to take place. The dictatorship took great care as did the Franco dictatorship in Spain in its time - to guarantee impunity for the main leaders as far as possible and to keep the opposition in check.

In 1978 an auto-amnesty law guaranteed protection from prosecution to those who carried out the coup d'état and those responsible for subsequent outrages.⁴³ In 1985 an agreement on greater democracy was concluded between the junta led by General Pinochet and some of the parties now tolerated.⁴⁴ The 1980 constitution allowed a limited degree of democracy and electoral freedom, and above all ensured that General Pinochet and the other members of his junta retained control of the process. The 1988 plebiscite that brought Pinochet's presidential mandate to an end took place against that background.⁴⁵ In 1991 a truth and reconciliation commission set up to investigate the fate Of victims over the period from 1973 to 1990 was able to begin its work.⁴⁶ It established 3,197 cases, a figure clearly much lower than the real scale of repression.

In 1994 the Reparations and Reconciliation Commission decided that compensation should be paid to 2,115 families. However, the recognition of violations suffered by victims and the award of compensation did not entail prosecution of the perpetrators.⁴⁷ The UN Human Rights Committee at its March 2007 meeting welcomed the process of institutional restoration begun in Chile. It nevertheless expressed concern that a decree-law that continued to provide total

⁴³<www.derechos.org/nizkor/chile/doc/amnistia.html> 10 July 202; Amnesty International on the case of Carmelo Soria Espinoza

<www.derechos.org/nizkor/chile/soria2.html> Accessed 10 July 2025). For the case of Luis Alfredo Almonacid, see "Corte Interamericana condena vigencia de Ley de Amnistía en Chile, <www.memorando.com/noticias/101-200/158.html> Accessed

10 July 2025; Communication No 746/1997 against Chile of 4 August 1999 to the UN Human Rights Committee, <[www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.66.D.746.1997.En](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.66.D.746.1997.En)> Accessed 10 July 2025.

⁴⁴Text of August 1985 Acuerdo Nacional para la transición a la plena democracia", <http://es.wikisource.org/wiki/Acuerdo_Nacional_para_la_transici9%C3%B3n_a_la_plena_democracia> Accessed 10 July 2025.

⁴⁵Constitución Política de la República de Chile', Instituto de derecho público comparado Universidad Carlos II de Madrid.

⁴⁶ "Comisión nacional de Verdad y Reconciliation" established by President Patricio Aylwin on 24 April 1990 by Decreto Supremo No. 355'. Report available at www.usip.org/library/truth.html4Chile (last visited 10 July 2025).

⁴⁷ Linea Cronológica del Programa: De la Comisión Nacional de Verdad y Reconciliación al programa de Derechos Humanos",

Ministerio de Interior Chile, available at www.ddhh.gov.cl/historia_programa.html (last visited 10 July 2025), Report of the National Truth and Reconciliation Commission referred to in the above document.



amnesty for those who committed violations between 11 September 1973 and 10 March 1978 had been kept in place, contrary to the provisions of the International Covenant on Civil and Political Rights.⁴⁸

In 1998, with a view to his retirement, General Pinochet had himself appointed senator-for-life, thereby guaranteeing himself total immunity from prosecution until his death. The plan proved less than foolproof, however – not because of any reaction by the opposition but thanks to interventions at international level, including that of Spain's Judge *Baltasar Garzón*. It was not until 2005, thirty-two years after the coup that overthrew President Salvador Allende, that a constitutional reform approved by the parliament swept away the remaining authoritarian elements inherited from the Pinochet dictatorship, marking the final act of the transition to democracy. The transition lasted two decades, from 1985 to 2005, and ended with the emergence of a democratic regime that showed greater respect for human rights. However, in terms of truth, compensation for victims and most of all, punishment for perpetrators of violations, the process remained highly constrained by the limits put in place by the general's regime.

8. NEGOTIATED PENALTIES OR GUARANTEES OF IMPUNITY

The process unfolding today in Colombia under the Justice and Peace Act is intended to bring about an end to hostilities between the government and organized groups operating outside the law. The rebels are invited to lay down their arms and help to restore the rule of law. The law provides for reduced penalties for crimes linked to political ends. This raises a great many questions.⁴⁹

Under this law, in contrast to its South African counterpart, the members of organized groups operating beyond the law are not threatened with losing the advantages they obtain under its provisions even if they do not co-operate fully and honestly by confessing all the crimes they have committed and passing on information in their possession. On the contrary, the law

⁴⁸ Concluding observations of the Human Rights Committee: Chile 18/05/2007, Eighty-ninths session 12-30 March 2007, CCPR/C/CHL/CO/5.

⁴⁹ Human Rights. Bogotá. 27 June 2005, available at www.hchr.org.co/ (last visited 10 July 2025). Up-to-date documentation on the impugned legal instruments is also to be found on the site Of the Colombian Commission of Jurists "Documentos acerca del marco jurídico sobre desmovilización e impunidad en Colombia", <www.coljuristas.org/justicia.htm> Accessed 10 July 2025).



stipulates that if a perpetrator "forgets a crime - even one as Serious as a massacre – the maximum increase in the sentence initially imposed will be 20 per cent.

Moreover, as pointed out by Jaime Araújo Rentería, a judge of the Supreme Court of Colombia, the alternative penalty reserved for armed the groups under the Justice and Peace Act for crimes such as genocide, genocide by multiple homicide, justifying genocide, homicide and aggravated homicide is between five and eight years, whereas for these same crimes, depending on how they are categorized, the penal code provides for sentences of between eight and fifty years. As common crimes committed for political ends are covered by the law, a drug trafficker who could be sentenced to fifty years' imprisonment for torture, murder and massacres has every interest in declaring himself to be a narco-paramilitary, as "Don Berna" did in Medellin, in order to take advantage of the maximum sentence or eight years stipulated for the same type of crimes under the Justice and Peace Act.⁵⁰

That would explain some statistical curiosities. First of all, when the paramilitaries were demobilized, the official figures indicated that 35,000 paramilitaries, over 10,000 of them bearing arms, had asked to benefit from the Act. However, it should be pointed out that the paramilitaries continue to operate on practically all the territory they occupied prior to its enactment.

On the face of it, it is a little difficult to explain such continued control territory, since according to the figures published by the armed forces prior to demobilization of the paramilitaries; the number was some 15,000 men. It was established that some of those demobilized "had never in fact been mobilized but had enlisted in order to of the law."⁵¹ Furthermore, many of those demobilized were either reincorporated into other groups or are continuing to lead their troops covertly. The Act has therefore had little effect on to be able to take advantage the military operations of the outlaw groups.

⁵⁰ Jaime Araújo Rentería, "Loi Justice et Paix' et driot des victimes: l'expérience colombienne", *Mouvement* 2008/1, No. 53, 88-94.

⁵¹ Report by Human Rights Watch "Las apariencias engañan: La desmovilización de grupos paramilitares en Colombia", August

2005, Vol. 17 (3) (B); Colombian Armed Forces to the *Diario Occidente* of 11 March 2006, *Fuerza Aérea Colombiana: concluye proceso de desmovilación de 26,000 paramilitares*, available at www.fac.mil.co/index.php?idcategoria=8374&facmil2007=689fbb5ae2017760f8ef647ed40aaba (last visited 10 July 2025).



The Act has also had another unwanted side-effect. Over the P past two decades, thousands of farmers have been massacred and, according to the figures of farmers' organizations, some three million of them have been forced to leave their lands.⁵² According to the same sources, over half of the displaced were small to the same sources, landholders. Jaime Araújo Rentería estimates the amount of land stolen from People forced to flee at some four million hectares.

53

Most of the victims will never be able to recover their property. Those who have appropriated that land by purchasing it through straw men or by taking advantage of laws on possession or laws intended to stamp out illegal crops are making enormous profits. In practice, a real agrarian reform in reverse is under way, favouring the growing of palm trees for the multinationals as opposed to the traditional food-producing agriculture. The Act, which provides for a very meagre compensation fund that will not allow dispossessed families to recover their former way of life, is helping to propel the sector into poverty. Colombia illustrates how difficult it is to address criminal violations of civil and political rights in isolation from the economic and social crimes with which they are closely bound up.

9. CONVICTION AND/OR PUNISHMENT

Louis Joinet formulated one way in which transitional justice could combine the demands of the fight against impunity with reconciliation and the consolidation of a process aimed at ensuring full respect for rights. At a colloquium held in Santiago de Chile in 1996, he presented a report entitled "Set of principles for the Protection and promotion of human rights through action to combat impunity": In which he suggested that a distinction be made between the amnesties Pronounced before any trial and sentencing could take place and those granted at the end of a process that has led to the conviction of a perpetrator.⁵⁴

⁵² "Solidaridad mundial con las víctimas de los crímenes de Estado y del paramilitarismo en Colombia" Medellín, 6 March 2008, <<http://colombia.indymedia.org/news/2008/03/82561.php>> Accessed 10 July 2025.

⁵³ (n 43).

⁵⁴ When presenting his report (see above note 26), Louis Joinet raised the question of the compatibility of Any form of amnesty with international law. According to his analysis, reported by Benjamin Cuellar in His Address Amnesia or amnesty" in San Salvador in autumn 1995, amnesties organize a conspiracy of silence and prevent the victims from obtaining any form of reparation. A conviction followed by an amnesty has fewer unwanted effects. <http://dc.nria.fr/~maranget/volcans/06_96/amnesie.html (last visited 10 July 2025).



Amnesties that prevent persons suspected of violating fundamental human rights from being brought to trial are unlawful from the viewpoint of international law. However, according to Louis Joinet, an amnesty granted after Someone has been convicted, either to reduce the sentence or even to enable the convicted Person to avoid serving it altogether, could be not only acceptable but also favourable to the transition process. In some cases, the conviction itself stigmatizes the perpetrator and his or her acts sufficiently to satisfy the expectations of both Society at large and the victims themselves. The most important thing is that the law be spoken and a values-based order restored by means of a clear statement to the effect that the tormentor is a criminal and the One tormented is a victim. A judicial sentence satisfies the related demands for truth and rehabilitation. It is therefore possible to imagine post-conviction amnesty mechanisms.

In terms of principles, it is plain that a solution of this kind deserves credit for satisfying the twofold demands of transitional justice. However, some questions arise when it comes to putting it into practice. As we have seen in South Africa, the aim of amnesty measures is to get the perpetrator to co-operate as fully as possible so as to establish the truth about all violations, both those committed by that perpetrator and any others of which that person may have knowledge.

An amnesty declared after the perpetrator has been sentenced would not necessarily help to achieve those objectives in the same way. If the perpetrator has been tried for crimes, some of which he could not be convicted for because of insufficient evidence, he will have no incentive to help to establish a truth that could cost him further indictments. The principle would not cover crimes that had remained hidden, even if they were part of a series. There remains a possibility that a convicted criminal might denounce accomplices or other acts the or she may have become aware of, for example in an official capacity. There too, we may wonder whether someone in that position might not be more inclined to keep quiet to avoid any reprisals by those incriminated in the form of further accusations.

To avoid such problems, the convicted person would probably demand assurances that any new information he or she provided or any information provided by others incriminating him or her would not lead to a heavier sentence or any further indictments. This would give rise to precisely the kind of situation that the measures were intended to avoid, namely an amnesty



that protects a perpetrator from being tried and convicted in accordance with his or her deserts as the "price" of co-operation.

Practice in South Africa has shown that, even when they agree to operate, perpetrators of violations tend to disclose their own violations or if they are aware of gradually and often out of fear that one of their accomplices will speak first and provide fuller information on crimes they themselves wished to hide or minimize. Those who want to take advantage of an amnesty encouraged to be transparent, all the more so since they are assured of an amnesty or a pre-negotiated reduction in sentence in return. After conviction, however, it seems to me that the conditions are not the same and that, unless they are protected from the consequences should they confess crimes as yet undiscovered, people already convicted are likely to be more circumspect.

10. DEALING WITH VIOLATIONS SELECTIVELY

Transitional justice theorists tend to postulate a radical caesura between a before "life with the worst evils and an "after" free of the slightest defect. Far be it from me to defend dictatorships or become an apologist for conflicts, but it should be pointed out that, even though they may constitute remarkable improvements over situations of lawlessness, transitions rarely meet the needs of peace, democracy, fair development and the rule of law to which traditional justice avowedly aspires.

11. JUSTICE RESTRICTS ITSELF TO VIOLATIONS OF CIVIL AND POLITICAL RIGHTS

Thus, understood, transitional justice tolerates limitations on the ideal application of justice, particularly punitive Justice, inasmuch as it countenances derogations justified by the need to speed up the transition process. The philosophy implicit in this approach is based on the idea that democracy and peace - which allow society to be rebuilt and the community to be reunified – will guarantee a peaceful and more just way of life and that it is therefore legitimate to sacrifice the absolute application of certain principles in view of the anticipated gains.

This process is greatly tinged with ideology in that it envisions a model of democracy defined mainly from the point of view of freedom of expression for the citizens and respect for internationally recognized civil and political rights. This liberal approach overlooks the fact



that any conflict - whether it is an internal conflict or a conflict arising out of a dictatorship - sets in and smoulders on in a context marked by deteriorations in the social structure of the state that affect not only civil and political rights but economic, social and cultural ones as well.⁵⁵

Transitional justice claims to address the most serious crimes that form part of the legacy of the past situation, for example torture, summary executions, forced disappearances, slavery, arbitrary detention. Its approach considers the "core" of human rights, which it sees as restricted to civil and political rights. If we attempt to deal with the past in an exhaustive way, can we overlook massive Violations of economic, social and cultural rights such as denial of shelter, food or Land? This is all the more paradoxical since transitional justice aspires not only to restore the *status quo ante* but to create the conditions necessary to the emergence of a peaceful society under the rule of law.

This being so, would it not be appropriate to take into account violations of economic, social and cultural rights perpetrated or aggravated during the conflict period, such as we have witnessed in South Africa or Colombia? There and n to be all the more justification for doing so since the violations of civil and political rights listed by Mark Freeman⁵⁶ are often combined with very serious violations of economic, social and cultural rights and, in some cases, failure to respect the latter creates fertile ground for violation of the former. Admittedly, it is more difficult to criminalize and punish violations of These rights, but precisely these violations often sow the seeds of conflict. If the aim is to bring about a real transition, surely it is necessary to address all serious human rights violations of the past. It will then become apparent that the roots of torture and forced disappearance are to be found in the social tensions generated by an unequal and unjust system and an inequitable sharing out of the fruits of production and by abusive appropriations and despoilment of entire communities. Can we punish the one without punishing the other? Is it because violations of economic, social and cultural rights are considered less serious that they are not included in the scope of transitional justice? How solid

⁵⁵ Thomas E. McCarthy (ed.), *Attacking the Root Causes of Torture: Poverty, Inequality and Violence*, preface by Louise Arbour,

OMCT, Geneva, 2005, available in book or electronic format <www.omct.org>

⁵⁶Freeman (n 24).



can reconciliation be when violations of social and economic rights are glossed over and the future is organized on a basis that perpetuates or even aggravates those violations?

It may be objected, as mentioned earlier, that judicial mechanisms that could punish violations of economic, social and cultural rights are embryonic stage and that it would therefore be appropriate to develop further the implementation mechanisms for civil and political rights for which there already are more precise and effective instruments. Although I would not deny the validity of this objection, I would point out that, while it purports to define a new domain, transitional justice seeks to operate within the framework of a combination measures aimed at protecting civil and political rights while totally ignoring social, economic and cultural rights, violations of which are not even referred to within that framework. Post-conflict and post-dictatorship situations often lead to deep seated frustrations as the citizens, while they may be relieved to be free of arbitrary rule, remain dissatisfied with the social model that emerges from the transition. In this connection, the situation in the countries of the former socialist bloc in Europe presents characteristics which it would be interesting to study in depth.

By the same token, while the South African transition in practice made it possible to apply the principle of "one man/one vote", it had practically no impact on the country's social structure, which was a legacy of colonialism. That social structure keeps the essential natural wealth of the country in white hands while the vast majority of black people continue to live in frequently unbearable conditions of poverty. Violence in South African society (the country has one of the highest urban crime rates in the world) is not regarded as a result of political discrimination, but it is certainly linked to social discrimination which was dealt with in the context of the transition. As a result, over and above the relative impunity granted to the perpetrators of crimes against civil and political rights, these societies have to post-transition situations in which the system of social injustices that led to the conflict in the first place is left intact.

There are two possible approaches. Given that it is impossible to punish all violations of fundamental rights for want of an appropriate system for punishing violations of economic, social and cultural rights, the first approach accepts the inevitability of applying the rules with a degree of flexibility that, logically enough, can call into question the very principles of criminal law in matters of civil and political rights too. The second approach premised on the view that impunity must be fought in all areas of fundamental rights if the law is not to lose its role as a common regulator of social conduct sets out to define avenues for bringing violations



of economic, social and cultural rights to justice and effective mechanisms for punishing as crimes violations of those rights.

12. CONCLUSION

Accountability for violations of the laws of armed conflict is a foundational pillar of transitional justice and a critical determinant of whether post-conflict societies move toward lasting peace or relapse into cycles of violence. This study has demonstrated that holding perpetrators individually responsible for grave breaches of international humanitarian law—through prosecutions, truth-seeking, reparations, and institutional reform—is not merely a legal obligation but a moral and political necessity. Without credible accountability, transitional justice becomes hollow, victims' rights remain unfulfilled, and impunity is entrenched as a structural feature of governance. The evolution of international and hybrid tribunals, the establishment of the International Criminal Court, and the proliferation of truth commissions all underscore the global recognition that large-scale atrocities require specialized accountability mechanisms. Yet, practical challenges—ranging from weak institutions and political interference to resource constraints and competing peace–justice priorities—continue to hinder the effective enforcement of LOAC norms. These challenges highlight the need for context-sensitive and complementary approaches rather than a one-size-fits-all model.

The analysis further shows that accountability must be conceived as part of a broader transitional justice strategy that harmonizes retributive and restorative mechanisms. Criminal trials alone cannot fully address the structural violence and social fractures left by armed conflict; similarly, truth-telling and reparations must be supported by genuine efforts to prosecute those responsible for serious violations. Hybrid accountability models, which integrate international standards with local ownership, offer a promising path—ensuring both legal rigor and societal legitimacy. Ultimately, sustainable peace requires more than political settlements; it requires justice that recognises victims, deters future violations, and rebuilds trust in state institutions. Ensuring accountability for LOAC violations affirms the principle that no actor—state or non-state—is above the law. Transitional justice, when properly aligned with accountability imperatives, becomes a transformative tool capable of reshaping post-conflict societies and preventing the recurrence of atrocity crimes.

