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SCSL-2003-07-PT
(2284-2366)

2284

SPECIAL COURT FOR SIERRA LEONE

APPEALS CHAMBER

Before: Judge Robertson, President
Judge King, Vice President
Judge Ayoola,
Judge Winter,

Registrar: Robin Vincent

Date: 30 October 2003

The Prosecutor Against: **Morris Kallon**

(Case No. SCSL-2003-07-PT)

ADDITIONAL AUTHORTITIES TO BE RELIED UPON BY DEFENDANT AT ORAL HEARING BEFORE APPEALS CHAMBER ON 3 NOVEMBER 2003

PRELIMINARY MOTION BASED ON LACK OF JURISDICTION/ABUSE OF PROCESS: AMNESTY PROVIDED BY LOME ACCORD

Office of the Prosecutor:

Desmond de Silva QC, Deputy Prosecutor
Luc Cote, Chief of Prosecution
Walter Marcus-Jones, Senior Appellate Counsel
Christopher Staker, Senior Appellate Counsel
Abdul Tejan-Cole, Appellate Counsel

Defence Counsel:

James Oury, Co-Counsel
Steven Powles, Co-Counsel
Melron Nicol-Wilson, Legal Assistant

Pursuant to Article 4 of the 'Practice Direction on Filing Documents Under Rule 72 of the Rules of Procedure and Evidence Before the Appeals Chamber of the Special Court for Sierra Leone' issued 22 September 2003, the Defence hereby provide copies of additional authorities to be relied upon in oral argument.

1. Article 6 Additional Protocol II to the Geneva Conventions of 12 August 1949.

2. ICRC Commentary to Article 6 of Additional Protocol II.

3. *AZAPO v President of the Republic of South Africa and Others* 1996 (4) SA 671

4. The Rome Statute of the International Criminal Court: A Commentary. Edited by Antonio Cassese, Paola Gaeta, and John Johns. pp 693 – 704.

5. *Dealing With Crimes of a Past Regime. Is Amnesty Still an Option*? 12 LJIL (1999) John Dugard.

6. *Prosecutor v Jean-Bosco Barayagwiza* Decision of ICTR Appeals Chamber. 3 November 1999.

Chairman: Jean PICTET

Hans-Peter GASSER · Sylvie-S. JUNOD ·
Claude PILLOUD† · Jean DE PREUX ·
Yves SANDOZ · Christophe SWINARSKI ·
Claude F. WENGER · Bruno ZIMMERMANN

(Protocol I)
Philippe EBERLIN *(Annex I)* ·
Sylvie-S. JUNOD *(Protocol II)*

with the collaboration of

Jean PICTET

—

Commentary on the Additional Protocols

of 8 June 1977 to the Geneva Conventions of 12 August 1949

—

Editors
Yves SANDOZ · Christophe SWINARSKI ·
Bruno ZIMMERMANN

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International Committee of the Red Cross

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Martinus Nijhoff Publishers

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Geneva 1987

Documentary references

Official Records

O.R. I. Part I, p. 193; Part III, p. 36 (Arts. 9-10). *O.R.* IV, pp. 30-36. *O.R.* VII, pp. 92-97, CDDH/SR.50, paras. 56-102; pp. 99-105, *id.*, Annex (Afghanistan, Holy See, Indonesia, Kenya, Nigeria, Saudi Arabia, Spain, Cameroon, Zaire). *O.R.* VIII, pp. 346-355, CDDH/I/SR.33, paras. 22-71; pp. 357-365, CDDH/I/SR.34; p. 443, CDDH/I.SR.41, para. 81. *O.R.* IX, pp. 297-302, CDDH/I.SR.63, paras. 40-75; p. 308, CDDH/I/SR.64, paras. 19-20; p. 310, para. 31; pp. 312-313, paras. 39-46; p. 314, para. 54; p. 315, para. 59; p. 318, paras. 73 and 79; p. 319, paras. 82 and 85; pp. 321-322, paras. 92 and 100; p. 323, para. 105. *O.R.* X, pp. 55-56, CDDH/219/Rev.1, paras. 176-178; pp. 107-108, CDDH/I/287/Rev.1; pp. 123-124, CDDH/234/Rev.1, paras. 49-52; pp. 130-133, paras. 84-95; pp. 143-151, CDDH/I/317/Rev.2 and CDDH/I/GT/88.

Other references

CE/5b, pp. 56-66. *CE 1971, Report*, pp. 46-47, paras. 253-265; pp. 58-59 (Arts. 14-18). *CE 1972, Basic Texts*, pp. 41-42 (Arts. 27-28). *CE 1972, Commentaries*, Part II, pp. 58-62. *CE 1972, Report*, vol. I, pp. 83-87, paras. 2.198-2.235; vol. II, p. 37, CE/COM II/24; p. 38, CE/COM II/31; p. 40, CE/COM II/39; pp. 41-43, CE/COM II/45, 48-50, 52-54 and 56; p. 49, CE/COM II/78. *Commentary Drafts*, pp. 140-143 (Arts. 9-10). *XXIInd Int. Conf. RC, Report*, p. 26, para. 80 (Arts. 9-10).

Commentary

General remarks

4597 The whole of Part II (*Humane treatment*) is aimed at ensuring respect for the elementary rights of the human person in non-international armed conflicts. Judicial guarantees play a particularly important role, since every human being is entitled to a fair and regular trial, whatever the circumstances;[1] the guarantees defined in this article refer to the two stages of the procedure: preliminary investigation and trial.[2] Just like common Article 3, Protocol II leaves intact the right of the established authorities to prosecute, try and convict members of the armed forces and civilians who may have committed an offence related to the armed conflict; however, such a situation often entails the suspension of constitutional guarantees, the promulgation of special laws and the creation of special jurisdictions. Article 6 lays down some principles of universal application which every responsibly organized body must, and can, respect.[3] It supplements and develops common Article 3, paragraph 1, sub-paragraph (1)(*d*), which prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples". This very general rule required clarification to strengthen the prohibition of summary justice and of convictions without trial, which it already covers. Article 6 reiterates the principles contained in the Third and Fourth Conventions,[4] and for the rest is largely based on the International Covenant on Civil and Political Rights,[5] particularly Article 15, from which no derogation is permitted, even in the case of a public emergency threatening the life of the nation. In Protocol I, Article 75 (*Fundamental guarantees*) contains rules with the same tenor.

[1] See *O.R.* VIII, pp. 346-355, CDDH/I/SR.33, paras. 22-71; pp. 357-365, CDDH/I/SR.34.

[2] The execution of penalties is not dealt with in this article – with the exception of the execution of the death penalty on pregnant women and mothers of young children, which is prohibited by para. 4.

Historical background

4598 The ICRC draft originally contained two articles: *Principles of penal law* and *Penal prosecutions*.[6] During the preliminary examination of those articles numerous amendments were submitted; a proposal to combine the two provisions in a single article was put forward,[7] and adopted as a starting point; this was the origin of the present Article 6.

Analysis of the article

Paragraph 1 – The scope of application

4599 This paragraph lays down the scope of application of the article by confining it to offences related to the armed conflict; these must be criminal offences and not merely administrative or disciplinary offences or procedures. *Ratione personae*, Article 6 is quite open and applies equally to civilians and combatants who have fallen in the power of the adverse party and who may be subject to penal prosecutions.

[3] Dissident armed forces and organized armed groups within the meaning of Article 1 of the Protocol, which are opposed to the government in power, must be able to apply the Protocol. See *supra*, p. 1353.

[4] See Arts. 86, 89-108 of the Third Convention and Arts. 64-78 of the Fourth Convention.

[5] Hereinafter referred to as the Covenant.

[6] Draft Arts. 9 and 10. It should be noted that the present heading of the article is incomplete, since it mentions only penal prosecutions, while the provision also lays down principles of penal law.

[7] *O.R.* IV, pp. 35-36, CDDH/I/262.

Paragraph 2 – The right to be tried by an independent and impartial court

Opening sentence

4600 The text repeats paragraph 1, sub-paragraph (1)(*d*) of common Article 3, with a slight modification. The term "regularly constituted court" is replaced by "a court offering the essential guarantees of independence and impartiality". In fact, some experts argued that it was unlikely that a court could be "regularly constituted" under national law by an insurgent party. Bearing these remarks in mind, the ICRC proposed an equivalent formula taken from Article 84 of the Third Convention,[8] which was accepted without opposition.

4601 This sentence reaffirms the principle that anyone accused of having committed an offence related to the conflict is entitled to a fair trial. This right can only be effective if the judgment is given by "a court offering the essential guarantees of independence and impartiality". Sub-paragraphs (*a*)-(*f*) provide a list of such essential guarantees; as indicated by the expression "in particular" at the head of the list, it is illustrative, only enumerating universally recognized standards.

Sub-paragraph (a) *– Right to information and defence*

4602 The ICRC draft simply provided for "a procedure affording the accused the necessary rights and means of defence".[9] That formula was clarified and developed following the proposal by a delegation, on which the present text is based.[10] The rules laid down here are very clear and do not give rise to any difficulties of interpretation: the accused must be informed as quickly as possible of the particulars of the offence alleged against him, and of his rights, and he must be in a position to exercise them and be afforded the rights and means of defence "before and during his trial", i.e., at every stage of the procedure. The right to be heard, and, if necessary, the right to call on the services of an interpreter, the right to call witnesses for the defence and produce evidence; these constitute the essential rights and means of defence.[11]

Sub-paragraph (b) *– The principle of individual responsibility*

4603 This sub-paragraph lays down the fundamental principle of individual responsibility; a corollary of this principle is that there can be no collective penal responsibility for acts committed by one or several members of a group. This principle is contained in every national legislation. It is already expressed in

[8] See *Commentary III*, pp. 411-412 (Art. 84); pp. 484-492 (Art. 105).
[9] See draft Art. 10, para. 1.
[10] See *O.R.* X, p. 145, CDDH/I/317/Rev.1. The amendment submitted during these deliberations is mentioned, but the text is not published in the Official Records as it was a working document.
[11] See *Commentary Drafts*, p. 142.

Article 33 of the Fourth Convention, where it is more elegantly worded as follows: "No protected person may be punished for an offence he or she has not personally committed".[12] The wording was modified to meet the requirement of uniformity between the texts in the different languages and, in this particular case, with the English terminology ("individual penal responsibility"). Article 75, paragraph 4(*b*), of Protocol I, lays down the same principle.

Sub-paragraph (c) *– The principle of non-retroactivity*

4604 This sub-paragraph sets out two aspects of the principle that penal law[13] should not be retroactively applied: *nullum crimen sine lege* and *nulla poena sine lege*. The ICRC draft was inspired by Articles 99 of the Third Convention, 67 of the Fourth Convention and 15, paragraph 1, of the Covenant.[14] The proposal to adopt this wording was put forward in an amendment which served as a basis for discussion.[15] There was a long debate, followed by a vote in Committee resulting in a large majority.[16] The wording of the Covenant was retained despite some problems of interpretation owing to the specific context of non-international armed conflict. This solution was adopted out of a concern to establish in Protocol II fundamental guarantees for the protection of human beings, which would be equivalent to those granted by the Covenant in the provisions from which no derogation may be made, even in time of public emergency threatening the life of the nation.[17] Article 15 of the Covenant is one of those articles. In fact, the relevance of including the principle on non-retroactivity was never contested, but the first sentence of the sub-paragraph, and in particular the words "under national or international law", were not considered by everyone to be very clear.

4605 The possible co-existence of two sorts of national legislation, namely, that of the State and that of the insurgents, makes the concept of national law rather complicated in this context.

4606 The Conference followed the Covenant, though there was no real explanation given as regards the meaning to be attributed to the term "national law", which appears in the French text though not in the English text of this sub-paragraph (as the reference to "le droit national ou international" in French has been abbreviated to "the law" in English, the following comments apply more particularly to the French text, although clearly "the law" referred to in the English text does include national law). The interests of the accused and good faith require that this should be interpreted in the light of the initial ICRC proposal, i.e., that no one can be convicted for an act, or for failing to act contrary to a duty to act, when such an act or omission was not an offence at the time when it was committed.

[12] *Commentary IV*, p. 224 (Art. 33).
[13] The term "law" is used here in a broad sense, as *lex* encompasses custom.
[14] See draft Art. 9, para. 2.
[15] *O.R.* IV, pp. 35-36, CDDH/I/262.
[16] *O.R.* X, p. 130, CDDH/234/Rev.1, para. 87.
[17] Covenant, Art. 4, paras. 1-2.

4607 The reference to international law is mainly intended to cover crimes against humanity. A breach of international law should not go unpunished on the basis of the fact that the act or omission (failure to act) concerned was not an offence under the national law at the time it was committed. Some delegations suggested replacing the term "under national or international law" by "under the applicable law" or even by "under applicable domestic or international law",[18] but the majority finally considered that it was best to retain the wording of the Covenant "in order to avoid being out of line".

Sub-paragraph (d) *- The principle of the presumption of innocence*

4608 This sub-paragraph sets out the principle of the presumption of innocence, which is implicitly contained in Article 67 of the Fourth Convention. This refers to the "general principles of law". It is also contained in Article 14, paragraph 2, of the Covenant. In addition, it is laid down in Article 75 (*Fundamental guarantees*), paragraph 4(*d*), of Protocol I.

Sub-paragraph (e) *- The right of the accused to be present at his own trial*

4609 This sub-paragraph reiterates the principle laid down in Article 14, paragraph 3(*d*), of the Covenant. It is the result of a proposal in the Working Group which recommended "everyone charged with an offence shall have the right to be tried in his presence".[19] The proposal was not adopted in this form because a number of delegations argued that sentences *in absentia* are allowed. The right of the accused to be present at his trial, which is established here, should be understood as a right which the accused is free to exercise or not.

Sub-paragraph (f) *- The right not to be compelled to testify against oneself or to confess guilt*

4610 This sub-paragraph repeats Article 14, paragraph 3(*g*), of the Covenant. It was included as the result of a proposal made by the Working Group.[20]

Paragraph 3 - The right to be informed of judicial remedies and of the time-limits in which they must be exercised

4611 It was not considered realistic in view of the present state of national legislation in various countries to lay down a principle to the effect that everyone has a right

[18] See *O.R.* X, p. 144, CDDH/I/317/Rev.2.
[19] *Ibid.*
[20] *Ibid.*

of appeal against sentence pronounced upon him, i.e., to guarantee the availability of such a right, as provided in the ICRC draft.[21] However, it is clear that if such remedies do exist, not only should everyone have the right to information about them and about the time-limits within which they must be exercised, as explicitly provided in the text, but in addition, no one should be denied the right to use such remedies.[22]

4612 The term "judicial and other remedies" was originally adopted in English and, in order to maintain uniformity between the languages, was translated into French as "droits de recours judiciaires et autres". The word "autres" is superfluous in the French text since the words "droit de recours" cover all the possible remedies. However, in English the word "judicial" was not considered sufficient to include all the different types of remedies existing in various legal systems.

Paragraph 4 - The prohibition on pronouncing the death sentence upon persons under eighteen years and on carrying it out on pregnant women and mothers of young children

4613 The authorities retain the right to pronounce the death sentence in accordance with national legislation with one exception: adolescents under the age of eighteen years at the time they committed the offence; the death sentence may be pronounced but may not be carried out on pregnant women or mothers of young children. According to the experts who were consulted it would not have been possible to impose a general prohibition on the death sentence as such a decision would not have taken into account all the penal systems in force.[23] Nevertheless, the ICRC expressed the wish that the penalty should not be executed before the end of hostilities.[24] This proposal, which was included in the draft, reflected the experience that executions result in an escalation of violence on both sides. Moreover, when hostilities have ceased, passions die down and there is a possibility of amnesty. Unfortunately, however modest the proposal, it did not gain a consensus. On the other hand, the limitation laid down in this paragraph was easily accepted in principle; it was inspired by Article 68, paragraph 4, of the Fourth Convention,[25] and by Article 6, paragraph 5, of the Covenant. The discussions were essentially about two points; fixing the age limit, and extending the rule in favour of pregnant women to cover also mothers of young children.

4614 The age limit of eighteen years was adopted in order to harmonize with the Conventions and the Covenant, which also contain this age limit. The proposal concerning mothers of young children was put forward by a delegation.[26] The concept of "young children" as a legal term remained vague. For this reason a

[21] Draft Art. 10, para. 2.
[22] This clarification was proposed in an amendment. It was not adopted apparently to avoid making the text too complicated. See *O.R.* IV, p. 33, CDDH/I/259.
[23] See *O.R.* VIII, pp. 357-365, CDDH/I/SR.34, paras. 2 ff.
[24] Draft Art. 10, para. 3.
[25] See *Commentary IV*, pp. 346-347 (Art. 68).
[26] *O.R.* IV, p. 33, CDDH/I/259.

vote was requested on this point, and it was adopted by 37 votes to 2, with 9 abstentions.[27] In any event, the concept is wider than "new-born babies" in the sense of Article 8 (*Terminology*), sub-paragraph (*a*), of Protocol I. It is up to the responsible authorities to reach a judgment in good faith on what is meant by "young children".[28]

4615 The results of the vote suggest that the concept will be broadly interpreted, and that in such special cases the death penalty will not be pronounced.

4616 In any case, Article 76 (*Protection of women*), paragraph 3, of Protocol I, which has the same tenor, contains the recommendation not to pronounce the death penalty on pregnant women and on mothers having dependent infants and this recommendation should be considered here.

Paragraph 5 – Amnesty

4617 Amnesty is a matter within the competence of the authorities. It is an act by the legislative power which eliminates the consequences of certain punishable offences, stops prosecutions and quashes convictions.[29] Legally, a distinction is made between amnesty and a free pardon. The latter is granted by the Head of State and puts an end to the execution of the penalty, though in other respects the effects of the conviction remain in being. This paragraph deals only with amnesty, though this does not mean that free pardon is deliberately excluded. The draft adopted in Committee provided, on the one hand, that anyone convicted should have the right to seek a free pardon or commutation of sentence, and on the other hand, that amnesty, pardon or reprieve of a death sentence may be granted in all cases.[30] That paragraph was not adopted in the end, in order to keep the text simple. Some delegations considered that it was unnecessary to include it because national legislation in all countries provides for the possibility of a free pardon.[31]

4618 The object of this sub-paragraph is to encourage gestures of reconciliation which can contribute to reestablishing normal relations in the life of a nation which has been divided.

S.J.

[27] *O.R.* X, p. 131, CDDH/234/Rev.1, para. 90.

[28] The Conventions provide some sort of guide in this respect by mentioning mothers of children under seven years old (Art. 14, para. 1, Fourth Convention).

[29] "Amnesty" is described as an act of oblivion, a general pardon of past offences by the ruling authority (*Shorter Oxford English Dictionary*, 1978, p. 60). Its mode of operation and effect may obviously differ from country to country. The French definition ("Amnistie: acte du législateur qui a pour effet d'éteindre l'action publique ou d'effacer une peine prévue pour une infraction et, en conséquence, soit d'empêcher ou d'arrêter les poursuites, soit d'effacer les condamnations."), as given in the *Grand Dictionnaire encyclopédique Larousse*, Vol. I, 1982, p. 414, indicates that it is an act of the legislative whereby the public prosecution of certain offences is ended and the penalty thereon is cancelled, so that no more prosecutions will be instituted, and those already instituted will be discontinued and any convictions for such offences will be quashed.

[30] *O.R.* X, p. 133, CDDH/234/Rev.1, para. 95.

[31] *O.R.* VII, pp. 94 and 96, CDDH/SR.50, para. 79 and 99.

Part III – Wounded, sick and shipwrecked

Introduction

4619 This Part is aimed at developing the fundamental principle that the wounded and sick should be respected and protected, as contained, very succinctly, in common Article 3, paragraph 1, sub-paragraph (2), of the Conventions: "The wounded and sick shall be collected and cared for". It also applies to the shipwrecked, who are put on the same footing as the wounded and sick under the Geneva Conventions.

4620 After 1949, the ICRC became concerned with the situation of civilian medical personnel who were only partially protected under the Fourth Convention. As a first step the problem was studied from a general point of view, both for international and non-international conflicts.

4621 For this purpose, the ICRC acted together with the two large international associations representing the medical profession, the World Medical Association and the International Committee of Military Medicine and Pharmacy, in which the medical corps of more than eighty countries participate. They jointly formed a working group which held a great many "Entretiens consacrés au droit international médical" in the presence of an observer representing the WHO. Draft Rules for the Protection of the Wounded and Sick and of Civilian Medical and Nursing Personnel in Time of Conflict were presented at the XXth International Conference of the Red Cross (Vienna, 1965).[1]

4622 The draft was favourably received, but the Conference wanted a thorough study to be carried out on an extension of the use of the red cross and red crescent emblem.

4623 The XXIst International Conference of the Red Cross (Istanbul, 1969) required concrete proposals to be put forward this time by the ICRC and by governments. At that time a Protocol additional to the Fourth Convention was envisaged.

4624 The Working Group was extended by a number of observers, in particular experts from the League of Red Cross and Red Crescent Societies, the International Law Association, the Commission Médico-juridique de Monaco and the International Committee for the Neutrality of Medicine. On reflection it appeared that it would be preferable to provide separate rules for situations of non-international armed conflicts, and two drafts, one for international conflicts and the other for internal conflicts, were submitted to the Conference of

[1] *CE/7b*, pp. 1-3.

1996

[47] The members of the Royal House are not referred to in the Ingonyama Act and are mentioned for the first time in the amendment. They hold no specific office in terms of the legislation and the reasons for the conclusion that the proposed legislation in its application to the Ingonyama, amakhosi and iziphakanyiswa is competent do not necessarily apply to them. To prohibit them from accepting offices of profit under the Republic, or from engaging in activities that prevent them from accepting remuneration or benefits from organs of the State, would be to curtail their rights to engage in economic activity. In my view, however, this is not the meaning that should be given to the amendment. The prohibition applies only to payments or benefits received by such persons 'in their capacity as' members of the Royal House. It would presumably include payment or benefits received for assignments carried out on behalf of the Ingonyama, or for accompanying him on an official visit. There may be other functions performed by the Ingonyama's immediate dependants in their capacity as members of the Royal House, but the prohibition is limited by the qualification and is likely to have a fairly narrow application.

[48] The remuneration and allowances paid by the KwaZulu-Natal Government to the Ingonyama would have regard to his obligations to his immediate dependants and to services that they might be required to perform on his behalf as members of the Royal House. What the amendment in effect requires is that the Ingonyama must make provision for such expenditure out of his official remuneration and allowances, and that his immediate dependants should not have to look to other organs of State for such support. Seen in this light, the prohibition is incidental to the overriding purpose of the legislation, which is to establish one source of payment for the Ingonyama's support and expenditure. It does not infringe the chap 3 rights of his immediate dependants to say that they must look to the Ingonyama and not to other organs of the State for their support and for compensation in respect of duties that they perform on his behalf.

Costs

[49] It has not been established that the amendments will be inconsistent with the Constitution on any of the grounds advanced by the objectors. This Court has decided that litigants seeking to ventilate important issues of constitutional principle in proceedings such as those which have been brought in the present matter ought not to be deterred from doing so by the risk of having to pay their adversary's costs.[17] The issues raised in the present proceedings fall into that category, and it was not suggested that there were any special factors in the present case that require the Court to depart from this rule.

[17] *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC) (1996 (4) BCLR 537) at para [36].

Order

[50] The following order is made:

The Payment of Salaries, Allowances and Other Privileges to the Ingonyama Amendment Bill of 1995 and the KwaZulu-Natal Amakhosi and Iziphakanyiswa Amendment Bill of 1995 submitted to this Court by the Speaker of the KwaZulu-Natal legislature in terms of ss 98(2)*(d)* and 98(9) of the Constitution are not unconstitutional on any of the grounds advanced by the petitioners.

Mahomed DP, Ackermann J, Didcott J, Kriegler J, Langa J, Madala J, Mokgoro J, O'Regan J and Sachs J concurred.

Attorneys for the KwaZulu-Natal Provincial Legislature: *Friedman & Falconer*, Durban. Petitioners' Attorneys: *Von Klemperer Davis & Harrison Inc*, Pietermaritzburg.

AZANIAN PEOPLES ORGANISATION (AZAPO) AND OTHERS v PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS

CONSTITUTIONAL COURT

CHASKALSON P, MAHOMED DP, ACKERMANN J, DIDCOTT J, KRIEGLER J, LANGA J, MADALA J, MOKGORO J, O'REGAN J and SACHS J

1996 May 30; July 25 Case No CCT 17/96

Constitutional law—Human rights—Right of access to Court in terms of s 22 in chap 3 of Constitution of the Republic of South Africa Act 200 of 1993—Amnesty provisions of s 20(7) of Promotion of National Unity and Reconciliation Act 34 of 1995 would constitute violation of s 22 of Constitution if there was nothing in the Constitution itself permitting or authorising such violation—Epilogue to Constitution ('National Unity and Reconciliation' section) authorising an 'amnesty' in its most comprehensive and generous meaning so as to enhance and optimise prospects of facilitating constitutional journey from shame of past to promise of the future—Parliament therefore specifically authorised by Constitution to enact the Act in the terms which it did—Amnesty provisions of s 20(7) of Act also not in conflict with international legal obligations imposed on South Africa by Geneva Conventions.

Constitutional law—Constitution—Constitution of the Republic of

South Africa Act 200 of 1993—Status of public international law in terms of—International law and contents of international treaties relevant only in interpretation of Constitution itself on grounds that makers of Constitution should not lightly be presumed to authorise any law which might constitute breach of international legal obligations of State—International conventions and treaties not becoming part of South African municipal law until and unless incorporated into municipal law by legislative enactment—Customary international law binding on Republic forming part of law of Republic unless inconsistent with Constitution or Act of Parliament—Geneva Conventions of 1949 and Additional Protocols thereto either not applicable to conflict in South Africa or not binding on South Africa—Accordingly enquiry into whether amnesty provisions of s 20(7) of the Promotion of National Unity and Reconciliation Act 34 of 1995 contrary to international law irrelevant to the determination of the constitutionality of s 20(7).

International law—Public international law—Requirement of Geneva Conventions of 1949 on the law of war and Additional Protocols of 1977 thereto that States parties enact legislation necessary to provide effective penal sanctions for persons committing grave breaches of provisions of Conventions—Amnesty provisions of s 20(7) of Promotion of National Unity and Reconciliation Act 34 of 1995 not in conflict with international legal obligations imposed on South Africa by Geneva Conventions.

The Promotion of National Unity and Reconciliation Act 34 of 1995 ('the Act') established a Truth and Reconciliation Commission and created three committees for the purpose of achieving the objectives of the Commission. One of these was a Committee on Amnesty which was empowered to grant amnesty in respect of any act, omission or offence, provided that the applicant concerned had made a full disclosure of all relevant facts and provided further that the relevant act, omission or offence was associated with a political objective committed before 6 December 1993. Section 20(7) of the Act provides in the relevant part that '(n)o person who has been granted amnesty in respect of an act, omission or offence shall be criminally or civilly liable in respect of such act, omission or offence and no body or organisation or the State shall be liable, and no person shall be vicariously liable, for any such act, omission or offence'. The applicants applied for direct access to the Constitutional Court and for an order declaring s 20(7) unconstitutional on the grounds that it was inconsistent with the right to have justiciable disputes settled by a court of law or other independent and impartial tribunal in terms of s 22 of the Constitution of the Republic of South Africa Act 200 of 1993. It was contended that agents of the State, acting within the scope and in the course of their employment, unlawfully murdered and maimed activists during the anti-apartheid struggle and that the applicants had a clear right to insist that such wrongdoers should properly be prosecuted and punished, that they should be ordered by the ordinary courts of the land to pay adequate civil compensation to the victims or dependants of the victims and further to require the State to make good to such victims or dependants the serious losses which they had suffered in consequence of the criminal and delictual acts of the employees of the State.

Held (*per* Mahomed DP, the other members of the Court concurring), that it was clear from s 20(7), read with s 20(8), (9) and (10) of the Act, that, once a person had been granted amnesty in respect of an act, omission or offence, the offender could no longer be held criminally liable for such offence and such an offender could also no longer be held civilly liable personally for any damages sustained by the victim and no such civil proceedings could successfully be pursued against him or her; and

if the wrongdoer was an employee of the , the State was equally discharged from any civil liability in respect of any act mission of such an employee, even if the relevant act or omission had been effected during the course and within the scope of his or her employment. Other bodies, organisations or persons were also exempt from any liability for any of the acts or omissions of a wrongdoer which would ordinarily have arisen in consequence of their vicarious liability for such acts or omissions. (Paragraph [7] at 680C–F.)

Held, further, that there would be considerable force in the submission that s 20(7) of the Act constituted a violation of s 22 of the Constitution if there was nothing in the Constitution itself which permitted or authorised such violation. The issue to be determined was therefore whether *(a)* any other provision of the Constitution permitted the effective removal by the Act of the right to obtain redress in the courts for violations of fundamental rights or, *(b)* if no such provision existed, whether the removal of the right could be justified in terms of s 33(1) of the Constitution. (Paragraph [10] at 681D–I, paraphrased.)

The Court considered the argument that the epilogue to the interim Constitution (the 'National Unity and Reconciliation' section) specifically authorised a law conferring amnesty on a wrongdoer in respect of acts, omissions and offences associated with political objectives and committed during the period prescribed by the Act.

Held, that the constitutional status of the epilogue was determined by s 232(4) of the Constitution, which provided that the epilogue shall not 'have a lesser status than any other provision of this Constitution . . . and such provision shall for all purposes be deemed to form part of the substance of this Constitution'. The epilogue not only authorised Parliament to make a law providing for amnesty to be granted in respect of the acts, omissions and offences falling within the category defined therein but in fact obliged Parliament to do so. (Paragraph [14] at 682F/G–683C, paraphrased.)

Held, further, as to the provisions of the Act itself, that, while there could be legitimate debate about the methods and the mechanisms chosen by the lawmaker to give effect to the difficult duty entrusted to it in terms of the epilogue, the Court was not concerned with that debate or with the wisdom of its choice of mechanisms, but only with its constitutionality. Applying that standard, in providing for amnesty for those guilty of serious offences associated with political objectives and in defining the mechanisms through which and the manner in which such amnesty might be secured by such offenders, s 20(7) of the Act did not offend any of the express or implied limitations on the powers of Parliament in terms of the Constitution. (Paragraph [21] at 686C–E.)

The Court then considered an argument that the State was obliged by international law to prosecute those responsible for gross human rights violations and that the provisions of s 20(7) which authorised amnesty for such offenders constituted a breach of the requirements of the four Geneva Conventions of 1949 on the law of war which required States parties to enact legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, grave breaches of the provisions of the Conventions.

Held, that the issue to be determined by the Court was whether s 20(7) of the Act was inconsistent with the Constitution and that the enquiry as to whether or not international law prescribed a different duty was irrelevant to that determination. International law and the contents of international treaties to which South Africa might or might not be a party were relevant only in the interpretation of the Constitution itself, on the grounds that the makers of the Constitution should not lightly be presumed to authorise any law which might constitute a breach of the obligations of the State in terms of international law. International conventions and treaties did not become part of the municipal law of South Africa until and unless they were incorporated into the municipal law by legislative enactment. (Paragraph [26] at 688A/B–C/D.)

Held, further, that s 231(1) of the Constitution provided that an Act of Parliament could override any contrary rights or obligations under international agreements entered into before the commencement of the Constitution. Section 231(4) of the Constitution further provided that 'rules of customary international law binding on the Republic, shall, unless inconsistent with this Constitution or an Act of Parliament, form part of the law of the Republic'. (Paragraph [27] at 688E–G, paraphrased.)

Held, further, that it was doubtful whether the Geneva Conventions of 1949 read with the Additional Protocols thereto applied at all to the conflict dealt with by the Act since the Conventions applied only to cases of 'declared war or . . . any armed conflict which may arise between two or more of the High Contracting Parties'. Even if the conflict in South Africa could be said to fall within the extension by Additional Protocol I of 1977 of the provisions of the Conventions to include 'armed conflicts in which peoples are fighting against colonial domination and alien occupation and against regimes in the exercise of their rights of self-determination', Additional Protocol I was not binding on South Africa. It was doubtful whether Additional Protocol II applied at all, but, if it did, it actually required the authorities in power, after the end of hostilities, to grant amnesty to those previously engaged in the conflict. (Paragraph [29] at 689B–C, read with footnote 29.)

Held, further, that public international law distinguished the position of perpetrators of acts of violence in the course of war (or armed conflicts between liberation movements seeking self-determination against colonial and alien domination of their countries), on the one hand, and their position in respect of violent acts perpetrated during conflicts which take place within the territory of a sovereign State in consequence of a struggle between the armed forces of that State and other dissident armed forces operating under responsible command, on the other. In respect of the latter category, there was no obligation on the part of a contracting State to ensure the prosecution of those who might have performed acts of violence or other acts which would ordinarily be characterised as serious invasions of human rights. (Paragraph [30] at 689D–690A/B.)

Held, accordingly, that there was nothing in the Act which could be said to be a breach of the international legal obligations imposed on South Africa by the Geneva Conventions. (Paragraph [32] at 691D–E.)

The Court then considered an argument that the 'amnesty' contemplated by the epilogue to the Constitution did not authorise Parliament to make any law which would have the result of indemnifying the perpetrator of a delict against any civil claims made for damages suffered by the victim of such a delict.

Held, that the 'amnesty' referred to in the epilogue to the Constitution could not be limited to the absolution from criminal liability alone, regardless of the context and regardless of the circumstances. The word amnesty indicated an act of oblivion. The degree of oblivion or obliteration had to depend on the circumstances. It could, in certain circumstances, be confined to immunity from criminal prosecutions and, in other circumstances, be extended also to civil liability. (Paragraph [35] at 692F–G.)

Held, further, that the epilogue to the Constitution provided for amnesty to facilitate 'reconciliation and reconstruction' by the creation of mechanisms and procedures which made it possible for the truth of the past to be uncovered. Central to the justification of amnesty in respect of the criminal prosecution for offences committed during the prescribed period was the appreciation that the truth would not effectively be revealed by the wrongdoers if they were to be prosecuted for such acts. That justification had necessarily and unavoidably to apply to the need to indemnify such wrongdoers against civil claims for payment of damages. Without that incentive the wrongdoer could not be encouraged to reveal the whole truth which might inherently be against his or her material or proprietary interests. There was nothing in the language of the epilogue indicating that what the makers of the Constitution intended to do was to encourage wrongdoers to reveal the truth by providing for amnesty against criminal prosecution in respect of their acts but simultaneously to discourage them from revealing that truth by keeping intact the threat that such revelations might be visited with what might in many cases be very substantial claims for civil damages. It was more reasonable to infer that the legislation contemplated in the epilogue would be wide enough to allow for an amnesty which would protect a wrongdoer who told the truth from both the criminal and the civil consequences of his or her admissions. The requirement of the epilogue that amnesty shall be granted in respect of 'acts' and 'omissions' in addition to 'offences' further indicated that the amnesty should cover both criminal and civil liability. (Paragraphs [36]–[37] at 693C–I.)

The Court then considered an argument that the Constitution could not justifiably authorise any law which had the effect of indemnifying the State itself against civil claims made by those wronged criminal and delictual acts perpetrated by wrongdoers in the course and within the scope of their employment as servants of the State.

Held (*per* Mahomed DP, Chaskalson P, Ackermann J, Kriegler J, Langa J, Madala J, Mokgoro J, O'Regan J and Sachs J concurring; Didcott J concurring for different reasons), that the epilogue required that a law be adopted by Parliament which would provide for amnesty and it appreciated the 'need for reparation', but left it to Parliament to decide upon the ambit of the amnesty, the permissible form and extent of such reparations and the procedures to be followed in the determination thereof, by taking into account all the relevant circumstances. Parliament was therefore entitled to decide that, having regard to the resources of the State, proper reparations for those victimised by the unjust laws and practices of the past justified formulae which did not compel any irrational differentiation between the claims of those who were able to pursue enforceable delictual claims against the State and the claims of those who were not in that position but nevertheless deserved reparations. (Paragraph [47] at 696F–H/I.)

Held, further, that the epilogue to the Constitution authorised and contemplated an 'amnesty' in its most comprehensive and generous meaning so as to enhance and optimise the prospects of facilitating the constitutional journey from the shame of the past to the promise of the future. Parliament was, therefore, entitled to enact the Act in the terms which it did. Accordingly s 20(7) of the Act was authorised by the Constitution itself and it was unnecessary to consider the relevance and effect of s 33(1) of the Constitution. (Paragraph [50] at 698A–B and F.) Application refused.

The following decided cases were cited in the judgment of the Court:

Azanian Peoples Organisation and Others v Truth and Reconciliation Commission and Others 1996 (4) SA 562 (C)

Binga v Cabinet for South West Africa and Others 1988 (3) SA 155 (A)

Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others 1995 (4) SA 877 (CC) (1995 (10) BCLR 1289)

Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others 1996 (1) SA 984 (CC) (1996 (1) BCLR 1)

Maluleke v Minister of Internal Affairs 1981 (1) SA 707 (B)

Pan American World Airways Incorporated v SA Fire and Accident Insurance Co Ltd 1965 (3) SA 150 (A)

Premier, KwaZulu-Natal, and Others v President of the Republic of South Africa and Others 1996 (1) SA 769 (CC) (1995 (12) BCLR 1561)

R v Secretary of State for the Home Department, Ex parte Brind and Others [1991] 1 AC 696 (HL) ([1996] 1 All ER 720)

S v Makwanyane and Another 1995 (3) SA 391 (CC) (1995 (2) SACR 1; 1995 (6) BCLR 665)

S v Petane 1988 (3) SA 51 (C).

The following statutes were considered by the Court:

The Constitution of the Republic of South Africa Act 200 of 1993, chap 3, ss 22, 33(1), 231(1) and (4), 232(4) and the 'National Unity and Reconciliation' section: see *Juta's Statutes of South Africa 1995* vol 5 at 1-211, 1-212, 1-213, 1-251 and 1-259

The Promotion of National Unity and Reconciliation Act 34 of 1995, s 20(7), (8), (9) and (10): see *Juta's Statutes of South Africa 1995* vol 1 at 2-390–2-392.

Adjudication of the constitutional validity of s 20(7) of the Promotion of National Unity and Reconciliation Act 34 of 1995. The facts appear from the judgment of Mahomed DP.

D H Soggot SC (with him *G M Khoza*) for the applicants.

G J Marcus (with him *D G Leibowitz*) for the respondents.

Cur adv vult.

Postea (July 25).

Mahomed DP:

[1] For decades South African history has been dominated by a deep conflict between a minority which reserved for itself all control over the political instruments of the State and a majority who sought to resist that domination. Fundamental human rights became a major casualty of this conflict as the resistance of those punished by their denial was met by laws designed to counter the effectiveness of such resistance. The conflict deepened with the increased sophistication of the economy, the rapid acceleration of knowledge and education and the ever increasing hostility of an international community steadily outraged by the inconsistency which had become manifest between its own articulated ideals after the Second World War and the official practices which had become institutionalised in South Africa through laws enacted to give them sanction and teeth by a Parliament elected only by a privileged minority. The result was a debilitating war of internal political dissension and confrontation, massive expressions of labour militancy, perennial student unrest, punishing international economic isolation, widespread dislocation in crucial areas of national endeavour, accelerated levels of armed conflict and a dangerous combination of anxiety, frustration and anger among expanding proportions of the populace. The legitimacy of law itself was deeply wounded as the country haemorrhaged dangerously in the face of this tragic conflict which had begun to traumatise the entire nation.

[2] During the eighties it became manifest to all that our country, with all its natural wealth, physical beauty and human resources, was on a disaster course unless that conflict was reversed. It was this realisation which mercifully rescued us in the early nineties as those who controlled the levers of State power began to negotiate a different future with those who had been imprisoned, silenced, or driven into exile in consequence of their resistance to that control and its consequences. Those negotiations resulted in an interim Constitution[1] committed to a transition towards a more just, defensible and democratic political order based on the protection of fundamental human rights. It was wisely appreciated by those involved in the preceding negotiations that the task of building such a new democratic order was a very difficult task because of the previous history and the deep emotions and indefensible inequities it had generated; and that this could not be achieved without a firm and generous commitment to reconciliation and national unity. It was realised that much of the unjust consequences of the past could not ever be fully reversed. It might be necessary in crucial areas to close the book on that past.

[3] This fundamental philosophy is eloquently expressed in the epilogue to the Constitution, which reads as follows:

'**National Unity and Reconciliation**

This Constitution provides a historic bridge between the past of a deeply divided society characterised by conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.

The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society.

The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge.

These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation.

In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.

With this Constitution and these commitments we, the people of South Africa, open a new chapter in the history of our country.'

Pursuant to the provisions of the epilogue, Parliament enacted during 1995 what is colloquially referred to as the Truth and Reconciliation Act. Its proper name is the Promotion of National Unity and Reconciliation Act 34 of 1995 ('the Act').

[4] The Act establishes a Truth and Reconciliation Commission. The objectives of that Commission are set out in s 3. Its main objective is to 'promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past'. It is enjoined to pursue that objective by 'establishing as complete a picture as possible of the causes, nature and extent of the gross violations of human rights' committed during the period commencing 1 March 1960 to the 'cut-off date'.[2] For this purpose the Commission is obliged to have regard to 'the perspectives of the victims and the motives and perspectives of the persons responsible for the commission of the violations'.[3] It also is required to facilitate

'. . . the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective . . .'.[4]

The Commission is further entrusted with the duty to establish and to make known 'the fate or whereabouts of victims' and of 'restoring the human and civil dignity of such victims' by affording them an opportu-

[1] The Constitution of the Republic of South Africa Act 200 of 1993, which is referred to in this judgment as 'the Constitution'.

[2] Described in the epilogue to the Constitution as 'a date after 8 October 1990 and before 6 December 1993'. 'Cut-off date' is defined in s 1 of the Act to mean 'the latest date allowed as the cut-off date in terms of the Constitution as set out under the heading "National Unity and Reconciliation" '.

[3] Section 3(1)*(a)*.

[4] Section 3(1)*(b)*.

nity to relate their own accounts of the violations and by recommending 'reparation measures' in respect of such violations[5] and, finally, to compile a comprehensive report in respect of its functions, including the recommendation of measures to prevent the violation of human rights.[6]

[5] Three committees are established for the purpose of achieving the objectives of the Commission.[7] The first committee is the Committee on Human Rights Violations which conducts enquiries pertaining to gross violations of human rights during the prescribed period, with extensive powers to gather and receive evidence and information.[8] The second committee is the Committee on Reparation and Rehabilitation which is given similar powers to gather information and receive evidence for the purposes of ultimately recommending to the President suitable reparations for victims of gross violations of human rights.[9] The third and the most directly relevant committee for the purposes of the present dispute is the Committee on Amnesty.[10] This is a committee which must consist of five persons of which the chairperson must be a Judge.[11] The Committee on Amnesty is given elaborate powers to consider applications for amnesty.[12] The Committee has the power to grant amnesty in respect of any act, omission or offence to which the particular application for amnesty relates, provided that the applicant concerned has made a full disclosure of all relevant facts and provided further that the relevant act, omission or offence is associated with a political objective committed in the course of the conflicts of the past, in accordance with the provisions of s 20(2) and (3) of the Act.[13] These subsections contain very detailed provisions pertaining to what may properly be considered to be acts 'associated with a political objective'. Subsection (3) of s 20 provides as follows:

'Whether a particular act, omission or offence contemplated in ss (2) is an act associated with a political objective, shall be decided with reference to the following criteria:

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

(b) the context in which the act, omission or offence took place, and in particular whether the act, omission or offence was committed in the course of or as part of a political uprising, disturbance or event, or in reaction thereto;

(c) the legal and factual nature of the act, omission or offence, including the gravity of the act, omission or offence;

[5] Section 3(1)*(c)*.
[6] Section 3(1)*(d)*.
[7] Section 3(3).
[8] Sections 3(3)*(a)*, 12 and 14.
[9] Sections 3(3)*(c)*, 23 and 25. The recommendations of the committee are themselves considered by the President who then makes recommendations to Parliament. This is considered by a joint committee of Parliament and the decisions of the joint committee, after approval by Parliament, are implemented by regulations made by the President. Section 27.
[10] Section 3(3)*(b)*.
[11] Section 17(3). It is common cause that the Committee on Amnesty, appointed by the President, in fact includes three Judges of the Supreme Court.
[12] Section 19.
[13] Section 20(1).

(d) the object or objective of the act, omission or offence, and in particular whether the act, omission or offence was primarily directed at a political opponent or State property or personnel or against private property or individuals;

(e) whether the act, omission or offence was committed in the execution of an order of, or on behalf of, or with the approval of, the organisation, institution, liberation movement or body of which the person who committed the act was a member, an agent or a supporter; and

(f) the relationship between the act, omission or offence and the political objective pursued, and in particular the directness and proximity of the relationship and the proportionality of the act, omission or offence to the objective pursued,

but does not include any act, omission or offence committed by any person referred to in ss (2) who acted—

(i) for personal gain: Provided that an act, omission or offence by any person who acted and received money or anything of value as an informer of the State or a former State, political organisation or liberation movement, shall not be excluded only on the grounds of that person having received money or anything of value for his or her information; or

(ii) out of personal malice, ill-will or spite, directed against the victim of the acts committed.'

[6] After making provision for certain ancillary matters, s 20(7) (the constitutionality of which is impugned in these proceedings) provides as follows:

'(7)*(a)* No person who has been granted amnesty in respect of an act, omission or offence shall be criminally or civilly liable in respect of such act, omission or offence and no body or organisation or the State shall be liable, and no person shall be vicariously liable, for any such act, omission or offence.

(b) Where amnesty is granted to any person in respect of any act, omission or offence, such amnesty shall have no influence upon the criminal liability of any other person contingent upon the liability of the first-mentioned person.

(c) No person, organisation or State shall be civilly or vicariously liable for an act, omission or offence committed between 1 March 1960 and the cut-off date by a person who is deceased, unless amnesty could not have been granted in terms of this Act in respect of such an act, omission or offence.'

Section 20(7) is followed by s 20(8), (9) and (10) which deal expressly with both the formal and procedural consequences of an amnesty in the following terms:

'(8) If any person—

(a) has been charged with and is standing trial in respect of an offence constituted by the act or omission in respect of which amnesty is granted in terms of this section; or

(b) has been convicted of, and is awaiting the passing of sentence in respect of, or is in custody for the purpose of serving a sentence imposed in respect of, an offence constituted by the act or omission in respect of which amnesty is so granted,

the criminal proceedings shall forthwith upon publication of the proclamation referred to in ss (6) become void or the sentence so imposed shall upon such publication lapse and the person so in custody shall forthwith be released.

(9) If any person has been granted amnesty in respect of any act or omission which formed the ground of a civil judgment which was delivered at any time

before the granting of the amnesty, the publication of the proclamation in terms of ss (6) shall not affect the operation of the judgment insofar as it applies to that person.

(10) Where any person has been convicted of any offence constituted by an act or omission associated with a political objective in respect of which amnesty has been granted in terms of this Act, any entry or record of the conviction shall be deemed to be expunged from all official documents or records and the conviction shall for all purposes, including the application of any Act of Parliament or any other law, be deemed not to have taken place: Provided that the Committee may recommend to the authority concerned the taking of such measures as it may deem necessary for the protection of the safety of the public.'[14]

[7] What is clear from s 20(7), read with s 20(8), (9) and (10), is that, once a person has been granted amnesty in respect of an act, omission or offence,

(a) the offender can no longer be held 'criminally liable' for such offence and no prosecution in respect thereof can be maintained against him or her;

(b) such an offender can also no longer be held civilly liable personally for any damages sustained by the victim and no such civil proceedings can successfully be pursued against him or her;

(c) if the wrongdoer is an employee of the State, the State is equally discharged from any civil liability in respect of any act or omission of such an employee, even if the relevant act or omission was effected during the course and within the scope of his or her employment; and

(d) other bodies, organisations or persons are also exempt from any liability for any of the acts or omissions of a wrongdoer which would ordinarily have arisen in consequence of their vicarious liability for such acts or omissions.

[8] The applicants sought in this Court to attack the constitutionality of s 20(7) on the grounds that its consequences are not authorised by the Constitution. They aver that various agents of the State, acting within the scope and in the course of their employment, have unlawfully murdered and maimed leading activists during the conflict against the racial policies of the previous administration and that the applicants have a clear right to insist that such wrongdoers should properly be prosecuted and punished, that they should be ordered by the ordinary courts of the land to pay adequate civil compensation to the victims or dependants of the victims and further to require the State to make good to such victims or dependants the serious losses which they have suffered in consequence of the criminal and delictual acts of the employees of the State. In support of that attack Mr *Soggott SC*, who appeared for the applicants together with Mr *Khoza*, contended that s 20(7) was inconsistent with s 22 of the Constitution, which provides that

[14] Subsection (6), which is referred to in ss (8) and (9), simply provides that the Committee must by proclamation in the *Gazette* make known the full names of any person to whom amnesty has been granted, together with sufficient information to identify the act, omission or offence in respect of which such amnesty has been granted.

'(e)very person shall have th at to have justiciable disputes settled by a court of law or, where appropriate, another independent or impartial forum'.

He submitted that the Amnesty Committee was neither 'a court of law' nor an 'independent or impartial forum' and that, in any event, the Committee was not authorised to settle 'justiciable disputes'. All it was simply required to decide was whether *amnesty* should be granted in respect of a particular act, omission or offence.

[9] The effect of an amnesty undoubtedly impacts upon very fundamental rights. All persons are entitled to the protection of the law against unlawful invasions of their right to life, their right to respect for and protection of dignity and their right not to be subject to torture of any kind. When those rights are invaded those aggrieved by such invasion have the right to obtain redress in the ordinary courts of law and those guilty of perpetrating such violations are answerable before such courts, both civilly and criminally. An amnesty to the wrongdoer effectively obliterates such rights.

[10] There would therefore be very considerable force in the submission that s 20(7) of the Act constitutes a violation of s 22 of the Constitution if there was nothing in the Constitution itself which permitted or authorised such violation. The crucial issue, therefore, which needs to be determined is whether the Constitution, indeed, permits such a course. Section 33(2) of the Constitution provides that

'(s)ave as provided for in ss (1) or any other provision of this Constitution, no law, whether a rule of common law, customary law or legislation, shall limit any right entrenched in this chapter'.

Two questions arise from the provisions of this subsection. The first question is whether there is 'any other provision in this Constitution' which permits a limitation of the right in s 22 and, secondly, if there is not, whether any violation of s 22 is a limitation which can be justified in terms of s 33(1) of the Constitution, which reads as follows:

'The rights entrenched in this chapter may be limited by law of general application, provided that such limitation—

(a) shall be permissible only to the extent that it is—
(i) reasonable; and
(ii) justifiable in an open and democratic society based on freedom and equality; and

(b) shall not negate the essential content of the right in question, and provided further that any limitation to—
(aa) a right entrenched in s 10, 11, 12, 14(1), 21, 25 or 30(1)*(d)* or *(e)* or (2); or
(bb) a right entrenched in s 15, 16, 17, 18, 23 or 24, insofar as such right relates to free and fair political activity,

shall, in addition to being reasonable as required in para *(a)*(i), also be necessary.'

[11] Mr *Marcus*, who together with Mr *Leibowitz* appeared for the respondents, contended that the epilogue, which I have previously quoted, is indeed a 'provision of this Constitution' within the meaning of s 33(2). He argued that any law conferring amnesty on a wrongdoer in respect of acts, omissions and offences associated with political objec-

tives and committed during the prescribed period is therefore a law properly authorised by the Constitution.

[12] It is therefore necessary to deal, in the first place, with the constitutional status of the epilogue. In the founding affidavit in support of the application for direct access to this Court made by the deputy president of the first applicant, reliance was placed on the Constitutional Principles contained in Schedule 4 to the Constitution and it was submitted that

'(the) Constitutional Principles in Schedule 4 enjoy a higher status than that of other sections of the Constitution, in that, in terms of s 74(1) of the Constitution, it is not permissible to amend the Constitutional principles and they shall be included in the final Constitution.

To the extent that, therefore, the post-end clause is in conflict with Constitutional Principle VI, the latter should prevail.'

Constitutional Principle VI provides that '(t)here shall be a separation of powers between the legislature, executive and the judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness'.

[13] During oral argument before us this submission was wisely not pressed by counsel for the applicants. Even assuming in favour of the applicants that there is some potential tension between the language of s 20(7) of the Act and Constitutional Principle VI, it can be of no assistance to the applicants in their attack on the status of the epilogue. The purpose of Schedule 4 to the Constitution is to define the principles with which a new constitutional text adopted by the Constitutional Assembly must comply.[15] The new constitutional text has no force and effect unless the Constitutional Court has certified that the provisions of the text comply with these Constitutional Principles.[16]

[14] The Constitutional Principles have no effect on the *status* of the epilogue. That status is determined by s 232(4) of the Constitution, which provides as follows:

'In interpreting this Constitution a provision in any Schedule, including the provision under the heading '*National Unity and Reconciliation*', to this Constitution shall not by reason only of the fact that it is contained in a Schedule, have a lesser status than any other provision of this Constitution which is not contained in a Schedule, and such provision shall for all purposes be deemed to form part of the substance of this Constitution.'

The epilogue, therefore, has no lesser status than any other part of the Constitution. As far as s 22 is concerned, it therefore would have the same effect as a provision within s 22 itself which enacted that:

[15] Section 71(1) of the Constitution. *Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others* 1995 (4) SA 877 (CC) (1995 (10) BCLR 1289) at para [41]; *Premier, KwaZulu-Natal, and Others v President of the Republic of South Africa and Others* 1996 (1) SA 769 (CC) (1995 (12) BCLR 1561) at para [12]; *Azanian Peoples Organisation and Others v Truth and Reconciliation Commission and Others* (CPD, case No 4895/96, 9 May 1996, not yet reported, at pp 20–1 ('the *AZAPO* case').*

* Reported at 1996 (4) SA 562 (C). See at 570I–571B—Eds.

[16] Section 71(2) of the Constitution.

'Nothing contained in this Constitution shall preclude Parliament from adopting a law providing for amnesty to be granted in respect of acts, omissions and offences associated with political objectives committed during a defined period and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.'

What is clear is that Parliament not only has the authority in terms of the epilogue to make a law providing for amnesty to be granted in respect of the acts, omissions and offences falling within the category defined therein but that it is in fact obliged to do so. This follows from the wording in the material part of the epilogue, which is that 'Parliament under this Constitution *shall* adopt a law' providing, *inter alia*, for the 'mechanisms, criteria and procedures . . . through which . . . amnesty shall be dealt with'.

[15] It was contended that, even if this is the proper interpretation of the status of the epilogue and even if the principle of 'amnesty' is authorised by the Constitution, it does not authorise, in particular, the far-reaching amnesty which s 20(7) allows. In his heads of argument on behalf of the applicants, Mr *Soggot* conceded that the wording of the epilogue provides

'. . . a clear indication that the Constitution contemplates the grant of amnesty in respect of offences associated with political objectives and committed in the course of the conflicts of the past, including offences involving gross violations of human rights'.

At the commencement of oral argument Mr *Soggot* informed us, however, that he had been instructed by his clients to withdraw this concession and he therefore did not abandon the submission that s 20(7) was unconstitutional in all respects and that Parliament had no constitutional power to authorise the Amnesty Committee to indemnify any wrongdoer either against criminal or civil liability arising from the perpetration of acts falling within the categories described in the legislation.

Amnesty in respect of criminal liability

[16] I understand perfectly why the applicants would want to insist that those wrongdoers who abused their authority and wrongfully murdered, maimed or tortured very much loved members of their families who had, in their view, been engaged in a noble struggle to confront the inhumanity of apartheid should vigorously be prosecuted and effectively be punished for their callous and inhuman conduct in violation of the criminal law. I can therefore also understand why they are emotionally unable to identify themselves with the consequences of the legal concession made by Mr *Soggot* and if that concession was wrong in law I would have no hesitation whatsoever in rejecting it.

[17] Every decent human being must feel grave discomfort in living with a consequence which might allow the perpetrators of evil acts to walk the streets of this land with impunity, protected in their freedom by an amnesty immune from constitutional attack, but the circumstances in support of this course require carefully to be appreciated. Most of the

acts of brutality and torture which have taken place have occurred during an era in which neither the laws which permitted the incarceration of persons or the investigation of crimes, nor the methods and the culture which informed such investigations, were easily open to public investigation, verification and correction. Much of what transpired in this shameful period is shrouded in secrecy and not easily capable of objective demonstration and proof. Loved ones have disappeared, sometimes mysteriously, and most of them no longer survive to tell their tales. Others have had their freedom invaded, their dignity assaulted or their reputations tarnished by grossly unfair imputations hurled in the fire and the cross-fire of a deep and wounding conflict. The wicked and the innocent have often both been victims. Secrecy and authoritarianism have concealed the truth in little crevices of obscurity in our history. Records are not easily accessible, witnesses are often unknown, dead, unavailable or unwilling. All that often effectively remains is the truth of wounded memories of loved ones sharing instinctive suspicions, deep and traumatising to the survivors but otherwise incapable of translating themselves into objective and corroborative evidence which could survive the rigours of the law. The Act seeks to address this massive problem by encouraging these survivors and the dependants of the tortured and the wounded, the maimed and the dead to unburden their grief publicly, to receive the collective recognition of a new nation that they were wronged, and, crucially, to help them to discover what did in truth happen to their loved ones, where and under what circumstances it did happen, and who was responsible. That truth, which the victims of repression seek so desperately to know is, in the circumstances, much more likely to be forthcoming if those responsible for such monstrous misdeeds are encouraged to disclose the whole truth with the incentive that they will not receive the punishment which they undoubtedly deserve if they do. Without that incentive there is nothing to encourage such persons to make the disclosures and to reveal the truth which persons in the positions of the applicants so desperately desire. With that incentive, what might unfold are objectives fundamental to the ethos of a new constitutional order. The families of those unlawfully tortured, maimed or traumatised become more empowered to discover the truth, the perpetrators become exposed to opportunities to obtain relief from the burden of a guilt or an anxiety they might be living with for many long years, the country begins the long and necessary process of healing the wounds of the past, transforming anger and grief into a mature understanding and creating the emotional and structural climate essential for the 'reconciliation and reconstruction' which informs the very difficult and sometimes painful objectives of the amnesty articulated in the epilogue.

[18] The alternative to the grant of immunity from criminal prosecution of offenders is to keep intact the abstract right to such a prosecution for particular persons without the evidence to sustain the prosecution successfully, to continue to keep the dependants of such victims in many cases substantially ignorant about what precisely happened to their loved ones, to leave their yearning for the truth effectively unassuaged, to perpetuate their legitimate sense of resentment and grief and correspondingly to allow the culpr of such deeds to remain perhaps physically free but inhibited in their capacity to become active, full and creative members of the new order by a menacing combination of confused fear, guilt, uncertainty and sometimes even trepidation. Both the victims and the culprits who walk on the 'historic bridge' described by the epilogue will hobble more than walk to the future with heavy and dragged steps, delaying and impeding a rapid and enthusiastic transition to the new society at the end of the bridge, which is the vision which informs the epilogue.

[19] Even more crucially, but for a mechanism providing for amnesty, the 'historic bridge' itself might never have been erected. For a successfully negotiated transition, the terms of the transition required not only the agreement of those victimised by abuse but also those threatened by the transition to a 'democratic society based on freedom and equality'.[17] If the Constitution kept alive the prospect of continuous retaliation and revenge, the agreement of those threatened by its implementation might never have been forthcoming and, if it had, the bridge itself would have remained wobbly and insecure, threatened by fear from some and anger from others. It was for this reason that those who negotiated the Constitution made a deliberate choice, preferring understanding over vengeance, reparation over retaliation, ubuntu[18] over victimisation.[19]

[20] Is s 20(7), to the extent to which it immunises wrongdoers from criminal prosecution, nevertheless objectionable on the grounds that amnesty might be provided in circumstances where the victims, or the dependants of the victims, have not had the compensatory benefit of discovering the truth at last or in circumstances where those whose misdeeds are so obscenely excessive as to justify punishment, even if they were perpetrated with a political objective during the course of conflict in the past? Some answers to such difficulties are provided in the subsections of s 20. The Amnesty Committee may grant amnesty in respect of the relevant offence only if the perpetrator of the misdeed makes a full disclosure of all relevant facts.[20] If the offender does not, and in consequence thereof the victim or his or her family is not able to discover the truth, the application for amnesty will fail. Moreover, it will not suffice for the offender merely to say that his or her act was associated with a political objective. That issue must independently be determined by the Amnesty Committee pursuant to the criteria set out in s 20(3), including the relationship between the offence committed and the political objective pursued and the directness and proximity of the relationship and the proportionality of the offence to the objective pursued.

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[17] Sections 33(1)*(a)*(ii) and 35(1) of the Constitution.
[18] The meaning of that concept is discussed in *S v Makwanyane and Another* 1995 (3) SA 391 (CC) (1995 (2) SACR 1; 1995 (6) BCLR 665) at paras [224]–[227], [241]–[251], [263] and [307]–[313].
[19] See the fourth paragraph of the epilogue to the Constitution.
[20] Section 20(1)*(c)* of the Act.

A [21] The result, at all levels, is a difficult, sensi. , perhaps even agonising, balancing act between the need for justice to victims of past abuse and the need for reconciliation and rapid transition to a new future; between encouragement to wrongdoers to help in the discovery of the truth and the need for reparations for the victims of that truth; B between a correction in the old and the creation of the new. It is an exercise of immense difficulty interacting in a vast network of political, emotional, ethical and logistical considerations. It is an act calling for a judgment falling substantially within the domain of those entrusted with lawmaking in the era preceding and during the transition period. The results may well often be imperfect and the pursuit of the act might C inherently support the message of Kant that 'out of the crooked timber of humanity no straight thing was ever made'.[21] There can be legitimate debate about the methods and the mechanisms chosen by the lawmaker to give effect to the difficult duty entrusted upon it in terms of the epilogue. We are not concerned with that debate or the wisdom of its D choice of mechanisms but only with its constitutionality. That, for us, is the only relevant standard. Applying that standard, I am not satisfied that, in providing for amnesty for those guilty of serious offences associated with political objectives and in defining the mechanisms through which and the manner in which such amnesty may be secured E by such offenders, the lawmaker, in s 20(7), has offended any of the express or implied limitations on its powers in terms of the Constitution.

[22] South Africa is not alone in being confronted with a historical situation which required amnesty for criminal acts to be accorded for the purposes of facilitating the transition to, and consolidation of, an F overtaking democratic order. Chile, Argentina and El Salvador are among the countries which have in modern times been confronted with a similar need. Although the mechanisms adopted to facilitate that process have differed from country to country and from time to time, the principle that amnesty should, in appropriate circumstances, be accorded to violators of human rights in order to facilitate the consolida- G tion of new democracies was accepted in all these countries and truth commissions were also established in such countries.

[23] The Argentinean truth commission was created by Executive Decree 187 of 15 December 1983. It disclosed to the government the names of over one thousand alleged offenders gathered during the H investigations.[22] The Chilean Commission on Truth and Reconciliation was established on 25 April 1990. It came to be known as the Rettig Commission after its chairman, Paul Rettig. Its report was published in 1991 and consisted of 850 pages pursuant to its mandate to clarify 'the

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[21] Immanuel Kant paraphrased in Isaiah Berlin's essay on 'Two concepts of Liberty' in *Four Essays on Liberty* (Oxford University Press, Oxford, 1969) at 170. See also Ackermann J in *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) (1996 (1) BCLR 1) at para [53].

[22] Pasqualucci 'The Whole Truth and Nothing But the Truth: Truth Commissions, Impunity and the Inter-American Human Rights System' (1994) 12 J *Boston University International Law Journal* 321 at 337–8.

truth about the most serious h. n right violations . . . in order to bring A about the reconciliation of all Chileans'.[23] The Commission on the Truth for El Salvador was established with similar objectives in 1992 to investigate 'serious acts of violence that have occurred since 1980 and whose impact on society urgently demands that the public should know the truth'.[24] In many cases amnesties followed in all these countries.[25] B

[24] What emerges from the experience of these and other countries that have ended periods of authoritarian and abusive rule is that there is no single or uniform international practice in relation to amnesty. Decisions of States in transition, taken with a view to assisting such transition, are quite different from acts of a State covering up its own crimes by granting C itself immunity. In the former case, it is not a question of the governmental agents responsible for the violations indemnifying themselves, but rather one of a constitutional compact being entered into by all sides, with former victims being well-represented, as part of an ongoing process to develop constitutional democracy and prevent a repetition of the D abuses.

[25] Mr *Soggot* contended on behalf of the applicants that the State was obliged by international law to prosecute those responsible for gross human rights violations and that the provisions of s 20(7) which authorised amnesty for such offenders constituted a breach of interna- E tional law. We were referred in this regard to the provisions of art 49 of the first Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art 50 of the second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art 129 of the F third Geneva Convention relative to the Treatment of Prisoners of War and art 146 of the fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War. The wording of all these articles is exactly the same and provides as follows:

'The High Contracting Parties undertake to enact any legislation necessary to G provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches . . .'

defined in the instruments so as to include, *inter alia*, wilful killing, torture or inhuman treatment and wilfully causing great suffering or serious injury to body or health.[26] They add that each High Contracting H Party shall be under an obligation to search for persons alleged to have

[23] *Id* at 338, quoting the National Commission on Truth and Reconciliation 'Report of the Chilean Commission on Truth and Reconciliation' (*Berryman's* translation (1993)). I

[24] *Id* at 339, quoting the Report of the Commission on the Truth for El Salvador 'From Madness to Hope: The 12-Year War in El Salvador' United Nations s/25500 (1993).

[25] *Id* at 343.

[26] Article 50 of the first Geneva Convention; art 51 of the second Geneva Convention; art 130 of the third Geneva Convention and art 147 of the fourth Geneva Convention. J

committed such grave breaches and shall bring such persons, regardless of their nationality, before its own courts.[27]

[26] The issue which falls to be determined in this Court is whether s 20(7) of the Act is inconsistent with the Constitution. If it is, the enquiry as to whether or not international law prescribes a different duty is irrelevant to that determination. International law and the contents of international treaties to which South Africa might or might not be a party at any particular time are, in my view, relevant only in the interpretation of the Constitution itself, on the grounds that the lawmakers of the Constitution should not lightly be presumed to authorise any law which might constitute a breach of the obligations of the State in terms of international law. International conventions and treaties do not become part of the municipal law of our country, enforceable at the instance of private individuals in our courts, until and unless they are incorporated into the municipal law by legislative enactment.[28]

[27] These observations are supported by the direct provisions of the Constitution itself referring to international law and international agreements. Section 231(3) of the Constitution makes it clear that when Parliament agrees to the ratification of or accession to an international agreement such agreement becomes part of the law of the country only if Parliament expressly so provides and the agreement is not inconsistent with the Constitution. Section 231(1) provides in express terms that

'(a)ll rights and obligations under international agreements which immediately before the commencement of this Constitution were vested in or binding on the Republic within the meaning of the previous Constitution, shall be vested in or binding on the Republic under this Constitution, unless provided otherwise by an Act of Parliament'.

It is clear from this section that an Act of Parliament can override any contrary rights or obligations under international agreements entered into before the commencement of the Constitution. The same temper is evident in s 231(4) of the Constitution, which provides that

'(t)he rules of customary international law binding on the Republic, shall, unless inconsistent with this Constitution or an Act of Parliament, form part of the law of the Republic'.

Section 35(1) of the Constitution is also perfectly consistent with these conclusions. It reads as follows:

'In interpreting the provisions of this chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and

[27] Article 49 of the first Geneva Convention; art 50 of the second Geneva Convention; art 129 of the third Geneva Convention and art 146 of the fourth Geneva Convention.

[28] *R v Secretary of State for the Home Department, Ex parte Brind and Others* [1991] 1 AC 696 (HL) at 761G–762D ([1991] 1 All ER 720); *Pan American World Airways Incorporated v SA Fire and Accident Insurance Co Ltd* 1965 (3) SA 150 (A) at 161C; *Maluleke v Minister of Internal Affairs* 1981 (1) SA 707 (B) at 712G–H; *Binga v Cabinet for South West Africa and Others* 1988 (3) SA 155 (A) at 184H–185D; *S v Petane* 1988 (3) SA 51 (C) at 56F–G; Hahlo and Kahn *The South African Legal System and Its Background* (Juta & Co Ltd, Kenwyn, 1968) at 114; Dugard *International Law: A South African Perspective* (Juta & Co Ltd, Kenwyn, 1994) at 339–46.

equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this chapter, and may have regard to comparable foreign case law.'

The Court is directed only to 'have regard' to public international law if it is applicable to the protection of the rights entrenched in the chapter.

[28] The exact terms of the relevant rules of public international law contained in the Geneva Conventions relied upon on behalf of the applicants would therefore be irrelevant if, on a proper interpretation of the Constitution, s 20(7) of the Act is indeed authorised by the Constitution, but the content of these Conventions in any event does not assist the case of the applicants.

[29] In the first place it is doubtful whether the Geneva Conventions of 1949 read with the relevant Protocols thereto apply at all to the situation in which this country found itself during the years of the conflict to which I have referred.[29]

[30] Secondly, whatever be the proper ambit and technical meaning of these Conventions and Protocols, the international literature[30] in any event clearly appreciates the distinction between the position of perpetrators of acts of violence in the course of war (or other conflicts between States or armed conflicts between liberation movements seeking self-determination against colonial and alien domination of their countries), on the one hand, and their position in respect of violent acts perpetrated during other conflicts which take place within the territory of a sovereign State in consequence of a struggle between the armed forces of that State and other dissident armed forces operating under responsible command, within such a State on the other. In respect of the latter category, there is no obligation on the part of a contracting State to ensure the

[29] The Geneva Conventions of 1949 apply only to cases of 'declared war or of any armed conflict which may arise between two or more of the High Contracting Parties'. (No High Contracting Parties were involved in the South African conflict.) The Conventions were extended by art 1(4) of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted on 8 June 1977) to 'armed conflicts in which peoples are fighting against colonial domination and alien occupation and against regimes in the exercise of their rights of self-determination'. Even if the conflict in South Africa could be said to fall within this extension (this was not accepted by the Cape Supreme Court in the *AZAPO* case referred to in footnote 15, *supra*), Protocol I could only become binding after a declaration of intent to abide thereby had been deposited with the Swiss Federal Council in terms of art 95 as read with art 96 of this Protocol. This Protocol was never signed or ratified by South Africa during the conflict and no such 'declaration' was deposited with *that* Council by any of the parties to the conflict. As far as Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (also adopted on 8 June 1977) is concerned, it equally cannot assist the case of the applicants because it is doubtful whether it applies at all (see art 1(1) to Protocol II), but, if it does, it actually requires the authorities in power, after the end of hostilities, to grant amnesty to those previously engaged in the conflict.

[30] See, for example, *Dugard* (*supra*, n 28 at 333); and see further the references contained in footnotes 31, 32 and 33, *infra*.

prosecution of those who might have performed acts o. .lence or other acts which would ordinarily be characterised as serious invasions of human rights. On the contrary, art 6(5) of Protocol II to the Geneva Conventions of 1949 provides that

'(a)t the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained'.

[31] The need for this distinction is obvious. It is one thing to allow the officers of a hostile power which has invaded a foreign State to remain unpunished for gross violations of human rights perpetrated against others during the course of such conflict. It is another thing to compel such punishment in circumstances where such violations have substantially occurred in consequence of conflict between different formations within the same State in respect of the permissible political direction which that State should take with regard to the structures of the State and the parameters of its political policies and where it becomes necessary after the cessation of such conflict for the society traumatised by such a conflict to reconstruct itself. The erstwhile adversaries of such a conflict inhabit the same sovereign territory. They have to live with each other and work with each other and the State concerned is best equipped to determine what measures may be most conducive for the facilitation of such reconciliation and reconstruction. That is a difficult exercise which the nation within such a State has to perform by having regard to its own peculiar history, its complexities, even its contradictions and its emotional and institutional traditions. What role punishment should play in respect of erstwhile acts of criminality in such a situation is part of the complexity. Some aspects of this difficulty are covered by Judge Marvin Frankel in a book he authored with Ellen Saideman.[31]

'The call to punish human rights criminals can present complex and agonising problems that have no single or simple solution. While the debate over the Nuremberg trials still goes on, that episode—trials of war criminals of a defeated nation—was simplicity itself as compared to the subtle and dangerous issues that can divide a country when it undertakes to punish its own violators.

A nation divided during a repressive regime does not emerge suddenly united when the time of repression has passed. The human rights criminals are fellow citizens, living alongside everyone else, and they may be very powerful and dangerous. If the army and the police have been the agencies of terror, the soldiers and the cops aren't going to turn overnight into paragons of respect for human rights. Their numbers and their expert management of deadly weapons remain significant facts of life. . . . The soldiers and police may be biding their time, waiting and conspiring to return to power. They may be seeking to keep or win sympathisers in the population at large. If they are treated too harshly—or if the net of punishment is cast too widely—there may be a backlash that plays into their hands. But their victims cannot simply forgive and forget.

[31] Frankel *Out of the Shadows of the Night: The Struggle for International Human Rights* (Celacorte Press, New York, 1989) at 103–4.

These problems are not abstract g .ilities. They describe tough realities in more than a dozen countries. If, as we hope, more nations are freed from regimes of terror, similar problems will continue to arise.

Since the situations vary, the nature of the problems varies from place to place.'

The agonies of a nation seeking to reconcile the tensions between justice for those wronged during conflict, on the one hand, and the consolidation of the transition to a nascent democracy, on the other, have also been appreciated by other international commentators.[32] It is substantially for these reasons that amnesty clauses are not infrequent in international agreements concluded even after a war between different States.

'Amnesty clauses are frequently found in peace treaties and signify the will of the parties to apply the principle of *tabula rasa* to past offences, generally political delicts such as treason, sedition and rebellion, but also to war crimes. As a sovereign act of oblivion, amnesty may be granted to all persons guilty of such offences or only to certain categories of offenders.'[33]

[32] Considered in this context, I am not persuaded that there is anything in the Act, and more particularly in the impugned s 20(7) thereof, which can properly be said to be a beach of the obligations of this country in terms of the instruments of public international law relied on by Mr *Soggot*. The amnesty contemplated is not a blanket amnesty against criminal prosecution for all and sundry, granted automatically as a uniform act of compulsory statutory amnesia. It is specifically authorised for the purposes of effecting a constructive transition towards a democratic order. It is available only where there is a full disclosure of all facts to the Amnesty Committee and where it is clear that the particular transgression was perpetrated during the prescribed period and with a political objective committed in the course of the conflicts of the past. That objective has to be evaluated having regard to the careful criteria listed in s 20(3) of the Act, including the very important relationship which the act perpetrated bears in proportion to the object pursued.

Amnesty in respect of the civil liability of individual wrongdoers

[33] Mr *Soggot* submitted that chap 3 of the Constitution, and more particularly s 22, conferred on every person the right to pursue, in the ordinary courts of the land or before independent tribunals, any claim which such person might have in civil law for the recovery of damages sustained by such a person in consequence of the unlawful delicts

[32] See Orentlicher 'Settling Accounts: The Duty To Prosecute Human Rights Violations of a Prior Regime' (1991) 100 *Yale LJ* 2537 at 2544 and, by the same author, 'A reply to Professor Nino' (1991) 100 *Yale LJ* 2641. See also a recent interview with the same author commenting on the South African Truth Commission in *Issues of Democracy*, published by the United States Information Services, Johannesburg, vol 1 No 3 May 1996 at 33.

[33] Bernhardt (ed) *Encyclopedia of Public International Law* (North-Holland, Amsterdam, London, New York, Tokyo, 1992) vol I at 148 and Bernhardt (ed) *Encyclopedia of Public International Law* (North-Holland, Amsterdam, New York, Oxford, 1982) vol 3 ('Use of Force, War and Neutrality, Peace Treaties (A–M)') at 14–15.

perpetrated by a wrongdoer. He contended that the Constitution did not authorise Parliament to make any law which would have the result of indemnifying (or otherwise rendering immune from liability) the perpetrator of any such delict against any claims made for damages suffered by the victim of such a delict. In support of that argument he suggested that the concept of 'amnesty', referred to in the epilogue to the Constitution, was, at worst for the applicants, inherently limited to immunity from criminal prosecutions. He contended that, even if a wrongdoer who has received amnesty could plead such amnesty as a defence to a criminal prosecution, such amnesty could not be used as a shield to protect him or her from claims for delictual damages suffered by any person in consequence of the act or omission of the wrongdoer.

[34] There can be no doubt that in some contexts the word 'amnesty' does bear the limited meaning contended for by counsel. Thus one of the meanings of amnesty referred to in *The Oxford English Dictionary* is '. . . a general overlooking or pardon of past offences, by the ruling authority'[34] and, in similar vein, *Webster's Dictionary* gives as the second meaning of amnesty 'a deliberate overlooking, as of an offense'.[35] *Wharton's Law Lexicon* also refers to amnesty in the context 'by which crimes against the Government up to a certain date are so obliterated that they can never be brought into charge'.[36]

[35] I cannot, however, agree that the concept of amnesty is inherently to be limited to the absolution from criminal liability alone, regardless of the context and regardless of the circumstances. The word has no inherently fixed technical meaning. Its origin is to be found in the Greek concept of 'amnestia' and it indicates what is described by *Webster's Dictionary*[37] as 'an act of oblivion'. The degree of oblivion or obliteration must depend on the circumstances. It can, in certain circumstances, be confined to immunity from criminal prosecutions and in other circumstances be extended also to civil liability. Describing the effects of amnesty in treaties concluded between belligerent parties, a distinguished writer states:

> 'An amnesty is a complete forgetfulness of the past; and as the treaty of peace is meant to put an end to every subject of discord, the amnesty should constitute its first article. Accordingly, such is the common practice at the present day. But though the treaty should make no mention of it, the amnesty is necessarily included in it, from the very nature of the agreement.
>
> Since each of the belligerents claims to have justice on his side, and since there is no one to decide between them (Book III, § 188), the condition in which affairs stand at the time of the treaty must be regarded as their lawful status, and if the parties wish to make any change in it the treaty must contain an express stipulation to that effect. Consequently all matters not mentioned in the treaty are to continue as they happen to be at the time the treaty is concluded. This is also a result of the promised amnesty. *All the injuries caused by the war are likewise forgotten; and no action can lie on account of those for which the treaty does not stipulate that satisfaction shall be made; they are considered as never having happened.*
>
> But the effect of the settlement or amnesty cannot be extended to things which bear no relation to war terminated by the treaty. Thus, claims based upon a debt contracted, or an injury received, prior to the war, but which formed no part of the motives for undertaking the war, remain as they were, and are not annulled by the treaty, unless the treaty has been made to embrace the relinquishment of all claims whatsoever. The same rule holds for debts contracted during the war, but with respect to objects which have no relation to it, and for injuries received during the war, but not as a result of it.'

(My emphasis.)[38]

[36] What are the material circumstances of the present case? As I have previously said, what the epilogue to the Constitution seeks to achieve by providing for amnesty is the facilitation of 'reconciliation and reconstruction' by the creation of mechanisms and procedures which make it possible for the truth of our past to be uncovered. Central to the justification of amnesty in respect of the criminal prosecution for offences committed during the prescribed period with political objectives is the appreciation that the truth will not effectively be revealed by the wrongdoers if they are to be prosecuted for such acts. That justification must necessarily and unavoidably apply to the need to indemnify such wrongdoers against civil claims for payment of damages. Without that incentive the wrongdoer cannot be encouraged to reveal the whole truth which might inherently be against his or her material or proprietary interests. There is nothing in the language of the epilogue which persuades me that what the makers of the Constitution intended to do was to encourage wrongdoers to reveal the truth by providing for amnesty against criminal prosecution in respect of their acts but simultaneously to discourage them from revealing that truth by keeping intact the threat that such revelations might be visited with what might in many cases be very substantial claims for civil damages. It appears to me to be more reasonable to infer that the legislation contemplated in the epilogue would, in the circumstances defined, be wide enough to allow for an amnesty which would protect a wrongdoer who told the truth from both the criminal and the civil consequences of his or her admissions.

[37] This conclusion appears to be fortified by the fact that what the epilogue directs is that

> 'amnesty shall be granted in respect of acts, omissions and offences . . .'.

If the purpose was simply to provide mechanisms in terms of which wrongdoers could be protected from criminal prosecution in respect of offences committed by them, why would there be any need to refer also to 'acts and omissions' in addition to offences? The word 'offences' would have covered both acts and omissions in any event.

[38] In the result I am satisfied that s 20(7) is not open to constitutional

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[34] *The Oxford English Dictionary* 2nd ed vol I at 406.
[35] *Webster's New Twentieth Century Dictionary* 2nd ed at 59.
[36] *Wharton's Law Lexicon* 14th ed at 59.
[37] *Supra*, n 35.

[38] De Vattel *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns* (translation by Fenwick) (Carnegie Institute of Washington, Washington, 1916) at 351, paras 20–22, quoted by Friedman JP and Farlam J in the *AZAPO* case *supra*, n 15 at 24.*
* See 1996 (4) SA at 571I—Eds.

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challenge on the ground that it invades the right of a victim or his or her dependant to recover damages from a wrongdoer for unlawful acts perpetrated during the conflicts of the past. If there is any such invasion it is authorised and contemplated by the relevant parts of the epilogue.

The effect of amnesty on any potential civil liability of the State

[39] Mr *Soggot* contended forcefully that, whatever be the legitimate consequences of the kind of amnesty contemplated by the epilogue for the criminal and civil liability of the wrongdoer, the Constitution could not justifiably authorise any law which has the effect of indemnifying the State itself against civil claims made by those wronged by criminal and delictual acts perpetrated by such wrongdoers in the course and within the scope of their employment as servants of the State. Section 20(7) of the Act, he argued, had indeed that effect and was therefore unconstitutional to that extent.

[40] This submission has one great force. It is this. If the wrongdoer in the employment of the State is not personally indemnified in the circumstances regulated by the Act, the truth might never unfold. It would remain shrouded in the impenetrable mysteries of the past, leaving the dependants of many victims with a grief unrelieved by any knowledge of the truth. But how, it was argued, would it deter such wrongdoers from revealing the truth if such a revelation held no criminal or civil consequences for them? How could such wrongdoers be discouraged from disclosing the truth if their own liberty and property was not to be threatened by such revelations, but the State itself nevertheless remained liable to compensate the families of victims for such wrongdoings perpetrated by the servants of the State?

[41] This is a serious objection which requires to be considered carefully. I think it must be conceded that in many cases the wrongdoer would not be discouraged from revealing the whole truth merely because the consequences of such disclosure might be to saddle the State with a potential civil liability for damages arising from the delictual acts or omissions of a wrongdoer (although there may also be many cases in which such a wrongdoer, still in the service of the State, might in some degree be inhibited or even coerced from making disclosures implicating his or her superiors).

[42] The real answer, however, to the problems posed by the questions which I have identified seems to lie in the more fundamental objectives of the transition sought to be attained by the Constitution and articulated in the epilogue itself. What the Constitution seeks to do is to facilitate the transition to a new democratic order, committed to 'reconciliation between the people of South Africa and the reconstruction of society'. The question is how this can be done effectively with the limitations of our resources and the legacy of the past.

[43] The families of those whose fundamental human rights were invaded by torture and abuse are not the only victims who have endured 'untold suffering and injustice' in consequence of the crass inhumanity

of apartheid which so many have had to endure for so long. Generations of children born and yet to be born will suffer the consequences of poverty, of malnutrition, of homelessness, of illiteracy and disempowerment generated and sustained by the institutions of apartheid and its manifest effects on life and living for so many. The country has neither the resources nor the skills to reverse fully these massive wrongs. It will take many years of strong commitment, sensitivity and labour to 'reconstruct our society' so as to fulfill the legitimate dreams of new generations exposed to real opportunities for advancement denied to preceding generations initially by the execution of apartheid itself and for a long time after its formal demise, by its relentless consequences. The resources of the State have to be deployed imaginatively, wisely, efficiently and equitably to facilitate the reconstruction process in a manner which best brings relief and hope to the widest sections of the community, developing for the benefit of the entire nation the latent human potential and resources of every person who has directly or indirectly been burdened with the heritage of the shame and the pain of our racist past.

[44] Those negotiators of the Constitution and leaders of the nation who were required to address themselves to these agonising problems must have been compelled to make hard choices. They could have chosen to direct that the limited resources of the State be spent by giving preference to the formidable delictual claims of those who had suffered from acts of murder, torture or assault perpetrated by servants of the State, diverting to that extent desperately needed funds in the crucial areas of education, housing and primary health care. They were entitled to permit a different choice to be made between competing demands inherent in the problem. They could have chosen to direct that the potential liability of the State be limited in respect of any civil claims by differentiating between those against whom prescription could have been pleaded as a defence and those whose claims were of such recent origin that a defence of prescription would have failed. They were entitled to reject such a choice on the grounds that it was irrational. They could have chosen to saddle the State with liability for claims made by insurance companies which had compensated institutions for delictual acts performed by the servants of the State and to that extent again divert funds otherwise desperately needed to provide food for the hungry, roofs for the homeless and blackboards and desks for those struggling to obtain admission to desperately overcrowded schools. They were entitled to permit the claims of such school children and the poor and the homeless to be preferred.

[45] The election made by the makers of the Constitution was to permit Parliament to favour 'the reconstruction of society', involving in the process a wider concept of 'reparation', which would allow the State to take into account the competing claims on its resources but, at the same time, to have regard to the 'untold suffering' of individuals and families whose fundamental human rights had been invaded during the conflict of the past. In some cases such a family may best be assisted by a

reparation which allows the young in this family to maximise their potential through bursaries and scholarships; in other cases the most effective reparation might take the form of occupational training and rehabilitation; in still other cases complex surgical interventions and medical help may be facilitated; still others might need subsidies to prevent eviction from homes they can no longer maintain and in suitable cases the deep grief of the traumatised may most effectively be assuaged by facilitating the erection of a tombstone on the grave of a departed one with a public acknowledgement of his or her valour and nobility. There might have to be differentiation between the form and quality of the reparations made to two persons who have suffered exactly the same damage in consequence of the same unlawful act but where one person now enjoys lucrative employment from the State and the other lives in penury.

[46] All these examples illustrate, in my view, that it is much too simplistic to say that the objectives of the Constitution could only properly be achieved by saddling the State with the formal liability to pay, in full, the provable delictual claims of those who have suffered patrimonial loss in consequence of the delicts perpetrated with political objectives by servants of the State during the conflicts of the past. There was a permissible alternative, perhaps even a more imaginative and more fundamental route to the 'reconstruction of society', which could legitimately have been followed. This is the route which appears to have been chosen by Parliament through the mechanism of amnesty and nuanced and individualised reparations in the Act. I am quite unpersuaded that this is not a route authorised by the epilogue to the Constitution.

[47] The epilogue required that a law be adopted by Parliament which would provide for 'amnesty' and it appreciated the 'need for reparation', but it left it to Parliament to decide upon the ambit of the amnesty, the permissible form and extent of such reparations and the procedures to be followed in the determination thereof, by taking into account all the relevant circumstances to which I have made reference. Parliament was therefore entitled to decide that, having regard to the resources of the State, proper reparations for those victimised by the unjust laws and practices of the past justified formulae which did not compel any irrational differentiation between the claims of those who were able to pursue enforceable delictual claims against the State and the claims of those who were not in that position but nevertheless deserved reparations.

[48] It was submitted by Mr *Soggot* that the reference to the 'need for reparation' in the epilogue is contained only in the fourth paragraph of the epilogue and does not appear in the directive to Parliament to adopt a law 'providing for the mechanisms, criteria and procedures, including tribunals, if any, through which . . . amnesty shall be dealt with . . .'. He argued from this that what the makers of the Constitution must have contemplated was that the ordinary liability of the State, in respect of damages sustained by others in consequence of the acts of the servants

of the State, remained intact and was protected by s 22 of the Constitution. In my view, this is a fragmentary and impermissible approach to the structure of the epilogue. It must be read holistically. It expresses an integrated philosophical and jurisprudential approach. The very first paragraph defines the commitment to the 'historic bridge' and the second paragraph expands on the theme of this bridge by elevating 'the pursuit of national unity, . . . reconciliation between the people of South Africa and the reconstruction of society'. It then goes on in the third paragraph, in very moving and generous language, to 'secure' the 'foundation' of the nation by transcending 'the divisions and strife of the past, which generated gross violations of human rights' and elects, in eloquent terms in the next paragraph, to make the historic choice in favour of understanding above vengeance, ubuntu over victimisation and 'a need for reparation but not for retaliation'. This philosophy then informs the fifth paragraph, which directs Parliament to adopt a law providing for amnesty and is introduced by the words '(i)n order to advance such reconciliation and reconstruction, amnesty shall be granted . . .'. The reference to '*such* reconciliation and reconstruction' embraces the continuing radiating influence of the preceding paragraphs, including the reference to 'the need for reparation'. Approached in this way, the reparations authorised in the Act are not alien to the legislation contemplated by the epilogue. Indeed, they are perfectly consistent with, and give expression to, the extraordinarily generous and imaginative commitment of the Constitution to a philosophy which has brought unprecedented international acclaim for the people of our country. It ends with the deep spirituality and dignity of the last line:

'Nkosi sikelel' iAfrika—God seën Suid-Afrika.'

The indemnity of organisations and persons in respect of claims based on vicarious liability

[49] It was not contended by Mr *Soggat* that, even if the State was properly rendered immune against claims for damages in consequence of delicts perpetrated by its servants, acting within the scope and in the course of their employment, individuals and organisations should not enjoy any similar protection in respect of any vicarious liability arising from any unlawful acts committed by their servants or members. He was correct in that attitude. Apart from the fact that the wrongdoers concerned might be discouraged from revealing the truth which implicated their employers or organisations on whose support they might still directly or indirectly depend, the Constitution itself could not successfully have been transacted if those responsible for the negotiations which preceded it, and the political organisations to which they belonged, were going to remain vulnerable to potentially massive claims for damages arising from their vicarious liability in respect of such wrongful acts perpetrated by their agents or members. The erection of the 'historic bridge' would never have begun.

Conclusion

[50] In the result, I am satisfied that the epilogue to the Constitution authorised and contemplated an 'amnesty' in its most comprehensive and generous meaning so as to enhance and optimise the prospects of facilitating the constitutional journey from the shame of the past to the promise of the future. Parliament was, therefore, entitled to enact the Act in the terms which it did. This involved more choices apart from the choices I have previously identified.[39] They could have chosen to insist that a comprehensive amnesty manifestly involved in inequality of sacrifice between the victims and the perpetrators of invasions into the fundamental rights of such victims and their families, and that, for this reason, the terms of the amnesty should leave intact the claims which some of these victims might have been able to pursue against those responsible for authorising, permitting or colluding in such acts, or they could have decided that this course would impede the pace, effectiveness and objectives of the transition with consequences substantially prejudicial for the people of a country facing, for the first time, the real prospect of enjoying, in the future, some of the human rights so unfairly denied to the generations which preceded them. They were entitled to choose the second course. They could conceivably have chosen to differentiate between the wrongful acts committed in defence of the old order and those committed in the resistance of it, or they could have chosen a comprehensive form of amnesty which did not make this distinction. Again they were entitled to make the latter choice. The choice of alternatives legitimately fell within the judgment of the lawmakers. The exercise of that choice does not, in my view, impact on its constitutionality. It follows from these reasons that s 20(7) of the Act is authorised by the Constitution itself and it is unnecessary to consider the relevance and effect of s 33(1) of the Constitution.

Order

[51] In the result, the attack on the constitutionality of s 20(7) of the Promotion of National Unity and Reconciliation Act 34 of 1995 must fail. That was the only attack which was pursued on behalf of the applicants in this Court. It accordingly follows that the application must be, and is, refused.

Chaskalson P, Ackermann, Kriegler, Langa, Madala, Mokgoro, O'Regan and Sachs JJ concurred in the judgment of Mahomed DP.

Didcott J:

[52] I concur in the order that Mahomed DP proposes to make. I also agree in general with, and wish to add nothing to, the comprehensive and lucid reasons given by him for the conclusions to which he has come that the Promotion of National Unity and Reconciliation Act (34 of 1995) is not unconstitutional in absolving:

[39] In paras [44] and [45] *supra*.

(a) all those to whom an ies have been granted from personal liability, either criminal or civil, for their unlawful activities that are covered;

(b) everyone else and all bodies and organisations besides the State from civil liability, incurred vicariously or otherwise, for such activities on the part of persons who have obtained their own amnesties in respect of those.

After much hesitation, and without managing to shed altogether some doubts that linger in my mind even now, I feel persuaded on balance that the same must go for the civil liability of the State. Both my approach to that troublesome issue and the line I take in endeavouring to resolve it are narrower than and, in their emphasis, different from the ones preferred by Mahomed DP. I shall therefore explain separately why, at the end of that particular journey, I nevertheless find myself arriving rather reluctantly at the same destination as his. The considerations which account largely for those qualms of mine will emerge too from the explanation.

[53] That the discharges from civil liability are all incompatible with s 22 of the interim Constitution (Act 200 of 1993) is clear beyond question. For they deny to a class of persons the right bestowed by it on everyone '. . . to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial forum'.

Both the Committee on Amnesty and the Committee on Reparation and Rehabilitation which the statute establishes appear to be rateable for those purposes as independent and impartial tribunals, and I shall assume that they fit that bill. But the determination of justiciable disputes is hardly a function of either. That leaves the courts of law as the only avenue that would have been open to those asserting the right had they still enjoyed it. Subject to an obvious qualification, the class to whom it has instead been denied consists of people pursuing or wishing to pursue contested claims against any of the parties now protected which are based on a liability alleged for some unlawful activity of the kind encompassed. The qualification is this. Such claims are confined, firstly, to those intrinsically cognisable by a court according to the laws in force at the time when the causes of action arose and, secondly, to the ones not yet extinguished or barred by prescription or the like in terms of a scheme consistent with the Constitution. The rider must be added because, once a claim is unenforceable for the want of either attribute, it can never generate a justiciable dispute over its substantiation and the right does not then enter the reckoning. The relevance to my thinking of that consequence will become apparent in a moment or two.

[54] Whenever the right arises but is denied, on the other hand, the validity of the denial depends on the permissibility of that under s 33 of the Constitution. Its familiar ss (1) is not the sole component that counts in the context of this case. So does ss (2). The combined effect of the two subsections is that the denial will pass constitutional muster if we find it to be reasonable, justifiable in an open and democratic society based on freedom and equality, and not a negation of the essential content of the right or, should we make no complete finding along those lines, if we are

satisfied that some other provision of the Constitution allows it independently.[40] The only further provisions which may have such an import, as far as I can see, are the ones contained in the postscript to the Constitution or its epilogue, as Mahomed DP has called that, which under s 232(4) forms part of the Constitution and ranks equally with the rest of it.[41]

[55] In investigating the tolerability of the denial I do not set the store that Mahomed DP does by the impossibility of compensating all the countless victims of apartheid in any adequate measure or form for the incalculable damage done to them during that era, and by the unavailability of legal redress to a large majority of the victims either because the harm suffered was not in the first place the type for which the law could offer some remedy or because, though it fell within that restricted field, their claims had lapsed with the passage of time. Such harm, the scale and horror of which Mahomed DP has described so vividly, is highly pertinent to the political and social policy animating the statute, indeed of crucial importance there. It has scant bearing that I can see, however, on the constitutional issue now under discussion, since the lack of a right by the many can scarcely provide a sound excuse for its denial to others, be they relatively but few, whose title to it is clear. Nor do I attach great weight to the cost that the State would inevitably incur in meeting not some obligations foisted freshly on it, but ones endured all along from which the Legislature has now seen fit to release it. We have no means of assessing that cost, even approximately. But, unless perhaps its amount unbeknown to us is prohibitively high in relation to our national revenue and expenditure, it does not strike me as a strong reason for depriving the persons to whom the obligations are owed of their normal and legal due.

[56] Much the same may be said no doubt about the civil amnesties tendered to parties other than the State. A major factor in each of those distinguishes it sharply, however, from the immunity that the State has been granted.

[57] The amnesties made available to individuals are indispensable if an essential object of the legislation is to be achieved, the object of eliciting the truth at last about atrocities committed in the past and the responsibility borne for them. The primary sources of information concerning those infamies, the perpetrators themselves, would hardly be willing to divulge it voluntarily, honestly and candidly without the protection of exemptions from personal liability, civil no less than criminal. The emergence of the truth, or a good deal of that at any rate, depends after all on no fear of the consequences continuing to daunt them from telling it, on their encouragement by the prospect of amnesties to reveal it instead. The shroud of silence that has enveloped their activities for too long would otherwise go on doing so. And that

[40] The full text of both subsections will be found in the judgment of Mahomed DP at para [10].

[41] The complete text of the postscript has been reproduced in para [3] of the same judgment and of s 232(4) in para [14].

would have put paid effectively he bulk of legal claims against them, I mention in parenthesis, had their escapes from liability not disposed of the lot in any event. For enough evidence to substantiate the claims would then have seldom come to light. The immunity awarded to the State does not serve the same cardinal purpose. Having made a clean breast of their own misbehaviour and obtained personal amnesties in respect of it, the wrongdoers are unlikely to feel inhibited in disclosing such role as the State may have played in their activities. To absolve them but not it from liability would have furnished the people then suing it, what is more, with an additional advantage. They would have been helped to prove the unlawful conduct alleged, and its vicarious responsibility for that, by calling as witnesses and relying on the testimony of those very wrongdoers.

[58] The amnesties that shield bodies and organisations besides the State and persons apart from the actual offenders, to turn next to that category, appear to have had a different though equally cogent explanation. We all know that the agreement reached ultimately on the Constitution was the culmination of protracted and intense negotiations over its tenor and details alike, in which the main protagonists were organisations, bodies and individuals with a history of participation in the bitter political struggle that had preceded the process. It seems highly improbable that, when the postscript to the Constitution came up for discussion, the negotiators would ever have entertained the idea of amnesties which did not cover both their own organisations or bodies and persons found within their political ranks, including themselves. Any such suggestion, if pressed with vigour on a point so delicate, might well have jeopardised the entire negotiations. One has no reason to suppose and can scarcely imagine, however, that a comparable protectiveness or loyalty towards an entity as impersonal as the State would have been sentiments cherished by any significant number of negotiators.

[59] The cluster of amnesties share, on the other hand, a common denominator. I refer to one of the basic objects promoted by the statute, as seen from its provisions, and the effect to that which the amnesties are meant collectively to give. The object that I have in mind is this. Once the truth about the iniquities of the past has been established and made known, the book should be closed on them so that the catharsis thus engendered may divert the energies of the nation from a preoccupation with anguish and rancour to a future directed towards the goal which both the postscript to the Constitution and the preamble to the statute have set by declaring in turn that

'. . . the pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society'.

The book would not be closed while litigation against the State proceeded throughout the land, accompanied by a constant fanfare of publicity and lasting much longer in all probability than the strictly limited period which, in the interests of putting an early end to unfruitful recriminations, the statute fixes for the work that it requires.

[60] All the considerations canvassed in the three preceding paragraphs

of this judgment have a bearing, to a greater or lesser extent, on both of the alternative enquiries that arise under s 33. They thus introduce the particular one to which I now turn, the question whether the postscript to the Constitution, rightly construed, encompasses the notion of an immunity operating in favour of the State.

[61] The postscript does not differentiate between the various beneficiaries of the amnesties that it envisages. Indeed it identifies none. Any number of dictionaries, lay and legal, define the word 'amnesty'. But no definition has come to my attention which throws light on that specific question. We must therefore deduce the answer, as best we can, from the postscript read as a whole. Friedman JP and Farlam J decided in *Azanian Peoples Organisation and Others v Truth and Reconciliation Commission and Others*[42] that the 'broadest possible' meaning should be given to the word where it appeared within the setting of the postscript thus read. They said so, to be sure, in the context of an argument which had been addressed to them about the applicability of the word to civil wrongs in addition to crimes, and when their minds were not attuned to the narrower issue of State immunity. No stricter construction seems to be warranted once that issue confronts us, however, in the absence at any rate of some recognised usage attributing to the word a sense which suggests that the State may be intrinsically ineligible for such protection. The circumstances that I discussed a moment ago in ascribing a common denominator to all the amnesties tend on the contrary to call for an interpretation equally wide, and no less so in themselves on account of the separate factors distinguishing those granted to the State from the ones dispensed elsewhere. Liabilities incurred by the State would otherwise fall outside the ambit of the 'integrated philosophical and jurisprudential approach' to the treatment of liability in general which Mahomed DP sees, and I too accept, as a significant characteristic of the postscript.[43] Such a construction and the reasons for it which I have mentioned tell in favour of amnesties embracing all bearers of liability, amnesties that consequently include the State among their beneficiaries.

[62] The scales are tipped further that way, in my final estimation, by an aspect of the matter which I have not yet touched. It concerns the homage that the postscript pays to the 'need for reparation'. Reparations are usually payable by States, and there is no reason to doubt that the postscript envisages our own State shouldering the national responsibility for those. It therefore does not contemplate that the State will go scot-free. On the contrary, I believe, an actual commitment on the point is implicit in its terms, a commitment in principle to the assumption by the State of the burden.

[42] Their joint judgment has not yet been reported. It was delivered in the Cape Provincial Division of the Supreme Court on 9 May 1996.*
* Now reported at 1996 (4) SA 562 (C)—Eds.
[43] See para [48] of his judgment.

[63] What remains to be examined is the extent to which the statute gives effect to the acknowledgement of that responsibility. The question arises because it was said in argument to have done so insufficiently.

[64] The long title of the statute declares one of the objects which it promotes to be

'... the taking of measures aimed at the granting of reparation to, and the rehabilitation and the restoration of the human and civil dignity of, victims of violations of human rights'.

Section 1 defines 'reparation' in terms that include

'... any form of compensation, *ex gratia* payment, restitution, rehabilitation or recognition'.

The word 'victims' is said in the same section to cover

'... persons who ... suffered harm in the form of physical or mental injury, emotional suffering, pecuniary loss or a substantial impairment of human rights ... as a result of a gross violation of human rights or ... as a result of an act associated with a political objective for which amnesty has been granted'.

The section continues by adding to the 'victims' thus described a further class consisting of 'such relatives or dependants' of the ones already listed 'as may be prescribed' by regulation. Sections 26 and 27 provide for the process of awarding reparations. Everyone professing to be a 'victim' may apply for an award to the Committee on Reparation and Rehabilitation after the matter has been referred there. It must decide in the first place whether the applicant is truly a 'victim'. Its next task, having accepted him or her as one if it does so, is to consider the application and recommend to the President what should be done 'in an endeavour to restore the human and civil dignity of such victim'. The President is required in turn to submit to Parliament his own recommendations on the case and all others like it. A joint committee of both houses has to consider those. Its decision, should Parliament approve of that, must then be implemented by regulations emanating from the President that 'determine the basis and conditions upon which reparation shall be granted'. All reparations are payable ultimately, in terms of s 42, from a special fund stocked mainly with money allocated by Parliament to that purpose.

[65] The statute does not, it is true, grant any legally enforceable rights in lieu of those lost by claimants whom the amnesties hit. It nevertheless offers some *quid pro quo* for the loss and establishes the machinery for determining such alternative redress. I cannot see what else it might have achieved immediately once, in the light of the painful choices described by Mahomed DP[44] and in the exercise of the legislative judgment brought to bear on them, the basic decision had been taken to substitute the indeterminate prospect of reparations for the concrete reality of legal claims wherever those were enjoyed. For nothing more definite, detailed and efficacious could feasibly have been promised at that stage, and with no prior investigations, recommendations and decisions of the very sort for which provision is now made.

[44] See para [50] of his judgment.

[66] Such are the reasons for my eventual agreement with the full range of the order dismissing the present application. But for one problem posed by s 33(1), which strikes me as well-nigh intractable, I would probably have come to the same conclusion, and could no doubt have reached it more easily, by treading the path indicated there. Negating the essential content of a constitutional right is, however, a concept that I have never understood. Nor can I fathom how one applies it to a host of imaginable situations. Baffled as I am by both conundrums, I would have been at a loss to hold that the denial of the right in question either had or had not negated its essential content. It is therefore with a sigh of relief that I find myself free to say, as I end this judgment, that my reliance on ss (2) of s 33 dispenses altogether with the need for me to bother about ss (1).

Applicants' Attorneys: *C O Morolo & Partners*, Pretoria. Respondents' Attorney: *State Attorney*, Pretoria. *Amicus Curiae: Centre for Applied Legal Studies*, University of the Witwatersrand, Johannesburg.

THE SOUTH AFRICAN LAW REPORTS

DIE SUID-AFRIKAANSE HOFVERSLAE

DECEMBER 1996 (4) (Part A)

FRANK R THOROLD (PTY) LTD v ESTATE LATE BEIT

APPELLATE DIVISION

CORBETT CJ, SMALBERGER JA, F H GROSSKOPF JA, NIENABER JA and PLEWMAN AJA

1996 May 14; August 22 Case No 488/94

Auction and auctioneer—Auctioneer—Missed or overlooked bid—Conditions of business governing auction providing that 'any dispute will be settled at the auctioneer's absolute discretion'—Auctioneer overlooking bid higher than that at which hammer dropped—Overlooked bidder protesting within seconds—After receiving confirmation that overlooked bidder had indeed bid, auctioneer re-opening bidding until lot knocked down to original bidder at substantially higher price—Original bidder refusing to pay higher price—Underlying auctioneer's written conditions of business recognition that situations producing conflicting interests between bidders often arising at auction sales, and desirable that these be settled by auctioneer as quickly as possible—Word 'dispute' thus to be given expansive interpretation—Contention that original bidder not highest bidder implicit in objection that bid overlooked—Auctioneer thus to decide whether to reject overlooked bid or to re-open bidding—Effect of decision either to confirm sale to original bidder or to nullify it—Until dispute settled, no question of valid sale to original bidder—'Dispute' within meaning of word in conditions of business thus arising—Auctioneer given 'absolute discretion' to settle disputes—Entitled to re-open bidding to settle dispute.

At an auction sale of the Africana collection belonging to the respondent estate, an extremely rare book was knocked down to the appellant for R80 000. Within seconds thereafter one L protested that he had bid. The auctioneer had not known that L had entered the bidding and, after receiving confirmation from one of his 'bid spotters' that L had indeed bid, the auctioneer re-opened the bidding at R85 000,

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

IN THE APPEALS CHAMBER

Before:
Judge Gabrielle Kirk McDonald, Presiding
Judge Mohamed Shahabuddeen
Judge Lal Chand Vohrah
Judge Wang Tieya
Judge Rafael Nieto-Navia

Registrar: Mr. Agwu U. Okali

Decision of: 3 November 1999

JEAN-BOSCO BARAYAGWIZA
v.
THE PROSECUTOR

DECISION

Counsel for the Appellant:
Mr. Justry P. L. Nyaberi

The Office of the Prosecutor:
Mr. Mohamed C. Othman
Mr. N. Sankara Menon
Mr. Mathias Marcussen

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2. Whether the Appellant was held in Cameroon for any period between 23 February 1998 and 11 September 1998 at the request of the Tribunal, and if so, what effect did this detention have in regard to personal jurisdiction

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E. American Convention on Human Rights

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V. DISPOSITION

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Appendix A: Chronology of Events

1. INTRODUCTION

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January and 31 December 1994 ("the Appeals Chamber" and "the Tribunal" respectively) is seized of an appeal lodged by Jean-Bosco Barayagwiza ("the Appellant") against the "Decision on the Extremely Urgent Motion by the Defence for Orders to Review and/or Nullify the Arrest and Provisional Detention of the Suspect" of Trial Chamber II of 17 November 1998 ("the Decision"). By Order dated 5 February 1999, the appeal was held admissible. On 19 October 1999, the Appellant filed a Notice of Appeal seeking to disqualify certain Judges of the Trial Chamber from sitting on his case ("19 October 1999 Notice of Appeal"). On 26 October 1999, the Appellant filed an additional Notice of Appeal concerning a request of the Prosecutor to amend the indictment against the Appellant ("26 October 1999 Notice of Appeal").

2. There are several areas of contention between the parties. The primary dispute concerns the arrest and detention of the Appellant during a nineteen-month period between 15 April 1996, when he was initially detained, and 19 November 1997, when he was transferred to the Tribunal's detention unit pursuant to Rule 40*bis* of the Tribunal's Rules of Procedure and Evidence ("the Rules"). The secondary areas of dispute concern: 1) the Appellant's right to be informed promptly of the charges against him; 2) the Appellant's right to challenge the legality of his arrest and detention; 3) the delay between the Tribunal's request for the transfer of the Appellant from Cameroon and his actual transfer; 4) the length of the Appellant's provisional detention; and 5) the delay between the Appellant's arrival at the Tribunal's detention unit and his initial appearance.

3. The accused made his initial appearance before Trial Chamber II on 23 February 1998. On 24 February 1998, the Appellant filed a motion seeking to nullify his arrest and detention. Trial Chamber II heard the oral arguments of the parties on 11 September 1998 and rendered its Decision on 17 November 1998.

4. The dispute between the parties initially concerns the issue of under what authority the accused was detained. Therefore, the sequence of events since the arrest of the accused on 15 April 1996, including the lengthy procedural history of the case, merits detailed recitation. Consequently, we begin with the following chronology.

5. On 15 April 1996, the authorities of Cameroon arrested and detained the Appellant and several other suspects on suspicion of having committed genocide and crimes against humanity in Rwanda in 1994. On 17 April 1996, the Prosecutor requested that provisional measures pursuant to Rule 40 be taken in relation to the Appellant. On 6 May 1996, the Prosecutor asked Cameroon for a three-week extension of the detention of all the suspects, including the Appellant. However, on 16 May 1996, the Prosecutor informed Cameroon that she only intended to pursue prosecutions against four of the detainees, *excluding* the Appellant.

6. The Appellant asserts that on 31 May 1996, the Court of Appeal of Cameroon adjourned *sine die* consideration of Rwanda's extradition request, pursuant to a request to adjourn by the Deputy Director of Public Prosecution of the Court of Appeal of the Centre Province, Cameroon. The Appellant claims that in making this request, the Deputy Director of Public Prosecution relied on Article 8(2) of the Statute.

7. On 15 October 1996, responding to a letter from the Appellant complaining about his detention in Cameroon, the Prosecutor informed the Appellant that Cameroon was not holding him at her behest. Shortly thereafter, the Court of Appeal of Cameroon re-commenced the hearing on Rwanda's extradition request for the remaining suspects, including the Appellant. On 21 February 1997, the Court of Appeal of Cameroon rejected the Rwandan extradition request and ordered the release of the suspects, including the Appellant. The same day, the Prosecutor made a request pursuant to Rule 40 for the provisional detention of the Appellant and the Appellant was immediately re-arrested pursuant to this Order. The Prosecutor then requested an Order for arrest and transfer pursuant to Rule 40*bis* on 24 February 1997 and on 3 March 1997, Judge Aspegren signed an Order to that effect. The Appellant was not transferred pursuant to this Order, however, until 19 November 1997.

8. While awaiting transfer, the Appellant filed a *writ of habeas corpus* on 29 September 1997. The Trial Chamber never considered this application.

9. The President of Cameroon issued a Presidential Decree on 21 October 1997, authorising the transfer of the Appellant to the Tribunal's detention unit. On 22 October 1997, the Prosecutor submitted the indictment for confirmation, and on 23 October 1997, Judge Aspegren confirmed the indictment, and issued a Warrant of Arrest and Order for Surrender addressed to the Government of Cameroon. The Appellant was not transferred to the Tribunal's detention unit, however, until 19 November 1997 and his initial appearance did not take place until 23 February 1998.

10. On 24 February 1998, the Appellant filed the Extremely Urgent Motion seeking to have his arrest and detention nullified. The arguments of the parties were heard on 11 September 1998. Trial Chamber II, in its Decision of 17 November 1998, dismissed the Extremely Urgent Motion *in toto*. In rejecting the arguments put forward by the Appellant in the Extremely Urgent Motion, the Trial Chamber made several findings. First, the Trial Chamber held that the Appellant was initially arrested at the behest of Rwanda and Belgium and not at the behest of the Prosecutor. Second, the Trial Chamber found that the period of detention under Rule 40 from 21 February until 3 March 1997 did not violate the Appellant's rights under Rule 40. Third, the Trial Chamber found that the Appellant had failed to show that the Prosecutor had violated the rights of the Appellant with respect to the length of his provisional detention or the delay in transferring the Appellant to the Tribunal's detention unit. Fourth, the Trial Chamber held that Rule 40*bis* does not apply until the actual transfer of the suspect to the Tribunal's detention unit. Fifth, the Trial Chamber concluded that the provisional detention of the Appellant was legally justified. Sixth, the Trial Chamber found that when the Prosecutor opted to proceed against some of the individuals detained with the Appellant, but excluding the Appellant, the Prosecutor was exercising prosecutorial discretion and was not discriminating against the Appellant. Finally, the Trial Chamber held that Rule 40*bis* is valid and does not contradict any provisions of the Statute. On 4 December 1998, the Appellant filed a Notice of Appeal against the Decision and ten days later the Prosecution filed its Response.

11. The Appeals Chamber considered the Appellant's appeal and found that the Decision dismissed an objection based on the lack of personal jurisdiction over the accused and, therefore, an appeal lies as of right under Sub-rule 72(D). Consequently, a Decision and Scheduling Order was issued on 5 February 1999, and the parties submitted additional briefs. Notwithstanding these additional submissions by the parties, however, the Appeals Chamber determined that additional information was required to decide the appeal. Consequently, a Scheduling Order was filed on 3 June 1999, directing the Prosecutor to specifically address the following six questions and provide documentation in support thereof:

1. Whether the Appellant was held in Cameroon for any period between 21 February 1997 and 19 November 1997 at the request of the Tribunal, and if so, what effect did this detention have in relation to personal jurisdiction.

2. Whether the Appellant was held in Cameroon for any period between 23 February 1998

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and 11 September 1998 at the request of the Tribunal, and if so, what effect did this detention have in regard to personal jurisdiction.

3. The reason for any delay between the request for transfer and the actual transfer.

4. The reason for any delay between the transfer of the Appellant to the Tribunal and his initial appearance.

5. The reason for any delay between the initial appearance of the Appellant and the hearing on the Appellant's urgent motion.

6. The disposition of the *writ of habeas corpus* that the Appellant asserts that he filed on 2 October 1997.

12. The Prosecutor filed her Response to the 3 June 1999 Scheduling Order on 22 June 1999, and the Appellant filed his Reply on 2 July 1999. The submissions of the parties in response to these questions are set forth in section II.C., *infra*.

II. THE APPEAL

A. The Appellant

13. As noted *supra*, the Appellant has submitted numerous documents for consideration with respect to his arrest and detention. The main arguments as advanced by the Appellant are consolidated and briefly summarised below.

14. First, the Appellant asserts that the Trial Chamber erred in constructing a "Chronology of Events" without a proper basis or finding. According to the Appellant, the Trial Chamber further erred in dividing the events into arbitrary categories with the consequence that the Trial Chamber considered the events in a fragmented form. This resulted in a failure to perceive the events in their totality.

15. Second, the Appellant claims that the Trial Chamber erred in holding that the Appellant failed to provide evidence supporting his version of the arrest and detention. Thus, the Appellant contends, it was error for the Trial Chamber to conclude that the Appellant was arrested at the behest of the Rwandan and Belgian governments. Further, because the Trial Chamber found that the Appellant was detained at the behest of the Rwandan and Belgian authorities, the Trial Chamber erroneously held that the Defence had failed to show that the Prosecutor was responsible for the Appellant's being held in custody by the Cameroon authorities from 15 April 1996 until 21 February 1997.

16. Third, the Appellant contends that the Trial Chamber erred in holding that the detention under Rule 40 between 21 February 1997 and 3 March 1997, when the Rule 40*bis* request was approved, does not constitute a violation of the Appellant's rights under Rule 40. Further, the Trial Chamber erred in holding that there is no remedy for a provisionally detained person before the detaining State has transferred him prior to the indictment and warrant for arrest.

17. Fourth, the Appellant argues that the Trial Chamber erred in failing to declare that there was a breach of the Appellant's rights as a result of the Prosecutor's delay in presenting the indictment for confirmation by the Judge. Furthermore, the Appellant contends that the Trial Chamber erred in holding that the Appellant failed to show that the Prosecutor violated his rights due to the length of the detention or delay in transferring the Appellant. Similarly, the Appellant contends that the Trial Chamber erred in holding that the provisional charges and detention of the Appellant were justified under the circumstances.

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18. Fifth, with respect to the effect of the detention on the Tribunal's jurisdiction, the Appellant sets forth three arguments. The Appellant's first argument is that the overall length of his detention, which was 22 months, was unreasonable, and therefore, unlawful. Consequently, the Tribunal no longer has personal jurisdiction over the accused. The Appellant next asserts that the pre-transfer detention of the accused was 'very oppressive, torturous and discriminative'. As a result, the Appellant asserts that he is entitled to unconditional release. Finally, the Appellant contends that his detention cannot be justified on the grounds of urgency. In this regard, the length of time the Appellant was provisionally detained without benefit of formal charges amounts to a 'monstrous degree of prosecutorial indiscretion and apathy'.

19. In conclusion, the Appellant requests the Appeals Chamber to quash the Trial Chamber Decision and unconditionally release the Appellant.

B. The Prosecutor

20. In responding to the Appellant's arguments, the Prosecutor relies on three primary counter-arguments, which will be summarised. First, the Prosecutor submits that the Appellant was not in the custody of the Tribunal before his transfer on 19 November 1997, and consequently, no event taking place prior to that date violates the Statute or the Rules. The Prosecutor contends that her request under Rule 40 or Rule 40*bis* for the detention and transfer of the accused has no impact on this conclusion.

21. In support of this argument, the Prosecutor contends that the Appellant was detained on 15 April 1996 at the instance of the Rwandan and Belgian governments. Although the Prosecutor made a request on 17 April 1996 to Cameroon for provisional measures, the Prosecutor asserts that this request was 'only superimposed on the pre-existing request of Rwanda and Belgium' for the detention of the Appellant.

22. The Prosecutor further argues that the Tribunal does not have custody of a person pursuant to Rule 40*bis* until such person has actually been physically transferred to the Tribunal's detention unit. Although an Order pursuant to Rule 40*bis* was filed directing Cameroon to transfer the Appellant on 4 March 1997, the Appellant was not actually transferred until 19 November 1997. Consequently, the responsibility of the Prosecutor for any delay in bringing the Appellant to trial commences only after the Tribunal established custody of the Appellant on 19 November 1997.

23. The Prosecutor argues that custody involves 'care and control' and since the Appellant was not under the 'care and control' of the Tribunal prior to his transfer, the Prosecutor is not responsible for any delay resulting from Cameroon's failure to promptly transfer the Appellant. Furthermore, the Prosecutor asserts that Article 28 of the Statute strikes a delicate balance of distributing obligations between the Tribunal and States. Under this arrangement, 'neither entity is an agent or, *alter ego*, of the other: and the actions of the one may not be imputed on the other just because they were carrying out duties apportioned to them under the Statute'.

24. The Prosecutor acknowledges that although the 'delay in this transfer is indeed long, there is no factual basis to impute the fault of it to the ICTR Prosecutor'. She summarises this line of argument by concluding that since the Appellant was not in the custody of the Tribunal before his transfer to the Tribunal's detention unit on 19 November 1997, it follows that the legality of the detention of the Appellant while in the custody of Cameroon is a matter for the laws of Cameroon, and beyond the competence of the Appeals Chamber.

25. The second principal argument of the Prosecution is that the Prosecutor's failure to request Cameroon to transfer the Appellant on 16 May 1996 does not give the Appellant 'prescriptive claims against the Prosecutor's eventual prosecution'. The thrust of this contention seeks to counter the argument that the Prosecutor is somehow estopped from prosecuting the Appellant as the result of

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correspondence between the Prosecutor and both Cameroon and the Appellant himself.

26. The Prosecutor asserts that simply because at a certain stage of the investigation she communicated to the Appellant that she was not proceeding against him, this cannot have the effect of creating statutory or other limitations against prosecution for genocide and other serious violations of international humanitarian law. Moreover, the Prosecutor argues that she cannot be barred from proceeding against an accused simply because she did not proceed with the prosecution at the first available opportunity. Finally, the Prosecutor claims that her 'abstention from proceeding against the Appellant-Defendant before 3 March 1997 was due to on-going investigation'.

27. The third central argument of the Prosecutor is that any violations suffered by the Appellant prior to his transfer to the Tribunal's detention unit have been cured by subsequent proceedings before the Tribunal, presumably the confirmation of the Appellant's indictment and his initial appearance.

28. In conclusion, the Prosecution argues that there is no provision within the Statute that provides for the issuance of the order sought by the Appellant, and, in any event, the remedy sought by the Appellant is not warranted in the circumstances. In the event the Appeals Chamber finds a violation of the Appellant's rights, the Prosecutor suggests that the following remedies would be proper: 1) an Order for the expeditious trial of the Appellant; and/or 2) credit for the period of undue delay as part of the sentence, if the Appellant is found guilty, pursuant to Rule 101(D).

C. **Arguments of the Parties Pursuant to the 3 June 1999 Scheduling Order**

29. With respect to the specific questions addressed to the Prosecutor in the 3 June 1999 Scheduling Order, the parties submitted the following answers.

1. **Whether the Appellant was held in Cameroon for any period between 21 February 1997 and 19 November 1997 at the request of the Tribunal, and if so, what effect did this detention have in relation to personal jurisdiction.**

30. On 21 February 1997, following the Decision of the Cameroon Court of Appeal to release the Appellant, the Prosecutor submitted a Rule 40 Request to detain the Appellant for the benefit of the Tribunal. Further, the Prosecutor submits that following the issuance of the Rule 40*bis* Order on 4 March 1997, Cameroon was obligated, pursuant to Article 28, to implement the Prosecutor's request. However, because the Tribunal did not have custody of the Appellant until his transfer on 19 November 1997, the Prosecutor contends that the Tribunal 'could not regulate the conditions of detention or other matters regarding the confinement of the accused'. Nevertheless, the Prosecutor argues that between 21 February 1997 and 19 November 1997, 'there existed what could be described as joined or concurrent personal jurisdiction over the Appellant, the personal jurisdiction being shared between the Tribunal and Cameroon'.

31. The Appellant contends that Cameroon was holding him at the behest of the Prosecutor during this entire period. Furthermore, the Appellant argues that '[t]he only Cameroonian law applicable to him was the law concerning the extradition'. Consequently, he argues that the issue of concurrent or joint personal jurisdiction by both the Tribunal and Cameroon is 'fallacious, misleading and unacceptable'. In addition, he asserts that, read in conjunction, Articles 19 and 28 of the Statute confer obligations upon the Detaining State only when the appropriate documents are supplied. Since the Warrant of Arrest and Order for Surrender was not signed by Judge Aspegren until 23 October 1997, the Appellant contends that his detention prior to that date was illegal, given that he was being held after 21 February 1997 on the basis of the Prosecutor's Rule 40 request.

2. **Whether the Appellant was held in Cameroon for any period between 23 February 1998 and 11 September 1998 at the request of the Tribunal, and if so, what effect did this detention have in regard to personal jurisdiction.**

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32. The parties are in agreement that the Appellant was transferred to the Tribunal's detention unit on 19 November 1997, and consequently was not held by Cameroon at any period after that date.

3. **The reason for any delay between the request for transfer and the actual transfer.**

33. The Prosecutor fails to give any reason for this delay. Rather, without further comment, the Prosecutor attributes to Cameroon the period of delay between the request for transfer and the actual transfer.

34. The Appellant contends that the Prosecutor 'forgot about the matter and didn't really bother about the actual transfer of the suspect'. He argues that since Cameroon had been holding him pursuant to the Tribunal's Rule 40*bis* Order, Cameroon had no further interest in him, other than to transfer him to the custody of the Tribunal. In support of his contentions in this regard, the Appellant advances several arguments. First, the Prosecutor did not submit the indictment for confirmation before the expiration of the 30-day limit of the provisional detention as requested by Judge Aspegren in the Rule 40*bis* Order. Second, the Appellant asserts that the Prosecutor didn't make any contact with the authorities of Cameroon to provide for the transfer of the Appellant pursuant to the Rule 40*bis* Order. Third, the Prosecutor did not ensure that the Appellant's right to appear promptly before a Judge of the Tribunal was respected. Fourth, following the Rule 40*bis* Order, the Appellant claims, '[t]he Prosecutor didn't make any follow-up and didn't even show any interest'. Fifth, the Appellant contends that the triggering mechanism in prompting his transfer was his filing of a *writ of habeas corpus.* In conclusion, the Appellant rhetorically questions the Prosecutor, 'How can she expect the Cameroonian authorities to be more interested [in his case] than her?' [sic].

4. **The reason for any delay between the transfer of the Appellant to the Tribunal and his initial appearance.**

35. The Prosecutor contends that the Trial Chamber and the Registry have responsibility for scheduling the initial appearance of accused persons.

36. While the Appellant acknowledges that the Registrar bears some responsibility for the delay, he argues that the Prosecutor 'plays a big role in initiating of hearings' and plays a 'key part in the process'. The Appellant contends that the Prosecutor took no action to bring him before the Trial Chamber as quickly as possible. On the contrary, the Appellant asserts that the Prosecutor delayed seeking confirmation of the indictment and 'caused the removal of the Defence's motion for Habeas Corpus from the hearing list on 31 October 1997 thus delaying further the appearance of the suspect before the Judges'.

5. **The reason for any delay between the initial appearance of the Appellant and the hearing on the Appellant's urgent motion.**

37. With respect to the delay between the initial appearance and the hearing on the Urgent Motion, the Prosecutor again disclaims any responsibility for scheduling matters, arguing that the Registry, in consultation with the Trial Chambers, maintains the docket. The hearing on the Urgent Motion was originally docketed for 14 May 1998. However, on 12 May 1998, Counsel for the Appellant informed the Registry that he was not able to appear and defend his client at that time, because he had not been assigned co-counsel as he had requested and because the Tribunal had not paid his fees. Consequently, the hearing was re-scheduled for 11 September 1998.

6. **The disposition of the *writ of habeas corpus* that the Appellant asserts that he filed on 2 October 1997.**

38. With respect to the disposition of the *writ of habeas corpus* filed by the Appellant on 2 October 1997, the Prosecutor replied as follows:

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24. The Prosecutor respectfully submits that following the filing of the *habeas corpus* on 2 October 1997 the President wrote the Appellant by letter of 8 October 1997, informing him that the Office of the Prosecutor had informed him that an indictment would be ready shortly.

25. The Prosecutor is not aware of any other disposition of the *writ of habeas corpus*.

39. In fact, the letter referred to was written on 8 *September* 1997—prior to the filing of the *writ of habeas corpus*—and the Appellant contends that it was precisely this letter which prompted him to file the *writ of habeas corpus*. Moreover, the Appellant asserts that he was informed that the hearing on the *writ of habeas corpus* was to be held on 31 October 1997. However, directly contradicting the claim of the Prosecutor, the Appellant asserts that 'the Registry without the consent of the Defence removed the hearing of the motion from the calendar only because the Prosecution promised to issue the indictment soon'. Moreover, the Appellant claims that the indictment was filed and confirmed on 22 October 1997 and 23 October 1997, respectively, in order to pre-empt the hearing on the *writ of habeas corpus*. The Appellant is of the view that the *writ of habeas corpus* is still pending, since the Trial Chamber has not heard it, notwithstanding the fact that it was filed on 29 September 1997.

III. APPLICABLE AND AUTHORITATIVE PROVISIONS

40. The relevant parts of the applicable Articles of the Statute, Rules of the Tribunal and international human rights treaties are set forth below for ease of reference. The Report of the U.N. Secretary-General establishes the sources of law for the Tribunal. The International Covenant on Civil and Political Rights is part of general international law and is applied on that basis. Regional human rights treaties, such as the European Convention on Human Rights and the American Convention on Human Rights, and the jurisprudence developed thereunder, are persuasive authority which may be of assistance in applying and interpreting the Tribunal's applicable law. Thus, they are not binding of their own accord on the Tribunal. They are, however, authoritative as evidence of international custom.

A. The Statute

Article 8

Concurrent Jurisdiction

1. The International Tribunal for Rwanda and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.

2. The International Tribunal for Rwanda shall have primacy over the national courts of all States. At any stage of the procedure, the International Tribunal for Rwanda may formally request national courts to defer to its competence in accordance with the present Statute and Rules of Procedure and Evidence of the International Tribunal for Rwanda.

Article 17

Investigation and Preparation of Indictment

1. [...]

2. The Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor may,

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as appropriate, seek the assistance of the State authorities concerned.

3. [...]

4. Upon a determination that a prima facie case exists, the Prosecutor shall prepare an Indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the present Statute. The Indictment shall be transmitted to a Judge of the Trial Chamber.

Article 20

Rights of the accused

1. [...]
2. [...]
3. [...]
4. In the determination of any charge against the accused pursuant to the present statute, the accused shall be entitled to the following minimum guarantees, in full equality:
   a. To be informed promptly and in detail in a language in which he or she understands of the nature and cause of the charge against him or her;
   b. [...]
   c. To be tried without undue delay;
   d. [...]
   e. [...]
   f. [...]
   g. [...]

Article 24

Appellate Proceedings

1. [...]

2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers.

Article 28

Cooperation and Judicial Assistance

1. States shall cooperate with the International Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.
2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:

   a. The identification and location of persons;
   b. [...]
   c. [...]
   d. The arrest or detention of persons;
   e. The surrender or transfer of the accused to the International Tribunal for Rwanda.

B. The Rules

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Rule 2
Definitions

[...]

Accused: A person against whom one or more counts in an indictment have been confirmed in accordance with Rule 47.

[...]

Suspect: A person concerning whom the Prosecutor possesses reliable information which tends to show that he may have committed a crime over which the Tribunal has jurisdiction.

[...]

Rule 40

Provisional Measures

(A) In case of urgency, the Prosecutor may request any State:

i. to arrest a suspect and place him in custody;
ii. to seize all physical evidence;
iii. to take all necessary measures to prevent the escape of a suspect or an accused, injury to or intimidation of a victim or witness, or the destruction of evidence.

The state concerned shall comply forthwith, in accordance with Article 28 of the Statute.

(B) Upon showing that a major impediment does not allow the State to keep the suspect in custody or to take all necessary measures to prevent his escape, the Prosecutor may apply to a Judge designated by the President for an order to transfer the suspect to the seat of the Tribunal or to such other place as the Bureau may decide, and to detain him provisionally. After consultation with the Prosecutor and the Registrar, the transfer shall be arranged between the State authorities concerned, the authorities of the host Country of the Tribunal and the Registrar.

(C) In the cases referred to in paragraph B, the suspect shall, from the moment of his transfer, enjoy all the rights provided for in Rule 42, and may apply for review to a Trial Chamber of the Tribunal. The Chamber, after hearing the Prosecutor, shall rule upon the application.

(D) The suspect shall be released if (i) the Chamber so rules, or (ii) the Prosecutor fails to issue an indictment within twenty days of the transfer.

Rule 40*bis*

Transfer and Provisional Detention of Suspects

(A) In the conduct of an investigation, the Prosecutor may transmit to the Registrar, for an order by a Judge assigned pursuant to Rule 28, a request for the transfer to and provisional detention of a suspect in the premises of the detention unit of the Tribunal. This request shall indicate the grounds upon which the request is made and, unless the Prosecutor wishes only to question the suspect, shall include a provisional charge and a summary of the material upon which the Prosecutor relies.

(B) The Judge shall order the transfer and provisional detention of the suspect if the following

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conditions are met:

(i) the Prosecutor has requested a State to arrest the suspect and to place him in custody, in accordance with Rule 40, or the suspect is otherwise detained by a State;

(ii) after hearing the Prosecutor, the Judge considers that there is a reliable and consistent body of material which tends to show that the suspect may have committed a crime over which the Tribunal has jurisdiction; and

(iii) the Judge considers provisional detention to be a necessary measure to prevent the escape of the suspect, physical or mental injury to or intimidation of a victim or witness or the destruction of evidence, or to be otherwise necessary for the conduct of the investigation.

(C) The provisional detention of the suspect may be ordered for a period not exceeding 30 days from the day after the transfer of the suspect to the detention unit of the Tribunal.

(D) The order for the transfer and provisional detention of the suspect shall be signed by the Judge and bear the seal of the Tribunal. The order shall set forth the basis of the request made by the Prosecutor under Sub-Rule (A), including the provisional charge, and shall state the Judge's grounds for making the order, having regard to Sub-Rule (B). The order shall also specify the initial time limit for the provisional detention of the suspect, and be accompanied by a statement of the rights of a suspect, as specified in this Rule and in Rules 42 and 43.

(E) As soon as possible, copies of the order and of the request by the Prosecutor are served upon the suspect and his counsel by the Registrar.

(F) At the end of the period of detention, at the Prosecutor's request indicating the grounds upon which it is made and if warranted by the needs of the investigation, the Judge who made the initial order, or another Judge of the same Trial Chamber, may decide, subsequent to an *inter partes* hearing, to extend the provisional detention for a period not exceeding 30 days.

(G) At the end of that extension, at the Prosecutor's request indicating the grounds upon which it is made and if warranted by special circumstances, the Judge who made the initial order, or another Judge of the same Trial Chamber, may decide, subsequent to an *inter partes* hearing, to extend the detention for a further period not exceeding 30 days.

(H) The total period of provisional detention shall in no case exceed 90 days, at the end of which, in the event the indictment has not been confirmed and an arrest warrant signed, the suspect shall be released or, if appropriate, be delivered to the authorities of the State to which the request was initially made.

(I) The provisions in Rules 55(B) to 59 shall apply *mutatis mutandis* to the execution of the order for the transfer and provisional detention of the suspect.

(J) After his transfer to the seat of the Tribunal, the suspect, assisted by his counsel, shall be brought, without delay, before the Judge who made the initial order, or another Judge of the same Trial Chamber, who shall ensure that his rights are respected.

(K) During detention, the Prosecutor, the suspect or his counsel may submit to the Trial Chamber of which the Judge who made the initial order is a member, all applications relative to the propriety of provisional detention or to the suspect's release.

(L) Without prejudice to Sub-Rules (C) to (H), the Rules relating to the detention on remand of

accused persons shall apply *mutatis mutandis* to the provisional detention of persons under this Rule.

Rule 58

National Extradition Provisions

The obligations laid down in Article 28 of the Statute shall prevail over any legal impediment to the surrender or transfer of the accused or of a witness to the Tribunal which may exist under the national law or extradition treaties of the State concerned.

Rule 62

Initial Appearance of Accused

Upon his transfer to the Tribunal, the accused shall be brought before a Trial Chamber without delay, and shall be formally charged. The Trial Chamber shall:

(i) satisfy itself that the right of the accused to counsel is respected

(ii) read or have the indictment read to the accused in a language he speaks and understands, and satisfy itself that the accused understands the indictment;

(iii) call upon the accused to enter a plea of guilty or not guilty on each count; should the accused fail to do so, enter a plea of not guilty on his behalf;

(iv) in case of a plea of not guilty, instruct the Registrar to set a date for trial.

Rule 72

Preliminary Motions

A. Preliminary motions by either party shall be brought within sixty days following disclosure by the Prosecutor to the Defence of all material envisaged by Rule 66(A)(I), and in any case before the hearing on the merits.

B. Preliminary motions by the accused are:

i. objections based on lack of jurisdiction;
ii. [...]
iii. [...]
iv. [...]

C. The Trial Chamber shall dispose of preliminary motions *in limine litis*.

D. Decisions on preliminary motions are without interlocutory appeal, save in the case of dismissal of an objection based on lack of jurisdiction, where an appeal will lie as of right.

E. Notice of Appeal envisaged in Sub-Rule (D) shall be filed within seven days from the impugned decision.

F. Failure to comply with the time-limits prescribed in this Rule shall constitute a waiver of the rights. The Trial Chamber may, however, grant relief from the waiver upon showing good cause.

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C. International Covenant on Civil and Political Rights

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.

2. Anyone who is arrested shall be informed, at the time of his arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be a general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

Article 14

1. [...]

2. [...]
3. In the determination of any criminal charges against him, everyone shall be entitled to the following minimum guarantees, in full equality:
   a. To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
   b. [...]
   c. [...]
   d. [...]
   e. [...]
   f. [...]
   g. [...]
4. [...]
5. [...]
6. [...]
7. [...]

D. European Convention on Human Rights

Article 5

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law;

   a. [...]

   b. [...]

   c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence

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or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

d. [...]

e. [...]

f. the lawful arrest or detention of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

Article 6

1. [...]

2. [...]

3. Everyone charged with a criminal offence has the following minimum rights:

   a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
   b. [...]
   c. [...]
   d. [...]
   e. [...]

E. American Convention on Human Rights

Article 7

1. [...]
2. [...]
3. No one shall be subject to arbitrary arrest or detention.

4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.

5. Any person detained shall be brought promptly before judge or other law officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.

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6. Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In states Parties whose law provides that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.

7. [...]

Article 8

1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

2. Very person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

   a. [...]
   b. prior notification in detail to the accused of the charges against him;
   c. [...]
   d. [...]
   e. [...]
   f. [...]
   g. [...]
   h. [...]

3. [...]

4. [...]

5. [...]

IV. DISCUSSION

A. Were the rights of the Appellant violated?

1. Status of the Appellant

41. Before discussing the alleged violations of the Appellant's rights, it is important to establish his status following his arrest and during his provisional detention. Rule 2 sets forth definitions of certain terms used in the Rules. The indictment against the Appellant was not confirmed until 23 October 1997. Pursuant to the definitions of 'accused' and 'suspect' set forth in Rule 2, the Appeals Chamber finds that the Appellant was a 'suspect' from his arrest on 15 April 1996 until the indictment was confirmed on 23 October 1997. After 23 October 1997, the Appellant's status changed and he became an 'accused'.

2. The right to be promptly charged under Rule 40*bis*

42. Unlike national systems, which have police forces to effectuate the arrest of suspects, the Tribunal lacks any such enforcement agency. Consequently, in the absence of the suspect's

voluntary surrender, the Tribunal must rely on the international community for the arrest and provisional detention of suspects. The Statute and Rules of the Tribunal establish a system whereby States may provisionally detain suspects at the behest of the Tribunal pending transfer to the Tribunal's detention unit.

43. In the present case, there are two relevant periods of time under which Cameroon was clearly holding the Appellant at the behest of the Tribunal. Cameroon arrested the Appellant pursuant to the Rwandan and Belgian extradition requests on 15 April 1996. Two days later, the Prosecutor made her first Rule 40 request for provisional detention of the Appellant. On 6 May 1996, the nineteenth day of the Appellant's provisional detention pursuant to Rule 40, the Prosecutor requested the Cameroon authorities to extend the Appellant's detention for an additional three weeks. On 16 May 1996, however, the Prosecutor informed Cameroon that she was no longer interested in pursuing a case against the Appellant at 'that stage'. Thus, the first period runs from 17 April 1996 until 16 May 1996—a period of 29 days, or nine days longer than allowed under Rule 40. This first period will be discussed, *infra*, at sub-section IV.B.2.

44. The second period during which Cameroon detained the Appellant for the Tribunal commenced on 4 March 1997 and continued until the Appellant's transfer to the Tribunal's detention unit on 19 November 1997. On 21 February 1997, the Cameroon Court rejected Rwanda's extradition request and ordered the release of the Appellant. However, on the same day, while the Appellant was still in custody, the Prosecutor again made a request pursuant to Rule 40 for the provisional detention of the Appellant. This request was followed by the Rule 40*bis* request, which resulted in the Rule 40*bis* Order of Judge Aspegren dated 3 March 1997, and filed on 4 March 1997. This Order comprised, *inter alia*, four components. First, it ordered the transfer of the Appellant to the Tribunal's detention unit. Second, it ordered the provisional detention in the Tribunal's detention unit of the Appellant for a maximum period of thirty days. Third, it requested the Cameroon authorities to comply with the transfer order and to maintain the Appellant in custody until the actual transfer. Fourth, it requested the Prosecutor to submit the indictment against the Appellant prior to the expiration of the 30-day provisional detention.

45. However, notwithstanding the 4 March 1997 Rule 40*bis* Order, the record reflects that the Tribunal took no further action until 22 October 1997. On that day, the Deputy Prosecutor, Mr. Bernard Muna (who had spent much of his professional career working in the Cameroon legal community prior to joining the Office of the Prosecutor) submitted the indictment against the Appellant for confirmation. Judge Aspegren confirmed the indictment against the Appellant the next day and simultaneously issued a Warrant of Arrest and Order for Surrender addressed to the Government of Cameroon on 23 October 1997. However, the Appellant was not transferred to the Tribunal's detention unit until 19 November 1997. Thus, Cameroon held the Appellant at the behest of the Tribunal from 4 March 1997 until his transfer on 19 November 1997. At the time the indictment was confirmed, the Appellant had been in custody for 233 days, more than 7 months, from the date the Rule 40*bis* Order was filed.

46. It is important that Rule 40 and Rule 40*bis* be read together. It is equally important in interpreting these provisions that the Appeals Chamber follow the principle of 'effective interpretation', a well-established principle under international law. Interpreting Rule 40 and Rule 40*bis* together, we conclude that both Rules must be read restrictively. Rule 40 permits the Prosecutor to request any State, in the event of urgency, to arrest a suspect and place him in custody. The purpose of Rule 40*bis* is to restrict the length of time a suspect may be detained without being indicted. We cannot accept that the Prosecutor, acting alone under Rule 40, has an unlimited power to keep a suspect under provisional detention in a State, when Rule 40*bis* places time limits on such detention if the suspect is detained at the Tribunal's detention unit. Rather, the principle of effective interpretation mandates that these Rules be read together and that they be restrictively interpreted.

47. Although both Rule 40 and Rule 40*bis* apply to the provisional detention of suspects, there are

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important differences between the two Rules. For example, the time limits under which the Prosecutor must issue an indictment vary depending upon which Rule forms the basis of the provisional detention. Pursuant to Rule 40(D)(ii), the suspect must be released if the Prosecutor fails to issue an indictment within 20 days of the transfer of the suspect to the Tribunal's detention unit, while Rule 40*bis*(H) allows the Prosecutor 90 days to issue an indictment. However, the remedy for failure to issue the indictment in the proscribed period of time is the same under both Rules: *release of the suspect*.

48. The Prosecutor may apply for Rule 40*bis* measures 'in the conduct of an investigation'. Rule 40*bis* applies only if the Prosecutor has previously requested provisional measures pursuant to Rule 40 or if the suspect is otherwise already being detained by the State to whom the Rule 40*bis* request is made. The Rule 40*bis* request, which is made to a Judge assigned pursuant to Rule 28, must include a provisional charge and a summary of the material upon which the Prosecutor relies.

49. The Judge must make two findings before a Rule 40*bis* order is issued. First, there must be a reliable and consistent body of material that tends to show that the suspect may have committed an offence within the Tribunal's jurisdiction. Second, the Judge must find that provisional detention is a necessary measure to 'prevent the escape of the suspect, physical or mental injury to or intimidation of a victim or witness or the destruction of evidence, or to be otherwise necessary for the conduct of the investigation'.

50. Pursuant to Rule 40*bis*(C), the provisional detention of the suspect may be ordered for an initial period of thirty days. This initial thirty-day period begins to run from the 'day after the transfer of the suspect to the detention unit of the Tribunal'. Two additional thirty-day period extensions are permissible. At the end of the first thirty-day period, the Prosecutor must show that an extension is warranted by the needs of the investigation in order to have the provisional detention extended. At the end of the second thirty-day period, the Prosecutor must demonstrate that special circumstances warrant the continued provisional detention of the suspect for the final thirty-day period to be granted. In no event shall the total period of provisional detention of a suspect exceed ninety days. At the end of this cumulative ninety-day period, the suspect must be released if the indictment has not been confirmed and an arrest warrant signed.

51. The Statute and Rules of the Tribunal envision a system whereby the suspect is provided a copy of the Prosecutor's request, including provisional charges, in conjunction with the Rule 40*bis* Order. He is also served a copy of the confirmed indictment with the Warrant of Arrest, and pursuant to Rule 62(ii) he is to be orally informed of the charges against him at the initial appearance. In the present case, 6 days elapsed between the filing of the Rule *40bis* Order on 4 March 1997 and the date on which the Appellant apparently was shown a copy of the Rule 40*bis* Order. Additionally, 27 days elapsed between the confirmation of the indictment against the Appellant on 23 October 1998 and the service of a copy of the indictment upon the Appellant on 19 November 1998.

52. The Trial Chamber found that the Appellant was initially arrested at the behest of Rwanda and Belgium, a point the Prosecutor reiterates in this appeal, contending that the Prosecutor's request was merely 'superimposed' on the existing requests of those States. However, the Prosecutor fails to acknowledge that on 16 May 1996, she requested a three-week extension of the provisional detention of the Appellant. The Appeals Chamber finds the Appellant was detained at the request of the Prosecutor from 17 April 1996 through 16 May 1996. This detention—for 29 days—violated the 20-day limitation in Rule 40.

53. The Prosecutor also successfully argued before the Trial Chamber that Rule 40*bis* is inapplicable, since its operative provisions do not apply until after the transfer of the suspect to the Tribunal's detention unit. It is clear, however, that the purpose of Rule 40 and Rule 40*bis* is to limit the time that a suspect may be provisionally detained without the issuance of an indictment. This comports with international human rights standards. Moreover, if the time limits set forth in Rule 40(D) and

Rule 40*bis*(H) are not complied with, those rules mandate that the suspect must be released. 2327

54. Although the Appellant was not physically transferred to the Tribunal's detention unit until 19 November 1997, he had been detained since 21 February 1997 solely at the behest of the Prosecutor. The Appeals Chamber considers that if the Appellant were in the constructive custody of the Tribunal after the Rule *40bis* Order was filed on 4 March 1997, the provisions of that Rule would apply. In order to determine if the period of time that the Appellant spent in Cameroon at the behest of the Tribunal is attributable to the Tribunal for purposes of Rule 40*bis*, it is necessary to analyse the relationship between Cameroon and the Tribunal with respect to the detention of the Appellant. In fact, the Prosecutor has acknowledged that between 21 February 1997 and 19 November 1997, 'there existed what could be described as joined or concurrent personal jurisdiction over the Appellant, the personal jurisdiction being shared between the Tribunal and Cameroon'.

55. The Tribunal issued a valid request pursuant to Rule 40 for provisional detention, and shortly thereafter, pursuant to Rule 40*bis*, for the transfer of the Appellant. These requests were honoured by Cameroon, and *but for* those requests, the Appellant would have been released on 21 February 1997, when the Cameroon Court of Appeal denied the Rwandan extradition request and ordered the immediate release of the Appellant.

56. Thus, the Appellant's situation is analogous to the 'detainer' process, whereby a special type of warrant (known as a 'detainer' or 'hold order') is filed against a person *already in custody* to ensure that he will be available to the demanding authority upon completion of the present term of confinement. A 'detainer' is a device whereby the requesting State can obtain the custody of the detainee upon his release from the detaining State. The U.S. Supreme Court has stated that, '[I]n such a case, the State holding the prisoner in immediate confinement acts as agent for the demanding State...'. Moreover, that court has held that since the detaining state acts as an agent for the demanding state pursuant to the detainer, the petitioner is in custody for purposes of filing a *writ of habeas corpus* pursuant to U.S. law. Thus, the court reached the conclusion that the accused is in the constructive custody of the requesting State and that the detaining State acts as agent for the requesting state for purposes of *habeas corpus* challenges. In the present case, the relationship between the Tribunal and Cameroon is even stronger, on the basis of the international obligations imposed on States by the Security Council under Article 28 of the Statute.

57. Other cases have held that a defendant sentenced to concurrent terms in separate jurisdictions is in the constructive custody of the second jurisdiction after the first jurisdiction has imposed sentence on him. For example, In the Matter of Eric Grier, Peritioner v. Walter J. Flood, as Warden of the Nassau County Jail, Respondent, the court concluded that '*constructive custody attached before any sentence was imposed*. In Ex p. Hampton M. Newell, the court ruled that although the petitioner was in the physical custody of the federal authorities, he was in the constructive custody of the State of Texas on the basis of a detainer that Texas had filed against him.

58. The Prosecutor relies, in part, on a definition of custody ('care and control') from an oft-cited law dictionary. However, this same law dictionary also defines custody as 'the detainer of a man's person by virtue of lawful process or authority'. Thus, even using the Prosecutor's authority, custody can be taken to mean the detention of an individual pursuant to lawful authority even in the absence of physical control. It would follow, therefore, that notwithstanding a lack of physical control, the Appellant *was* in the Tribunal's custody *if* he were being detained pursuant to 'lawful process or authority' of the Tribunal. Or, as a Singapore court noted in Re Onkar Shrian, '[T]hat the person bailed is in the eye of the law, for many purposes, esteemed to be as much in the prison of the court by which he is bailed, as if he were in the actual custody of the proper gaoler'.

59. The Prosecutor has also relied on In the Matter of Surrender of Elizaphan Ntakirutimana in support of the proposition that under international law, an order by the Tribunal for the transfer of an individual does not give the Tribunal custody over such a person until the physical transfer has taken

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place. Reliance on this case is misguided in two respects. First, the U.S. Fifth Circuit Court of Appeals recently upheld a District Court ruling that reversed the Decision of the Magistrate that Ntakirutimana could not be extradited. Second, notwithstanding the reversal, Ntakirutimana had challenged the transfer process and is thus clearly distinguishable from the facts in the present case. There is no evidence here that either the Appellant sought to challenge his transfer to the Tribunal, or that Cameroon was unwilling to transfer him. On the contrary, the Deputy Prosecutor of the Cameroon Centre Province Court of Appeal, appearing at the Rwandan extradition hearing on 31 May 1996, argued that the Tribunal had primacy and, thus, convinced that Court to defer to the Tribunal. Moreover, as noted above, the President of Cameroon signed a decree order to transfer the Appellant prior to the signing of the Warrant of Arrest and Order for Surrender by Judge Aspegren on 23 October 1997. These facts indicate that Cameroon was willing to transfer the Appellant.

60. The co-operation of Cameroon is consistent with its obligation to the Tribunal. The Statute and Rules mandate that States must comply with a request of the Tribunal for the surrender or transfer of the accused to the Tribunal. This obligation on Member States of the United Nations is mandatory, since the Tribunal was established pursuant to Chapter VII of the Charter of the United Nations.

61. Thus, the Appeals Chamber finds that, under the facts of this case, Cameroon was holding the Appellant in constructive custody for the Tribunal by virtue of the Tribunal's lawful process or authority. In the present case, the Prosecutor specifically requested Cameroon to detain and transfer the Appellant. The Statute of the Tribunal obligated Cameroon to detain the Appellant for the benefit of the Prosecutor. The Prosecutor has admitted that it had personal jurisdiction over the Appellant after the Rule 40*bis* Order was issued. That Order also asserts personal and subject matter jurisdiction. This finding does not mean, however, that the Tribunal was responsible for each and every aspect of the Appellant's detention, but only for the decision to place and maintain the Appellant in custody. However, as will be discussed below, this limitation imposed on the Tribunal is consistent with international law. Even if the appellant was not in the constructive custody of the Tribunal, the principles governing the provisional detention of suspects should apply.

62. The Appeals Chamber recognises that international standards view provisional (or pre-trial) detention as an exception, rather than the rule. However, in light of the gravity of the charges faced by accused persons before the Tribunal, provisional detention is often warranted, so long as the provisions of Rule 40 and Rule 40*bis* are adhered to. The issue, therefore, is whether the length of time the Appellant spent in provisional detention, prior to the confirmation of his indictment, violates established international legal norms for provisional detention of suspects.

63. It is well-established under international human rights law that pre-trial detention of suspects is lawful, as long as such pre-trial detention does not extend beyond a reasonable period of time. The U.N. Human Rights Committee, in interpreting Article 9(2) of the ICCPR, has developed considerable jurisprudence with respect to the permissible length of time that a suspect may be detained without being charged. For example, in Glenford Campbell v. Jamaica, the suspect was detained for 45 days without being formally charged. In holding this delay to be a violation of ICCPR Article 9(2), the Committee stated the following:

> [T]he Committee finds that the author was not "promptly" informed of the charges against him: one of the most important reasons for the requirement of "prompt" information on a criminal charge is to enable a detained individual to request a prompt decision on the lawfulness of his or her detention by a competent judicial authority. A delay from 12 December 1984 to 26 January 1985 does not meet the requirement of article 9, paragraph 2.

64. Similar findings have been made in other cases involving alleged violations of ICCPR Article 9 (2). For example, in Moriana Hernández Valentini de Bazzano, a period of eight months between the commencement of detention and filing of formal charges was held to violate ICCPR Article 9(2). In Monja Jaona, a period of eight months under which the suspect was placed under house arrest

without being formally charged was found to be a violation of ICCPR Article 9(2). In Alba Pietraroia, the petitioner was detained for seven months without being formally charged and the Committee held that this detention violated ICCPR Article 9(2). Finally, in Leopoldo Buffo Carballal, a delay of one year between arrest and formal filing of charges was held to be a violation of ICCPR Article 9(2).

65. The Appeals Chamber also notes that the delay in indicting the Appellant apparently caused concern for President Kama. In a letter sent to the Appellant's Counsel on 8 September 1997, President Kama:

> I have already reminded the Prosecutor of the need to establish as soon as possible an indictment against Mr. Jean Bosco Barayagwiza, if she still intends to prosecute him. Only recently, Mr. Bernard Muna, the Deputy Prosecutor, reassured me that an indictment against Mr. Jean Bosco Barayagwiza should soon be submitted to a Judge for review.

However, even at that point the 90-day period had expired.

66. Additionally, the Trial Chamber, in its Decision dismissing the Extremely Urgent Motion, stated, 'It is regrettable that the Prosecution did not submit an indictment until 22 October 1997'. Moreover, even the Prosecutor acknowledged that the delay in indicting the Appellant was not justified. During the oral argument on the Appellant's Extremely Urgent Motion on 11 September 1998, Mr. James Stewart, appearing for the Prosecutor, acknowledged that the Appellant could or should have been indicted earlier:

> Now, I will say this, and I have to be frank with you, the president of this tribunal – and this is reflected in one of the letters that was sent to the accused –was anxious for the prosecutor to produce an indictment, if we were going to indict this man, and it may have been that *the indictment was, was not produced as early as it could have been or should have been...*

67. In conclusion, we hold that the length of time that the Appellant was detained in Cameroon at the behest of the Tribunal without being indicted violates Rule 40*bis* and established human rights jurisprudence governing detention of suspects. The delay in indicting the Appellant violated the 90-day rule as set forth in Rule 40*bis*. In the present appeal, Judge Aspregren issued the Rule 40*bis* Order with the proviso that the indictment be presented for confirmation within 30 days (the Rule permits for two 30-day extensions). In doing so, he invoked Sub-rule 40*bis*, thereby making an assertion of jurisdiction over the Appellant. The Prosecutor agrees that there was 'joined or concurrent jurisdiction' over the Appellant. Sub-rule 40*bis*(H) provides explicitly that the suspect shall be released or, if appropriate, be delivered to the authorities of the State to which the request was initially made if the indictment is not issued within 90 days. This limitation on the detention of suspects is consistent with established human rights jurisprudence.

3. The delay between the transfer of the Appellant and his initial appearance

68. In the present case, the Appellant was transferred to the Tribunal on 19 November 1997. However, his initial appearance was not held until 23 February 1998—some 96 days *after* his transfer. At the outset of this analysis the Appeals Chamber rejects the Prosecutor's contention that a 31-day holiday recess, between 15 December 1997 and 15 January 1998, could somehow justify this delay. The Appellant should have had his initial appearance well before the holiday recess even commenced and did not have it until over one month after the end of the recess.

69. The issue, therefore, is whether the 96-day period between the Appellant's transfer and initial appearance violates the statutory requirement that the initial appearance is held without delay. There is no evidence that the Appellant was afforded an opportunity to appear before an independent Judge

during the period of the provisional detention and the Appellant contends that he was denied this opportunity. Consequently, it is even more important for the protection of his rights that his initial appearance was held without delay.

70. Rule 62, which is predicated on Articles 19 and 20 of the statute, provides that an accused shall be brought before the assigned Trial Chamber and formally charged *without delay* upon his transfer to the seat of the Tribunal. In determining if the length of time between the Appellant's transfer and his initial appearance was unduly lengthy, we note that the right of the accused to be promptly brought before a judicial authority and formally charged ensures that the accused will have the opportunity to mount an effective defence. The international instruments have not established specific time limits for the initial appearance of detainees, relying rather on a requirement that a person should 'be brought promptly before a Judge' following arrest. The U.N. Human Rights Committee has interpreted 'promptly' within the context of 'more precise' standards found in the criminal procedure codes of most States. Such delays must not, however, exceed a few days. Thus, in Kelly v. Jamaica, the U.N. Human Rights Committee held that a detention of five weeks before being brought before a Judge violated Article 9(3).

71. Based on the plain meaning of the phrase, 'without delay', the Appeals Chamber finds that a 96-day delay between the transfer of the Appellant to the Tribunal's detention unit and his initial appearance to be a violation of his fundamental rights as expressed by Articles 19 and 20, internationally-recognised human rights standards and Rule 62. Moreover, we find that the Appellant's right to be promptly indicted under Rule 40*bis* to have been violated. Although we find that these violations do not result in the Tribunal losing jurisdiction over the Appellant, we nevertheless reaffirm that the issues raised by the Appellant certainly fall within the ambit of Rule 72.

72. In the Tadić Interlocutory Appeal Decision, the Appeals Chamber set forth several policy arguments for why a liberal approach to admitting interlocutory appeals is warranted. The Appeals Chamber there stated:

> Such a fundamental matter as the jurisdiction of the International Tribunal should not be kept for decision at the end of a potentially lengthy, emotional and expensive trial. All the grounds of contestation relied upon by Appellant result, in final analysis, in an assessment of the legal capability of the International Tribunal to try his case. What is this, if not in the end a question of jurisdiction? And what body is legally authorized to pass on that issue, if not the Appeals Chamber of the International Tribunal? Indeed—this is by no means conclusive, but interesting nevertheless: *were not those questions to be dealt with in limine litis, they could obviously be raised on an appeal on the merits. Would the higher interest of justice be served by a decision in favour of the accused, after the latter had undergone what would then have to be branded as an unwarranted trial.* After all, in a court of law, common sense ought to be honoured not only when facts are weighed, but equally when laws are surveyed and the proper rule is selected. In the present case, the jurisdiction of this Chamber to hear and dispose of the Appellant's interlocutory appeal is indisputable.

We find that the challenge to jurisdiction raised by the Appellant is consistent with the logic underlying the decision reached in the Tadić case. Given that the Appeals Chamber is of the opinion that to proceed with the trial of the Appellant would amount to an act of injustice, we see no purpose in denying the Appellant's appeal, forcing him to undergo a lengthy and costly trial, only to have him raise, once again the very issues currently pending before this Chamber. Moreover, in the event the Appellant was to be acquitted after trial we can foresee no effective remedy for the violation of his rights. Therefore, on the basis of these findings, the Appeals Chamber will decline to exercise jurisdiction over the Appellant, on the basis of the abuse of process doctrine, as discussed in the following Sub-section.

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B. The Abuse of Process Doctrine

1. In general

73. The Appeals Chamber now considers, in light of the abuse of process doctrine, the Appellant's allegations concerning three additional issues: 1) the right to be promptly informed of the charges during the first period of detention; 2) the alleged failure of the Trial Chamber to resolve the *writ of habeas corpus* filed by the Appellant; and 3) the Appellant's assertions that the Prosecutor did not diligently prosecute her case against him. These assertions will be considered. Before addressing these issues, however, several points need to be emphasised in the context of the following analysis. First and foremost, this analysis focuses on the alleged violations of the Appellant's rights and is not primarily concerned with the entity responsible for the alleged violation(s). As will be discussed, it is clear that there are overlapping areas of responsibility between the three organs of the Tribunal and as a result, it is conceivable that more than one organ could be responsible for the violations of the Appellant's rights. However, even if fault is shared between the three organs of the Tribunal—or is the result of the actions of a third party, such as Cameroon—it would undermine the integrity of the judicial process to proceed. Furthermore, it would be unfair for the Appellant to stand trial on these charges if his rights were egregiously violated. Thus, under the abuse of process doctrine, it is irrelevant which entity or entities were responsible for the alleged violations of the Appellant's rights. Second, we stress that the circumstances set forth in this analysis must be read as a whole. Third, none of the findings made in this sub-section of the Decision, in isolation, are necessarily dispositive of this issue. That is, it is the combination of these factors—and not any single finding herein—that lead us to the conclusion we reach in this sub-section. In other words, the application of the abuse of process doctrine is case-specific and limited to the egregious circumstances presented by this case. Fourth, because the Prosecutor initiates the proceedings of the Tribunal, her special responsibility in prosecuting cases will be examined in sub-section 4, *infra*.

74. Under the doctrine of "abuse of process", proceedings that have been lawfully initiated may be terminated after an indictment has been issued if improper or illegal procedures are employed in pursuing an otherwise lawful process. The House of Lords summarised the abuse of process doctrine as follows:

> [P]roceedings may be stayed in the exercise of the judge's discretion not only where a fair trial is impossible, but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place.

It is important to stress that the abuse of process doctrine may be invoked as a matter of discretion. It is a process by which Judges may decline to exercise the court's jurisdiction in cases where to exercise that jurisdiction in light of serious and egregious violations of the accused's rights would prove detrimental to the court's integrity.

75. The application of this doctrine has resulted in dismissal of charges with prejudice in a number of cases, particularly where the court finds that to proceed on the charges in light of egregious violations of the accused's rights would cause serious harm to the integrity of the judicial process. One of the leading cases in which the doctrine of abuse of process was applied is R. v. Horseferry Road Magistrates' Court *ex parte* Bennett. In that case, the House of Lords stayed the prosecution and ordered the release of the accused, stating that:

> [A] court has a discretion to stay any criminal proceedings on the ground that to try those proceedings will amount to an abuse of its own process either (1) because it will be impossible (usually by reason of delay) to give the accused a fair trial or (2) *because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of a particular case.*

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The abuse of doctrine has been applied in several cases. For example, in Bell v. DPP of Jamaica, the Privy Council held that under the abuse of process doctrine courts have an inherent power to decline to adjudicate a case which would be oppressive as the result of unreasonable delay. In making this determination, the court set forth four guidelines for determining whether a delay would deprive the accused of a fair trial:

1. the length of the delay;
2. the prosecution's reasons to justify the delay;
3. the accused's efforts to assert his rights; and
4. the prejudice caused to the accused.

Regarding the issue of prejudice, in R. v. Oxford City Justices, *ex parte* Smith (D.K.B.), the court applied the abuse of process doctrine in dismissing a case on the grounds that a two-year delay between the commission of the offence and the issuing of a summons was unconscionable, stating:

> In the present case it seems to me that the delay which I have described was not only quite unjustified and quite unnecessary due to inefficiency, but it was a delay of such length that it could rightly be said to be unconscionable. That is by no means the end of the matter. It seems to me also that the delay here was of such a length that it is quite impossible to say that there was no prejudice to the applicant in the continuance of the case.

In R. v. Hartley, the Wellington Court of Appeal relied on the abuse of process doctrine in quashing a conviction that rested on an unlawful arrest and the illegally obtained confession that followed.

76. Closely related to the abuse of process doctrine is the notion of supervisory powers. It is generally recognised that courts have supervisory powers that may be utilised in the interests of justice, regardless of a specific violation. The U.S. Supreme Court has stated that courts have a 'duty of establishing and maintaining civilized standards of procedure and evidence' as an inherent function of the court's role in supervising the judicial system and process. As Judge Noonan of the U.S. Ninth Circuit Court of Appeals has stated:

> This court has inherent supervisory powers to dismiss prosecutions in order to deter illegal conduct. The "illegality" deterred by exercise of our supervisory power need not be related to a constitutional or statutory violation.

The use of such supervisory powers serves three functions: to provide a remedy for the violation of the accused's rights; to deter future misconduct; and to enhance the integrity of the judicial process.

77. As noted above, the abuse of process doctrine may be relied on in two distinct situations: (1) where delay has made a fair trial for the accused impossible; and (2) where in the circumstances of a particular case, proceeding with the trial of the accused would contravene the court's sense of justice, due to pre-trial impropriety or misconduct. Considering the lengthy delay in the Appellant's case, 'it is quite impossible to say that there was no prejudice to the applicant in the continuance of the case'. The following discussion, therefore, focuses on whether it would offend the Tribunal's sense of justice to proceed to the trial of the accused.

2. The right to be promptly informed of the charges during the first period of detention

78. In the present case, the Appellant makes several assertions regarding the precise date he was informed of the charges. However, using the earliest date, we conclude that the Appellant was

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informed of the charges on 10 March 1997 when the Cameroon Deputy Prosecutor showed him a copy of the Rule 40*bis* Order. This was approximately 11 months after he was initially detained pursuant to the *first* Rule 40 request.

79. Rule 40*bis* requires the detaining State to promptly inform the *suspect* of the charges under which he is arrested and detained. Thus, the issue is when does the right to be promptly informed of the charges attach to suspects before the Tribunal. Existing international norms guarantee such a right, and suspects held at the behest of the Tribunal pursuant to Rule 40*bis* are entitled, at a bare minimum, to the protections afforded under these international instruments, as well as under the rule itself. Consequently, we turn our analysis to these international standards.

80. International standards require that a suspect who is arrested be informed promptly of the reasons for his arrest and the charges against him. The right to be promptly informed of the charges serves two functions. First, it counterbalances the interest of the prosecuting authority in seeking continued detention of the suspect. In this respect, the suspect needs to be promptly informed of the charges against him in order to challenge his detention, particularly in situations where the prosecuting authority is relying on the serious nature of the charges in arguing for the continued detention of the suspect. Second, the right to be promptly informed gives the suspect the information he requires in order to prepare his defence. The focus of the analysis in this Sub-section is on the first of these two functions. At the outset of this analysis, it is important to stress that there are two distinct periods when the right to be informed of the charges are applicable. The first period is when the suspect is initially arrested and detained. The second period is at the initial appearance of the accused after the indictment has been confirmed and the accused is in the Tribunal's custody. For purposes of the discussion in this Sub-section, only the first period is relevant.

81. The requirement that a suspect be promptly informed of the charges against him following arrest provides the 'elementary safeguard that any person arrested should know why he is deprived of his liberty'. The right to be promptly informed at this preliminary stage is also important because it affords the arrested suspect the opportunity to deny the offence and obtain his release prior to the initiation of trial proceedings.

82. International human rights jurisprudence has developed norms to ensure that this right is respected. For example, the suspect must be notified 'in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, as he sees fit, to apply to a court to challenge its lawfulness…'. However, there is no requirement that the suspect be informed in any particular way. Thus, at this initial stage, there is no requirement that the suspect be given a copy of the arrest warrant or any other document setting forth the charges against him; in fact, there is no requirement at this stage that the suspect be notified in writing at all, so long as the suspect is informed promptly.

83. The European Court of Human Rights has held that the required information need not be given in its entirety by the arresting officer at the 'moment of the arrest', provided that the suspect is informed of the legal grounds of his arrest within a sufficient time after the arrest. Moreover, the information may be divulged to the suspect in stages, as long as the required information is provided promptly. Whether this requirement is complied with requires a factual determination and is, therefore, case-specific. Consequently, we will briefly survey the jurisprudence of the Human Rights Committee and the European Court of Human Rights in interpreting the promptness requirement of Article 9(2) of the ICCPR, Article 5(2) of the ECHR and Article 7 of the ACHR.

84. As pointed out above, the Human Rights Committee held in Glenford Campbell v. Jamaica, that detention without the benefit of being informed of the charges for 45 days constituted a violation of Article 9(2) of the ICCPR. Under the jurisprudence of the European Court of Human Rights, intervals of up to 24 hours between the arrest and providing the information as required pursuant to ECHR Article 5(2) have been held to be lawful. However, a delay of ten days between the arrest and

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informing the suspect of the charges has been held to run afoul of Article 5(2).

85. In the present case, the Appellant was detained for a total period of 11 months before he was informed of the general nature of the charges that the Prosecutor was pursuing against him. While we acknowledge that only 35 days out of the 11-month total are clearly attributable to the Tribunal (the periods from 17 April—16 May 1996 and 4—10 March 1997), the fact remains that the Appellant spent an inordinate amount of time in provisional detention without knowledge of the general nature of the charges against him. At this juncture, it is irrelevant that only a small portion of that total period of provisional detention is attributable to the Tribunal, since it is the Tribunal—and not any other entity—that is currently adjudicating the Appellant's claims. Regardless of which other parties may be responsible, the inescapable conclusion is that the Appellant's right to be promptly informed of the charges against him was violated.

86. As noted above, in Bell v. DPP of Jamaica, the abuse of process doctrine was applied where unreasonable delay would have resulted in an oppressive result had the case gone to trial. Applying the guidelines set forth in that case convinces us that the abuse of process doctrine is applicable under the facts of this case. The Appellant was detained for 11 months without being notified of the charges against him. The Prosecutor has offered no satisfactory justifications for this delay. The numerous letters attached to one of the Appellant's submissions point to the fact that the Appellant was in continuous communication with all three organs of the Tribunal in an attempt to assert his rights. Moreover, we find that the effect of the Appellant's pre-trial detention was prejudicial.

3. The failure to resolve the *writ of habeas corpus* in a timely manner

87. The next issue concerns the failure of the Trial Chamber to resolve the Appellant's *writ of habeas corpus* filed on 29 September 1997. The Prosecutor asserts that *after* the Appellant filed the *writ of habeas corpus*, the President of the Tribunal wrote a letter to the Appellant informing the Appellant that the Prosecutor would be submitting an indictment shortly. In fact, the President's letter is dated *8 September 1997*, and the Appellant claims that the *writ* was filed on the basis of this letter from the President. Moreover, the Appellant asserts that he was informed that the hearing on the *writ of habeas corpus* was to be held on 31 October 1997. The Appellant asserts that 'the Registry without the consent of the Defence removed the hearing of the motion from the calendar only because the Prosecution promised to issue the indictment soon'. The Appellant also claims that the indictment was filed and confirmed on 22 October 1997 and 23 October 1997, respectively, in order to pre-empt the hearing on the *writ of habeas corpus*. These assertions by the Appellant are, of course, impossible for him to prove, absent an admission by the Prosecutor. We note, however, that the Prosecutor has not directed the Appeals Chamber to any evidence to the contrary, and that the Appellant was never afforded an opportunity to be heard on the *writ of habeas corpus*.

88. Although neither the Statute nor the Rules specifically address *writs of habeas corpus* as such, the notion that a detained individual shall have recourse to an independent judicial officer for review of the detaining authority's acts is well-established by the Statute and Rules. Moreover, this is a fundamental right and is enshrined in international human rights norms, including Article 8 of the Universal Declaration of Human Rights, Article 9(4) of the ICCPR, Article 5(4) of the ECHR and Article 7(6) of the ACHR. The Inter-American Court of Human Rights has defined the *writ of habeas corpus* as:

> [A] judicial remedy designed to protect personal freedom or physical integrity against arbitrary decisions by means of a judicial decree ordering the appropriate authorities to bring the detained person before a judge so that the lawfulness of the detention may be determined and, if appropriate, the release of the detainee be ordered.

Thus, this right allows the detainee to have the legality of the detention reviewed by the judiciary.

89. The European Court of Human Rights has held that the detaining State must provide recourse to an independent judiciary in all cases, whether the detention was justified or not. Under the jurisprudence of that Court, therefore, a *writ of habeas corpus* must be heard, even though the detention is eventually found to be lawful under the ECHR. Thus, the right to be heard on the *writ* is an entirely separate issue from the underlying legality of the initial detention. In the present case, the Appellant's right was violated by the Trial Chamber because the *writ* was filed but was not heard.

90. The Appeals Chamber is troubled that the Appellant has not been given a hearing on his *writ of habeas corpus*. The fact that the indictment of the Appellant has been confirmed and that he has had his initial appearance does not excuse the failure to resolve the *writ*. The Appellant submits that as far as he is concerned the *writ of habeas corpus* is still pending. The Appeals Chamber finds that the *writ of habeas corpus* is rendered moot by this Decision. Nevertheless, the failure to provide the Appellant a hearing on this *writ* violated his right to challenge the legality of his continued detention in Cameroon during the two periods when he was held at the behest of the Tribunal and the belated issuance of the indictment did not nullify that violation.

4. The duty of prosecutorial due diligence

91. Article 19(1) of the Statute of the Tribunal provides that the Trial Chambers shall ensure that accused persons appearing before the Tribunal are guaranteed a fair and expeditious trial. However, the Prosecutor, has certain responsibilities in this regard as well. For example, the Prosecutor is responsible for, *inter alia*: conducting investigations, including questioning suspects; seeking provisional measures and the arrest and transfer of suspects; protecting the rights of suspect, by ensuring that the suspect understands those rights; submitting indictments for confirmation; amending indictments prior to confirmation; withdrawing indictments prior to confirmation; and, of course, for actually prosecuting the case against the accused.

92. Because the Prosecutor has the authority to commence the entire legal process, through investigation and submission of an indictment for confirmation, the Prosecutor has been likened to the 'engine' driving the work of the Tribunal. Or, as one court has stated, '[T]he ultimate responsibility for bringing a defendant to trial rests on the Government and not on the defendant'. Consequently, once the Prosecutor has set this process in motion, she is under a duty to ensure that, within the scope of her authority, the case proceeds to trial in a way that respects the rights of the accused. In this regard, we note that some courts have stated that 'mere delay' which gives rise to prejudice and unfairness might by itself amount to an abuse of process. For example, in R. Grays Justices ex p. Graham, the Queen's Bench stated in *obiter dicta* that:

> [P]rolonged delay in starting or conducting criminal proceedings may be an abuse of process when the substantial delay was caused by the improper use of procedure or inefficiency on the part of the prosecution and the accused has neither caused nor contributed to the delay.

93. The Prosecutor has asserted that her 'abstention from proceeding against the Appellant-Defendant before 3 March 1997 was due to on-going investigation,. The Prosecutor further argues that she should not be barred from proceeding against the Appellant simply because she did not proceed against the Appellant at the first available opportunity. In putting forth this argument, the Prosecutor relies on Judge Shahabuddeen's Separate Opinion from the Kovačević Decision. In that Separate Opinion, Judge Shahabuddeen referred to United States v. Lovasco, a leading United States case on pre-indictment delay, wherein the Court stated:

> [T]he Due Process Clause does not permit courts to abort criminal prosecutions simply because they disagree with a prosecutor's judgement as to when to seek an indictment. Judges are not free, in defining 'due process', to impose on law enforcement officers our 'personal and private notions' of fairness and to 'disregard the limits that bind judges in their judicial function'. ... Our task is more circumscribed. We are to determine only whether the action

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> complained of—here, compelling respondent to stand trial after the Government delayed indictment to investigate further—violates ... "fundamental conceptions of justice..." which "define the community's sense of fair play and decency"...

The Court continued:

> It should be equally obvious that prosecutors are under no duty to file charges as soon as probable cause exists but before they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt.

94. The facts in Lovasco are clearly distinguishable from those of the Appellant's case, and, therefore, we do not find the Supreme Court's reasoning persuasive. In Lovasco, the respondent was subjected to an 18-month delay between the alleged commission of the offences and the filing of the indictment. However, Mr. Lovasco had not been arrested during the 18-month delay and was not in custody during that period when the police were conducting their investigation. We also note that in United States v. Scott, in a dissent filed by four of the Court's nine Justices, (including Justice Marshall, the author of the Lovasco decision), the Lovasco holding regarding pre-indictment delay was characterised as a 'disfavored doctrine'.

95. Moreover, in the Kovačević Decision relied upon by the Prosecutor, the Appeals Chamber held that that the Rules provide a mechanism whereby the Prosecutor may seek to amend the indictment. Pursuant to Rule 50(A), the following scheme for amending indictments is available to the Prosecutor. The Prosecutor may amend an indictment, without prior leave, at any time before the indictment is confirmed. After the indictment is confirmed, but prior to the initial appearance of the accused, the indictment may be amended only with the leave of the Judge who confirmed it. At or after the initial appearance of the accused, the indictment may be amended only with leave of the Trial Chamber seized of the case. The Prosecutor thus has the ability to amend indictments based on the results of her investigations. Therefore, the Prosecutor's argument that investigatory delay at the pre-indictment stage does not violate the rights of a suspect who is in provisional detention is without merit. Rule 40*bis* clearly requires issuance of the indictment within 90 days and the amendment process is available in situations where additional information becomes available to the Prosecutor.

96. Although a suspect or accused before the Tribunal is transferred, and not extradited, extradition procedures offer analogies that are useful to this analysis. In the context of extradition, several cases from the United States confirm that the prosecuting authority has a due diligence obligation with respect to accused awaiting extradition. For example, in Smith v. Hooey, the Supreme Court found that the Government had a 'constitutional duty to make a diligent, good-faith effort to bring [the defendant] before the court for trial'. In United States v. McConahy, the court held that the Government's obligation to provide a speedy resolution of pending charges is not relieved unless the accused fails to demand that an effort be made to return him and the prosecuting authorities have made a diligent, good faith effort to have him returned and are unsuccessful, or can show that such an effort would prove futile. We note that the Appellant made several inquiries of Tribunal officials regarding his status. It is also clear from the record that the Prosecutor made no efforts to have the Appellant transferred to the Tribunal's detention unit until after he filed the *writ of habeas corpus*. Similarly, the Prosecutor has made no showing that such efforts would have been futile. There is nothing in the record that indicates that Cameroon was not willing to transfer the Appellant. Rather, it appears that the Appellant was simply forgotten about.

97. Moreover, conventional law and the legislation of many national systems incorporate provisions for the protection of individuals detained pending transfer to the requesting State. We also note in this regard that the European Convention on Extradition provides that provisional detention may be terminated after as few as 18 days if the requesting State has not provided the proper documents to the requested State. In no case may the provisional detention extend beyond 40 days from the date of

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arrest.

98. Setting aside for the moment the Prosecutor's contention that Cameroon was solely responsible for the delay in transferring the Appellant, the only plausible conclusion is that the Prosecutor failed in her duty to take the steps necessary to have the Appellant transferred in a timely fashion. The Appellant has claimed that the Prosecutor simply forgot about his case, a claim that is, of course, impossible for the Appellant to prove. However, we note that after the Appellant raised this claim, the Prosecutor failed to rebut it in any form, relying solely on the argument that it was Cameroon's failure to transfer the Appellant that resulted in this delay. The Prosecutor provided no evidence that she contacted the authorities in Cameroon in an attempt to get them to comply with the Rule 40*bis* Order. Further, in the 3 June 1999 Scheduling Order, the Appeals Chamber directed the Prosecutor to answer certain questions and provide supporting documentation, including an explanation for the delay between the request for transfer and the actual transfer. Notwithstanding this Order, the Prosecutor provided no evidence that she contacted the Registry or Chambers in an effort to determine what was causing the delay.

99. While it is undoubtedly true, as the Prosecutor submits, that the Registry and Chambers have the primary responsibility for scheduling the initial appearance of the accused, this does not relieve the Prosecutor of some responsibility for ensuring that the accused is brought before a Trial Chamber 'without delay' upon his transfer to the Tribunal. In the present case, the Appellant was transferred to the Tribunal on 19 November 1997. However, his initial appearance was not held until 23 February 1998—some 96 days *after* his transfer, in violation of his right to an initial appearance 'without delay'. There is no evidence that the Prosecutor took any steps to encourage the Registry or Chambers to place the Appellant's initial appearance on the docket. Prudent steps in this regard can be demonstrated through written requests to the Registry and Chambers to docket the initial appearance. The Prosecutor has made no such showing and the only logical conclusion to be drawn from this failure to provide such evidence is that the Prosecutor failed in her duty to diligently prosecute this case.

C. Conclusions

100. Based on the foregoing analysis, we conclude that the Appellant was in the constructive custody of the Tribunal from 4 March 1997 until his transfer to the Tribunal's detention unit on 19 November 1997. However, international human rights standards comport with the requirements of Rule 40*bis*. Thus, even if he was not in the constructive custody of the Tribunal, the period of provisional detention was impermissibly lengthy. Pursuant to that Rule, the indictment against the Appellant had to be confirmed within 90 days from 4 March 1997. However, the indictment was not confirmed in this case until 23 October 1997. We find, therefore, that the Appellant's right to be promptly charged pursuant to international standards as reflected in Rule 40*bis* was violated. Moreover, we find that the Appellant's right to an initial appearance, without delay upon his transfer to the Tribunal's detention unit under Rule 62, was violated.

101. Moreover, we find that the facts of this case justify the invocation of the abuse of process doctrine. Thus, we find that the violations referred to in paragraph 101 above, the delay in informing the Appellant of the general nature of the charges between the initial Rule 40 request on 17 April 1996 and when he was actually shown a copy of the Rule 40*bis* Order on 10 March 1997 violated his right to be promptly informed. Also, we find that the failure to resolve the Appellant's *writ of habeas corpus* in a timely manner violated his right to challenge the legality of his continued detention. Finally, we find that the Prosecutor has failed with respect to her obligation to prosecute the case with due diligence.

D. The Remedy

102. In light of the above findings, the only remaining issue is to determine the appropriate remedy

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for the violation of the rights of the Appellant. The Prosecutor has argued that the Appellant is entitled to either an order requiring an expeditious trial or credit for any time provisionally served pursuant to Rule 101(D). The Appellant seeks unconditional immediate release.

103. With respect to the first of the Prosecutor's suggestions, the Appeals Chamber notes that an order for the Appellant to be expeditiously tried would be superfluous as a remedy. The Appellant is already entitled to an expedited trial pursuant to Article 19(1) of the Statute. With respect to the second suggestion, the Appeals Chamber is unconvinced that Rule 101(D) can adequately protect the Appellant and provide an adequate remedy for the violations of his rights. How does Rule 101(D) offer any remedy to the Appellant in the event he is acquitted?

104. We turn, therefore, to the remedy proposed by the Appellant. Article 20(3) states one of the most basic rights of all individuals: the right to be presumed innocent until proven guilty. In the present case, the Appellant has been in provisional detention since 15 April 1996—more than three years. During that time, he spent 11 months in illegal provisional detention at the behest of the Tribunal without the benefits, rights and protections afforded by being formally charged. He submitted a *writ of habeas corpus* seeking to be released from this confinement—and was never afforded an opportunity to be heard on this *writ*. Even after he was formally charged, he spent an additional 3 months awaiting his initial appearance, and several more months before he could be heard on his motion to have his arrest and detention nullified.

105. The Statute of the Tribunal does not include specific provisions akin to speedy trial statutes existing in some national jurisdictions. However, the underlying premise of the Statute and Rules are that the accused is entitled to a fair and expeditious trial. The importance of a speedy disposition of the case benefits both the accused and society, as has been recognised by national courts:

> The criminal defendant's interest in prompt disposition of his case is apparent and requires little comment. Unnecessary delay may make a fair trial impossible. If the accused is imprisoned awaiting trial, lengthy detention eats at the heart of a system founded on the presumption of innocence. ... Moreover, we cannot emphasize sufficiently that the public has a strong interest in prompt trials. As the vivid experience of a witness fades into the shadow of a distant memory, the reliability of a criminal proceeding may become seriously impaired. This is a substantial price to pay for a society that prides itself on fair trials.

106. The crimes for which the Appellant is charged are very serious. However, in this case the fundamental rights of the Appellant were repeatedly violated. What may be worse, it appears that the Prosecutor's failure to prosecute this case was tantamount to negligence. We find this conduct to be egregious and, in light of the numerous violations, conclude that the only remedy available for such prosecutorial inaction and the resultant denial of his rights is to release the Appellant and dismiss the charges against him. This finding is consistent with Rule 40*bis*(H), which requires release if the suspect is not charged within 90 days of the commencement of the provisional detention and Rule 40 (D) which requires release if the Prosecutor fails to issue an indictment within 20 days after the transfer of the suspect. Furthermore, this limitation on the period of provisional detention is consistent with international human rights jurisprudence. Finally, this decision is also consistent with national legislation dealing with due process violations that violate the right of the accused to a prompt resolution of his case.

107. Considering the express provisions of Rule 40*bis*(H), and in light of the Rwandan extradition request for the Appellant and the denial of that request by the court in Cameroon, the Appeals Chamber concludes that it is appropriate for the Appellant to be delivered to the authorities of Cameroon, the State to which the Rule 40*bis* request was initially made.

108. The Appeals Chamber further finds that this dismissal and release must be with prejudice to the Prosecutor. Such a finding is consistent with the jurisprudence of many national systems.

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Furthermore, violations of the right to a speedy disposition of criminal charges have resulted in dismissals with prejudice in Canada, the Philippines, the United States and Zimbabwe. As troubling as this disposition may be to some, the Appeals Chamber believes that to proceed with the Appellant's trial when such violations have been committed, would cause irreparable damage to the integrity of the judicial process. Moreover, we find that it is the only effective remedy for the cumulative breaches of the accused's rights. Finally, this disposition may very well deter the commission of such serious violations in the future.

109. We reiterate that what makes this case so egregious is the combination of delays that seemed to occur at virtually every stage of the Appellant's case. The failure to hear the *writ of habeas corpus*, the delay in hearing the Extremely Urgent Motion, the prolonged detention of the Appellant without an indictment and the cumulative effect of these violations leave us with no acceptable option but to order the dismissal of the charges with prejudice and the Appellant's immediate release from custody. We fear that if we were to dismiss the charges without prejudice, the Appellant would be subject to immediate re-arrest and his ordeal would begin anew. Were we to dismiss the indictment without prejudice, the strict 90-day limit set forth in Rule 90*bis*(H) could be thwarted by repeated release and re-arrest, thereby giving the Prosecutor a potentially unlimited period of time to prepare and submit an indictment for confirmation. Surely, such a 'revolving door' policy cannot be what was envisioned by Rule 40*bis*. Rather, as pointed out above, the Rules and jurisprudence of the Tribunal permit the Prosecutor to seek to amend the indictment if additional information becomes available. In light of this possibility, the 90-day rule set forth in Rule 40*bis* must be complied with.

110. Rule 40*bis*(H) states that in the event that the indictment has not been confirmed and an arrest warrant signed within 90 of the provisional detention of the suspect, the 'suspect shall be released'. The word used in this Sub-rule, 'shall', is imperative and it is certainly not intended to permit the Prosecutor to file a new indictment and re-arrest the suspect. Applying the principle of effective interpretation, we conclude that the charges against the Appellant must be dismissed with prejudice to the Prosecutor. Moreover, to order the release of the Appellant without prejudice—particularly in light of what we are certain would be his immediate re-arrest—could be seen as having cured the prior illegal detention. That would open the door for the Prosecutor to argue (assuming *arguendo* the eventual conviction of the Appellant) that the Appellant would not then be entitled to credit for that period of detention pursuant to Rule 101(D), on the grounds that the release was the remedy for the violation of his rights. The net result of this could be to place the Appellant in a worse position than he would have been in had he not raised this appeal. This would effectively result in the Appellant being punished for exercising his right to bring this appeal.

111. The words of the Zimbabwean Court in the Mlambo case are illustrative. In ordering the dismissal of the charges and release of the accused, the Zimbabwean Court held:

> The charges against the applicant are far from trivial and there can be no doubt that it would be in the best interests of society to proceed with the trial of those who are charged with the commission of serious crimes. Yet, that trial can only be undertaken if the guarantee under... the Constitution has not been infringed. In this case it has been grievously infringed and the unfortunate result is that a hearing cannot be allowed to take place. To find otherwise would render meaningless a right enshrined in the Constitution as the supreme law of the land'.

We find the forceful words of U.S. Supreme Court Justice Brandeis compelling in this case:

> Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself: it invites anarchy. To declare that

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> in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.

112. The Tribunal—an institution whose primary purpose is to ensure that justice is done—must not place its imprimatur on such violations. To allow the Appellant to be tried on the charges for which he was belatedly indicted would be a travesty of justice. Nothing less than the integrity of the Tribunal is at stake in this case. Loss of public confidence in the Tribunal, as a court valuing human rights of all individuals—including those charged with unthinkable crimes—would be among the most serious consequences of allowing the Appellant to stand trial in the face of such violations of his rights. As difficult as this conclusion may be for some to accept, it is the proper role of an independent judiciary to halt this prosecution, so that no further injustice results.

V. DISPOSITION

113. For the foregoing reasons, THE APPEALS CHAMBER hereby:

Unanimously,

1. ALLOWS the Appeal, and in light of this disposition considers it unnecessary to decide the 19 October 1999 Notice of Appeal or the 26 October 1999 Notice of Appeal;

Unanimously,

2. DISMISSES THE INDICTMENT with prejudice to the Prosecutor;

Unanimously,

3. DIRECTS THE IMMEDIATE RELEASE of the Appellant; and

By a vote of four to one, with Judge Shahabuddeen dissenting,

4. DIRECTS the Registrar to make the necessary arrangements for the delivery of the Appellant to the Authorities of Cameroon.

Judge Shahabuddeen appends a Separate Opinion to this Decision.

Judge Nieto-Navia appends a Declaration to this Decision.

Done in both English and French, the English text being authoritative.

Gabrielle Kirk McDonald Mohamed Shahabuddeen Lal Chand Vohrah

Presiding

Wang Tieya Rafael Nieto-Navia

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Dated this third day of November 1999
At The Hague,
The Netherlands.

[Seal of the Tribunal]

Appendix A

Chronology of Events

15 April 1996:	Cameroon arrests twelve to fourteen Rwandans on the basis of international arrest warrants. The accused was among those arrested. The parties disagree with respect to the question of under whose authority the accused was detained. The Appellant asserts he was arrested by Cameroon on the basis of a request from the Prosecutor, while the Prosecutor contends that the Appellant was arrested on the basis of international arrest warrants emanating from the Rwandan and Belgian authorities.
17 April 1996:	The Prosecutor requests that provisional measures under Rule 40 be taken in relation to the Appellant.
6 May 1996:	The Prosecutor seeks a three-week extension for the detention of the Appellant in Cameroon.
16 May 1996:	The Prosecutor informs Cameroon that she seeks to transfer and hold in provisional detention under Rule 40*bis* four of the individuals detained by Cameroon, *excluding* the Appellant.
31 May 1996:	The Court of Appeal in Cameroon issues a Decision to adjourn *sine die* consideration of the Rwandan extradition proceedings concerning the Appellant as the result of a request by the Cameroonian Deputy Director of Public Prosecution. In support of his request, the Deputy Director cites Article 8(2) of the ICTR Statute.
15 October 1996:	The Prosecutor sends the Appellant a letter indicating that Cameroon is not holding the Appellant at her behest.
21 February 1997:	The Cameroon court rejects Rwanda's extradition request for the Appellant. The court orders the Appellant's release, but he is immediately re-arrested at the behest of the Prosecutor pursuant to Rule 40. This is the second request under Rule 40 for the provisional detention of the Appellant.
24 February 1997:	Pursuant to Rule 40*bis*, the Prosecutor requests the transfer of the accused to Arusha.
4 March 1997:	An Order pursuant to Rule 40*bis* (signed by Judge Aspegren on 3 March 1997), is filed. This Order requires Cameroon to arrest and transfer the

	Appellant to the Tribunal's detention unit.
10 March 1997:	The Appellant is shown a copy of the Rule 40*bis* Order, including the general nature of the charges against him.
29 September 1997:	The Appellant files a *writ of habeas corpus*.
21 October 1997:	The President of Cameroon signs a decree ordering the Appellant's transfer to the Tribunal's detention unit.
22 October 1997:	The Prosecutor submits the indictment for confirmation.
23 October 1997:	Judge Aspegren confirms the indictment against the Appellant and issues a Warrant of Arrest and Order for Surrender to Cameroon.
19 November 1997:	The Appellant is transferred to Arusha.
23 February 1998:	The Appellant makes his initial appearance.
24 February 1998:	The Appellant files the Extremely Urgent Motion seeking to nullify the arrest.
11 September 1998:	The Trial Chamber hears the arguments of the parties on the Motion.
17 November 1998:	The Trial Chamber dismisses the Extremely Urgent Motion *in toto*.
27 November 1998:	The Appellant notified the Appeals Chamber of his intention to appeal, claiming that he did not receive the Decision until 27 November 1998. On that same day, he signs his Notice of Appeal.

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articles

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Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

Part II : Humane treatment

Article 6 -- Penal prosecutions

1. This Article applies to the prosecution and punishment of criminal offences related to the armed conflict.

2. No sentence shall be passed and no penalty shall be executed on a person found guilty of an offence except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality. In particular:

(a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;

(b) no one shall be convicted of an offence except on the basis of individual penal responsibility;

(c) no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under the law, at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;

(d) anyone charged with an offence is presumed innocent until proved guilty according to law;

(e) anyone charged with an offence shall have the right to be tried in his presence;

(f) no one shall be compelled to testify against himself or to confess guilt.

3. A convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised.

4. The death penalty shall not be pronounced on persons who were under the age of eighteen years at the time of the offence and shall not be carried out on pregnant women or mothers of young children.

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5. At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.

THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT:

A COMMENTARY

VOLUME I

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Chapter 18.3

Possible Conflicts of Jurisdiction with Truth Commissions

John Dugard

I. Introduction

In recent years we have seen the emergence of two types of institutions for dealing with systematic and large-scale human rights violations: the international criminal courts and the truth and reconciliation Commissions (hereinafter 'TRCs'). Both have been widely acclaimed by the international human rights community as instruments for dealing with crimes committed by repressive regimes despite the fact that they employ radically different methods. Thus far there has been no conflict between the two as TRCs have been established only in societies not subject to the jurisdiction of international criminal courts. Suggestions that TRCs be established in Bosnia-Herzegovina and Rwanda have not been implemented with the result that the ICTY and ICTR have not been faced with the problem of a TRC. The ICC is less likely to avoid this problem as its jurisdiction will be more extensive. Consequently, it is not inconceivable that it will be called upon to decide whether to recognize the process and decisions of a TRC, either as a bar to prosecution or as a factor to be considered in mitigation of punishment. A conflict is most likely to arise in the case of a TRC modelled on that of South Africa, which grants amnesty after a proper investigation, where the accused raises amnesty as a defence to prosecution before the ICC. This potential conflict between the ICC and TRCs forms the subject of the present study.

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II. The Truth and Reconciliation Commissions

Since 1974, twenty-one TRCs have been established to enquire into the immediate past of particular societies that have emerged from repression, with the goal of achieving reconciliation by means of exposing the historical record.[1] Probably the best known are the TRCs established for Chile, Argentina, El Salvador, South Africa, and Guatemala.[2] In 1999, a Group of Experts, under the Chairmanship of Sir Ninian Stephen, recommended that consideration be given to the establishment of such a commission for Cambodia.[3] (The future of such a commission remains uncertain.)

Truth and reconciliation commissions vary considerably in respect of composition, independence, and mandate, although they are all committed to healing by means of truth telling. They are not, *in theory*, antithetical to prosecution. Thus, Louis Joinet in his 1997 Report on the 'Question of the Impunity of Perpetrators of Human Rights Violations' to the Sub-Commission on Prevention of Discrimination and Protection of Minorities[4] recommended that an extrajudicial commission of inquiry into the events of the past should go hand in hand with prosecution and punishment of human rights violators. The Stephen's Commission[5] adopted a similar approach in its recommendations for Cambodia as it proposed that consideration be given to the creation of a TRC to accompany the prosecution before an international tribunal of those responsible for genocide in Cambodia between 1975 and 1979.

In practice the position is very different. In most cases a TRC is established because the new regime lacks the power to embark on prosecution—as in the case of Chile where President Aylwin's democratic government operated in the shadow of the Pinochet-led military;[6] or because the political compact that has produced democracy is premissed on a compromise between old and new regimes which precludes prosecution—as in the case of South Africa, whose democracy was founded on an agreement between the National Party apartheid regime and the African National Congress (ANC) based on conditional amnesty;[7] or because years of fratricidal civil war between security forces and guerillas places peace

[1] P. B. Hayner, *Unspeakable Truths, Confronting State Terror and Atrocity* (2001), Appendix 1.

[2] The reports of many of the TRCs appear in N. J. Kritz (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, 3 vols. (1995).

[3] A/53/850; S/1999/231 (16 March 1999) paras. 199–208, 219 (10).

[4] E/CN, 4/sub.2/1997/20/Rev. 1 (2 October 1997).

[5] *Supra* note 3.

[6] Kritz, *supra* note 2, vol. 2 at 453; J. Mera, 'Chile: Truth and Justice under the Democratic Government', in N. Roth-Arriaza (ed.), *Impunity and Human Rights in International Law* (1995) [illegible]

[7] J. Dugard, 'Reconciliation and Justice: The South African Experience', 8 *Transnational Law and Contemporary Problems* (1998) 277.

above justice-through-prosecution as a national priority—as in the case of Guatemala after forty years of civil war.[8] In her study of fifteen TRCs, Priscilla Hayner concludes that prosecutions are very rare after a TRC report even where the identity of the perpetrators is known.[9]

While the circumstances of a particular society will determine the choice of TRC or prosecution, it should not be thought that the TRC is established only when prosecution is politically, and practically, impossible. The TRC may be chosen as a more effective means of reaching the truth than prosecution as, if accompanied by the prospect of amnesty, it holds out an incentive to the guilty to unburden themselves of the truth. This was emphasized by South Africa's former Chief Justice, Ismail Mohamed, in his judgment on the challenge to the constitutionality of South Africa's amnesty legislation in *Azapo v. President of the Republic of South Africa* where he stated:

> Most of the acts of brutality and torture which have taken place have occurred during an era in which neither the law which permitted the incarceration of persons or the investigation of crimes, nor the methods and the culture which informed such investigations, were easily open to public investigation, verification and correction. Much of what transpired in this shameful period is shrouded in secrecy and not easily capable of objective demonstration and proof.
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> . . .
>
> That truth, which the victims of repression seek so desperately to know is, in the circumstances, much more likely to be forthcoming if those responsible for such monstrous misdeeds are encouraged to disclose the whole truth with the incentive that they will not receive the punishment which they undoubtedly deserve if they do. Without that incentive there is nothing to encourage such persons to make the disclosure and to reveal the truth which persons in the positions of the applicants so desperately desire . . .[10]

III. Amnesty and International Law

Amnesty is a practice that has its roots in the early history of mankind. From time immemorial, successor regimes have sought to secure peace through the pardoning of their enemies. In the past decade there has, however, been a change in attitude towards amnesty and it is now demanded that the former leaders of repressive regimes should be tried and punished. There are many reasons for this. The abuse of amnesty by military dictatorships that have enacted 'self-amnesty' laws before

[8] See *Guatemala. Memory of Silence. Tz'inil Na'tab'al. Report of the Commission for Historical Clarification. Conclusion and Recommendations* (1999); N. Roth-Arriaza and L. Gibson, 'The Developing Jurisprudence of Amnesty', 20 *HRQ* (1998) 843, at 851.

[9] *Supra* note 1.

[10] 1996 (4) South African Law Reports 671, at 683–685.

surrendering power is an obvious reason. Perhaps the most important reason, however, is the internationalization of crime. Most of the atrocities committed by dictators today are not merely national crimes. They are frequently international crimes—genocide, crimes against humanity, torture, hostage-taking, and apartheid—which concern the international community as well as the national State.

In pursuance of this demand for prosecution, it is argued that there is a *duty* on successor regimes to prosecute leaders of the former regime.

Multilateral treaties do not uniformly oblige signatory States to prosecute those suspected of grave human rights violations. The Genocide Convention is explicit in its support for a duty to prosecute in providing that persons committing genocide 'shall be punished'.[11] The 1949 Geneva Conventions are equally clear: Contracting States are obliged to prosecute or extradite those guilty of grave breaches.[12] Additional Protocol I of 1977 reiterates this obligation.[13] The Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity of 1968[14] by necessary implication places an obligation on States to prosecute war crimes and crimes against humanity by requiring States not to apply statutory limitations to such crimes. The Statutes of the ICTY[15] and the ICTR[16] contemplate the trial of all persons responsible for committing crimes within the jurisdiction of these Tribunals before the Tribunals themselves or domestic courts and oblige States to cooperate 'with the relevant tribunal' in the investigation and prosecution of persons committing 'serious violations of international humanitarian law'.[17] Amnesty is not, therefore, permitted.

The 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[18] requires States to try or extradite offenders[19] and the UN Human Rights Committee has held that amnesties covering acts of torture are 'generally incompatible' with the duties of States Parties under the Convention.[20]

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[11] Art. 4.

[12] See Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Art. 49) 75 UNTS 31; Convention for the Amelioration of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Art. 50) 75 UNTS 85; Convention relative to the Treatment of Prisoners of War (Art. 129) 75 UNTS 135; Convention relative to the Protection of Civilian Persons in Time of War (Art. 146) 75 UNTS 287.

[13] Art. 85. Reprinted in 16 ILM (1977) 1391.

[14] GA Res. 2391 (XXIII); (1969) 8 ILM 68.

[15] SC Res. 827 (1993); (1993) 32 ILM 1192.

[16] SC Res. 955; (1994) 33 ILM 1598.

[17] Art. 29 of the ICTY Statute; and Art. 28 of the ICTR Statute.

[18] (1985) 24 ILM 535.

[19] Art. 7.

[20] General Comment No. 20 (44) (Art. 7), UN Doc. CCPR/C21/Rev. 1/Add 3, para. 15 (April 1992).

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Multilateral human rights conventions, whose enforcement mechanisms are designed to ensure compliance by States Parties with their obligations by means other than prosecution of State officials, are silent on the question of the duty to prosecute but it has been persuasively argued that such a duty may be inferred in certain cases.[21] The Inter-American Court of Human Rights has given support to this view by holding in the *Velasquez Rodriguez* case,[22] in respect of Honduras, that Article 1(1) of the Convention, requiring States to 'ensure the rights set forth in the Convention, obliged states to investigate and punish any violation of the rights recognized by the American Convention of Human Rights'. Moreover, the Inter-American Commission of Human Rights has held that amnesties granted by Uruguay, Argentina, and El Salvador were incompatible with the American Convention on Human Rights.[23]

Other instruments support the duty to prosecute. The 1996 International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind[24] obliges States to try or extradite those alleged to have committed crimes against humanity; and the Final Declaration and Programme of Action of the 1993 World Conference on Human Rights[25] called on States to prosecute those responsible for grave human rights violations, such as torture, and to abrogate legislation leading to impunity for such crimes. Finally there is a substantial body of academic writing to support this argument.[26]

A necessary consequence of the argument that there is a duty to prosecute is that international law prohibits the granting of amnesty in the case of the violation of international crimes. This was confirmed by the Trial Chamber of the ICTY in *Prosecutor v. Furundžija* when it held that amnesty for torture would be null and void. Here the Tribunal reasoned that:

> The fact that torture is prohibited by a peremptory norm of international law has other effects at the inter-state and individual levels. At the inter-state level, it serves to internationally de-legitimize any legislative, administrative or judicial act authorizing torture. It would be senseless to argue, or on the one hand, that on account of

[21] D. F. Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violators of a Prior Regime', 100 *Yale Law Journal* (1991) 2537.

[22] Inter-American Court of Human Rights (series C) no. 4, para. 165 (1988).

[23] Inter-American Commission on Human Rights, Report No. 29/92 (Uruguay) OEA/L/V/11.82.Doc 25 (1992); Report No. 24/92 (Argentina), Doc. 24 (1992); OEA/L/V/11.85, Doc. 28 (1994) (El Salvador).

[24] Art. 6 Draft Code of Crimes against the Peace and Security of Mankind, *Report of the International Law Commission of the work of its forty-eighth session*, 51st Sess., Supp. No. 10, UN Doc. A/51/10 (1996).

[25] Part II, para. 60, UN Doc. A/CONF/57/24 (October 1993); (1993) 32 ILM 166.

[26] M. C. Bassiouni, 'Searching for Peace and Achieving Justice: The Need for Accountability', 59 *Law and Contemporary Problems* (1996) 9; C. Edelenbos, 'Human Rights Violations: A Duty to Prosecute?' 7 *Leiden Journal of International Law* (1994) 5; G. S. Goodwin-Gill, 'Crimes in International Law: Obligations *Erga Omnes* and the Duty to Prosecute', in G. S. Goodwin-Gill and S. Talmon (eds.), *The Reality of International Law: Essays in Honour of Ian Brownlie* (1999) 222.

> the *jus cogens* value of the prohibition against torture, treaties or customary rules providing for torture would be null and void *ab initio*, and then be unmindful of a state say, taking national measures authorizing or condemning torture or absolving its perpetrators through an amnesty law. If such a situation were to arise, the national measures, violating the general principle and any treaty provision . . . would not be accorded international legal recognition . . . [P]erpetrators of torture acting upon or benefiting from those national measures may nevertheless be held criminally responsible for torture, whether in a foreign state, or in their own state under a subsequent regime.[27]

A general *duty* to prosecute international crimes under international law is not supported by State practice. On the contrary, modern history is replete with examples of cases in which successor regimes have granted amnesty to officials of the previous regime guilty of torture and crimes against humanity, rather than prosecute them.[28] In many of these cases, notably that of South Africa, the United Nations has welcomed such a solution. The decisions of national courts likewise give no support to the duty to prosecute.[29] In the first *Pinochet* case before the English House of Lords, Lord Lloyd stated that:

> Further light is shed on state practice by the widespread adoption of amnesties for those who have committed crimes against humanity including torture. Chile was not the first in the field. There was an amnesty at the end of the Franco-Algerian War in 1962. In 1971 India and Bangladesh agreed not to pursue charges of genocide against Pakistan troops accused of killing about one million East Pakistanis. General amnesties have also become common in recent years, especially in South America, covering members of former regimes accused of torture and other atrocities. Some of these have had the blessing of the United Nations, as a means of restoring peace and democratic government . . . It has not been argued that these amnesties are as such contrary to international law by reason of the failure to prosecute the individual perpetrators.[30]

Although international law does not—yet—prohibit the granting of amnesty for international crimes, it is clearly moving in this direction. The Preamble of the Statute of the ICC confirms this when it declares that 'it is the duty of every State to exercise criminal jurisdiction over those responsible for international crimes.'

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[27] Case IT-95-17/1-T (10 December 1998); 39 ILM (1999) 317 at para. 155.

[28] See M. Scharf, 'The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes', 59 *Law and Contemporary Problems* (1996) 41, at 47.

[29] See the decisions of the constitutional courts of South Africa and El Salvador upholding the validity of amnesty laws: *Azanian Peoples Organization (AZAPO) v. President of the Republic of South Africa*, 1996(4) South African Law Reports 671 (CC) 691; El Salvador constitutional court, Proceedings No. 10-93 (20 May 1993); reprinted in Kritz (ed.), supra note 2, vol. 3 at 545, 555.

[30] *R v. Bow Street Metropolitan Stipendiary Magistrate, ex Parte Pinochet* [1998] 4 All ER 897 (HL) at 929 h–i.

IV. Truth and Reconciliation Commissions and the Granting of Amnesty

A distinction must be drawn between the lawfulness of amnesty under international law and the obligations of other States to accord recognition to national amnesties, that is between legality and opposability.

Although international law is clearly evolving in the direction of a general duty to prosecute international crimes, it cannot be said that this stage has yet been reached. Consequently, it is still open to States to grant amnesty for international crimes without violating a rule of international law—except in the case of genocide,[31] 'grave breaches' under the Geneva Conventions,[32] and torture[33]—where States are obliged to prosecute or extradite. This does not mean, however, that the courts of other States or international tribunals are required to recognize such grants of amnesty as amnesty does not have extraterritorial effect. This is illustrated by the *Pinochet* case[34] in which it was not even suggested by Pinochet's lawyers that his self-granted amnesty in Chile might constitute a bar to extradition from the United Kingdom to Spain.

Not all amnesties will be recognized abroad. The kind of blanket, unconditional amnesty granted by the Pinochet regime to itself cannot hope to receive international recognition. But the same principle does not necessarily apply to conditional amnesty accompanied by a thorough investigation by a TRC of the South African kind. The South African Truth and Reconciliation Commission obviously believed that it was entitled to favourable consideration as in its Report it appealed to the international community for recognition of its process. The Report states:

> The definition of apartheid as a crime against humanity has given rise to a concern that persons who are seen to have been responsible for apartheid policies and practices might become liable to international prosecutions. The Commission believes that international recognition should be given to the fact that the Promotion of National Unity and Reconciliation Act, and the processes of this Commission itself, have sought to deal appropriately with the matter of responsibility for such policies.[35]

The suggestion that some amnesties may be more deserving of international recognition than others raises the question of how to draw a distinction between

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[31] *Supra* note 11.
[32] *Supra* note 12.
[33] *Supra* notes 18–20.
[34] *R v. Bow Street Metropolitan Stipendiary Magistrate, ex Parte Pinochet Ugarte (No. 3)* [1999] 2 All ER 97 (HL).
[35] Truth and Reconciliation Commission Report (1998) vol. 5 at 349.

permissible and impermissible amnesties. No clear rules can be enunciated, but it is submitted that international recognition might be accorded where amnesty has been granted as part of a truth and reconciliation inquiry and each person granted amnesty has been obliged to make a full disclosure of his or her criminal acts as a precondition for amnesty and the acts were politically motivated. South African amnesties granted by a quasi-judicial amnesty committee functioning as part of the TRC process might meet the required standard, whereas Chilean amnesties granted by the regime itself before the establishment of a TRC do not.[36] The nature of the TRC is also important. Recognition should only be considered where the TRC has been established by a democratically elected government or international organization and functions in accordance with due process of law requirements.

The Rome Statute is silent on the subject of amnesty and makes no mention of truth and reconciliation commissions. Yet it is possible that if TRCs continue to be employed as an alternative to prosecution in transitional societies that the ICC may be compelled to decide whether to accord recognition to amnesties granted as part of a truth and reconciliation process. This raises two questions: first, whether the ICC is competent to accord such recognition; and, secondly, if it enjoys this competence, under what circumstances it should exercise it.

V. The Rome Statute and Amnesty

The question of whether national amnesties might constitute a bar to prosecution before the International Criminal Court was raised, but not seriously considered, by the Preparatory Committee in its meetings preceding the Rome Diplomatic Conference,[37] and it was evaded at the Rome Conference itself, apparently under pressure from non-governmental human rights groups determined to ensure that human rights violators would be prosecuted.[38] As a result, the Rome Statute is silent on amnesty.

[36] Dugard, *supra* note 7 at 287–295; Dugard, 'Dealing with Crimes of a Past Regime: Is Amnesty Still an Option?' 12 *Leiden Journal of International Law* (1999) 1001.

[37] Both amnesty and pardon were considered and rejected in the context of the defence of *ne bis in idem*: see Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. 1, p. 40 (para. 174) (Proceedings of the Preparatory Committee during March–April and August 1996) GAOR, 51st Sess., Suppl. No. 22 (A/51/22); A/CONF. 283/2/Add. 1 of the 14 April 1998, Art. 19. Ruth Wedgwood reports that in August 1997 the United States circulated a 'non paper' to the Preparatory Committee suggesting that a responsible decision by a democratic regime to allow an amnesty should be taken into account in judging the admissibility of a case: 'The International Criminal Court: An American View', 10 *EJIL* (1999) 93 at 96. See too M. P. Scharf, 'The Amnesty Exception to the Jurisdiction of the ICC', 32 *Cornell International Law Journal* (1998) 507.

[38] M. H. Arsanjani, 'Reflections on the Jurisdiction and Trigger Mechanism of the ICC', in H. A. M. Von Hebel, J. G. Lammers, and J. Schukking (eds.), *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos* (1999) 57, at 75.

There are signs in the Rome Statute that the failure to deal with amnesty was deliberate.[39] The Preamble affirms that 'the most serious crimes of concern to the international community as a whole must not go unpunished', expresses the determination 'to put an end to impunity for the perpetrators of these crimes', and recalls that 'it is the duty of every state to exercise criminal jurisdiction over those responsible for international crimes'.[40] Furthermore, genocide and grave breaches of the Geneva Conventions, which feature prominently among the crimes falling within the jurisdiction of the Court, are crimes in respect of which States are obliged to prosecute. Had the Rome Statute intended amnesty to be a defence, special provision would have been made for it in the clauses dealing with the defence of *ne bis in idem* and surrender to the Court (extradition). However, Article 20, on *ne bis in idem,* allows this defence only where a person has been 'tried' by another court and the *travaux préparatoires* show that the exclusion of amnesty and pardon was deliberate.[41]

It is true that extradition agreements not uncommonly provide that a requested State may refuse to extradite a person granted amnesty.[42] This practice cannot, however, be transposed upon rendition to the ICC as the Statute, in Article 102, makes it clear that the 'surrender' of a person to the ICC pursuant to the Statute is to be distinguished from 'extradition'.

Despite these *indicia* that the Rome Statute does not recognize amnesty, it is possible to argue that there is sufficient flexibility in the system for amnesty to be recognized in appropriate circumstances.

First, it is suggested[43] that the Security Council, acting under Article 16, may order the deferral of a prosecution for twelve months (or more) where amnesty has been granted. This is difficult to accept, however, as such a deferral must be made in a resolution under Chapter VII and it is hard, if not impossible, to contemplate a situation in which refusal to recognize a national amnesty could constitute a threat to international peace.

Secondly, it may be argued that Article 17(1)(b) of the Rome Statute contemplates recognition of amnesty. It provides that the International Criminal Court will declare that a case is inadmissible where:

[39] See G. Hafner *et al.*, 'A Response to the American View as Presented by Ruth Wedgwood', 10 *EJIL* (1999) 108 at 109–113.

[40] Paras. 4–6.

[41] *Supra* note 37.

[42] The 1990 UN Model Treaty on Extradition lists amnesty granted by either requesting or requested State as a mandatory ground for the refusal of extradition: GA Res. 45/116 of 14 December; 30 *ILM* 140 (1991): Art. 3(e). The 1996 European Union Extradition Agreement allows the requested State to refuse extradition where it has granted amnesty and was competent to prosecute the offence under its own criminal law: *Official Journal of the European Communities*, No. 313/12 of 23 October 1996.

[43] Scharf, *supra* note 37.

> The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute.

While the first part of the provision might be interpreted imaginatively to cover South African-style amnesty—that is the decision not to prosecute and instead to grant amnesty after an investigation—it is difficult to maintain such an interpretation in the face of the second part of the provision as the decision 'not to prosecute' will result from an 'unwillingness' to prosecute, or 'to bring the person concerned to justice',[44] because the State has decided to grant amnesty instead of prosecuting!

Thirdly, there is the possibility that a person granted amnesty might seek the protection of Article 20, which codifies the principle of *ne bis in idem*. In such a case the accused person might argue that an amnesty granted after an investigation by a quasi-judicial body, as required by the South African Promotion of National Unity and Reconciliation Act,[45] qualifies as a prior conviction for the purposes of Article 20. This argument will, however, be difficult to sustain in the light of Article 20(3)'s requirement that the accused should have been 'tried by another court' and in a manner 'consistent with an intent to bring the person concerned to justice'.

Fourthly, and more plausibly, it is possible that a genuine amnesty may be protected by prosecutorial discretion. Article 53(2)(c) allows the Prosecutor to refuse prosecution at the instance of a State or the Security Council where, after investigation, she or he concludes that 'a prosecution is not in the interests of justice, taking into account all circumstances'. This decision is subject to review by the Pre-Trial Chamber. Similarly the Prosecutor may decline to exercise her or his discretion to prosecute *proprio motu* under Article 15 on the ground that the suspect has been granted amnesty.

VI. Circumstances Warranting the Recognition of Amnesty

The TRC is an important institution in the process of peace and national reconciliation. A new society cannot be built without knowledge of the past and an acknowledgement of their crimes on the part of those responsible for the repressions of the past. But where the crimes offend not only national law but international law, the international community also has an interest in the process and it has decided that justice, in the form of prosecution, must take priority over peace and national reconciliation. The establishment of the ICC testifies to this

[44] See Art. 17(2)(c).

[45] Act 34 of 1995, particularly sections 19 and 20. Discussed by Dugard, *supra* note 7, at 293–294.

judgement on the part of the international community. For this reason a TRC and amnesty cannot be allowed to halt the course of international justice. Those guilty of committing international crimes will be held accountable before national courts, in accordance with the principle of complementarity contained in the ICC Statute.

Only in extreme circumstances may the Security Council invoke its powers under Article 16 to defer prosecution of a person granted amnesty. It is not inconceivable that a situation may arise where the trial before the ICC of a former dictator granted amnesty at home may threaten international peace under Article 39 of the UN Charter, thereby justifying Chapter VII action. That this is highly unlikely is illustrated by the *Pinochet* case[46] in which the House of Lords and the British government paid little attention to the political repercussions in Chile of their refusal to protect Pinochet from extradition to Spain.

It is more likely that amnesty will be a consideration to be taken into account by the Prosecutor in the exercise of his or her discretion. Amnesty will clearly not be considered in the cases of genocide and grave breaches of the Geneva Conventions, where there is an obligation to prosecute, and it is a factor that should only be taken into account exceptionally, if at all, in other cases falling within the jurisdiction of the ICC in the light of the emerging rule of international law requiring prosecution of international crimes.

Amnesty granted to offenders by themselves (à la Pinochet) will be ignored. So too will amnesty granted unconditionally. Where, however, amnesty is subject to judicial approval,[47] or it is granted after a quasi-judicial inquiry, at which the applicant is required to make a full disclosure and to show that the act was committed with a political objective[48] *and* the society in question has subjected its past to scrutiny by a TRC,[49] the Prosecutor may, after considering the interests of the victims and the gravity of the crime, decide to withhold prosecution in the exercise of his or her discretion under Article 53.

Finally, the ICC itself may take the fact that the accused has been granted amnesty into account in mitigation of sentence. In most cases this will be the wisest course as it will preserve the integrity of the ICC which is premissed on an aversion to impunity and accountability for the commission of international crimes.

[46] *R v. Bow Street Metropolitan Stipendiary Magistrate, ex Parte Pinochet Ugarte (No. 3)* [1999] 2 All ER 97 (HL).

[47] As in Guatemala: Roth-Arriaza and Gibson, *supra* note 8, at 852, 882.

[48] As in South Africa: *supra* note 38.

[49] As in the cases of both South Africa and Guatemala.

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TRUTH AND RECONCILIATION COMMISSIONS

P. Hayner, 'Fifteen Truth Commissions—1974 to 1994: A Comparative Study', 16 *HRQ* (1994) 600; J. Dugard, 'Reconciliation and Justice: The South African Experience', 8 *Transnational Law and Contemporary Problems* (1998) 277; P. B. Hayner, *Unspeakable Truths, Confronting State Terror and Atrocity* (2001).

Dealing With Crimes of a Past Regime. Is Amnesty Still an Option?*

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Keywords: amnesty; international criminal law; International Criminal Tribunal; truth commissions.

Abstract: From time immemorial amnesty has been employed as a means of promoting a political settlement and advancing reconciliation in societies that have emerged from repression. At present there is a trend in support of prosecution of those who have committed international crimes, such as torture and crimes against humanity, which excludes the possibility of amnesty. That amnesty is no longer favored is illustrated by the failure of the Rome Statute of the International Criminal Court to recognize amnesty as a defence to prosecution. While there is no place for unconditional amnesty in the contemporary international legal order an intermediate solution such as a Truth and Reconciliation Commission with power to grant amnesty after investigation, of the South African kind, may contribute to the achievement of peace and justice in a society in transition more effectively than mandatory prosecution.

1. INTRODUCTION

How to deal with the crimes of removed repressive regimes is now a principal preoccupation of international law. Amnesty is no longer accepted as the natural price to be paid for transition from repression to democracy. Inspired by the establishment of *ad hoc* international criminal tribunals for the Former Yugoslavia and Rwanda, and the prospect of a permanent International Criminal Court, prosecution has become the preferred choice. Whether it is the wisest course to pursue remains a matter of debate. In some situations amnesty may still offer the best prospect for peace – if not for justice. In others an intermediate course may be more suitable. The Truth and Reconciliation Commission, of the kind established in several Latin-American countries and South Africa, may serve the interests of peace and justice better than prosecution or amnesty. In this article I shall examine this debate in the context of contemporary international law, with special reference to the case of Augusto Pinochet.

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2. AMNESTY, PROSECUTION OR TRUTH COMMISSION?

Amnesty is a practice that has its roots in the early history of mankind. From time immemorial successor regimes have sought to secure peace through the pardoning of their enemies. The sole alternative, until present times, was brutal punishment without trial. Consequently, human rights advocates pleaded for amnesty for political prisoners, even for those from fallen regimes.

The past decade has seen a change in attitude. There is now a demand for prosecution of the villains of past regimes. There are many reasons for this. The abuse of amnesty by military dictatorships that have enacted 'self-amnesty' laws before surrendering power is an obvious reason. Perhaps the most important reason, however, is the internationalization of crime in the global village. Most of the atrocities committed by dictators today are not merely national crimes. They are frequently international crimes – genocide, crimes against humanity, torture, hostage-taking and apartheid – which concern the international community as well as the national state. Moreover, international criminal courts have been, and are being, established to punish the perpetrators of such crimes. In these circumstances the international community has an interest in the treatment of human rights violations, and sees punishment before national courts or international courts as the best solution.

Consequently successor regimes are now told by the high priests of public opinion – NGOs and scholars – not only that they *ought* to prosecute but that they are *obliged* under international law to prosecute.

Support for this argument is to be found in the Genocide Convention of 1948, which contains an absolute obligation to prosecute offenders;[1] in decisions of the Inter-American Court and Commission of Human Rights[2] holding that amnesties granted by Argentina and Uruguay were incompatible with the American Convention on Human Rights; in the decision of the American Court of Human Rights in the *Velasquez Rodriguez Case*[3] holding, in respect of Honduras, that Article 1 (1) of the Convention, requiring states to "ensure the rights set forth in the Convention", obliged states to investigate and punish any violation of the rights recognized by the American Convention of Human Rights; in a comment by the UN Human Rights Committee that amnesties covering acts of torture are "generally incompatible with the duty of states to investigate such acts";[4] in the 1996 International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind, which obliges states to try or extradite those alleged to have committed crimes against humanity;[5] in the Final Declaration and Programme of Action of the 1993 World Conference on Human Rights[6] calling on states to prosecute those responsible for grave human rights violations, such as torture, and to abrogate legislation leading to impunity for such crimes; in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity of 1968;[7] and in the Statutes for the International Criminal Tribunal for the Former Yugoslavia (ICTY)[8] and the International Criminal Tribunal for Rwanda (ICTR)[9] which require prosecution of those responsible for the crimes punishable under these statutes. Support for prosecution is also derived from the obligation to prosecute or extradite those guilty of grave breaches of the 1949 Geneva Conventions.[10] Here it is argued that the distinction between international and non-international armed conflicts has largely disappeared and that the obligation to prosecute grave breaches or similar war crimes extends to internal conflicts. Finally, of course, there is a substantial body of academic writing to support this argument.[11]

The implication of this argument is that international law prohibits amnesty. This is clearly spelt out by the Trial Chamber of the ICTY in *Prosecutor v. Furundžija*[12] which held that amnesties for torture are null and void and will not receive foreign recognition.

It is, however, doubtful, whether international law has reached this stage. State practice hardly supports such a rule as modern history is replete with examples of cases in which successor regimes have granted amnesty to officials of the previous regime guilty of torture and crimes against humanity, rather than prosecute them. In many of these cases, notably that of South Africa, the United Nations has welcomed such a solution.[13]

The decisions of national courts may also provide evidence of state practice. And here it must be stressed that national constitutional courts have generally upheld the validity of amnesty laws; sometimes, as in the case of the courts of

1. Art. 4 Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277 (1951).
2. Inter-American Commission on Human Rights, Report No. 29/92 (Uruguay) 82nd session OEA/LV/11.82.Doc. 25 (2 Oct. 1992); *id.*, Report No. 24/92 (Argentina), Doc. 24.
3. 1988 IACHR (Ser. C), No. 4, para. 165.
4. General Comment No. 20 (44), (Art. 7), UN Doc. CCPR/C21/Rev. 1/Add 3., para 15 (1992).
5. Art. 6 Draft Code of Crimes against the Peace and Security of Mankind, Report of the International Law Commission of the Work of its Forty-eighth Session, 51st Sess., Supp. No. 10, UN Doc. A/51/10 (1966).
6. Part II, para. 60, UN Doc. A/Conf/57/24 (1993); 32 ILM 166 (1992).
7. 8 ILM 68 (1969).
8. Security Council Resolution 827 (1993); 32 ILM 1192 (1993).
9. Security Council Resolution 955; 33 ILM 1598 (1994).
10. *See, for example*, Arts.146 and 147 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287 (1950).
11. *See, for example*, M Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, 59 Law and Contemporary Problems 9 (1996); D. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 Yale Law Journal 2537, 2568 (1991); C. Edelenbos, *Human Rights Violations; A Duty to Prosecute?* 7 Leiden Journal of International Law 5, 15 (1994).
12. Case No. IT-95-17/1-T (10 December 1998); (1999) 39 ILM, at paras. 151-157 (1999).
13. *See* M. Scharf, *The Letter of the Law: the Scope of the International Legal Obligation to Prosecute Human Rights Crimes*, 59 Law and Contemporary Problems 41, 47 (1996).

South Africa[14] and El Salvador,[15] expressing the view that international law not only fails to prohibit amnesty but rather encourages it. These courts have invoked Article 6 (5) of Additional Protocol II of 1977 which on the face of it, although this is disputed by the International Committee of the Red Cross,[16] encourages amnesty by providing that at the end of hostilities in internal conflicts the authorities "shall endeavour to grant the broadest possible amnesty to persons who have participated in the conflict."

Of the twelve Law Lords who heard the *Pinochet* case, only one commented on the question of amnesty. Although he was one of the minority judges (in the first *Pinochet* case), few would disagree with Lord Lloyd's statement that:

> Further light is shed on state practice by the widespread adoption of amnesties for those who have committed crimes against humanity including torture. Chile was not the first in the field. There was an amnesty at the end of the Franco-Algerian War in 1962. In 1971 India and Bangladesh agreed not to pursue charges of genocide against Pakistan troops accused of killing about one million East Pakistanis. General amnesties have also become common in recent years, especially in South America, covering members of former regimes accused of torture and other atrocities. Some of these have had the blessing of the United Nations, as a means of restoring peace and democratic government [...] It has not been argued that these amnesties are as such contrary to international law by reason of the failure to prosecute the individual perpetrators.[17]

Although international law does not – yet – prohibit the granting of amnesty for international crimes it is clearly moving in this direction. The Statute of the International Criminal Court (ICC),[18] adopted in Rome in 1998, makes no provision for amnesty. Moreover, the adoption of the principle of 'complementarity' in the Rome Statute,[19] which gives both national courts and the ICC jurisdiction over war crimes, crimes against humanity and genocide, suggests that national courts will assert their permissive jurisdiction over such crimes with more enthusiasm than in the past. Moreover, it can confidently be expected that NGO's will, in future, bring pressure on both national and international courts to prosecute international criminals and that the granting of amnesty will be challenged with new vigor.

14. Azanian Peoples Organization (AZAPO) *v.* President of the Republic of South Africa, 1996 (4) SA 671 (CC), at 691, para. 32.
15. Proceedings No. 10-93 (May 20, 1993); *reprinted in* N.J. Kritz (Ed.), Transitional Justice, Vol. 3, 549, 555 (1995).
16. *See* D. Cassel, *Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities*, 59 Law and Contemporary Problems 196, 212 (1996).
17. R. *v.* Bow Street Metropolitan Stipendiary Magistrate. *Ex Parte* Pinochet [1998] 4 All ER 897 (HL) at 929 h-i.
18. The Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9 (1998), *reprinted in* 37 ILM 999 (1998).
19. Preamble, para. 10, Art. 17.

Strangely, at the very point in time that international opinion is moving towards prosecution and away from amnesty, a new institution has appeared on the scene which challenges prosecution as the only option. This is the truth or truth and reconciliation commission.

Since 1974 some seventeen truth commissions have been established to enquire into the past of particular societies, to "tell the truth" of what happened.[20] Probably the best known are those of Chile, Argentina, El Salvador, South Africa and Guatemala. There are now proposals to establish truth commission for Cambodia and Bosnia.

Truth commissions vary considerably in respect of composition, independence and mandate, although they are all committed to healing by means of truth telling. They are not, *in theory*, antithetical to prosecution. Thus Louis Joinet in his 1997 Report on the "Question of the Impunity of Perpetrators of Human Rights Violations" to the Sub-Commission on Prevention of Discrimination and Protection of Minorities[21] recommends that an extrajudicial commission of enquiry into the events of the past should go hand in hand with prosecution and punishment of human rights violators. *In practice* the position is very different. In most cases a truth commission is established because the new regime lacks the power to embark on prosecution – as in the case of Chile where President Aylwin's democratic government operated in the shadow of the Pinochet-led military; or because the political compact that has produced democracy is premised on a compromise between old and new regimes which precludes prosecution – as in the case of South Africa, whose democracy was founded on an agreement between the National Party apartheid regime and the African National Congress (ANC) based on conditional amnesty. In her study of fifteen truth commissions Priscilla Hayner states that prosecutions are "very rare" after a truth commission report even where the identity of the perpetrators is known. She adds "[i]n only a few of the fifteen cases looked at [...] was there an amnesty law passed explicitly preventing trials, but in most other cases there was in effect a *de facto* amnesty – prosecutions were never seriously considered."[22]

So in practice truth commissions and prosecutions are competing mechanisms for dealing with crimes of the past. Blanket, unconditional amnesty, unaccompanied by a truth commission is no longer an acceptable option. The choice is between prosecution or amnesty accompanied by a truth commission.

Each has its merits. Prosecution emphasizes the right to justice, and society's demand for retribution. The truth commission seeks to satisfy the right to know and understand the past, and aims at reconciliation rather than retribution. Which course is most likely to heal a divided society is unclear. While interna-

20. P Hayner, *Fifteen Truth Commissions – 1974 to 1994: A Comparative Study*, 16 Human Rights Quarterly 600 (1994).
21. UN Doc. E/CN, 4/sub.2/1997/20/Rev 1 (1997).
22. *Supra* note 20, at n. 4.

tional opinion increasingly demands prosecution and justice, domestic opinion has other priorities. One has only to read the eloquent judgment of South Africa's present Chief Justice, Ismail Mahomed, in the challenge to the constitutionality of South Africa's amnesty legislation in *Azapo v. President of the Republic of South Africa*[23] to understand why societies prefer truth to prosecution:

> Most of the acts of brutality and torture which have taken place have occurred during an era in which neither the law which permitted the incarceration of persons or the investigation of crimes, nor the methods and the culture which informed such investigations, were easily open to public investigation, verification and correction. Much of what transpired in this shameful period is shrouded in secrecy and not easily capable of objective demonstration and proof. Loved ones have disappeared, sometimes mysteriously, and most of them no longer survive to tell their tales. [...] Secrecy and authoritarianism have concealed the truth in little crevices of obscurity in our history. Records are not easily accessible, witnesses are often unknown, dead, unavailable or unwilling. All that often effectively remains is the truth of wounded memories of loved ones sharing instinctive suspicions, deep and traumatising to the survivors but otherwise incapable of translating themselves into objective and corroborative evidence which could survive the rigours of the law. The [Promotion of National Unity and Reconciliation] Act seeks to address this massive problem by encouraging these survivors and the dependants of the tortured and the wounded, the maimed and the dead to unburden their grief publicly, to receive the collective recognition of a new nation that they were wronged, and, crucially, to help them to discover what did in truth happen to their loved ones, where and under what circumstances it did happen, and who was responsible.
>
> That truth, which the victims of repression seek so desperately to know is, in the circumstances, much more likely to be forthcoming if those responsible for such monstrous misdeeds are encouraged to disclose the whole truth with the incentive that they will not receive the punishment which they undoubtedly deserve if they do. Without that incentive there is nothing to encourage such persons to make the disclosure and to reveal the truth which persons in the positions of the applicants so desperately desire. [...]

International opinion, often driven by NGO's and western activists who are strangers to repression, fails to pay sufficient attention to the circumstances of the society which chooses amnesty above prosecution; and to the argument that wounds are best healed at home, by national courts and truth commissions, rather than by foreign courts and international tribunals.

23. 1996 (4) SA 671, at 683-685.

3. THE *PINOCHET* CASE

What are the lessons to be learned from the *Pinochet* case – comprising two judgments[24] of the House of Lords – for the purpose of the present thesis?

Augusto Pinochet was granted amnesty by a military decree of 1978, which granted unconditional, total amnesty for crimes committed between 1973 and 1978.[25] He was also entitled to immunity from prosecution in Chile by virtue of his office of senator. Yet neither his lawyers nor the Chilean government raised this amnesty in the legal proceedings. No doubt, this was because it was realized that a foreign court was unlikely to give serious consideration to an amnesty decree in effect granted by Pinochet to himself.

The Law Lords, with two exceptions,[26] failed even to mention the question of amnesty. This does not, however, mean that they were unsympathetic to the view that the treatment of a former head of state is best left to the territorial state, the state in which the crimes were committed. Although there is no express approval of this view, it may be suggested that support for such a solution is implicit in the reasoning and decision of the House of Lords. Two reasons may be advanced for this proposition.

First, although both judgments may be labelled as progressive by reason of their refusal to accord immunity to a former head of state in respect of international crimes (*in casu* torture), the second and decisive judgment was hardly progressive in its reasoning or effect. Only one judge (Lord Millett) was prepared to accept that torture was an international crime with universal jurisdiction under customary international law before 1988, with the result that the double criminality requirement was met in respect of acts of torture committed from 1973 onwards.[27] The other judges insisted that only the enactment of the Torture Convention of 1984 into English law in 1988 made the international crime of torture punishable under English law in fulfilment of the double criminality requirement.

24. R. *v.* Bow Street Metropolitan Stipendiary Magistrate, *Ex Parte* Pinochet Ugarte, [1998] 4 All ER 897 (HL) and R. *v.* Bow Street Metropolitan Stipendiary Magistrate, *Ex Parte* Pinochet Ugarte (No. 3), [1993] 2 All ER 97 (HL). The rehearing was occasioned by the fact that the first judgment was set aside on the ground of irregularity because one of the members of the House of Lords (Lord Hoffmann) was found to have close ties with Amnesty International, an intervening party in the proceedings: reported in R. *v.* Bow Street Metropolitan Stipendiary Magistrate, *Ex Parte* Pinochet Ugarte (No 2), [1999] 1 All ER 577 (HL).
25. *See* N.J. Kritz (Ed.), Transitional Justice. How Emerging Democracies Deal With Former Regimes, Vol. 2, at 500 (1995).
26. Lord Lloyd in the first judgment, [1998] 4 All ER, at 929, h-i. Lord Goff in the second judgment, [1999] 2 All ER, at 127-128.
27. [1999] 2 All ER, at 178 b-c.

The concept of double criminality too was restrictively interpreted. Instead of following the normal practice, supported by the Netherlands,[28] of requiring the extraditable crime to be a crime in the requested state (the United Kingdom) at the time of the extradition request, it held that it should be a crime in the United Kingdom at the time the alleged offence was committed in the foreign state.[29] This finding was based on a highly restrictive interpretation of the Extradition Act of 1989, which reads a requirement under the old Extradition Act of 1870 into treaty arrangements between European states, which finds no basis in the European Convention on Extradition of 1957.[30] This is not to suggest that it is an untenable interpretation. However, it is not the only possible interpretation, as is shown by the fact that the Chief Justice, Lord Bingham C.J., and Lord Lloyd had rejected this interpretation in earlier judgments in this matter,[31] in which they relied on the plain language of the extradition statute.

The judicial decision is an exercise in choice, particularly in the field of statutory interpretation. It is trite that the judges are frequently influenced by extra-legal factors in their choice – and properly so because judges are not bricklayers of the law but architects. They must interpret the law in its political and social context. In the *Pinochet* case it is not improbable that judges were influenced by the argument strongly advanced by the government of Chile in its public utterances that it should be left to Chile to deal with Pinochet, if necessary by trying him itself, and that the extradition of Pinochet to Spain would endanger the fragile peace between army and civilian government in that country.

This view receives support from the second reason for suggesting that the judgment gives implied support to the view that Pinochet should be returned to Chile. Five judges (all except Lords Goff and Phillips) attached a codicil to their speeches exhorting the Secretary of State to reconsider his decision to allow the extradition hearing to proceed in the light of the substantial reduction in the number of charges against Pinochet. This recommendation, which is more political than judicial in character, strongly suggests that the House of Lords was of the mind that the extradition proceedings should be discontinued. (On 15 April the Secretary of State decided that the extradition proceedings should continue.)

This assessment of judicial behaviour in the realist tradition is not intended to imply a lack of integrity on the part of the Law Lords. Like many they seem to have been unsure about the best way to deal with an ex-dictator whose punishment abroad might disturb the peace at home. Their judgment, which some may interpret as Solomonic in effect, provides testimony of their doubts.

28. *See* the decisions of the Hoge Raad of 16 Januari 1973 (*NJ*, 1973, no. 281) and 28 June 1977 (*NJ*, 1978, no. 438). This is also the position in Germany, *see* W. Schomberg & O. Lagodny, Internationale Rechtshilfe in Strafsachen 52 (1998).
29. *See* the speech of Lord Browne-Wilkinson, [1999] 2 All ER, at 104-107.
30. Art. 2 European Convention on Extradition 1957, (ETS No. 24), opened for signature 13 December 1957, entered into force 18 April 1960 (ECEx).
31. [1999] 2 All ER, at 105.

4. PERMISSIBLE AND IMPERMISSIBLE AMNESTIES. THE CASE OF SOUTH AFRICA

A solution must be made to reconcile the competing needs and interests of the territorial state and the international community. In practice this means that an attempt must be made to provide for the legitimation of amnesty, and for its recognition by foreign and international courts.

Obviously not all amnesties should be recognized abroad. The kind of blanket, unconditional amnesty given by Pinochet and his regime to themselves cannot hope to receive international recognition. But does this apply to conditional amnesty, accompanied by a thorough investigation by a truth and reconciliation commission, of the South African kind? The South African Truth and Reconciliation Commission (TRC) obviously believed it was entitled to more favourable treatment as in its final Report it appealed to the international community for recognition of its process. The Report states:

> The definition of apartheid as a crime against humanity has given rise to a concern that persons who are seen to have been responsible for apartheid policies and practices might become liable to international prosecutions. The Commission believes that international recognition should be given to the fact that the Promotion of National Unity and Reconciliation Act, and the processes of this Commission itself, have sought to deal appropriately with the matter of responsibility for such policies.[32]

Reconciliation between the international demand for prosecution of international crimes and the national appeal for a political compromise involving amnesty can best be achieved by drawing a distinction between permissible and impermissible amnesties, and by limiting international recognition to the former.

Here it is instructive to compare and contrast the experiences of Chile and South Africa.

The *Reports* of the Chilean National Commission on Truth and Reconciliation (1991)[33] and the South African Truth and Reconciliation Commission (1998)[34] have much in common. This is no surprise as the South African process was inspired by and modelled on that of Chile. Both *Reports* seek to provide a full picture of the gross violations of human rights that occurred in their countries; both examine the role of the judiciary, media and churches; both list the

32. Truth and Reconciliation Commission Report, Vol. 5, at 349 (1998).
33. Report of the Chilean National Commission on Truth and Reconciliation, translated by P.E. Berryman (1993); excerpts *in* N.J. Kritz (Ed.), Transitional Justice, Vol. 3, at 105 (1995).
34. *Supra* note 32.

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names of victims; both recommend reparations and measures to prevent a recurrence of the past.

But there are important differences:

1. The Chilean Commission confined its investigations to the dead; the South African TRC investigated all gross human rights violations, involving killing, abduction, torture or severe ill-treatment, even where death did not result. Thus the former did not investigate torture where the victim had survived; the latter did.
2. The Chilean Commission had no subpoena powers to compel witnesses to testify, which meant in practice that members of the security forces refused to co-operate. The South African TRC had such powers and used them to ensure that reluctant witnesses testified.
3. The Chilean Commission had no power to name the names of perpetrators. The South African TRC had such a power, to be executed after giving notice to the person to be named, and in its final report it makes important findings on individual responsibility. Thus it finds that former State President P.W. Botha facilitated gross violations of human rights and was accountable;[35] that P.W. Botha, Magnus Malan (Minister of Defence) and Chief Mangosuthu Buthelezi were accountable for the gross human rights violations committed by paramilitary units in KwaZulu;[36] and that Winnie Madikizela-Mandela was accountable for the acts of murder, torture and assaults committed by the Mandela Football Club.[37]
4. In Chile the National Commission operated in the shadow of its former dictator, Augusto Pinochet, who remained Commander-in-Chief of the Army. No such threat existed in South Africa and many members of the security forces testified before the TRC.
5. The most important difference related to amnesty. The Chilean National Commission was bound by the 1978 Amnesty Decree in which the armed forces under Pinochet had given themselves immunity from prosecution for crimes committed between 1973 and 1978. The Commission therefore had no competence to pronounce on matters of amnesty. In contrast amnesty was (and still is) an integral part of the South African truth and reconciliation process.

Amnesty was one of the most difficult issues that faced negotiators after the abandonment of apartheid. Prosecution *à la* Nuremberg that had been threatened by the African National Congress (ANC) while engaged in the armed struggle was clearly impossible in a situation in which there was no victor. On the other

35. *Supra* note 32, Vol. 5, at 225.
36. *Id.*, at 235.
37. *Id.*, at 243.

hand, absolute, unconditional amnesty, of the kind favoured by the retiring apartheid regime, was unacceptable to the ANC. The compromise was conditional amnesty on application. This was given legislative effect by the 1993[38] and 1996[39] Constitutions and the Promotion of National Unity and Reconciliation Act of 1995.[40]

The Promotion of National Unity and Reconciliation Act established a Truth and Reconciliation Commission with a dual task: the compilation of a complete picture of the human rights violations of the past; and the facilitation of amnesty. For the latter purpose a quasi-judicial Amnesty Committee was established comprising judges and senior lawyers. Although this Committee – later extended to several committees to cope with an expanded workload – operated (and still operates) separately from the TRC, it was part of the TRC structure.[41]

An Amnesty Committee considers applications for amnesty and may grant amnesty if it is satisfied that the applicant has committed an act constituting "a gross violation of human rights", made "a full disclosure of all relevant facts", and that the act to which the application relates is "an act associated with a political objective committed in the course of conflicts of the past".[42] The criteria to be employed for deciding whether the act is one "associated with a political objective" are drawn from the principles used in extradition law for deciding whether the offence in respect of which extradition is sought is a political offence. These criteria include, *inter alia*, the motive of the offender; the context in which the act took place and, in particular, whether it was committed "in the course of or as part of a political uprising, disturbance or event";[43] the gravity of the act; the objective of the act, and in particular, whether it was "primarily directed at a political opponent or State property or personnel or against private property or individuals";[44] and the relationship between the act and the political objective pursued, and "in particular the directness and proximity of the relationship and the proportionality of the act to the objective pursued".[45] A person granted amnesty shall not be criminally or civilly liable in respect of the act in question.[46] Amnesty Committees conduct their hearings in public; and both applicants and victims are permitted legal representation.

While the TRC has completed its work the Amnesty Committees are unlikely to complete their task before the end of 1999. Of the over 7000 applications received, 150 have been granted, almost 5000 dismissed and 2000 remain to be

38. Act 200 of 1993.
39. Act 108 of 1996.
40. Act 34 of 1995.
41. Sections 10(1), 19(3)(b)(iii) of Act 34 of 1995.
42. Section 20 of Act 34 of 1995.
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*

dealt with. These applications, mainly from members of the police force, and not the army, have provided, and continue to provide, a horrifying picture of brutality by the security forces, involving torture, murder, disappearances and repression.

Those who have failed to obtain amnesty from an amnesty committee, or who failed to apply for amnesty, are exposed to prosecution. Some prosecutions have been completed, others are under way, and no doubt there will be more to come as evidence of complicity in human rights violations becomes available. A special unit within the Prosecutor's office has been established for this purpose. This serves to emphasize that amnesty in South Africa is conditional.

At present, there are serious attempts to prepare guidelines[47] for the operation of truth commissions, which will provide assistance in determining the minimum requirements for acceptable truth commissions. On the basis of these guidelines and the experience of truth commissions from different parts of the world, it is suggested that the following minimum requirements be met:

1. The Commission should be established by the legislature or executive of a democratically elected regime;
2. The Commission should be a representative and independent body;
3. The Commission should have a broad mandate to enable it to make a thorough investigation. It should not, for example, be restricted to deaths and disappearances (as with Chile) but should be permitted instead to investigate all forms of gross human rights violations;
4. The Commission should hold public hearings at which victims of human rights abuses are permitted to testify;
5. The perpetrators of gross human rights violations should be named, provided adequate opportunity is given to them to challenge their accusers before the Commission;
6. The Commission should be required to submit a comprehensive report and recommendations within a reasonable time;
7. The Commission should be empowered to recommend reparations for victims of gross human rights violations; and
8. Amnesty should be denied to perpetrators of gross human rights abuses who refuse to co-operate with the Commission or who refuse to make a full disclosure of their crimes.

47. *See* the Report by Louis Joinet on the Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political) for the Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Doc. E/CN.4/Sub.2/1997/20/Rev 1 (1997); N.J. Kritz, *Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights*, 59 Law and Contemporary Problems 127 (1996); P. Hayner, *International Guidelines for the Location and Operation of Truth Commissions: A Preliminary Proposal, id.*, at 173; S. Landsman, *id.*, at 81.

If a state follows these guidelines – as has South Africa – will its amnesties receive recognition by foreign courts? Or will its amnesties be ignored, as has happened in the case of Augusto Pinochet?

5. THE INTERNATIONAL CRIMINAL COURT AND AMNESTY

Amnesty was on the agenda of the Rome Diplomatic Conference as it had been considered in the *travaux préparatoires*.[48] The final text of the Rome Statute is, however, silent on the subject.

How is this silence to be interpreted? One view[49] holds that the omission of amnesty is deliberate. Support for this position is to be found in the Preamble which affirms that "serious crimes of concern to the international community as a whole must not go unpunished" and expresses the determination "to put an end to impunity for the perpetrators of these crimes".[50] Moreover genocide and 'grave breaches' of the Geneva Conventions, which feature prominently among the crimes falling within the jurisdiction of the Court, are crimes in respect of which states are obliged to prosecute. Had the Rome Statute intended amnesty to be a defence, it is argued, special provision would have been made for it in the clauses dealing with the defence of *ne bis in idem* and surrender to the Court (extradition). However, Article 20 on *ne bis in idem* allows this defence only where a person has been 'tried' by another court, and the *travaux préparatoires* show that the exclusion of amnesty and pardon was deliberate.[51] "Surrender" to the Court is to be distinguished from 'extradition'.[52] Consequently the fact that amnesty may be a bar to extradition between states[53] is irrelevant in respect of 'surrender' to the Court.

48. Both amnesty and pardon were considered and rejected in the context of the defence of *ne bis in idem*: *see* Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. 1, at 40 (para. 174) (Proceedings of the Preparatory Committee during March-April and August 1996) GAOR, 51st Session, Supplement No 22 (UN Doc. A/51/22); UN Doc. A/CONF./283/2/Add. 1 (1998), Art. 19. Ruth Wedgwood reports that in August 1997 the United States circulated a 'non paper' to the Preparatory Committee suggesting that a responsible decision by a democratic regime to allow an amnesty should be taken into account in judging the admissibility of a case, *see* R. Wedgwood, *The International Criminal Court: An American View*, 10 European Journal of International Law 93, at 96 (1999).
49. *See* G. Hafner, K. Boon, A. Rubesame & J. Huston, *A Response to the American View as Presented by Ruth Wedgwood*, 10 European Journal of International Law 108, at 109-113 (1999).
50. Paras. 4 and 5.
51. *Supra* note 44.
52. Art. 102.
53. The 1990 UN Model Treaty on Extradition lists amnesty granted by either requesting or requested state as a mandatory ground for the refusal of extradition: General Assembly Resolution 45/116 of 14 December; 30 ILM 1407 (1991). Art. 3(e). The 1996 European Union Extradition Agreement allows the requested state to refuse extradition where it has granted amnesty and was competent to prosecute the offence under its own criminal law, *see* OJEC, No. 313/12 of 23 October 1996.

Another view[54] holds that the Rome Statute contains provisions which allow amnesty to be recognized indirectly.

First, it is suggested that the Security Council, acting under Article 16, may order the deferral of a prosecution for twelve months (or more) where amnesty has been granted. This is difficult to accept, however, as such a deferral must be made in a resolution under Chapter VII and it is difficult to contemplate a situation in which refusal to recognize a national amnesty could constitute a threat to international peace.

Secondly, it is argued that Article 17(1)(b) of the Rome Statute contemplates recognition of amnesty. It provides that the International Criminal Court will declare that a case is inadmissible where

> the case has been investigated by a State which has jurisdiction over it and the state has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute.

While the first part of the provision might be imaginatively interpreted to cover South Africa-style amnesty – that is the decision not to prosecute and instead to grant amnesty after an investigation – it is difficult to maintain such an interpretation against the qualification as in such a case the amnesty will result from an 'unwillingness' on the part of the State to prosecute.

Thirdly, and more plausibly, it is suggested that amnesty may be dealt with by prosecutorial discretion. Article 53(2)(c) allows the Prosecutor to refuse prosecution at the instance of a state or the Security Council where, after investigation, she or he concludes that 'a prosecution is not in the interests of justice, taking into account all the circumstances'. This decision is subject to review by the Pre-Trial Chamber. Similarly the Prosecutor may decline to exercise her or his direction to prosecute *proprio motu* under Article 15 on the ground that the suspect has been granted amnesty.

Finally it may be suggested that the Court itself might have regard to an amnesty, if only as a factor in mitigation of sentence.

From the United States come pleas for a re-opening of the Rome Statute, which might allow reconsideration of the question of amnesty. This is highly unlikely. The Rome Statute is a compromise package of provisions reached after intense negotiations. There is no serious prospect of the Statute being re-opened for amendment or for an Amending Protocol. In these circumstances it seems clear that amnesty can only be accommodated within the existing text. Prosecutorial discretion alone offers a real opportunity for the recognition of amnesty. If a set of guidelines is drawn up for the exercise of prosecutorial discretion – as has been proposed – it is suggested that amnesty should be addressed in these guidelines. This would go some way towards curing an omission in the Statute.

54. M. Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 Cornell International Law Journal (1999) (not yet published).

What such guidelines to the Prosecutor might include is another matter. Some international crimes, notably genocide, are not appropriate for the grant of amnesty and this should be made clear. War crimes or 'grave breaches' of the Geneva Conventions committed in international armed conflicts are also not capable of amnesty as they have an international dimension that demands extradition or prosecution. Difficulties arise in respect of torture and crimes against humanity committed by a repressive regime or in the course of an internal conflict. Ideally the perpetrators of such crimes should be tried before a national or international court, as stressed by the ICTY in *Furundžija*.[55] Where, however, a state opts for amnesty in order to achieve reconciliation and requires amnesty seekers to undergo the type of screening process involved in the South African model, it is difficult for foreign and international courts simply to ignore these amnesties.

6. CONCLUSION

The present state of international law on the issue of amnesty is, to put it mildly, unsettled. While amnesty is prohibited in the case of genocide and war crimes committed in international armed conflicts, there are no clear rules prohibiting amnesty in the case of other international crimes. This uncertainty has a major advantage: it allows prosecutions to proceed where they will not impede peace, but at the same time permits societies to 'trade' amnesty for peace where there is no alternative. Unconditional amnesty for atrocious crimes is, however, no longer generally accepted by the international community. Here the Truth and Reconciliation Commission may serve as a useful compromise to ensure that justice is not entirely sacrificed to the cause of peace.

55. *Supra* note 12.