

**WHISTLING PAST THE GRAVEYARD: AMNESTY AND THE RIGHT TO AN EFFECTIVE REMEDY UNDER THE AFRICAN CHARTER: THE CASE OF SOUTH AFRICA AND MOÇAMBIQUE**

Submitted in partial fulfilment of the requirements of the degree LLM (Human Rights and Democratisation in Africa) Faculty of Law, Centre for Human Rights, University of Pretoria

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## DECLARATION

I, MUSILA Godfrey, declare that the work presented in this dissertation is original. It has never been presented to any other University or institution. Where other people's works have been used, references have been provided, and in some cases, quotations made. It is in this regard that I declare this work as originally mine. It is hereby presented in partial fulfilment of the requirements for the award of the LL.M Degree in Human Rights and Democratisation in Africa.

Signed.....

Date.....

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Signature.....

Date.....

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## **DEDICATION**

To all those on the continent and across the distance; to whose pain, aspiration to dignity and injustice unrelenting global effort is allocated; and to posterity, for the record.

In honouring the victim's right to benefit from remedies and reparation, the international community keeps faith and human solidarity with victims, survivors and the future of human generations, and affirms the international legal principles of accountability, justice and the rule of law.

Preamble, Bassiouni Report (E/CN.4/2000/62)

## LIST OF ABBREVIATIONS

ACHR	American Convention of Human Rights
AfCHPR	African Charter on Human and Peoples' Rights
AGP	Accordos Geral de Paz
ANC	African National Congress
API	Additional Protocol
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CESR	(UN) Committee on Economic, Social and Cultural Rights
ECHR	European Convention on the Protection of Human Rights
FIA	Further Indemnity Act
GC	Geneva Convention
HRC	Human rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IHRL	International Human Rights Law
NGOs	Non-Governmental Organisations
TRC	Truth and Reconciliation Commission
UDHR	Universal Declaration of Human Rights
UN	United Nations (Organisation)
ICRC	International Committee of the Red Cross

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## CHAPTER ONE

### INTRODUCTION

#### 1.1 Background to the study

Whereas both the obligation of states to prosecute and punish serious violations of human rights and to avail redress to the victims and their dependants<sup>1</sup> are entrenched in international law and may have indeed achieved the status of *jus cogens*,<sup>2</sup> African states are continually in breach of this peremptory obligation through the practice of amnesties. The tragedy may not be that through amnesties, authors of gross human rights transgressions escape the wrath of the law, or in some cases, negotiate themselves from having to account for violations. What is lamentable is that victims are often completely forgotten and the possibility of them seeking redress extinguished by amnesty proclamations so fashioned as to obviate pursuit of effective remedies at the domestic plane.

Effectively, victims have been subjected to further abuse. In this regard, Cassese<sup>3</sup> has observed:

[A]ll those who were deported, executed or massacred have none but us to think of them. If we stopped thinking of them, we would complete their extermination; they would definitely be annihilated ... those who vanished forever now exist on through us in the devoted faithfulness of our memory; were we to forget them ... they would simply cease to be. Should we begin to forget the ghetto fighters, they would be murdered a second time.

Although victims and their relatives would ordinarily have recourse to the domestic machinery for redress, the promulgation of amnesty laws, as in the case of South Africa and a number of other African countries defeats this possibility.<sup>4</sup> In some, notably South Africa,

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<sup>1</sup> In this piece, 'victims' refers to all those who may pursue remedies for human rights violations, including victims themselves and their dependants. See Draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for victims of Violations of International Human Rights and Humanitarian Law E/CN.4/Sub.2/1993/8 (Bassiouni Report).

<sup>2</sup> See in this regard Melanczuk (1997) 57 stating that norms that belong to the category of peremptory general international law, (*jus cogens*) overarch national constitutions; Roht-Arriaza (1995) 41 stating that there is evidence that compensation for official wrongdoing codified in all the comprehensive human rights treaties has attained customary status. See also Chigara (2002) 26.

<sup>3</sup> Cassese (1998) *Modern Law Review* vol. 61 no 1 1. See also Aldana-Pindell (2002) 35 *Vand. J Transnat'l Law* 1399 1501 1438 espousing two levels of abuse: torture, extra judicial killings, arbitrary arrest and detention and subsequently absence recourse.

<sup>4</sup> Nowak (1993) para 59 noting that amnesty renders remedies ineffective. See also *Azanian Peoples Org. v. The President of the Republic of S. Africa* 1996 (4) SALR 637 (CC) para 9.

the amnesty arrangement has permitted a certain degree of redress.<sup>5</sup> In others, such as Ghana,<sup>6</sup> Angola and Moçambique, blanket amnesties have offered no chance of redress.<sup>7</sup>

Pertinent in this debate is the African Court on Human and People's Rights (the African Court or the Court), which recently came into existence, and which has been hailed as one of the most important developments in the African human rights system.<sup>8</sup> One of the issues not previously addressed by the Commission,<sup>9</sup> the Court's sister oversight body established by the Charter,<sup>10</sup> and that may require the court's immediate attention is the question of amnesties and how they impact upon human rights.<sup>11</sup> A related aspect is the right of victims within the criminal justice process seen in the context of amnesty. Whereas there is extensive jurisprudence from the Inter-American and European oversight bodies, this has not been articulated at continental level.<sup>12</sup> The Principles and Guidelines on the Right to a Fair Trial (Fair Trial Guidelines) recently elaborated by the Commission affirm unequivocally that 'the granting of amnesty to absolve perpetrators of human rights violations from accountability violates the right of victims of an effective remedy'.<sup>13</sup>

The matter is nevertheless not as easy as that. Amnesty often involves complex issues that would need to be canvassed were an amnesty to be called into question at the Commission

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<sup>5</sup> There has been a flat rate compensation of victims on a 'closed list basis' upon recommendation of the TRC. See generally in this regard Tutu (1999) and section 3.2.4.

<sup>6</sup> Section 34 (transitional provisions) Constitution of Ghana (1992) indemnifies members of all military regimes in that country since 1966 and ousts the jurisdiction of the courts from entertaining any case relative to the amnesty.

<sup>7</sup> In Angola the Lusaka Peace Agreement provided a framework for blanket amnesty that has indemnified both UNITA and government people responsible for human rights violations in that country's civil war. In Moçambique, although the peace agreements - *acordos geral de paz* did not make disposition for amnesty, the National Assembly passed a law granting amnesty. See section 3.5.

<sup>8</sup> Udombana (2000) 3 *Yale Human Rights and Development Law Journal* 45 46. Also Amnesty International 'African Union: Entry-into force of the Protocol Establishing an African Court on Human and Peoples' Rights- a significant development.' At <<http://web.amnesty.org/library/index/engaf010042004>> (accessed on 15 September 2004).

<sup>9</sup> The Commission has previously made cursory references to amnesty in *Malawi African Association & others v Mauritania* (Communications 54/91, 61/91, 98/93, 196/97, 210/98, 164/97 joint) indicating that their practice does not comport with the Charter.

<sup>10</sup> Art 30 AfCHPR.

<sup>11</sup> Specifically state obligations under article 1 of the Charter requiring that states take legislative and other measures to implement protected rights, importing the obligations to respect, protect, promote and fulfil rights.

<sup>12</sup> See Aldana-Pindell (n 3 above) 1415.

<sup>13</sup> Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, the right to an effective remedy (d). At <<http://www.interights.org>> (accessed on 10 September 2004).

or African Court level.<sup>14</sup> Pressure on the much-anticipated Court to deliver will be immense, considering the record of the Commission, which has received general assessment of ineffectiveness, mostly for its structural and institutional flaws.<sup>15</sup> This piece explores how the Court will possibly deal with such a matter.

## 1.2 Statement of the research problem

The practice of granting amnesties in situations of human rights violations have undercut the seriousness with which obligations to establish accountability for human rights violations ought to be taken.<sup>16</sup> Equally, amnesties often are in violation of the right to effective remedies inscribed in various human rights treaties and other instruments, both regional and universal.<sup>17</sup> In this regard, there appears to be a sharp conflict between state obligations to establish accountability for violations of human rights and considerations of national peace and reconciliation often cited as the justification for amnesty, especially after generalised upheaval that entailed substantial atrocities.

One commentator has aptly captured the utilitarian argument often deployed to justify post conflict amnesty:

It must be acknowledged, nevertheless, that some of the cases... show that the disjuncture, which is often present between 'law' and 'justice', can perhaps be explained by the pursuit of some greater goal. In other words, while it is accepted that there is often no good reason for rules of law not to further justice, sometimes it may be that a noble goal, such as successful political transformation and compromise or the value of adherence to a relatively predictable and fair legal process, might justify such discrepancies and apparent injustice to some. Thus, instead of arguing that 'injury to one is injury to all', perhaps it would be justified to acknowledge that 'an injustice to one leads to greater justice to all'.<sup>18</sup>

Although situations of widespread disorder may unhinge harmonious co-existence necessitating extra-judicial reorganisation and reconciliation, it does not divest states from their human rights obligations. Yet by fashioning amnesties that eliminate the right of victims

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<sup>14</sup> See Young (2003) *U.C. Davis Journal of International Law and Policy* 209 210 noting that grant of amnesty requires looking not only at international law obligations but also at political realities and individual and societal needs for justice and reconciliation.

<sup>15</sup> There is a considerable body of literature on this singular subject. See for instance Dankwa in Evans & Murray (2002) 335-352; Kwashigah (2002) 2 *AHRLJ* 261-300; Motala in Evans & Murray (2002) 246-279.

<sup>16</sup> Roht-Arriaza (n 2 above) 40 notes that practice of amnesties by states equivocates their commitment to combat impunity.

<sup>17</sup> See chapter 2 and 4.

<sup>18</sup> Corder in Villa-Vicencio and Verwoerd (eds.) (2000) 106 quoted in Bennun 'Amnesty and international law' in Villa-Vicencio and Doxtader (eds.) (2003) 92 114 97.

to pursue and secure appropriate remedies, state conduct seems to indicate, and mistakenly so, that this is the case. To analogise, amnesty can be regarded as a door to the gate of justice, of which the state is a gatekeeper; a door that the state bangs in the face of those seeking to walk in the narrow corridors of justice and refuses to open and to listen to their hoarse cries for redress.

The real problem, it seems, is first, to rationalise amnesty in international human rights law (IHRL) generally, and specifically the African Charter. Secondly, to reconcile amnesties as instruments of addressing national concerns of peace and reconciliation with individuals' rights to appropriate, sufficient and effective remedies for human rights violations at municipal level while remaining cognisant of the possibility of pursuing redress in an international forum, in this case, the African Court.<sup>19</sup> These are the central questions that this study proposes to grapple with, particularly with a view of establishing how a case arising out of an amnesty situation in which denial of justice is alleged would be, and should be, decided by the African Court. In this regard, specific reference will be made to South Africa and Moçambique as representative case studies.<sup>20</sup>

### **1.3 Focus and objectives of the study**

First, this dissertation proposes to explore the practice of amnesties in dealing with violations of human rights vis-à-vis the obligation of states to punish and to prosecute gross violations of human rights and to guarantee effective remedies for victims.<sup>21</sup> Secondly, it seeks to inquire, for purposes of meeting the first objective, into the validity of amnesties in international law with specific reference to the African Charter. Thirdly, on the strength of a selected case studies: South Africa<sup>22</sup> and Moçambique, and informed by relevant jurisprudence drawn from the Inter-American human rights system and elsewhere, a critique informative of the recommendations as to how the African Court should deal with cases arising out of such amnesty situations will be attempted. Equally, similar reference will be made, albeit in an abridged way, to how amnesties could be dealt with at the political levels

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<sup>19</sup> Chigara (n 2 above) 13 commenting on the subordination of individual rights to the societal common good states the even at a conceptual level there are problems with amnesty laws:

If human rights are the property of individuals, and in this case the property of victims, it is difficult to see how title to those basic rights of victims transfers to the government so that it legitimately can exchange them for another good...

<sup>20</sup> The case studies merely present a working framework of analysis. Although they may represent the major trends of how amnesties have been dealt with, they are not conclusive of the same and are treated as such.

<sup>21</sup> This study does not explore the general obligation to prosecute perpetrators for its own sake, but to the extent that it constitutes an effective remedy to which victims have a right.

<sup>22</sup> Here, analysis will focus on the effects of the constitutional court case of AZAPO (n 4 above).

of the African Union (AU). Fourthly, the dissertation will inquire into why amnesties, which have been used to advance utilitarian ends of the communal good (national reconciliation) thereby 'trumping individuals' rights', cannot at the same time, be so fashioned as to reconcile these especially relating to effective remedies for violations of human rights the amnesty seeks to address. Fifthly, in drawing on the foregoing, this study will, by way of recommendations, seek to outline criteria or conditionalities upon which amnesty should, if ever, be granted.

#### **1.4 Significance of the study**

Despite the fact that national amnesties undercut international efforts to achieve greater respect for human rights by fostering a culture of impunity and by frustrating the pursuit of justice by those affected by human rights violations, the issue continues to receive scant attention within the AU. Those affected by these amnesties at the national level may eventually seek recourse to the African human rights enforcement mechanisms where the issue, it seems, has not been articulated. This study is particularly significant as it seeks to explore and to outline, by drawing from amnesty experience elsewhere, how amnesty cases properly placed within the African context should be decided especially where the impugned amnesty purports to extinguish protected human rights. It is believed that this study will contribute to the development of African jurisprudence on this seemingly gray area of international law especially from a human rights perspective.

#### **1.5 Hypotheses**

In the first place, this dissertation conceives of the obligation to establish accountability through punishment of authors of human rights violations and affording effective remedies as the bedrock obligation in the human rights enforcement structure and that continued breach of this obligation not only threatens to stagnate enforcement efforts, but also augurs badly for the crusade against impunity. Secondly, this dissertation takes the preliminary position that the need to reconcile a nation after protracted periods of instability that entailed violation of human rights and in which amnesties have been proclaimed has contributed in a major way to failure or avoidance of states to meet peremptory human rights obligations relating to redress for those affected by violations. Thirdly, it is presumed, from the outset, that imperatives of national reconciliation do not divest states of their obligations in international law with respect to protected human rights requiring that states take measures to afford an effective remedy to victims.

## 1.6 Literature survey

The subject of amnesty has evoked a considerable amount of comment in academic literature. A number of books and articles have been written on the broad subject of amnesty. In spite of this, it is not easy to find literature that addresses the precise issue raised by this dissertation. More so, there is little that addresses amnesty in the African context. The utility of the existing literature, in terms of books, articles and Internet sources can however not be gainsaid.

The book edited by Roht-Arriaza<sup>23</sup> and Ben Chigara's<sup>24</sup> are the major works on the subject. Both works nevertheless focus largely on the problematisation of amnesty and its validity in international law. Roht-Arriaza's coverage of case studies in the African context is not reflective of the actual practice on the continent as it is limited to South Africa and Zimbabwe and is not, even in relation to these two countries, sufficiently current. Chigara, while discussing national approaches to amnesty, focuses more on the conceptual justifications. Further extensive contribution has been in the form of articles. David Cassel's article<sup>25</sup> is an historical account of the Latin American experience with amnesties and provides some general guidelines on how the international community (UN) should respond to amnesties at the political level as an alternative of confronting atrocities. A number of other articles on the subject have a Latin American slant<sup>26</sup> and focus preponderantly on the state's prosecutorial obligations. All these works do not however address the specific issues of denial of justice and the right to effective remedy in case of violations of human rights, which is the subject of consideration in this dissertation, which is further of specific focus on the African context.

## 1.7 Methodology

The research shall mainly be library based with documented facts on this subject being explored. The study adopts both critical and active research methods. As the subject under consideration is of particular pertinence to the current African experience, this study is not of academic interest only.

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<sup>23</sup> Roht-Arriaza n 2 above.

<sup>24</sup> Chigara n 2 above.

<sup>25</sup> Cassel (1996) 59 *Law & Contemp. Probs.* 197.

<sup>26</sup> See in this regard, Scharf (1996) 59 *Law & Contemp. Probs.* 41; Roht-Arriaza (1990) 78 *California Law Review* 451; Orentlicher (1991) 100 *Yale Law Journal* 25 37.

## **1.8 Limitations of the study**

Any person attempting to write on the subject of amnesties is immediately confronted with one major challenge; the systematization of the study given the varied ways in which amnesty has been dealt with in jurisdictions that have practiced it. In an attempt to delimit the study to the African context, two case studies are chosen, but the selected studies merely act to anchor the analysis, and may not adequately represent the varied national approaches to amnesty. Indeed, it would have been more appropriate to assess the examples of a number of individual African states in this regard. The case studies nevertheless represent the major trends of the less structured 'abstention model' that focuses little on victims and the more structured approaches of the Truth and Reconciliation Commission (TRC) combined with prosecutions of perpetrators.

The study does not discuss in depth, nor does it provide a historical account how the amnesty processes were handled. It limits itself, to the most part, to brief accounts of the same and to the effects of amnesties proclaimed on the state's obligations under consideration: obligation to ensure rights protected under the African Charter and by extension in other relevant international instruments through provision of effective remedies. Further, given that there is a dearth of jurisprudence at continental level (African Commission) on this subject, the study will draw considerably from amnesty experiences elsewhere, particularly Latin America.

## **1.9 Overview of chapters**

The study consists of five chapters. Chapter one will provide the context in which the study is set. It highlights the basis and structure of the study. Chapter two endeavours to outline some of the basic concepts central to the study; amnesty, pardon as instruments of national reconciliation and the various avenues through which these has been effected in the past. In the main, the chapter attempts a problematisation of the concept of amnesty by which its validity and place in international law will be examined. Chapter three outlines the approaches to amnesty in South Africa and Moçambique and the countervailing state obligations to ensure rights protected in human rights instruments: to prosecute and punish violators and the rights of victims and their relatives to effective remedies. In the case of South Africa, the right to effective remedies is discussed within the context of the decision of the South African constitutional court in *AZAPO*.<sup>27</sup> Chapter four attempts to grapple with the possibility of bringing a case before the African Court of Human Rights and how this case

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<sup>27</sup> See n 4 above.

may, and should be decided in light of existing decisions of the African Commission on Human and Peoples' Rights<sup>28</sup> and available comparative jurisprudence on the subject. Chapter five will consist of a summary of the presentation and the conclusions drawn from the entire study. It will also make some recommendations as to how amnesty should be dealt with both at political level (AU) and at the level of the African Court in relation to human rights violations. In furtherance of this, it attempts an outline of directive criteria that should be applied.

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<sup>28</sup> See n 9 above.

## CHAPTER TWO

### CONCEPTUAL FRAMEWORK AND BASIC CONCEPTS

#### 2.1 Introduction

The subject of amnesty relates closely with a number of concepts in their effects on human rights. This chapter discusses these basic concepts with a view to differentiating with clarity and delimiting its terrain of operation. It also places amnesty in international law. This will set ground for more profound analysis of the issues at hand. Further, it discusses the meaning of effective remedies both at international law and African Charter level. Some basic obligations that may be impacted upon by a declaration of amnesty are also outlined.

#### 2.2 The right to effective remedies in IHRL

A violation of one's right calls for action to remedy the situation. The idea that violations should be redressed, that reparation should be made to the injured is, according to Roht-Arriaza,<sup>29</sup> 'among the most venerable and most central of legal principles'. It is recognized, at the broader level of international law for instance, that an internationally wrongful act engages the international responsibility of the state to make full reparation for injury caused.<sup>30</sup> According to Shelton,<sup>31</sup> the international guarantee of a remedy implies that a wrongdoing state has the primary duty to afford redress to the victim of the violation. In effect, 'any violation by a state of any obligation, of whatever origin, gives rise to state responsibility.'<sup>32</sup> In human rights terms, these obligations are contained in applicable treaties, international custom, declarations and other instruments with binding force.<sup>33</sup>

#### 2.3 Meaning of 'effective remedy'

There is lack of clarity in the terminology of remedies.<sup>34</sup> 'Remedy', which is often used similarly as 'redress' can be understood to refer to 'the range of measures that may be

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<sup>29</sup> Roht-Arriaza (n 2 above) 17.

<sup>30</sup> *Chorzow Factory Case*, Merits (1928) PCIJ ser A, No. 17 para 48 cited in Harris (1991) 491; Art 31 ILC Articles on State Responsibility.

<sup>31</sup> Shelton (1999) 15.

<sup>32</sup> The Arbitral Tribunal in the *Rainbow Warrior case (New Zealand v France)* 26 ILM 1346 (1987) cited in Harris (n 30 above) 910

<sup>33</sup> See section 2.5.

<sup>34</sup> Haasdijk (1992) *Leiden Journal of International Law* 245 cited in Shelton (n 31 above) 4.

taken in response to an actual or threatened violation of human rights'.<sup>35</sup> Taking note that victims can never really be restored fully to the *status quo ante*, an effective remedy for harm caused implies the measures taken to wipe out the injury and satisfy the victim of the violation by effectively, and adequately addressing the alleged violation. Compliance with state obligations in this regard presupposes that individuals are enabled to complain. This, according to Thune,<sup>36</sup> must naturally be interpreted as including the possibility of submitting one's complaint to competent authorities to declare that there has been a violation and, if appropriate, order compensation. This comports with the traditional position in IHRL in which fundamental obligations primarily bind the state.<sup>37</sup> This state-centric view of responsibility has an element that 'the chief guarantee of a state's compliance with its human rights obligations is the establishment of efficient and accessible possibilities for individual appeals at domestic level'.<sup>38</sup>

Remedies are ineffective where they insufficiently address the violation alleged. For instance, where only a declaration of rights is made, problems arise because such a declaration often will not provide an effective remedy for the individual concerned who may, for example, remain in detention (without bail), notwithstanding the recognised incompatibility of such action with IHRL.<sup>39</sup> The African Commission has been of the view that a remedy is effective, 'where it offers a prospect of success'.<sup>40</sup>

## **2.4 Sources of the obligation to prosecute and provide redress**

The obligations of states to provide redress to victims of human rights violations including prosecution of perpetrators can be derived from two main sources: treaties and custom. Various treaty obligations including the AfCHPR are a firm primary basis for this obligation. Customary international law forms another source of the obligation to provide redress. Interpretative jurisprudence of various oversight treaty bodies reinforces the obligation.

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<sup>35</sup> Shelton (n 31 above) 4.

<sup>36</sup> Thune in Gomien (ed.) (1993) 79 80.

<sup>37</sup> On state-centric paradigm of IHRL, see Lang (2003) 28 *European Law Review* 102. See also Skogly in Addo, M (ed.) (1999) 239.

<sup>38</sup> Thune (n 36 above) 80.

<sup>39</sup> Editorial (1998) *European Human Rights Law Review* 1 2.

<sup>40</sup> *Sir Dawda K Jawara v The Gambia* (communication 147/95 and 149/96 joint) para 32. See note 52 below.

## 2.5 Treaty sources of the obligation to redress

The treaty sources for the obligation to avail redress to victims of human rights violations are many and varied. The right to an effective remedy is inscribed in regional as well as universal human rights instruments, 'whose texts guarantee both the procedural right of effective access to a fair hearing and the substantive right to a remedy'.<sup>41</sup> The right has received formal recognition in contemporary human rights since the Universal Declaration of Human Rights (UDHR).<sup>42</sup> A number of these instruments, like the UDHR, expressly provide for this right,<sup>43</sup> while for others, it is attached to the various substantive rights,<sup>44</sup> or contained in provisions of general obligations.<sup>45</sup>

### 2.5.1 Effective remedies under the AfCHPR

As opposed to the ACHR, the American Declaration and the (ECHR), the African Charter does not have a specific provision on the right to effective remedies. The Charter, like these instruments, as is the case for general human rights instruments, is equally silent on the obligation to prosecute. The right to an effective remedy at African Charter level has therefore been derived by interpretation. The African Commission has taken the view generally adopted in interpreting the general obligation to 'ensure' as requiring effective remedies for human rights violations<sup>46</sup> In addition to the Commission's jurisprudence, developments under the ECHR, ACHR and ICCPR are relevant in understanding the frontiers of the right.<sup>47</sup>

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<sup>41</sup> Shelton (n 31 above) 14.

<sup>42</sup> Article 8 provides that everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

<sup>43</sup> Art 2(3) International Covenant on Civil and Political Rights (ICCPR) 999 U.N.T.S. 171 (1967); art 25 American Convention of Human Rights (ACHR) 1144 UNTS 123; art XXIV American Declaration of the Rights and Duties of Man (American Declaration) and art 13 ECHR 213 UNTS 22, as reaffirmed by art 47 of the Charter of Fundamental Rights of the European Union have provisions providing similarly that everyone whose rights and freedoms as set forth in the instruments are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

<sup>44</sup> For instance arts 7(1) & 21(2) AfCHPR, which provide for recourse to national tribunals for human rights violations and compensation for spoliation of natural resources respectively. Art 10 of ACHR establishes expressly the right to compensation for miscarriage of justice. Arts 7 ACHR and 9(5) ICCPR on the right to freedom and security of the person prohibiting arbitrary arrest and illegal detention provides for a right to remedies such as compensation where this right is infringed.

<sup>45</sup> See for instance art 1 AfCHPR, art 2 (e) ECHR, arts 1 & 2 ACHR, art 2 (3) (a) ICCPR.

<sup>46</sup> Young (n 14 above) 211 noting that the prohibition of amnesty in human rights instruments derives from obligation to 'ensure'. Although the AfCHPR does not use this terminology, the Commission has adopted the interpretation of HRC.

<sup>47</sup> See section 4.4.

The Commission has stated in the landmark case of *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* (SERAC decision),<sup>48</sup> that article 1 of the Charter requires that apart from providing for the Charter standards in its law, the state must among other things, protect its citizens from incursions upon their rights by private persons and to provide effective remedies in case of breach.<sup>49</sup>

Further, procedural requirements under the Charter and the decisions of the Commission provide additional useful references to effective remedies. As a general rule, the Charter requires that local remedies must be exhausted for the Commission to entertain a complaint (communication) alleging violation of human rights.<sup>50</sup> The same requirements apply to the Court.<sup>51</sup> Logically, the rule on exhaustion of local remedies presupposes that there are remedies at domestic level to which recourse may be made in the first instance.

Three related aspects have been elaborated in relation to remedies required under the Charter: effectiveness, sufficiency and availability. According to the Commission, 'a remedy is available if the petitioner can pursue it without impediment; it is deemed effective if it offers a prospect of success; and it is found sufficient if it is capable of redressing the harm alleged.'<sup>52</sup>

## 2.5.2 Effective remedies under the ICCPR

Under article 2(3) of the ICCPR, states must accord an effective remedy to any person whose rights under the covenant have been violated.<sup>53</sup> Though not expressly provided for, they are required to conduct an effective prosecution to remedy the harm caused to victims of right to life and personal integrity violations.<sup>54</sup> In these cases, an effective remedy due to

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<sup>48</sup> Communication 155/96.

<sup>49</sup> SERAC above para 47. See further chapter 4.

<sup>50</sup> Art. 56 (5). See section 4.2.

<sup>51</sup> See Mugwanya (2003) 255-262 discussing the permissive language in art 6 Protocol on the African Court.

<sup>52</sup> *Dawda Jawara* (n 40 above) 31-32.

<sup>53</sup> Nowak (n 4 above) 58 noting that art 2(3) refers to both judicial and non-judicial remedies. See for instance *Chonwe v. Zambia* (Communication 821/98) para 7 available at <<http://www.unhchr.ch/tbs/doc.nsf>>.

<sup>54</sup> Including arbitrary detention, forced disappearances, torture, and extra judicial executions.

victims must include a criminal investigation that brings to justice those responsible.<sup>55</sup> Whereas monetary compensation is envisaged by this provision, effective remedies require a higher standard as 'purely disciplinary and administrative remedies cannot be deemed to constitute adequate and effective remedies ... in the event of particularly serious violations of human rights, notably in the event of an alleged violation of the right to life'.<sup>56</sup>

Noting that amnesties are inimical to the rights of victims, the HRC has cautioned that states may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible.<sup>57</sup>

### 2.5.3 Specialised treaties

The mandatory obligation to prosecute or extradite authors of certain international crimes is contained in specialised instruments. The Genocide Convention establishes the duty to investigate, prosecute and provide for effective penalties for the crime of genocide.<sup>58</sup> Similarly, parties to the Geneva Conventions<sup>59</sup> and the first Additional Protocol of 1977,<sup>60</sup> which apply only to international conflicts,<sup>61</sup> enact for an obligation to prosecute and punish or extradite perpetrators of 'grave breaches' including torture, inhuman treatment, extensive destruction of property and depriving civilians of due process rights.<sup>62</sup> The Convention Against Torture (CAT) similarly institutes the obligation to prosecute or extradite, and to ensure that victims obtain redress.<sup>63</sup> In the same vein, the Apartheid Convention enables any state to prosecute apartheid, designated as a crime against humanity.<sup>64</sup> On its part, the

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<sup>55</sup> This view is reiterated by the HRC in its jurisprudence. See for instance *Tshiongo v Zaire* (Communication 366/89) para 7 accessible at <<http://www.unhchr.ch/tbs/doc.nsf>> and *Atachahua v Peru* (Communication 540/93) para 10 accessible at <<http://www.unhchr.ch/tbs/doc.nsf>>.

<sup>56</sup> *Bautista v. Colombia* (Communication 563/93) para 8.

<sup>57</sup> General Comment 20 (HRC) concerning art 7 ICCPR para 15. Also Nowak (n 4 above) para 57 noting that grant of amnesty renders remedies ineffective.

<sup>58</sup> 78 UNTS 277 arts 4 and 5.

<sup>59</sup> Articles 49 of Geneva Convention (I) 75 UNTS 31; art 50 of Geneva Convention (II) 75 UNTS 85; art 129 of Geneva Convention (III) 75 UNTS 135 and art 146 of Geneva Convention (IV) 75 UNTS 28.

<sup>60</sup> 1125 UNTS 3 art 85. Additional Protocol II 1125 UNTS 609 relating to internal armed conflicts is less adequate in this regard.

<sup>61</sup> Common article 1 GC and art 1(2) API.

<sup>62</sup> n 59 above.

<sup>63</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, reprinted in 23 ILM 1027 (1984) arts 5(2), 8 and 14.

<sup>64</sup> Art 1 Convention on the Suppression and Punishment of the Crime of Apartheid (1974) 13 ILM 50.

Convention on Elimination of All Forms of Racial Discrimination (CERD)<sup>65</sup> requires states to provide 'effective protection and remedies' to victims of racial discrimination which violate their human rights, as well as 'just and adequate reparation' for damage suffered. Despite their peremptory nature, eclectic state practice has tended to dilute these obligations.<sup>66</sup> These provisions may be relevant in elaborating the right to effective remedies under the Charter.<sup>67</sup>

#### 2.5.4 UN reports and studies

There are various studies and reports on the rights of victims of atrocities which mostly elaborate treaty provisions and in some cases custom. The UN Basic Principles on victims<sup>68</sup> outline important aspects of victims' rights including the requirement that the state 'shall ensure that adequate legal or other appropriate remedies are available to any person claiming that his or her rights have been violated.'<sup>69</sup>

The Joinet Report<sup>70</sup> recommended adoption by the United Nations General Assembly of a set of principles for the protection and promotion of human rights through action to combat impunity. Another effort by the Working Group on Disappearance of Persons concluded that victims of enforced disappearance and their families shall have a right to adequate compensation.<sup>71</sup>

#### 2.5.5 Special case of the International Criminal Court (ICC)

The adoption of the Rome Statute and installation of the ICC has been touted as one of the greatest developments in international criminal justice,<sup>72</sup> perhaps for its bold confrontation of impunity for serious crimes such as genocide, war crimes and crimes against humanity.<sup>73</sup>

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<sup>65</sup> 660 UNTS art 6.

<sup>66</sup> Orentlicher (n 26 above) 51.

<sup>67</sup> Section 4.4.

<sup>68</sup> Bassiouni Report (n 1 above).

<sup>69</sup> Bassiouni Report (n 1 above) art 4.

<sup>70</sup> Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Revised Final Report on the Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political), E/CN.4/Sub.2/1997/20/Rev.1, UN ESCOR, 49th Sess. (1997) Annex, Agenda Item 11(d).

<sup>71</sup> Report of Working Group on Involuntary or enforced Disappearances, General Comment to Article 19 Declaration on the Protection of All Persons from Enforced Disappearances, E/CN.4.1998/43 (1998).

<sup>72</sup> Carden (2000) *Georgetown Law Journal* 381 384.

<sup>73</sup> Art 5 Rome Statute.

Despite potential structural and institutional shortcomings that may impede its work, it represents the utmost expression of the commitment to combat impunity by ensuring that serious human rights violations do not go unpunished.<sup>74</sup>

By establishing the principle of complementarity, it supplies impetus for diligent state action and consequently adds teeth to the mandatory obligations to punish perpetrators.<sup>75</sup> States are enabled to refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed.<sup>76</sup> Such crimes may or may not be committed within the jurisdiction of the referring state.<sup>77</sup> Suspects may be indicted irrespective of official capacity.<sup>78</sup> The Statute is however silent on national amnesties. Initial commentary on the subject preponderantly favours the view that national amnesties are not recognised within the context of complementarity and object of the Court.<sup>79</sup>

### 2.5.6 Customary international law and crimes against humanity

Norms of customary international law are those rules of general international law which, by virtue of state practice - *usus* (which need not be uniform),<sup>80</sup> and belief in their binding force (*opinio juris*)<sup>81</sup> are a source of obligations for states even in the absence consent on the part of the state.<sup>82</sup> Since international custom binds states irrespective of consent, states may bear obligations under treaties that codify custom to which they are not party.<sup>83</sup>

As opposed to the clarity of the obligation to redress violations in treaty law as outlined, its customary law status has been subject to some ambiguity and perhaps, contention,<sup>84</sup>

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<sup>74</sup> Prmb. Rome Statute. On the ICC see generally Schabas (2003).

<sup>75</sup> In terms of article 12 and 17 the ICC will override national jurisdictions in case failure, refusal or inability to prosecute. Sham national proceedings will also be spotlighted. See generally Prefontaine et al. (2000).

<sup>76</sup> Article 14 (1) Rome Statute.

<sup>77</sup> See articles 12 and 17 of the Statute.

<sup>78</sup> Art 27 Rome Statute.

<sup>79</sup> Henrard (1999) 595 DCL *Journal of international law* 628; Generally Scharf (1999) 32 *Cornell Int'l L.J* 507.

<sup>80</sup> Cassese (2001) 120.

<sup>81</sup> Cassese above 119-200.

<sup>82</sup> Aust (2003) 140.

<sup>83</sup> See art 26 ILC Articles on state responsibility. This is important where the state was not a party at the time when events engaging its responsibility occurred. Section 4.4.

<sup>84</sup> Roht-Arriaza (n 2 above) 40.

mainly because peremptory norms are not borne out by firm compliance by states, even for the most egregious violations.<sup>85</sup> A survey of jurisprudence nevertheless reveals that international custom is a source of the obligation to provide redress to victims within the context of crimes against humanity.<sup>86</sup>

Although, there may be disagreement on the exact content of customary international law, given the inconsistency reflected by internal practice by states, there is agreement that 'as a minimum, prohibitions on torture, summary execution and arbitrary execution are part of customary international law'.<sup>87</sup> The prohibition against discrimination, which lies at the core of IHRL, has also achieved the status of customary international law.<sup>88</sup>

## 2.6 Types of remedies under the Charter

International law has yet to develop a coherent theory or consistent practice of remedies for victims of human rights violations, such that rarely does one find a reasoned decision articulating the principles on which remedies are founded.<sup>89</sup> This is true even the African Charter level, where the jurisprudence of the Commission on remedies, articulated currently by way of recommendations is grossly wanting.<sup>90</sup> The Protocol on the Court provides some guidance on the nature of remedies that may be ordered.<sup>91</sup>

Traditionally, various options, some of which have been exclusive to the domestic domain of states have been deployed. They include both judicial and non-judicial measures, implicating criminal or civil liability.<sup>92</sup> In national jurisdictions, one finds in use a blend of judicial and administrative remedies for violations. Usually, remedies available include judicial declaration of rights, and compensation.<sup>93</sup> Prosecutions of perpetrators, which constitute an effective remedy as advanced further on, are used in many jurisdictions.<sup>94</sup>

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<sup>85</sup> States continue to practice overbroad amnesties that absolve perpetrators from both criminal and civil responsibility. In Africa for instance, Ghana, Angola, Uganda, Zimbabwe, Moçambique, Sierra Leone.

<sup>86</sup> Roht-Arriaza (n 2 above) 43 making specific reference to the Torture Convention.

<sup>87</sup> Roht-Arriaza (n 2 above) 42; Bassiouni (1992) 503.

<sup>88</sup> See General Comment 18 (HRC) (1989) para 1

<sup>89</sup> Shelton (n 31 above) 1.

<sup>90</sup> See Mugwanya (n 51 above) 272-274.

<sup>91</sup> Art 27 Protocol on the African Court provides specifically for reparations or compensation and other 'appropriate' remedies, which may include prosecutions. See chapter 4.

<sup>92</sup> Shelton (n 31 above) 15.

<sup>93</sup> Shelton (n 31 above) 68-90.

<sup>94</sup> See Henkin et al (eds.) (1999) 25.

### 2.6.1 Prosecution as a remedy

Due to the dissatisfaction expressed by victims with civil remedies, it is now accepted at IHRL that prosecution of perpetrators is a right of victims. Aldana-Pindell<sup>95</sup> notes that the framing of prosecutions as a victim's right has emerged primarily from the interpretation of treaty provisions establishing the right of access to justice, the right to fair trial, and the right to an effective remedy. Indeed, a part from the general treaty obligations, treaty oversight bodies have interpreted prosecutions as part of the remedy available to victims of a select category of violent crimes.<sup>96</sup>

From this jurisprudence, it can be discerned that separate from the deterrent utility of prosecutions, they are an integral part of reparations to which victims have a right. Although prosecution is generally viewed as serving societal interests of law and order, it is in itself is an effective remedy that should be afforded to victims.<sup>97</sup>

### 2.6.2 Monetary reparations

Reparation refers to the obligation of the wrongdoing party to redress the damage caused to injured party.<sup>98</sup> It denotes all types of redress, material and non-material, for victims of human rights violations. Consequently, the terms 'restitution', 'compensation' and 'rehabilitation' cover particular aspects of reparation.<sup>99</sup> Attributable to state prerogative, compliance may be achieved through an array of mechanisms available to it. The Protocol to the African Court as stated provides expressly for reparation or compensation. The extent and scope to be ordered is the preserve of national tribunals, or the African Court in matters brought before them.<sup>100</sup>

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<sup>95</sup> Aldana-Pindell (n 3 above) 1402.

<sup>96</sup> There is a large body of jurisprudence, mostly from Inter-American Court and HRC on this subject. See below.

<sup>97</sup> Roht-Arriaza (n 2 above) 41.

<sup>98</sup> Reparation is a term of wide import. See Shelton (n 31 above) 4 noting that the it is used as a generic term for the various methods available to a state for discharging itself.

<sup>99</sup> Bassiouni Report (n 1 above) section on reparations.

<sup>100</sup> According to *Chorzow Factory Case* (n 30 above) 48 'reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed'.

### 2.6.3 Other forms of reparations

States afford themselves an array of mechanisms to act in case of human rights violations that are not limited to prosecution and compensation. They may include disciplinary sanctions, apology and commemoration. The usefulness of apologies as integral to victims' healing process has been acknowledged.<sup>101</sup> A variety of disciplinary sanctions may be adopted especially if the perpetrators are members of a disciplined force as an army or militia with a form of command structure. These measures have often included loss of employment benefits of those concerned. Treaty oversight bodies have however taken the view that such administrative measures alone do not meet the yardstick of effectiveness.<sup>102</sup>

## 2.7 Amnesty defined

Amnesty may be defined as an act of forgiveness that a sovereign grants to people who have committed offensive acts.<sup>103</sup> It involves abolition or forgetting of offences<sup>104</sup> and rendering a perpetrator unaccountable for crimes committed.<sup>105</sup> Slye<sup>106</sup> writes that amnesties are a well used and, in most circumstances, relatively uncontroversial legal mechanism that is found throughout history, in use in disparate disciplines.<sup>107</sup> Criticism leveled against their practice in latter-day discourse comes at a time of the ascendancy of human rights as a fundamental principle directing state conduct. In this regard, amnesty is considered a negation of notions of universal currency and acceptance. In fact, amnesties are no longer uncontroversial, and are an open question in international law.<sup>108</sup>

### 2.7.1 Types of amnesty

Amnesties may be classified variously depending on; the extent to which it cushions persons who would ordinarily be required to account for wrongs (criminally or civilly), or the

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<sup>101</sup> Bassiouni Report (n 1 above) art 15(a) f.

<sup>102</sup> See for instance *Bautista v. Colombia* (n 58 above) para 7- 8

<sup>103</sup> Black's Law Dictionary (1990) 82. See also Slye in Rotberg & Thompson (eds) (2000) 171

<sup>104</sup> *AZAPO* (n 4 above) 31, 35 stating that amnesty equals a sovereign act of oblivion and involves a complete forgetting of the past.

<sup>105</sup> Slye (2002) *Virginia Journal of International Law* 173 174.

<sup>106</sup> Slye (above) 174.

<sup>107</sup> For instance in areas of tax to raise revenue, immigration, in times of peace and in times of war.

<sup>108</sup> Young (n 14 above) 210.

manner in which it was adopted. We consider the types of amnesties in Chapter 3 where we outline national approaches to amnesty.<sup>109</sup>

### 2.7.2 Related concepts: pardons and immunity and impunity

Pardons are proclamations in the exercise of prerogative powers of the executive to give reprieve to convicted persons. As opposed to amnesty, it is granted after trial and conviction. A pardon generally does not vitiate guilt for the underlying offence, whereas amnesty operates as an extinction of the crime itself.<sup>110</sup> As such, a pardon protects one, not from facing criminal proceedings, but avoiding the pain of the sentence. Another distinction lies in the beneficiaries. Amnesty is typically granted to a group or class of persons, unlike a pardon, which is granted to an individual.<sup>111</sup>

Immunity as understood in international law is the ability of a state official to escape prosecution for crimes for which he would otherwise be held accountable.<sup>112</sup> It is grounded in principles of state sovereignty and sovereign equality, which rest on the mutual respect and reciprocity between states,<sup>113</sup> premised on the formulation that a state cannot exercise jurisdiction over another.<sup>114</sup>

Sovereign equality often comes into conflict with human rights, which establishes obligations for states in relation to victims.<sup>115</sup> Sovereign immunity, like amnesty, can immunize an individual from having to account for violations.<sup>116</sup>

In human rights discourse, 'amnesty' is often used interchangeably with impunity. It may nevertheless be used as a related but distinct from amnesty.<sup>117</sup> Impunity, defined as an

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<sup>109</sup> Commentators adopt varying classifications and appellations for various 'types' of amnesty. Compare for instance, Chigara (n 2 above) and Young (48 above).

<sup>110</sup> Roht-Arriaza (n 2 above) 42

<sup>111</sup> Black's Law Dictionary (1990) 82-3; Roht-Arriaza 'Punishment, Redress and Pardon: Theoretical and Psychological Approaches' in Roht-Arriaza (n 2 above) 13 22.

<sup>112</sup> Black's Law Dictionary ((1990) 752-53 defines the term immunity as 'any exemption from a duty, liability, or service of process; esp. such an exemption granted to a public official.

<sup>113</sup> See Pierson (2000) 14 *Temp Int'l & Comp Law Journal* 263, 269 stating that state sovereignty was the traditional basis for allowing immunity to states and officials acting on their behalf.

<sup>114</sup> Arrest Warrant Case (*Democratic Republic of the Congo v. Belgium*) (2002) this judgment determined that under customary international law foreign ministers, heads of government and heads of state are immune from arrest by foreign jurisdictions while in office. See also Boister & Burchill (2000) 11 *Afr. J. Int'l & Comp. L.* 619, 619.

<sup>115</sup> Pierson (n above 113) 263.

<sup>116</sup> Scharf (n 80 above) 508.

'exemption or protection from penalty or punishment', prevents an entity from prosecuting offenses.<sup>118</sup> Impunity does not acknowledge, forgive or forget an offense.<sup>119</sup> Amnesty operates like impunity, however, as it similarly renders a perpetrator unaccountable for his or her crimes,<sup>120</sup> by acting as a shield from prosecution.<sup>121</sup>

### 2.7.3 Amnesty in international law

There is no single human rights instrument that expressly sanctions or proscribes amnesty. More broadly, save for the Additional Protocol II to the 1949 Geneva Conventions,<sup>122</sup> such endorsement is also absent in international humanitarian law. Even in this respect, it is clear that references to amnesty are meant to be of restricted application, although states have attempted, strenuously so, to justify their amnesties on its basis arguing that article 6(5) is an international legal justification of amnesties for gross violations of human rights.<sup>123</sup> Although, the authoritative interpretation of this provision discloses the contrary, it is not without ambiguity and continues to attract considerable comment.<sup>124</sup> Despite this, states have practiced amnesty in varied forms and spheres. Noting that amnesty is often granted to belligerents through peace agreements, Bernhardt<sup>125</sup> writes that:

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.

As seen above and in further discussion, whereas states reserve the right to practice amnesty, they are not absolved from human rights obligations, some of which are peremptory in nature and unequivocal in their terms.

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<sup>117</sup> Black's Law Dictionary (n 117 above) 758.

<sup>118</sup> Joinet Report (n 70 above) defining impunity as 'impossibility, *de jure* or *de facto*, of bringing the perpetrators of human rights violation to account'.

<sup>119</sup> Young (n 14 above) 211 noting that amnesty is just one form of impunity.

<sup>120</sup> Slye (n 105 above) 171.

<sup>121</sup> Roht-Arriaza (1997) 19 *Whittier Law Review* 325 339-341.

<sup>122</sup> Applicable to internal armed conflicts.

<sup>123</sup> Art. 6(5) provides that:

At the cessation of hostilities, authorities in power shall procure granting the broadest possible amnesty to persons that have taken part in the armed conflict or that are deprived of their liberty, detained or interned by motives related with the armed conflict.

<sup>124</sup> Cassel (n 25 above) 218 discussing the interpretation by the International Committee of the Red Cross (ICRC).

<sup>125</sup> Bernhardt (ed.) (1992) 148 and Bernhardt (ed.) (1982) 14-15.

## 2.8 Conclusion

This chapter concluded, by way of an outline, that states have peremptory obligations with respect to victims to supply effective remedies, though compliance has been at best, eclectic. It also concluded that the current use of amnesty in IHRL not only to exclude criminal and civil accountability of perpetrators but also to oust the rights of victims to effective remedies is, on a preliminary analysis, fundamentally inconsistent with their rights.<sup>126</sup>

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<sup>126</sup> See further chapter 4.

## CHAPTER 3

### DECLARING AMNESTY: NATIONAL APPROACHES

#### 3.1 Introduction

Approaches to amnesty have been varied. Dictated by national dynamics, they have reflected various realities including the nature of transitions necessitating such amnesty. This chapter discusses the national approaches to amnesty in South Africa and Moçambique. While also outlining briefly the human rights violations witnessed in the two countries it sets the ground for the analysis of applicable standards under the African Charter and IHRL generally.

#### 3.2 The human rights violations

The histories of these two countries are tied in more than one way. Both countries have been through conflicts in which large-scale atrocities were witnessed. For South Africa, the conflict was rooted in the racial policies of the white minority government.<sup>127</sup> In Moçambique, the armed conflict pitted the FRELIMO government against RENAMO, a rebel movement seen as dissatisfied with the marxist and exclusionist policies of the ruling party.<sup>128</sup> The conflicts in the two countries were tied in certain respects. Caught in the twist of the Cold War politics and the liberation struggle in South Africa, Moçambique became not only a theatre of the armed manifestation of the East-West ideological divide,<sup>129</sup> but also a target of the 'destabilization campaign' by South Africa convinced that it lent support to liberation groups fighting the apartheid regime.<sup>130</sup>

The catalogue of violations associated with the war in Moçambique, as well as the accounts of the atrocities that issued out of the anti-apartheid struggle in South Africa make grim reading.<sup>131</sup> In South Africa, these atrocities, which range from outright murder and extra judicial executions, to harrowing accounts of torture and other violations involving property,<sup>132</sup> are widely lamented in literature on the subject.<sup>133</sup>

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<sup>127</sup> Tutu (n 5 above) 20.

<sup>128</sup> Newitt (1995) 541-577.

<sup>129</sup> Above 577.

<sup>130</sup> Vines (1996) 7.

<sup>131</sup> See Atkins and Pagan (2002) 119 *SALJ* 174 191 and generally Africa Watch (HRW) (1992).

<sup>132</sup> This study does not prioritise civil and political rights. Since the Vienna Declaration, the argument for a dichotomy of rights has, at least at the level of rhetoric, lost its impetus.

The Mozambican civil war has been described as a catastrophe.<sup>134</sup> Extensive atrocities against civilians by both parties to the conflict are documented. Forced removals, widespread violence against civilians, torture, mutilations and other attacks on personal integrity of civilians came to define the brutality of the war.<sup>135</sup> The fate of thousands of citizens who disappeared during the civil war still remains unresolved.<sup>136</sup>

It is acknowledged that although the responsibility of the state and its agents in both countries for violations was both profound and expansive in its reach, those in the liberation struggle in South Africa<sup>137</sup> and RENAMO in Moçambique bear their own responsibility.<sup>138</sup> As we advance further on, these atrocities, which offend against the AfCHPR, do also amount to crimes against humanity and war crimes.<sup>139</sup>

### 3.3 Declaring amnesty: national approaches

Although it is no easy task to systematize national approaches to amnesty, major trends can be discerned from the ways in which states have put amnesties in place. In some cases, amnesties have been an internal arrangement, involving only domestic players. In other cases, the process has received impetus from international players, actively involved in brokering the amnesty, or simply encouraging the process.<sup>140</sup>

Of the main trends, a distinction should be made between blanket and conditional amnesty. In the latter classification, one finds either negotiated (imposed amnesties or elective amnesties). The distinction finds relevance in the assessment of compliance with human

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<sup>133</sup> See generally Tutu (n 5 above); Elmann (1992); Bindman (1988); UN Office of Public Information *Apartheid in Practice* UN Publication OPI/428 (1971) cited in Atkins and Pagan (n 131 above) 174.

<sup>134</sup> Newitt (n 128 above) 569.

<sup>135</sup> HRW (n 131 above) 42-65.

<sup>136</sup> Moçambique Country Report on Human Rights Practices Released by the Bureau of Democracy, Human Rights, and Labour. U.S. Department of State, February 25, 2000. Accessible at <<http://www.state.gov/g/drl/rls/hrrpt/2001/af/8394.htm>> (accessed on 17th September 2004).

<sup>137</sup> Ntsebeza in Doxtader (n 18 above) 24 noting that ANC admitted its role before the TRC. See also Parker (1996) *Human Rights Law Journal* v 17 (1996) 1 13 describing the dynamics of the negotiated transition in which the Indemnity Act was enacted.

<sup>138</sup> Mondlane in An-Na'im (ed.) (2003) 182-210 201 noting that conservative estimates put the total death toll at million, and thousands of surviving *mutilados*.

<sup>139</sup> See chapter 4.

<sup>140</sup> Moçambique was an internal arrangement seen as a practical way of starting the reconstruction process. The *acordos geral de paz* (AGP) did not make provision for amnesty. South Africa's settlement involved both internal and external forces, the latter being actively involved in cutting the deal.

rights obligations. As will become evident, these categories are not mutually exclusive. The typologies oftentimes bear crosscutting elements.

### **3.3.1 Imposed national amnesty laws**

An imposed amnesty law is granted to members of an outgoing regime by itself, with the consent of the incoming government.<sup>141</sup> Usually blanket in their form, they are sometimes publicised as ‘negotiated amnesties’ in the sense that they are often the product of agreement and are granted as a prerequisite for surrender of power. This obtains where on the one hand the forces of change are not strong enough to overturn government, whereas on the other hand, the incumbent government is incapable of remaining in control. As seen below, the South African situation presented elements of this mold.<sup>142</sup>

### **3.3.1 Elective national amnesty**

Although not conditional upon the relinquishment of power by an outgoing regime, elective amnesties are considered as a practical necessity for the state to make transition to democratic rule.<sup>143</sup> The incoming government decides that granting amnesty to members of the previous regime who would otherwise be prosecuted for crimes against humanity is beneficial to the state. This in effect, ‘presupposes an executive decision over a judicial consideration of the legal rights of the victims’. Authors of human rights violations are discharged from their legal duties as ‘the lives of victims become sacrifices of a political dream’.<sup>144</sup>

### **3.3.3 Structured amnesties and executive proclamations**

Structured amnesties are usually put in place by a legislative mechanism. They are, in this respect, the product of the normal legislative process involving negotiation. Because of this, they receive a more broad based sanction of representatives. Given that through amnesty victims’ rights are traded for a ‘greater good’, structured amnesties have greater legitimacy to the extent that they are adopted by persons to whom the duty to do so has been

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<sup>141</sup> Chigara (n 2 above) 9 noting that blanket amnesty covers all crimes

<sup>142</sup> Most amnesties in Latin America granted by former military leaders to themselves and lieutenants fit this classification. See Lutz in Harris & Livingstone (1998) 345 370 345.

<sup>143</sup> Cassese (n 3 above) 4.

<sup>144</sup> Chigara (n 2 above) 12. See also Daly (2002) 12 *Int'l Legal Persp.* 73 quoted in Ludwin in Stromseth (2003) 273-317 276 noting that blanket amnesty signals to people that their suffering has no legal or public significance.

delegated.<sup>145</sup> On the other hand, amnesties may be declared through executive proclamations and decrees. Naturally, as initiatives of the executive, this type of amnesty does not receive broad sanction. Such proclamations may retroactively receive legislative sanction. In this way, amnesties have been declared in several African countries.<sup>146</sup>

### 3.3.4 Negotiated peace agreements

Another type of amnesty is that negotiated during peace agreements. This is usually brokered by an international party<sup>147</sup> and its purpose is often to bring an end to atrocities through cessation of conflict or relinquishment of power.<sup>148</sup> The Angolan and Sierra Leonian cases are examples of this kind of amnesty.<sup>149</sup> These are usually blanket amnesties, in the sense that they are designed to cover all crimes.<sup>150</sup> Like self-amnesty, this amnesty grant is difficult to overturn, as it can have both domestic and international legitimacy because they attract international participation, at which level validity of amnesties is usually raised.<sup>151</sup>

Both South Africa and Moçambique opted to grant amnesty to perpetrators to facilitate transition to democratic government and to end war. As will be seen below, the amnesty arrangements nevertheless took two distinct trajectories.<sup>152</sup>

## 3.4 The South African Model

At the dawn of the 90s, South Africa was teetering on the brink of all out war. Justice Mohammed aptly captures this scenario:

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 result was a debilitating war

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<sup>145</sup> Chigara (n 2 above) 26 on the property theory of rights.

<sup>146</sup> Moçambique, Ghana and Zimbabwe are examples.

<sup>147</sup> Young (n 14 above) 222.

<sup>148</sup> Cassel (n 25 above) 198; Scharf (1998) 31 *Texas Int'l Law Journal* 24 508.

<sup>149</sup> The Angolan and Sierra Leonian amnesty declared through the Lusaka Accords and Lome Peace Agreement respectively.

<sup>150</sup> The practice of amnesties in most of Latin America provides ample examples. See Roht-Arriaza (1998) 92 *Am. Soc'y Int'l L. Proc.* 313, 314.

<sup>151</sup> Young (n 14 above) 222; Roht-Arriaza above 314.

<sup>152</sup> See further below.

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 country haemorrhaged dangerously in the face of this tragic conflict which had begun to traumatise the entire nation.<sup>153</sup>

To address concerns from both sides of the divide, amnesty became an integral part of the transition process.<sup>154</sup> This amnesty arrangement, which has been hailed by commentators as a shining example, took a more structured form.<sup>155</sup>

### 3.4.1 The TRC: institutions and mandate

The Truth and Reconciliation Commission, which drove the process was established by an Act of Parliament, the Promotion of National Unity and Reconciliation Act (TRC Act).<sup>156</sup> The general tenor of the TRC's objectives was 'to promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past.'<sup>157</sup> This core objective was to be pursued by the TRC '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'.<sup>158</sup>

The TRC was to facilitate grant of amnesty 'to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective'<sup>159</sup> and to establish and to make known 'the fate or whereabouts of victims' and of 'restoring the human and civil dignity of such victims' by enabling them to relate their accounts of the violations and by recommending 'reparation measures' in respect of such violations.<sup>160</sup>

A distinct feature of the TRC's mandate which raises serious questions of South Africa's responsibility under the Charter, and IHRL generally is that its inquiry did not extent to acts

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<sup>153</sup> AZAPO (n 4 above) para 1.

<sup>154</sup> Parker (n 137 above) 2.

<sup>155</sup> See Aldana-Pindell (n 3 above). Its merits are discussed in the next chapter while assessing its conformity with IHRL.

<sup>156</sup> Act 34 of 1995.

<sup>157</sup> Section 3 TRC Act.

<sup>158</sup> Described in the epilogue to the Constitution as a date after 8 October 1990 and before 6 December 1993.

<sup>159</sup> S 3(1) b TRC Act.

<sup>160</sup> S 3(1) c TRC Act.

which constituted international crimes, for reasons that they were not crimes under South African Law at the time.<sup>161</sup>

The Act established three committees, each with a set of duties that contributed to the global objective of the TRC. The Human Rights Violations Committee,<sup>162</sup> Reparations and Rehabilitation Committee<sup>163</sup> and the Amnesty Committee, whose main function was to receive and process amnesty applications on the basis of statutory criteria.<sup>164</sup> The TRC could, as it did, recommend prosecutions where a grant of amnesty was refused.<sup>165</sup>

### 3.4.2 Pre -TRC Indemnity Acts

Apart from the TRC process, thousands of people were reportedly indemnified through the Indemnity Acts that preceded it. The Indemnity Act<sup>166</sup> was a negotiated deal between the government and the ANC concluded at the start of the transition talks.<sup>167</sup> By this agreement, some state agents, ANC exiles, and political prisoners were released. The Further Indemnity Act,<sup>168</sup> which generated much political heat saw the indemnification of unspecified numbers of mostly members of the security apparatus.<sup>169</sup> Reportedly, amnesties granted under the FIA were retrospectively ratified on the adoption of the TRC Act.<sup>170</sup>

Whereas the much-publicized TRC Act adopted an approach that permitted for both prosecution of perpetrators on recommendation and compensation for victims, the amnesty declared under the Indemnity Acts bear, it seems, the trappings of a self-amnesty.<sup>171</sup>

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<sup>161</sup> Dugard (1997) *SAJHR* 260. See section 4.5.

<sup>162</sup> Chapters VI 6 VII TRC Act.

<sup>163</sup> Atkins (n 131 above) 194.

<sup>164</sup> Grant of amnesty to an applicant required full disclosure of acts relating to a political objective committed in the course of the liberation struggle. S 20(3) TRC Act provided for criteria for the evaluation of the political objective, considering the proportionality of the object pursued with the act perpetrated.

<sup>165</sup> Ntsebeza (n 137 above) 23; Bizos in Villa-Vicencio & Doxtader (n 18 above) 5.

<sup>166</sup> Act 35 of 1990.

<sup>167</sup> Parker (n 137 above) 5.

<sup>168</sup> Act 151 of 1992.

<sup>169</sup> Parker (n 137 above) 2.

<sup>170</sup> Parker as above observing that the TRC Act made provision for those who had not applied for or been granted amnesties under the previous Acts. Those already given were, subject to the constitution, to be honoured.

<sup>171</sup> Parker as above stating that the FIA was a unilateral act of government.

### 3.4.3 The AZAPO decision

The outcome of the TRC's work prompted a constitutional challenge by victims of apartheid atrocities alleging that by ousting the criminal as well as civil liability of perpetrators, section 20(7) of the TRC Act was in violation of constitutionally entrenched right that one should have their justiciable disputes settled by competent national tribunals.<sup>172</sup> Finding against the victims, the Constitutional Court lamented the painful decision stating that:

the granting of amnesty is difficult, sensitive, perhaps even agonizing, 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 reparations for the victims of that truth; between a correction in the old and a creation of the new. It is an exercise of immense difficulty interacting in a vast network of political, emotional, ethical and logistical considerations.<sup>173</sup>

In its view, although amnesty precluded civil and criminal liability of beneficiaries thereby trenching victims constitutional rights, it was not only authorised by the constitution,<sup>174</sup> but was also justifiable given that 'it was not a blanket amnesty against criminal prosecution for all and sundry, granted automatically as a uniform act of compulsory statutory amnesia.'<sup>175</sup> On validity of amnesty in international law, the court stated that the relevant standards were not part of South African law.<sup>176</sup>

### 3.5 Moçambique: a case of collective amnesia

The peace agreement, *acordos geral de paz* (AGP) concluded in the Rome officially put to an end the Mozambican civil war and set ground for the first democratic elections in that country. The AGP provided for issues related to political parties, general elections, joint army and cease fire.<sup>177</sup> Although atrocities had been a main feature of the war, the AGP made no provision in this regard. This contrasts with Angola, where the Lusaka Accords that ended the war dedicated a separate protocol to amnesty providing that a law shall be enacted to govern the grant of amnesty in post-conflict Angola.<sup>178</sup>

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<sup>172</sup> S. 22 Interim Constitution of the Republic of South Africa.

<sup>173</sup> AZAPO (n 4 above) para 19.

<sup>174</sup> Above para 14 Noting that the Postamble to the interim constitution mandated parliament to put in place an amnesty for the 'the purposes of effecting a constructive transition towards a democratic order'.

<sup>175</sup> AZAPO para 32. See also para 19-25 espousing the utility of amnesty in reconciliation.

<sup>176</sup> AZAPO para 26-28. See section 4.5.

<sup>177</sup> AWEPA (1992) 4.

<sup>178</sup> Protocol n 8.

To address atrocities, a path of collective oblivion was chosen. Prior to the AGP, but during the peace negotiations, the National Assembly decided that 'in the spirit of reconciliation and normalization of Moçambican civil life', all persons responsible for crimes against the state, military crimes and crimes against individuals since 1979 were to be unconditionally amnestied.<sup>179</sup> This approach was marked by forgiveness, 'by placing a heavy stone over atrocities and human rights violations of the past.'<sup>180</sup> Explaining their choice in 1992, President Chissano revealed recently that:

Some people wanted us to create a truth commission to look into the war and to establish responsibility... what for? Many people wanted reconciliation after the war... they wanted peace...we decided to do it our way, *a maneira moçambicana*...we considered that it was not necessary to know who killed how many... who stole whose window... real reconciliation had to start from within. We had to open a new page and move on...<sup>181</sup>

Mazula<sup>182</sup> opines that forgiving past atrocities was vital to building trust and fostering a fledgling peace arrangement. Describing earlier attempts to deal with atrocities associated with the war of liberation, Mondlane<sup>183</sup> suggests that this approach eschewed that of founding President Machel, which focused on truth telling and collective chastisement of perpetrators at workplaces.<sup>184</sup> Short on detail, the law authorizing the sweeping amnesty made no attempt to reach any settlement in favor of victims.<sup>185</sup> As it stands, proceedings in pursuit of recourse for victims are untenable.<sup>186</sup>

### 3.6 The approaches: preliminary assessment

Whereas victims in South Africa have had some recourse, the performance of Moçambique has, as discussed, abysmal. The South African approach has however not escaped criticism, mostly for its inability to adequately address the plight of victims, lack of

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<sup>179</sup> Lei n 15 (Law n 15) (1992) adopted in terms of s 135 (l) of the constitution (1990)

<sup>180</sup> Mondlane (n 138 above) 201.

<sup>181</sup> Speech delivered on 4<sup>th</sup> October 2004 during the 12<sup>th</sup> commemoration of the signing of the AGP in Rome (translation from Portuguese mine).

<sup>182</sup> See generally Mazula, 'The General Peace Agreement: from radical distrust to basic trust' in Mazula, (ed.) (1996).

<sup>183</sup> Mondlane (n 138 above) 20.

<sup>184</sup> Christie (1988) 172-175.

<sup>185</sup> n 184 above.

<sup>186</sup> HRW (n 131 above) 2.

inclusiveness and on failure to prosecute pursuant to TRC recommendation.<sup>187</sup> Critics of the model claim that it is overrated, especially from the victims' point of view.<sup>188</sup>

### 3.7 Conclusion

This chapter concluded that South Africa and Moçambique adopted different approaches to amnesty. While South Africa chose a conditional amnesty, Moçambique chose the path of amnesia. It further concluded, on a preliminary basis, that both amnesty arrangements fall short with regard to victims, although the former focused to a large extent on victims. Although amnesty precluded civil and criminal liability, successful victims have benefited from a compensation scheme.

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<sup>187</sup> Such trials which fall to state prosecutors are subject to political dynamics and other obstacles in the justice system bureaucracy. See Sarkin in Villa-Vicencio (n 18 above) 237 264 237.

<sup>188</sup> See for instance Mugwanya (n 51 above) 95-96; Klaaren (2000) 117SALJ 572 574-579.

## CHAPTER 4

### DECIDING AN AMNESTY CASE: THE AFRICAN COURT

#### 4.1 Introduction

This chapter tests the compliance of approaches adopted by the two countries with the African Charter. Specifically, it discusses how, in varying degrees, the amnesties declared undermine the right to an effective remedy under the AfCHPR. As such, how the African Court would decide a case in which violation of the right to an effective remedy is claimed in this context is the main thrust of this chapter. In setting out to construct a model upon which such decision may be reached, it is assumed from the outset, that the Commission and the Court apply the same law,<sup>189</sup> and that for our purposes, enabling circumstances to bring a matter before the Court exist, namely that the requisite declaration has been made by a state participating in the Court.<sup>190</sup>

#### 4.2 Approaching the Court: procedural requirements

One fundamental rule underpins admission of complaints on human rights violations before international oversight bodies. That is, exhaustion of domestic remedies.<sup>191</sup> Already founded in the practice of tribunals,<sup>192</sup> it is well established in the jurisprudence of the African Commission.<sup>193</sup> In a state-centric framework of human rights, it has the utility that a state whose responsibility is engaged in an international tribunal should have had prior opportunity to remedy the violations through its national machinery.<sup>194</sup> The rigor with which the Commission has enforced this rule is definitive of its weight as a prerequisite to admissibility.<sup>195</sup>

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<sup>189</sup> See below note 211.

<sup>190</sup> Art 5 read together with art 34(6) require a declaration permitting direct access to the Court by individuals and NGOs.

<sup>191</sup> Art 55(6) AfCHPR.

<sup>192</sup> Interhandel case (*Switzerland v USA*) (1959) ICJ Reports 6 27.

<sup>193</sup> On the subject generally see Viljoen in Evans and Murray (n 15 above) 61 99.

<sup>194</sup> *SERAC* (n 48 above) para 36-38.

<sup>195</sup> *Dawda Jawara* (n 40 above) para 30 noting that this rule is the most important in admissibility inquiry.

Where the complainant has, before approaching the Court pursued remedies to the highest possible level but remains dissatisfied, domestic remedies will be considered exhausted.<sup>196</sup> In the case of South Africa, where amnesty granted foreclosed any proceedings related to violations to which an amnesty applies, a communication should be admitted, especially after the AZAPO decision.<sup>197</sup> This may possibly apply to responsibility related to newly identified perpetrators or those who did not apply for amnesty.<sup>198</sup> Similarly, in the case of Moçambique, the case would be admitted.<sup>199</sup>

### 4.3 The rights in issue

National amnesty laws for the most part disregard the fundamental rights of victims. By treating them, 'as if they did not have predetermined rights at the moment of abuse, and if they did, as if they had not been breached at all ... the law does not regard perpetrators of crimes against humanity as having trampled upon predetermined legal rights.'<sup>200</sup> They shut their eye, it appears, to these rights and the human dignity that human rights commitments by states require them to respect, protect and preserve.

A multiplicity of rights of victims is implicated in a claim of violation of the right to an effective amnesty. That is, the substantive or 'foundational rights' that call for a remedy when breached and the right to effective remedy itself.

#### 4.3.1 Substantive rights

The Charter provides for a wide spectrum of rights; civil and political, socio-economic & cultural and group rights.<sup>201</sup> Although all have equal value worthy of protection,<sup>202</sup> some often feature more prominently in the debate on amnesties.

Provided for are the right to life,<sup>203</sup> personal liberty;<sup>204</sup> fair trial<sup>205</sup> and human dignity, including prohibitions of torture, cruel, inhuman, or degrading punishment or treatment as

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<sup>196</sup> See *Boubacar Diawara v Benin* (communication 18/88) in which the African commission articulated that where a matter is pending before national tribunals, a complaint related thereto is inadmissible.

<sup>197</sup> Being the highest court in the land, its decision is final.

<sup>198</sup> Amnesty was granted only those who applied on individual basis.

<sup>199</sup> *Dawda Jawara* (n 40 above) 34 noting that where domestic remedies are not evident, complainants will not be required to exhaust local remedies.

<sup>200</sup> Chigara (n 2 above) 4.

<sup>201</sup> Heyns (2004) 108 *Penn State Law Review* 679.

<sup>202</sup> Note 132 above.

non-derogable right.<sup>206</sup> It has been held that extra-judicial executions or of civilian non-combatants in a civil conflict, all violate the right to life.<sup>207</sup> The right to an effective remedy may only be invoked when a substantive right, such as these, is violated.<sup>208</sup>

#### 4.3.2 Making the claims for a remedy

The Fair Trial Guidelines<sup>209</sup> provide that the right to an effective remedy includes access to justice, reparations for the harm suffered and access to the factual information concerning the violations. This may be synthesized into the five principles elaborated by the American Court relating to victims' rights:<sup>210</sup> the right to justice; the right to truth (corollary to the obligation to investigate);<sup>211</sup> the right to judicial protection,<sup>212</sup> also referred to as the right to an effective remedy;<sup>213</sup> and the right to judicial guarantees.<sup>214</sup> These are elaborated below.

#### 4.4 Expanding Charter standards

The Commission is mandated to make reference to the jurisprudence of other bodies at both regional and UN level.<sup>215</sup> The Court, on its part is enabled to apply the Charter and all relevant instruments ratified by the state(s) in question.<sup>216</sup> Heyns<sup>217</sup> considers this is a

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<sup>203</sup> AfCHPR art 4.

<sup>204</sup> AfCHPR art 6.

<sup>205</sup> AfCHPR art 7.

<sup>206</sup> AfCHPR art 5.

<sup>207</sup> *Commission Nationale* (communication 74/92) para 22.

<sup>208</sup> Thune (n 36 above) on the *Klass* case E.Ct.H.R.Jt Series A vol.7 espousing the traditional position under the ECHR that an alleged violation of this right may only be entertained within the context of substantive rights.

<sup>209</sup> n 13 above (b)1.

<sup>210</sup> Article 6 and 26 AfCHPR; Art 14 and 26 ICCPR are of relevance.

<sup>211</sup> For instance *Ellacuria v. El Salvador*, Case 10.488, Inter-Am. C.H.R. 136 223 stating that the right to know the truth arises as a basic and indispensable consequence for every state party to [the American Convention].

<sup>212</sup> Article 25 American Convention on Human Rights; *Consuelo v. Argentina* Cases 10.147, 10.181, 10.240, 10.262, 10.309, 10.311, Inter-Am. C.H.R. 28, OEA/ser. L/V./II.83, doc. 14 at 41.

<sup>213</sup> Article 25 ACHR; *Lewenhoff v. Uruguay*, (Communication 30/1978) (HRC) stating that the right to a remedy obligates state to investigate and prosecute.

<sup>214</sup> Arts 1(1) and 8(1) American Convention on Human Rights; *Hermosilla*, Case 10.843, I.A.C.H.R. 36 at 62-67.

<sup>215</sup> Article 60 and 61 Charter.

<sup>216</sup> Article 3 and 7 Protocol on the Court.

potential weakness of the Court since the latitude of its sources of law is seemingly more limited than that of the Commission. Given that the Court is intended to be an effective complement to the Commission's work,<sup>218</sup> the view that despite this incongruity, both the Commission and the Court should be regarded as applying the same law, permitting a more extended recourse to international law is favoured.<sup>219</sup> A contrary interpretation would produce unfavourable results.<sup>220</sup> In expanding on the rights in issue, the Court should be able to rely amply upon international law.

#### 4.5 Framing the complaint: applicable law

Both South Africa and Moçambique have ratified the African Charter.<sup>221</sup> They are also party to major human rights instruments, including the ICCPR and the Torture Convention.<sup>222</sup> Although alleged acts raise a *prima facie* violation of the Charter, they occurred before both countries ratified the Charter.<sup>223</sup> On the strength of the principle of retroactivity, their responsibility under AfCHPR is untenable as a matter of treaty alone.<sup>224</sup> They nevertheless bear obligations under the Charter on the basis of custom<sup>225</sup> and the 'continuing' harm 'principle'.<sup>226</sup>

As indicated, the prohibitions against torture, arbitrary detention, discrimination and requirement that violations should be remedied have attained the status of custom.<sup>227</sup> The 'continuing' harm 'principle' posits that a state bears responsibility for violations

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<sup>217</sup> Heyns (2001) 1 *AHRLJ* 155 174 169 noting that the Protocol seems to limit the latitude of the Court's sources of law compared to the Commission.

<sup>218</sup> Art 2 Protocol on the African Court

<sup>219</sup> Heyns (n 217 above) 170.

<sup>220</sup> Heyns as above noting that a contrary interpretation would produce stratified jurisprudence, especially given that ratification of human rights instruments by states is not uniform.

<sup>221</sup> Moçambique ratified on 25<sup>th</sup> August 1988 while South Africa ratified on 9<sup>th</sup> July 1996.

<sup>222</sup> Moçambique ratified both instruments on 12<sup>th</sup> December 1991.

<sup>223</sup> On South Africa see generally Dugard in van Wyk et al (eds.) (1994) 171-195.

<sup>224</sup> Aust (n 82 above) 142; Art 28 Vienna Convention on the Law of Treaties.

<sup>225</sup> Given that a complaint has to raise *prima facie* violation of the Charter, the communication has to identify, provisions, which expressly or by interpretation violate it and make the argument above for custom by drawing from international law.

<sup>226</sup> Mugwanya (n 51 above) 254 notes that although the Commission has upheld the principle of non-retroactivity, it has accepted the doctrine of 'continuous' violation or their effects.

<sup>227</sup> Section 2.5.6.

commencing prior to the Charter's entry into force with respect to that state as long as such breach or its effects still endures after its entry into force.<sup>228</sup>

Failure by South Africa and Moçambique to inquire into violations that constituted crimes as a matter of international custom, and furthermore whose effects still linger as may be advanced variously by victims, thus raises questions of compatibility with the Charter.<sup>229</sup>

#### 4.6 Amnesty under the Charter: its limits

There is no general norm against amnesty.<sup>230</sup> In the absence of an express provision on amnesty in the Charter, whether amnesty can find a place in its framework depends on the effects of such amnesty on the obligations undertaken by states with respect to victims and to its general spirit and purport.<sup>231</sup>

As alluded to earlier, amnesty has previously received cursory attention from the Commission. Hinting at its likely incompatibility with the Charter, the Commission stated in the case against Mauritania<sup>232</sup> that:

[a]n amnesty law adopted with the aim of nullifying suits or other actions seeking redress that may be filed by the victims or their beneficiaries, while having force within Mauritanian national territory, cannot shield that country from fulfilling its international obligations under the Charter.

Though only perfunctory and generalised, as a sneak preview of the likely opinion of the Court or Commission, this comment furnishes a skeletal basis for establishing a model of compliance.

##### 4.6.1 General state obligations

Parties to the AfCHPR subscribe to an obligation to recognize the rights contained in it and commit to take measures to give effect to them. According to the Commission, there are

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<sup>228</sup> See *Modise v Botswana* (communication 97/93) 15 where the Commission noted that [if an act] has consequences that constitute a continuing violation of any of the articles of the African Charter it has to pronounce on these. See also *Amnesty International and others v Sudan* (joint communications 48/90, 50/91 52/9, 89/93, 89/93) 40 espousing essentially the same point.

<sup>229</sup> Dugard (n 161 above) 260 noting that in framing the TRC Act, international crimes were left out. See also Chigara (n 2 above) 11.

<sup>230</sup> Section 2.7.3.

<sup>231</sup> Prmb. AfCHPR.

<sup>232</sup> *Mauritania Joint Case* (n 9 above) para 52.

four duties entailed in this undertaking: respect, protect, promote, and fulfill.<sup>233</sup> Of more direct pertinence in this discussion is the obligation to protect and provide effective remedies in case of violations of protected rights.<sup>234</sup>

The duty to redress breaches, which enjoins the state 'to take measures to protect beneficiaries of the protected rights against political, economic and social interferences' and to provide remedies<sup>235</sup> like the rest, 'cannot be avoided or superseded by domestic legislation'.<sup>236</sup> Although states have the prerogative of deciding the manner and form of implementation, the field of state discretion is curbed by the requirement that the remedies provided have to be effective.<sup>237</sup> Additionally, any purported nullification by law of the right to resort to protected rights domestically has been held to be ineffective.<sup>238</sup> As such, amnesty laws that purport to erase the rights of victims, even under colour of the constitution have no place in the scheme of the Charter.<sup>239</sup>

#### **4.6.2 Right to judicial protection**

This right guarantees effective remedies in the event that their rights are violated. A victim should be able to approach competent tribunals for a determination and award of appropriate remedies.<sup>240</sup> Irrespective of the perpetrator's station in government, states are enjoined to ensure that victims have a remedy<sup>241</sup> and that such is enforced and fully complied with.<sup>242</sup> It will be argued by victims that amnesties that purport to wipe out this right to pursue remedies through previously established machinery violates their rights.

#### **4.6.3 Right to justice**

Victims have a right to justice, constituted in a real need to see perpetrators punished for their transgressions. The requirement to prosecute at least architects of violations that

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<sup>233</sup> SERAC (n 48 above) 44-47

<sup>234</sup> For a contextual exposition of these obligations see generally SERAC (n 48 above)

<sup>235</sup> SERAC para 46.

<sup>236</sup> Odinkalu (1998) 390.

<sup>237</sup> *Dawda Jawara* (n 40 above) 37

<sup>238</sup> *Civil Liberties Organization v. Nigeria* (Communication 129/94) para 16 and 23.

<sup>239</sup> See further section 4.8.1 below.

<sup>240</sup> Art 26 AfCHPR.

<sup>241</sup> Fair Trial Guidelines (n 13 above) C (c) 1.

<sup>242</sup> Fair Trial Guidelines C (c) 3 & 4; See sec 2.3.

affront the security and dignity of the person such as torture & disappearance, extrajudicial killings, rape and other serious violations is peremptory.<sup>243</sup> Although neither the African Charter, nor the Protocol on the Court specifically require prosecutions, the imperative is drawn from the general obligation to effectively protect, and to ensure effective remedies, as a right of victims of atrocities.<sup>244</sup>

In *Velasquez Rodriguez v Honduras*,<sup>245</sup> the American Court stated that states have a duty to organize the governmental apparatus so that it is capable of legally ensuring and actually ensures the free and full enjoyment of human rights. As a consequence, 'states must prevent, investigate and punish any violation of the rights recognised in the Convention...'<sup>246</sup>

While trials have their usefulness,<sup>247</sup> a myriad of justifications for shunning prosecutions have been proffered by states. Landsman<sup>248</sup> notes that among these, the fear of unsettling a fragile situation (the undertaking not to prosecute having been integral in transition negotiations);<sup>249</sup> conservative judiciaries; obstructive bureaucracies; difficulties of marshalling sufficient evidence to sustain convictions and the cost of such a venture are ready examples.<sup>250</sup>

#### 4.6.4 Right to truth

Related to the obligation to prosecute, states are enjoined to establish accountability by investigating allegations of violations. It is the right of survivors not only to know identities of perpetrators, but also the whereabouts of their victims.<sup>251</sup> Indeed, societies such right,

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<sup>243</sup> Section 2.5.

<sup>244</sup> See in development of victims' rights Aldana-Pindell (n 3 above) 1407

<sup>245</sup> I/A Cr. H.R Series C No. 4 (1988), 9 HRLJ 212; See also *Ellacuria*, Case 10.488, Inter-Am. C.H.R. 136 at 198 stating that Amnesty laws 'leave the victims of serious human rights violations unprotected, since they deprive them of the right to seek justice.'

<sup>246</sup> *Rodriguez* (as above) para 166.

<sup>247</sup> Landsman (1996) 59 *Law & Contemp. Probs.* 81 81-82 noting that these in the establishment of a culture of rule of law conducive for human rights; promotion of human rights by educating the people; establishing a framework for compensation; as a means of punishing perpetrators and as an important step in the healing process of victims.

<sup>248</sup> Landsman (as above) 85-87 on practical and policy reasons to forgo prosecutions.

<sup>249</sup> See Klaaren (n 188 above) 572 593 making reference to South Africa alludes to the possibility of destabilization of the peace arrangement.

<sup>250</sup> See AZAPO (n 4 above) para 20 discussing the demerits of prosecutions.

<sup>251</sup> *Ellacuria v. El Salvador* Case 10.488, Inter-Am. C.H.R. 136 (1999) 197.

rooted in the need of preventing repetition of atrocities in future.<sup>252</sup> Failure to facilitate truth telling would offend against obligations to investigate.<sup>253</sup> Protagonists of the South African approach often hinge their defence on the infeasibility of prosecuting large numbers of perpetrators and on its success, comparative to possible trials, in unearthing some of the darkest secrets of apartheid.<sup>254</sup>

Whilst it is important to create an environment where survivors and relatives of victims can know the truth about past atrocities, 'several categories of human rights violations should never be left to the exclusive assessment of a TRC.'<sup>255</sup>

#### **4.6.5 Amnesty and impunity**

It has been recognised that by cushioning perpetrators from liability, amnesty undermines the rule of law and enhances unequal protection of individuals under the law, which augurs badly for the rule of law.<sup>256</sup> Most amnesties, especially sweeping amnesties suppress the investigation and prosecution of crimes,<sup>257</sup> thereby contradicting notions of accountability.<sup>258</sup> Young notes that notwithstanding the aims of an amnesty, the outcome of many states practice of amnesties has been to entrench a culture of impunity.<sup>259</sup> It is inevitable in such a scenario, efforts of cultivating a culture respect for human rights will not be dented.

Today, as attested to by recent practice the broader international community is increasingly disinclined to unequivocally accept amnesty that entrenches impunity.<sup>260</sup> This further buttresses the peremptory element of article 1 of the African Charter in the context of victims' rights.<sup>261</sup>

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<sup>252</sup> Inter-American Commission on Human Rights (IACHR) Annual Report (1985-86) 192-3 cited in Lutz (142 above) 347.

<sup>253</sup> See Lutz (n 142 above) 353 in relation to Honduras.

<sup>254</sup> Slyle (n 106 above) 181.

<sup>255</sup> Landsman (n 247 above) 3.

<sup>256</sup> Joinet Report (n 70 above) 48.

<sup>257</sup> Cassel (n 25 above) 198-200.

<sup>258</sup> Slyle (n 106 above) 179.

<sup>259</sup> Young (n 14 above) 215.

<sup>260</sup> See Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, U.N. Security Council, U.N. Doc. S/2000/915 (Oct. 4, 2000) establishing the Special Court whose statute (art 10) which rejects amnesty granted for crimes against humanity, serious violations of international law and the Geneva Conventions.

<sup>261</sup> See 2.5.5.

## 4.7 Countering the claims

A Respondent state answering to claims on the right to an effective remedy is unlikely not to invoke the general principles of international law: state sovereignty and subsidiarity that underlie state action in implementing Charter standards.<sup>262</sup> The state may also raise arguments pertaining to margin of appreciation, maintaining that in implementing Charter obligations that primarily reside with it, its institutions are more in touch with the intricacies at state level and as such, more adapted to monitor state compliance with protected rights.

### 4.7.1 Affirming sovereignty

The state is underpinned by the principle of sovereignty, which expresses internally, the supremacy of governmental institutions and externally, the supremacy of the state as an international legal person vesting in the state rights that attach to such status.<sup>263</sup> Although with a certain colour of validity, states may still attempt to set up, in various ways, the otherwise tired arguments notion that as a matter of international law, what is done behind their borders is an internal matter. In fact, discourse on amnesty is often conducted on the basis that it is a sovereign act.<sup>264</sup>

Victims find response to this claim in contemporary international law, largely inimical to untrammelled conceptions of sovereignty. IHRL imposes limits on state conduct designed to accommodate the development that individuals are a unique concern of the law of nations.<sup>265</sup> In this regard, Falk<sup>266</sup> has noted that:

[a]side from doctrinal confusion, manipulation and uncertainty, there is a clear trend away from the idea of unconditional sovereignty and toward a concept of responsible sovereignty. Government legitimacy that validates the exercise of sovereignty involves adherence to minimum humanitarian norms...

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<sup>262</sup> On sovereignty see generally Steiner & Alston (2000) 573-583.

<sup>263</sup> Steiner as above, 574 noting that sovereignty implies, among others, freedom of action by the state including the power to legislate and enforce municipal law with respect to its territory.

<sup>264</sup> See Young (n 14 above) 214 noting that domestic actors have considered amnesty as the act of a sovereign, political body and thus a political question or concern, often not reviewable by the judiciary.

<sup>265</sup> Mugwanya (n 51 above) preface xi.

<sup>266</sup> Falk 'Sovereignty and Human Dignity: The Search for Reconciliation' in Deng & Lyons (eds.) (1998) quoted in Steiner & Alston (n 268 above) 582.

In fact, in an era where states can no longer treat their citizens how they wish, the application of this notion to human rights is severely in doubt.<sup>267</sup>

#### 4.7.2 Confronting subsidiarity arguments: margin of appreciation

Subsidiarity, as opposed to universality, is a doctrine inclined towards emphasising local characteristics in implementing global standards. Applicable as a legal and political principle of 'devolution' within the European Community, 'it requires that problems be solved where they occur, by those who understand them best, and by those who are most affected by them.'<sup>268</sup> Under human rights treaties, it is often achieved through the doctrine of 'margin of appreciation', (in systems where it obtains notably the ECHR)<sup>269</sup> which holds that unique state experience necessitate permitting a certain degree of latitude on the part of states in finding a level of compliance with human rights obligations.<sup>270</sup>

The state is likely to argue that article 1 AfCHPR merely sets the global standard and general duties and that it leaves the rest to the state, whose institutions are best suited to determine specific levels of compliance with the Charter. Admittedly, the responsibility of implementing the Charter at national level is the preserve of the state. In *Legal Resources Foundation v. Zambia*,<sup>271</sup> the commission asserted this position deciding that:

[A]n international treaty body like the Commission has no jurisdiction in interpreting and applying domestic law. Instead, a body like the Commission may examine a state's compliance with the treaty, in this case, the AfCHPR. In other words the point of the exercise is to interpret and apply the AfCHPR rather than to test the validity of domestic law for its own sake.

This stance shuns the principle of subsidiarity and the justification for use of the doctrine of margin of appreciation applied under the ECHR.<sup>272</sup> Whilst it true that it remains within the proper remit of the state to choose the means of implementing Charter provisions,<sup>273</sup> measures taken should meet its standards, serving as a minimum benchmark state

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<sup>267</sup> See Miller 'Checkered flags: sovereignty isn't sacred anymore' *New York Times* 18<sup>th</sup> April 1999 p. 4wk extract in Steiner & Alston (n 66 above) 586-587.

<sup>268</sup> Linnan (1989) quoted in Shelton 'Subsidiarity, Democracy and Human Rights' in Gomien (1993) 43-54 43.

<sup>269</sup> Hill (1998) 1 *European Human Rights Law Review* 73.

<sup>270</sup> See Wildhaber (2002) 23 *Hum. Rts. L.J.* 161 162

<sup>271</sup> Communication 211/98 para 59.

<sup>272</sup> Although subsidiarity regulates the applicability of article 1 of the Charter, 'margin of appreciation' does not apply, at least overtly under the Charter and the Commission has not previously ruled on the same. It has stated in *Commission Nationale v Chad* (n 207 above) para 21 that Charter provisions represent minimum standards from which derogation is impermissible. See Chapter 4.

<sup>273</sup> *Legal Resources Foundation* (n 271 above) para 59.

behaviour from which derogation is impermissible.<sup>274</sup> It therefore behooves upon the state to resort to its own devices to implement these standards, the system of law notwithstanding.<sup>275</sup>

It has been observed that ‘while states have, in principle, some discretion regarding the actual content of human rights policy to deal with past abuses concordant to unique national experience, this does not exclude the application of international standards, which represent the threshold of international legality’.<sup>276</sup> It is unlikely that the Court will introduce the ‘margin of appreciation’ principle in its jurisprudence, given that at ECHR level, ‘the principal objection to [it] is that it introduces an unwarranted subjective element into the interpretation of various provisions of the European Convention on Human Rights.’<sup>277</sup>

### 4.7.3 National constitutions and the Charter

In advancing the subsidiarity claim, the Respondent state may also attempt to put up an argument, which is part of the much-underscored assertion, that national constitutions constitute the basic law of the state, a fact that curbs the terrain of international law in the domestic sphere.<sup>278</sup> Although, this basic postulate is tenable, difficulties arise in application, especially where it assumes a global antipathy to IHRL. It is shown that such a stance is implausible when considered within the general prism of state responsibility for human rights.

In *Legal Resources Foundation*,<sup>279</sup> the Commission opined with respect to domestic legislation that:

[t]he responsibility of the Commission is to examine the compatibility of domestic law and practice with the Charter. Consistent with decisions in the European and Inter-American jurisdictions, the Commission’s jurisdiction does not extend to adjudicating on the legality or constitutionality or otherwise of national laws. Where the Commission finds a legislative measure to be incompatible with the Charter, this obliges the State to restore conformity in accordance with the provisions of Article 1.

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<sup>274</sup> *Commission Nationale* (n 207 above) para 21.

<sup>275</sup> Reference here is made to the civil-common law divide (monist and dualist), with generally self-executing and non-self executing systems respectively. On treaties and domestic law see Aust (n 82 above) 143-161.

<sup>276</sup> Bassiouni (1996) 59 *Law and Contemp. Probs.* 13.

<sup>277</sup> Lavender (1997) 4 *European Human Rights Law Review* 380-390 at 380.

<sup>278</sup> See Dugard (2000) 47 stating that in terms of s 232 and 233 of the constitution of South Africa, the constitution and Acts of Parliament enjoy greater weight than customary international law. In the case of Moçambique, the constitution is silent on the application of customary law.

<sup>279</sup> (n 271 above) para 68.

It further noted that ‘international treaty law prohibits states from relying on their national law as justification for their non-compliance with international obligations’.<sup>280</sup> It does not matter whether the treaty is self-executing or not, treaty undertakings at international law have to be fulfilled in good faith, in terms of the customary principle of *pacta sunt servanda*.<sup>281</sup> In fact, ‘legally binding international human rights standards should operate directly and immediately within the domestic legal system of each [state], thereby enabling individuals to seek enforcement of their rights before national courts and tribunals.’<sup>282</sup>

From this decision, it is clear that although the constitution is the national benchmark of validity of state action, at Charter level, it will be tested for compliance with international law.<sup>283</sup>

#### **4.8 Finding a level of compliance: acceptable amnesty?**

An analysis that looks at the scope of amnesty in the legal, political, and social context will enable a state to develop a solution that will respond to human rights abuses, provide justice to the victims, uncover the truth, and pave the way for reconciliation. Such an amnesty can achieve the aims of justice and truth telling.<sup>284</sup>

Prosecutions do not sit well with many commentators. Indeed, the mandatory requirement that states should punish serious violations of human rights has not recommended itself to many observers, some of whom consider that there may be circumstances where waiver of persecutions may be warranted. The challenge is to find an acceptable compromise.

Jowdy<sup>285</sup> emphasises the utility of trials but maintains that focus should be on victims because in appropriate cases, pardons can satisfy many victims, given that in some cases, what they primarily demand is ‘acknowledgement and recognition, not vengeance.’ At what point the option lies between prosecutions and collective amnesia is perhaps the question.

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<sup>280</sup> *Legal Resources Foundation* (as above); art 27 Vienna Convention on the Law of Treaties reprinted in 8 ILM 679.

<sup>281</sup> Art 26 Vienna Convention; *Mauritania Joint case* (n 9 above) para 53.

<sup>282</sup> General Comment 9 (ESCR Committee) para 4.

<sup>283</sup> South Africa and Moçambique’s enactment of amnesty laws endorsed with constitutional validity does not in itself meet the yardstick erected by the Charter.

<sup>284</sup> Young (n 14 above) 246.

<sup>285</sup> Jowdy (1997) 17 *B.C Third World L.J* 285, 328 quoted in Ludwin in Sromseth (2003) 273-317 276.

Cassel<sup>286</sup> provides useful guidelines synthesised from the incremental jurisprudence of the Inter-American bodies on the nature of amnesty law that may comport with victims' rights. Such amnesty must first have democratic endorsement, obliterating the possibility of self amnesty.<sup>287</sup> A state, in deciding whether or not to grant such amnesty, should further consider the ability of the victims to attain redress.<sup>288</sup>

Bassiouni<sup>289</sup> states that amnesty must be consistent with providing reparation and rehabilitation for victims. A grant of amnesty that precludes identification of perpetrators or investigation into the crimes committed does not allow victims the reparation, rehabilitation, or compensation necessary to fully respect their human dignity. Clearly, a sweeping amnesty, or collective amnesia such as that adopted in Moçambique offends against all these elements as it is bereft of basic validity that would require acknowledgment of the facts and reparation for violations.

The utility of non-criminal sanctions has been acknowledged. Kritz<sup>290</sup> argues that if properly administered, they can serve many important functions. They make much more plausible the processing of large numbers of cases and can provide society with a sense that justice and accountability have been established, and can generate greater confidence and credibility in the institutions and personnel of the new order.

Joinet<sup>291</sup> proposes the use of administrative sanctions in appropriate cases for societies grappling with past abuses, stating that 'officials with important decision-making power and therefore an obligation of loyalty to the process in progress - particularly in the army, the police, and the judiciary, may be vetted and ultimately suspended, transferred, demoted, offered early retirement, or dismissed'.

Whereas the South African model is laudable as an example directive of how amnesty should be handled, greater compliance will be required. This would include the necessity that the most serious violations such as torture and extra-judicial killings should not go

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<sup>286</sup> Cassel (n 25 above) 208-230. See also chapter 5.

<sup>287</sup> The Inter-American Commission has stated that only the appropriate democratic institutions-usually the legislature-with the participation of all the representative sectors, are called upon to determine whether or not to decree an amnesty or the scope thereof, while amnesties decreed previously by perpetrators have no juridical validity. *Hermosilla* (n 221 above) 26-39 &163-66.

<sup>288</sup> Joinet Report (n 70 above) para 26-34; & principles 18-22.

<sup>289</sup> Bassiouni Report (n 1 above) para 5 -15.

<sup>290</sup> Kritz (1996) *59 Law & Contemp. Probs.* 127 140.

<sup>291</sup> Joinet Report (n 70 above) principles 48-50.

unpunished. A more robust approach to selective prosecution is favoured. The African court may also require that as a remedy, ongoing investigations to unearth details of crimes should continue.<sup>292</sup>

#### **4.9 Conclusion**

This chapter concluded that amnesties, especially unconditional amnesties, 'self amnesties' and to an extent, conditional amnesties in which compliance with prosecution is lacking violate at least the obligation to punish the most serious crimes. It further concluded that amnesty that renders crimes committed without legal effect and that deprives victims of their right to legal recourse through which perpetrators may be identified and brought to justice also violates the right to judicial protection under the Charter. It was further concluded that amnesties may be so fashioned as to meet both the requirements to afford an effective remedy to victims and the need to reconcile society and to establish a stable democratic state conducive to a culture of human rights.

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*Caballero Delgado and Santana case* I/A Court H.R. Series C No. 15 (1993) 87 the American Court stated that reparations to be ordered include continuation of judicial proceedings in accordance with domestic law that complies with international standards.

## CHAPTER 5

### CONCLUSIONS AND RECOMMENDATIONS

#### 5.4 Introduction

This work has made a case for the rights of victims of human rights violations within the context of amnesties that have been adopted by a number of African countries, focussing more specifically on South Africa and Moçambique. Central to the study is the firm assertion that the adoption of amnesties has contributed largely to disregard of victims' rights. The study showed that imperatives of national transition do not discharge states from Charter obligations relating to victims, which, not being mere exhortations, enjoin states to attend to victims. The study also articulated that failure to prosecute the most serious violations as the linchpin of enforcement action violates the rights of victims.

#### 5.5 Conclusions

Of utility in varied spheres, amnesty has been an important tool in facilitating political transitions to democratic or more democratic regimes and in resolving conflicts in which human rights atrocities are in issue. Through such mechanism, the rights of victims to an effective remedy have been undermined, especially where, as in the case of Moçambique, sweeping amnesties have been declared.

A select category of human rights violations which qualify as international crimes imposes mandatory obligations on the state to prosecute perpetrators and to provide redress to victims. Under the Charter, there is a basis of enjoining states as a matter of customary international law, as some of the norms codify, or have attained such status. Recent practice indicates, as agreed even at the political level, that amnesties for such crimes are unacceptable when applied to international crimes.

Insistence on prosecutions does not sit well with architects of transitions, seen as delicate affairs. The mandatory requirement that states should punish perpetrators does recommend itself to some commentators, who consider that there may be circumstances where waiver of prosecutions may be warranted, and that the challenge is to find an acceptable compromise between collective amnesia and trials which present enormous, often insurmountable obstacles.<sup>293</sup>

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<sup>293</sup> See Lutz (n 142 above) 353 noting that there may be legitimate circumstances in which a state may not be able to meet their obligation to punish perpetrators.

Apart from the mandatory sanction to prosecute, there is an array of remedies for human rights violations to which states may make recourse. First among these are TRCs, through which the need to establish accountability for violations by investigating allegations of violations can be achieved. By focusing on truth-telling, TRCs may comport with an important component of victims' rights (truth), but are inadequate on their own. As discussed, South Africa has become the first country to deploy an innovative model including a TRC focused more intently on victims.<sup>294</sup>

Instituting a TRC mechanism that does not combine compensation in appropriate cases with trials does not comport with the Charter. Monetary reparations are integral to the package of remedies. Such reparations and other disciplinary measures do not suffice on their own.<sup>295</sup>

Amnesties that eliminate all these possibilities, thus constituting a total ouster of victims' rights, present a scenario of the lowest ebb in the echelon of noncompliance with Charter standards and the rights of victims. As shown, an amnesty may be in conformity with the Charter in various degrees depending on its formulation.<sup>296</sup> An option situated between a sweeping amnesty and an insistence on difficult prosecutions presents a better level of compliance.

There are cases where victims may be satisfied with only compensation and may actively push for reconciliation with perpetrators rather than prosecutions, which are seen as being predominantly in the interest of the state.<sup>297</sup> This does not however relieve the state of the obligation to punish the most serious crimes.

Absolutist conceptions of sovereignty in defence of overbroad amnesties are untenable in contemporary human rights discourse. Whereas the state reserves the powers attendant to its sovereignty, human rights narrow the remit of these functions. This dictates that

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<sup>294</sup> Earlier attempts at truth-telling in countries such as Uganda were limited both in scope and public dimension making them less open affairs. See Mugwanya (n 51 above) 88-89.

<sup>295</sup> Nowak (n 4 above) 59 and various HRC decisions discussed above expressly reject the position of some states' arguments that disciplinary sanctions or monetary damages should suffice as a remedy.

<sup>296</sup> See recommendations on guidelines below.

<sup>297</sup> In South Africa, victims acting through Khulumani (an NGO) at the prompting of victims dissatisfied with or left out of the TRC process, are focusing their efforts on securing compensation and rehabilitation rather than criminal trials. (Documents on file with author).

sovereign acts alleged to offend against the Charter be tested against it, rather than national law.<sup>298</sup>

The foregoing conclusions call for an approach to amnesty that balances victims' rights and imperatives of national interests of reconciliation while meeting IHRL standards as prescribed by the African Charter and fortified by other instruments. Given that compliance is not merely a matter of law, the enforcement mechanisms under the African human rights framework, as well as political arms of the African Union have a pivotal role in enforcing compliance with Charter standards, securing the rights of victims and in combating impunity.

## 5.6 Recommendations

Amnesty laws should have a certain amount of legitimacy, drawing from the way they have been adopted. This is particularly important given that amnesties adopted 'have ranged from dictatorial decrees to legitimate acts of parliament.'<sup>299</sup> According to Cassel,<sup>300</sup> to be legally valid at all, amnesties must be adopted by democratic bodies, usually the legislature and that self-amnesties by lawless regimes should be rejected.

Institutions created (such as a TRC) should be the product of an open and democratic process. It should be structured and invested with such powers as may be sufficient to carry out a thorough and expedient inquiry with a process open to public scrutiny. Further, to be acceptable, such institution should be vested with the powers to order compensation to be paid to victims. The inquiry conducted by the Commission should be open and such TRC should not be amenable to external control. Given that such institution should have a clear mandate, 'the process should be rejected where exigent social, economic, or political factors make more complete compliance impossible.'<sup>301</sup>

Due to the difficulty inherent in any attempt to prosecute all human rights violations, selective prosecution is advised. It must be demonstrated that a real effort has been

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<sup>298</sup> There is ample practice in this regard by the Commission. See *Civil Liberties Org* (n 244 above) in which the Commission affirmed its powers to subject an Act of legislature to scrutiny through the lens of the Charter. See also Udombana (2003) 153-154.

<sup>299</sup> Burke-White (2001) *Harvard International Law Journal* 467 472 notes that under a system of democracy (in terms of values of the liberal law theory) the will of the people is to be the basis of the authority of government.

<sup>300</sup> Cassel (n 25 above) 229.

<sup>301</sup> Landsman (n 247 above) 90.

invested in such a process. Crimes against humanity such as torture should be automatic cases for prioritisation.

Amnesties may not foreclose investigations of violations, sufficient to vindicate both society's right to know the truth and survivors' right to know what happened to their relatives. The mechanisms that are established must be victim-centered, and must be capable of addressing the needs of victims in a meaningful way. Investigations must also seek to identify and name perpetrators. In this regard, in states where such procedures exist, victims should be permitted to initiate or participate in judicial criminal proceedings and inquiries into violations.

Given that victims have a right compensation in appropriate cases amnesties 'may not foreclose or in practical effect substantially limit the right of victims or survivors to obtain adequate compensation for violations.'<sup>302</sup>

As discussed, amnesties should not apply to international crimes. The amnesty arrangement should ensure that at least perpetrators of serious atrocities are prosecuted and effectively punished. The Court at the point of adjudication on an amnesty, should, in line with *Velasquez*,<sup>303</sup> be able to decide on the merits of failure to fully prosecute, having been afforded a view of the options available to the state.

Responsibility for past violations must be acknowledged by the state.<sup>304</sup> The Court could adopt the position of the Joinet Report that 'amnesty cannot be accorded to perpetrators of violations before the victims have obtained justice by means of an effective remedy. It must have no legal effect on any proceedings brought by victims relating to the right to reparation'.<sup>305</sup>

'Amnesty guidelines' may be adopted by the African Court on its own motion, or in the form of an advisory opinion.<sup>306</sup> A protocol to the Charter may be contemplated in this vein. However, a soft law approach is more favourable because 'if the guidelines were embodied as hard law in a treaty, then either an absolutist approach, or exceptions or qualifications, might have to be expressly provided' and further that 'if they were asserted as hard

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<sup>302</sup> Cassel (n 25 above) 229.

<sup>303</sup> Lutz (n 142 above) observing that there are circumstances under which failure to prosecute may be excused.

<sup>304</sup> Cassel (n 25 above) 229.

<sup>305</sup> Joinet report (n 70 above) para 30(b).

<sup>306</sup> Art 4(1) Protocol to the African Court. Such effort may also be with the participation of political players in the AU as in the case of the Fair Trial Principles and Guidelines elaborated by the Commission.

customary law, courts might be compelled to consider potential exceptions and qualifications in defining and applying a customary rule'.<sup>307</sup>

The institutions of the AU are therefore a vital role to play pre-emptively at the adoption of amnesties, to push for compliance with these standards, especially at a time when the AU is showing increasing concern for state conduct within their own borders.<sup>308</sup> Policy makers at relevant AU levels ought to push in their influence on adoption of amnesties that accord with the principles outlined.

The Court should clearly map out the frontiers of state obligations with respect to 'violations other than international crimes,' under the Charter, especially from a victims point of view. Whether this permits a certain 'margin of appreciation' to the state will have to be elaborated.

Amnesty jurisprudence of the African Court should build on that of other human rights oversight bodies. The bold thinking of the Inter-American bodies is particularly important. In an era considered as that of enforcement and realization of human rights,<sup>309</sup> ground already gained in setting the basic principles on amnesty, impunity and victims' rights should not be lost on inward-looking jurisprudence.

For states grappling with atrocities, a framework of the South African model, adopted for unique national experience is recommended. However, greater effort should be invested in prosecuting at least the most serious atrocities while prioritising the widest victim base through imaginative options that do not purge real chances of victims obtaining compensation either from the state or other parties.<sup>310</sup>

## **Word count**

17 986 (including footnotes)

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<sup>307</sup> Cassel as (n 25 above) 229 observing that like the jurisprudence from which they mainly derive, developed case by case, the guidelines could be applied and if necessary tailored to fit individual cases.

<sup>308</sup> Art 4 AU Constitutive Act providing for humanitarian intervention in case of gross human rights violations.

<sup>309</sup> See Meyers (1997) 3 *ILSA* 3 *ILSA J. Int'l & Comp. L.* 895-914 905 noting that the traditional notion of sovereignty as an inviolable, impenetrable barrier that neatly defines a nation's physical and political boundaries is now an outdated concept.

<sup>310</sup> Critique the South African approach focuses on its failure to prosecute, and inadequate address of victims' plight. See for instance Klaaren (n 188 above).

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