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Transitional justice: reconciling and building peace. Lebanon in front of reconciliation experiences of other States[1]

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Abstract

Transitional justice is an extraordinary form of justice that has been widely used for almost three decades in countries emerging from an internal conflict characterized by numerous and serious human rights violations committed by one part of society against another. Such conflicts have generally left deep divisions within society, and State institutions have been weakened if not largely destroyed. Recourse to transitional justice enables victims or their next of kin to understand what happened, to identify the authors of the violations of their fundamental rights and the reasons that led to these violations. The right to know the truth has even become a fundamental human right. The goal of transitional justice is to achieve a lasting peace, in which the victims, the perpetrators of human rights violations, and the individuals and communities who opposed each other during the conflict can coexist, with an inclusive institutional framework conducive to rebuilding the country.

Lebanon has not experienced such a process of rebuilding its society and its victims after the civil war. Some of the best-known examples of countries that have resorted to transitional justice are South Africa, which set up the first Truth and Reconciliation Commission with a mechanism of conditional amnesty, and Rwanda, which chose to set up tribunals made up of non-professional magistrates chosen by the population. These examples, beyond their diversity, reveal common characteristics and problematic issues that may be relevant for Lebanon in its difficult journey towards a more stable and inclusive model of society. The problematic issues we address here are the question of impunity posed by the amnesty of perpetrators of serious human rights violations, and the ability of transitional justice bodies to balance the central place given to the voice of victims with the search for truth and the rights of the defense.

[1]This article is a developed version of a presentation initially given at the seminar "The In-between of Peace: Built and/or Impeded Peace" organized by the USEK Faculty of Arts and Sciences under the direction of professor Marie Fayad at USEK, Jounieh, Lebanon, April 25, 2023.

Following a traumatic civil conflict, can peace be restored without reconciliation and transitional justice?

Nowadays, we would tend to answer in the negative, but various conflicts in the past and up to the 1990s were not followed by real reconciliation, which did not prevent the return of peace and the building of stable institutions. Above all, the States and governments concerned wanted to turn the page and rebuild their countries and economies as quickly as possible. There was a fear that a reconciliation process that would unleash the people's willingness to speak out and reveal sensitive facts could reopen wounds and rekindle conflicts within the population, making it more difficult to rebuild the country.

This willingness to turn the page and rebuild the country and its economy as quickly as possible was observed in Germany, France and other European countries after the WW2 conflict. It's also what happened in Lebanon at the end of the civil war.

In France, a film about the Occupation and the Resistance during WW2 was banned from television in 1968 after its release. According to the director of *ORTF* (French Television) at the time, it posed moral problems and "*harmed the honor of certain families*[2]".

Since the 1990s, peace-building in many countries traumatized by conflict or bloody events has been based on transitional justice, truth-seeking and reconciliation.

What is reconciliation? What is transitional justice?

Post-conflict reconciliation takes place not only between individuals, but also between communities and at the level of society itself. The social fabric has been torn apart, particularly following a civil war in which individuals belonging to the same nation clashed. The nation itself needs to be rebuilt together with the institutions of the State, if we are to follow Ernest Renan's conception of the nation[3], seen as a community of people united not only by a common language and culture, but also by a spiritual bond such as the willingness to make sacrifices together in the present and future, as they have done in the past. Rebuilding such a bond requires recognition of the crimes committed during the civil conflict, and reparation for the victims. Reconstituting the truth and making reparation for crimes leads to the reconciliation of victims and, beyond that, of parts of society in conflict with one another. This goes beyond the work of

[2] A. COMTE, *Journal télévisé, 20 h,* 3 janvier 1973, <https://www.reseau-canope.fr/enseigner-la-resistance/D442>.
[3] E. RENAN, *Qu'est-ce qu'une nation ?*, Paris, Mille et une nuits, 1997, p. 47.

a conventional justice system charged solely with bringing out the judicial truth and applying penalties to the perpetrators of identified crimes. This is where transitional justice comes in.

In most of the countries where it has been implemented, the extrajudicial process of transitional justice aims at creating a national dialogue in order to rebuild the nation. It has complemented rather than replaced, traditional justice to take care of what the latter could not, especially when that justice has been weakened by the breakdown of state institutions. In the words of the United Nations Secretary-General:

> "*The notion of transitional justice discussed in the present report comprises the full range of processes and mechanisms associated with a society attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof*[4]".

It can therefore be said that transitional justice refers to processes of transition from conflict to peace and is a combination of the use of ordinary justice, generally to deal with serious violations of international human rights law and international humanitarian law, and an extrajudicial mechanism to bring out the truth, identify the victims and repair the damage caused to them. As the above-mentioned U.N Secretary-General's report states, transitional justice does not follow a single model due to differences in context and conflict. A practical guide drawn up by the *Organisation internationale de la francophonie,* has listed 56 countries (francophones and not francophones) where transitional justice processes have taken place, each with its own particularities and successes or failures[5]. These various processes were (or are still) conducted by a commission, most often called 'Truth commission', whose composition and powers with regard to truth-seeking and reconciliation vary from country to country. Despite the absence of a single model, some reconciliation processes stand out.

Transitional justice in South Africa is one of the oldest, with a Truth and Reconciliation Commission (TRC) established in 1995 by the then Government of National Unity under a 1993 interim constitution, itself a transition to the new democratic regime and the constitution

[4] United Nations Security Council, Report of the Secretary General, "The rule of law and transitional justice in conflict and post-conflict societies", S/2004/616, 23 August 2004, p. 4.

[5] Organisation internationale de la francophonie, *Guide pratique. Les processus de transition, justice, vérité et réconciliation dans l'espace francophone*, 30 March 2021, 2nd ed., p. 220, <https://www.francophonie.org/2e-edition-guide-pratique-processus-transition-justice-verite-reconciliation>, consulted on July 2, 2023.

of 1996. This TRC is made up of a Committee on Human Rights Violations with broad investigative powers, a Committee on Reparation and Rehabilitation and a powerful Committee which can grant amnesty on a case-by-case basis to perpetrators of gross human rights violations perpetrated during the Apartheid period, in exchange for a full confession to these crimes. The other perpetrators were subjected to ordinary court proceedings.

In Rwanda, the transitional justice process was set up in the wake of the 1994 genocide and mainly involved extraordinary tribunals, known as *Gacaca*, made up of non-professional magistrates with the participation of the population to deal with the mass of people accused of having taken part in the genocide. These tribunals had the power to apply sentences. About 2 million judgments were handed down, with a conviction rate of around 65%[6]. The most serious cases, of perpetrators and planners of genocide, were dealt with by the ordinary courts. No amnesty was planned.

Amnesty is part of the transitional justice process in some countries, where it is seen as a tool for peace and reconciliation. However, nowhere has it been made conditional on a full confession of the truth, as in South Africa. In some countries such as Angola or El Salvador, the amnesty was total and unconditional. In Colombia, where the transitional justice process is called the 'integral system of truth, justice, reparation and non-repetition' (*Sistema Integral de Verdad, Justicia, Reparación y No Repetición*), the amnesty for the guerrillas was conditional on their surrendering their weapons in accordance with a timetable set out in the peace agreement between the opposing parties.

Under the Colombian mechanism of transitional justice established by the 2016 Havana Peace Accords, amnesty falls within the jurisdiction of a 'Special Jurisdiction for Peace', which is a tribunal[7] in charge of trying people accused of committing crimes during the armed conflict. It can order integral reparation measures for the victims. It has an Investigation and Prosecution Unit. This transitional justice mechanism also includes various specialized bodies such as the 'Commission for the Clarification of Truth, Coexistence and Non-Recurrence'; the 'Special Unit for the Search for Persons Reported Missing in the Context of Armed Conflict'.

To what extent can these processes, which have led the countries concerned to lasting peace and stability, could inspire Lebanon to put the civil war behind it once and for all and

[6] BBC News, "Gacaca genocide courts finish work", <https://www.bbc.com/news/world-africa-18490348>, consulted on July 27, 2023.
[7] Its members are not necessarily professional magistrates.

complete its unfinished transition to a stable model of society? This is the question we propose to address in this paper.

The literature on transitional justice and national reconciliation in general is rife and multidisciplinary. On Lebanon specifically, several articles have been written, focusing on attempts to build some form of transitional justice and the obstacles that stand in the way. These articles take generally a sociological or political science approach[8]. One article took a historical and legal approach to the problem of enforced disappearances during the civil war and Lebanon's treatment of the right to the truth as part of the reconciliation process. It was published in 2011, well before the enactment of the important 2017 law on missing and forcibly disappeared persons[9].

The present paper will focus on two essential and problematic aspects of any reconciliation process, which are particularly relevant to Lebanon: the question of impunity arising from amnesty and the implementation of the right to the disclosure of the truth about gross violations of human rights. From a legal standpoint, how can one justify an amnesty that grants immunity to perpetrators of gross human rights violations?

The right to know the truth is put into practice by the widespread use of the spoken word in an extrajudicial or non-conventional judicial setting, characteristic of transitional justice. Victims are invited to tell their stories, and the public is invited to testify. To a certain extent, this gives victims and their representatives the upper hand. To what extent does this process not undermine the principle of balance between the rights of victims and the prosecution, on the one hand, and the rights of the defense, on the other?

The approach here will be primarily law-based, although politics is inevitably present to the extent that the establishment of a transitional justice system and the rebuilding of a nation are necessarily driven by political imperatives and need not only legality but also legitimacy: they should serve the interests of all citizens, not just a few.

[8] To list but a few papers: P. CHRABIEH, « Pratiques de réconciliation au Liban Un état des lieux », *Théologiques*, vol. 23, n° 2, 2015, p. 229-252. Ch. J. SKAFF, « L'amnistie et la justice transitionnelle. Un exemple : les accords de paix au Liban », *Le Portique [on line*], 31 | 2013, p. 1-10. R. SAADEY, "On Justice Denied : Interrogating Amnesty and Amnesia in Post-conflict Lebanon", *Yale Journal of International Affairs*, November 23, 2021, <https://www.yalejournal.org/publications/on-justice-denied-interrogating-amnesty-and-amnesia-in-post-conflict-lebanon>, consulted on July 15, 2023.

[9] G.S. BATTEL, "Beirut's Sunset: Civil War, Right to the Truth and Public Remembrance", *Pace diritti umani* n° 2, maggio-agosto 2011, p. 129-153.

In order to get the perpetrators of crimes committed during the conflict to collaborate and confess their acts, the reconciliation process generally, though not always, involves an amnesty, as shown by the examples cited above. But this immediately raises fears of impunity for these people, which poses a problem of both law and justice - in the primary sense of the term - for the victims (**I**).

The process of reconciliation involves unleashing the truth about what really happened during the civil war, which is an essential step not only in repairing the suffering of victims or the families of victims, but also in overcoming divisions within society. The search for the truth has become a requirement. It is an obligation owed by the State to both victims and society and is now enshrined in the constitutions and legal systems of several States, as well as in international law, as a fundamental human right. However, its application is far from straightforward in the aftermath of a conflict because of the risk of violence that it may generate against witnesses or victims and because of the difficulty of striking a balance between the rights of the defence and the rights of the prosecution in proceedings before extraordinary bodies or tribunals, which are characteristic of transitional justice (**II**).

I. Amnesty and the question of impunity

The term "*amnesty*" is sometimes associated with the word "amnesia"[10], since the aim is to erase the judicial consequences of crimes, including the most serious crimes in some countries, *i.e.* to write off the responsibilities of the perpetrators of these crimes in order to turn the page on a conflict more quickly. But amnesty reduced to amnesia is an act of violence against the victims, who need to know what happened to them or against the victims' next-of-kin, and to have the perpetrators brought to book, in order to rebuild their lives. There are, however, different forms of amnesty, with varying degrees of legality and impact on the rights of victims and on post-conflict reconstruction in society. The price of impunity - inherent in any amnesty - is higher for victims and society, and its legality under international law more questionable when amnesty covers serious human rights violations and is granted unconditionally (A) than when it depends on specific conditions or is at least closely linked to a broad and comprehensive process of national reconciliation (B).

[10] P. HAZAN, « Les dilemmes de la justice transitionnelle », *Mouvements* n° 53 mars-mai 2008, p. 43.

A. Amnesties granted unconditionally

What is an amnesty and how is it considered under international law?

The International Committee of the Red Cross (ICRC) characterizes it as "*an official legislative or executive act whereby criminal investigation or prosecution of an individual, a group or class of persons and/or certain offences is prospectively or retroactively barred, and any penalties cancelled. In such cases, an amnesty can halt imminent or ongoing prosecutions, quash convictions already handed down and/or lift sentences already imposed*[11]". This is close to the definition given by the French Larousse dictionary but different for the definition provided by the Shorter Oxford English Dictionary – "*an act of oblivion, a general pardon of past offences by the ruling authority*" - to which the ICRC also refers[12].

Under international humanitarian law, amnesty is a duty for the State on whose territory a non-international armed conflict took place, provided that it is as broad as possible. Article 6 (5), Protocol II of 1977 additional to the 1949 Geneva conventions states: "*At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained*[13]". The words " *shall endeavour* " indicate, however, that the obligation is not one of result but of means. The idea is, as the ICRC noted in its comment to the article 6 (5), that the amnesty is intended to "*encourage gestures of reconciliation that can help restore normal relations in the life of a nation that has been divided*[14]".

These gestures referred to by the ICRC do not mean, however, that violations of international humanitarian law, including war crimes, cannot be investigated or prosecuted. International criminal law is based on the idea that no international crime can go unpunished, as proclaimed by the Rome Statute of the International Criminal Court in its preamble. The

[11] ICRC Advisory Service on Humanitarian law, "Amnesties and International Humanitarian Law: Purpose and Scope", p. 1, file:///D:/170545_amnesties_factsheet_october_2017_clean_en.pdf.
[12] According to the Larousse French dictionary, an amnesty is "*an act of the legislator which has the effect of extinguishing public action or canceling a penalty applicable to an offence and, consequently, either preventing or halting prosecution, or canceling convictions*", Grand Dictionnaire encyclopédique Larousse, Vol. I, 1982, p. 414. Quoted by the ICRC, *Commentary of 1987 to Article 6 (5) of the Protocol Additional II (1977) to the 1949 Geneva conventions and relating to the Protection of Victims of Non-International Armed Conflicts*, n° 4617. (times new roman)
[13] Article 6 (5) of the Protocol Additional II (1977) to the 1949 Geneva conventions and relating to the Protection of Victims of Non-International Armed Conflicts.
[14] ICRC, *Commentary of 1987…,* n° 4618.

preamble also says that all States have the duty to exercise their jurisdiction over the authors of those crimes[15]. This makes amnesty impossible for these people. The ICRC "*rule 159*" expressly recognizes the existence of an exception to the duty to declare an amnesty to participants in a non-international armed conflict. According to it: "*most amnesties specifically exclude from their scope persons who are suspected of having committed war crimes or other specifically listed crimes under international law*[16]".

It should be pointed out that the ICRC's "*rules*" do not have the force of law and have no value other than doctrinal, but they do reflect the practice of certain States and the case law of criminal courts. In support of its "*rule 159*", the ICRC cites various tribunals, domestic or international such as the Inter-American court of Human rights and the International Criminal Tribunal for the former Yugoslavia, which have held that perpetrators of war crimes are not eligible for amnesty, particularly when torture, arbitrary executions and enforced disappearances, which violate non-derogable human rights, have been used[17].

The practice of the United Nations Security Council also supports amnesties which exclude crimes that are not war crimes though not in a systematic way. Regarding crimes committed during the civil war in Croatia between different ethnic communities, the Security Council "*urges the Government of the Republic of Croatia to eliminate ambiguities in implementation of the Amnesty Law, and to implement it fairly and objectively in accordance with international standards, in particular by concluding all investigations of crimes covered by the amnesty and undertaking an immediate and comprehensive review with United Nations and local Serb participation of all charges outstanding against individuals for serious violations of international humanitarian law which are not covered by the amnesty in order to end proceedings against all individuals against whom*

[15] See preamble of the Rome Statute of the International Criminal Court. The Inter-American Commission on Human Rights, which filters complaints that can afterwards be referred to the Inter-American Court of Human Rights, also makes mention of the existence of an obligation on States to investigate the most serious human rights violations, an obligation arising from the general obligation of States parties to the American Convention on Human Rights to offer effective protection to these rights (Article 1 of the Convention). See Inter-American Commission on Human Rights*, Compendio de la Comisión Interamericana de Derechos Humanos sobre verdad, memoria, justicia y reparación en contextos transicionales,* OEA/Ser.L/V/II. Doc. 121, 12 April 2021, p. 23.
Likewise, article 8 of the *Inter-American convention to prevent and sanction torture* states that "*when there is an accusation or well-founded reason to believe that an act of torture has been committed within their jurisdiction, the States Parties shall guarantee that their respective authorities will proceed ex officio and immediately to carry out an investigation into the case and to initiate, when appropriate, the respective criminal proceedings*".
[16] ICRC, International Humanitarian Law Datase, rule 159 and its commentary, <https://ihldatabases.icrc.org/en/customaryihl/v1/rule159#:~:text=At%20the%20end%20of%20hostilities,suspected%20of%2C%20accused%20of%20or>, consulted on July 17, 2023.
[17] *Ibid*.

there is insufficient evidence[18]". Here, as in the case of Sierra Leone in 2000[19] the Security Council is only endorsing an amnesty as part of a peace agreement on condition that the most serious crimes are left aside and dealt with by an *ad hoc* international tribunal.

The amnesty law in Colombia, provided for in the peace agreements signed in 2016, complies with the above principles of international law. It differentiates between the types of crimes committed during the armed conflict and refers to the Rome Statute of the International Criminal Court:

> "*In no case shall amnesty or pardon be granted for crimes that correspond to the following conducts: a. Crimes against humanity, genocide, serious war crimes, hostage taking or other serious deprivation of liberty, torture, extrajudicial executions, forced disappearance, violent carnal access and other forms of sexual violence, abduction of minors, forced displacement, in addition to the recruitment of minors, in accordance with the provisions of the Rome Statute*[20]*".*

In contrast to Colombian law, which stems from a peace agreement that put an end to a conflict lasting over 50 years, there are amnesties that have granted impunity to the perpetrators of serious human rights violations, which can be called "self-amnesties" when they have been adopted by or for the same perpetrators. To name but a few examples: Chile, El Salvador, and the 1991 amnesty law in Lebanon.

In Chile, the perpetrators of political assassinations during the 1973 coup d'état were granted amnesty by a 1978 decree-law, in the name of "*consolidat*[ing] *the reunification of the Chilean people*[21]*"*, while Pinochet's government continued to take repressive measures against sympathizers of the former republic presided over by S. Allende. The relatives of a victim murdered in 1973 had filed a request for an investigation with the Chilean courts, which was

[18] UN Security Council resolution 1120 of 14 July 1997.
[19] UN Security Council resolution 1315 of 14 August 2000.
[20] Article 22, Ley de amnistía, indulto y tratamientos penales especiales, Acuerdo Final para la terminación del conflicto y la construcción de una paz estable y duradera, 24 August 2016.
[21] "*Whereas […] The country is now enjoying general peace, order and quietness, and the civil commotion stage has been overcome […] It is necessary to rely on strong national unity to support progress towards new institutions to rule the destiny of Chile. The Government has decided to issue the following Decree Law: Section 1 - Amnesty shall be granted to all individuals who performed illegal acts, whether as perpetrators, accomplices or accessories after the fact, during the state of siege in force from September 11, 1973 to March 10, 1978 […] Section 2 - Amnesty shall be further granted to those individuals who, to the date of this Decree Law, have been sentenced by military courts, after September 11, 1973."* Section 3 of the Decree lists a number of common crimes excluded from amnesty (drug-dealing, robbery, rape, etc.). Murder, torture and other gross violations of human rights are not in the list. Decree Law No. 2.191 issued by the de facto government of Chile on April 18, 1978. Cited by the Inter-American Court of Human Rights in *Almonacid-Arellano et al v. Chile,* Judgment of September 26, 2006, p. 30.

rejected. They then turned to the Inter-American court of human rights, which ruled that the Chilean courts' decision was a denial of justice contrary to the right to judicial protection guaranteed by the Inter-American Convention on Human Rights (article 25). The Inter-American court noted that "*Mrs. Gómez-Olivares and her children endured pain and suffering as a result of the fact that those responsible for the death of Mr. Almonacid-Arellano had not been punished*[22]". The court qualified the murder of Mr. Almonacid-Arellano, a member of the Communist party, in the context of other extra-legal executions carried out during the 1973 coup d'État as a crime against humanity, which therefore could not be susceptible of amnesty. It held that the 1978 decree-law "*basically grants a self-amnesty, since it was issued by the military regime to avoid judicial prosecution of its own crimes*" and that this type of amnesty laws "*leave victims defenseless and perpetuate impunity for crimes against humanity. Therefore, they are overtly incompatible with the wording and the spirit of the American Convention, and undoubtedly affect rights embodied in such Convention*". To emphasize the illegality of this amnesty, the court also adds that "*the fact that such provisions have been adopted pursuant to the domestic legislation or against it, is irrelevant for this purpose*[23]".

Another country, El Salvador, adopted a "General Amnesty Law for the Consolidation of Peace" in 2000 in the aftermath of the country's civil war. Article 1 states:

> "*A broad, absolute and unconditional amnesty is granted in favor of all persons who in any way have participated in the commission of political and related crimes, and common crimes committed by a number of persons not less than twenty before January 1, nineteen hundred and ninety-two, whether or not a sentence has been pronounced against such persons, whether or not proceedings have been instituted for the same offenses, or whether or not they have been as immediate or indirect perpetrators or accomplices in the aforementioned criminal acts. The grace of amnesty is extended to the persons referred to in Article 6 of the National Reconciliation Law contained in Legislative Decree Number 147* [24]".

[22] *Almonacid-Arellano et al v. Chile…*, p. 31.
[23] *Ibid.*, p. 51-53.
[24] Inter-American Court of Human Rights, Case n°10.720 (merit) *Massacres of "El Mozote" and surrounding areas v. el Salvador*, Judgement of 13 November 2010, para.47. According to Article 6 of the National Reconciliation Law to which the above article 1 of the Amnesty law refers to: "*This grace will not be granted to persons who, according to the Truth Commission's report, have participated in serious acts of violence that have occurred since January 1, 1980, whose imprint on society demands, with greater urgency, the public knowledge of the truth, regardless of the sector to which they belonged in their case*". *Massacres of "El Mozote"*…, para.46.

In the "*El Mozote*" case, in which the responsibility of the State of El Salvador for the massacre of the population of a village committed by the army had to be established, the Inter-American court of human rights concludes that "*the General Amnesty Law and its application in the present case, are incompatible with the international obligations of the State of El Salvador under the American Convention. As indicated, the facts of this case are extremely serious and constitute crimes against humanity*[25]".

As for Lebanon, the law of August 26, 1991 n°84 relating to the general amnesty for crimes committed before March 28, 1991 (i.e. during the 1975-1990 civil war) belongs to this category of self-amnesty laws. According to article 2 of this law, the following crimes benefit from amnesty:

a) "*Political crimes or crimes of a general or local political nature, including politically motivated homicides, except homicides committed for personal interest (it is the judge who decides on the political motive or personal interest) […]*

f) *Crimes under paragraphs 1, 2, 3, 5 and 7 of the 569 of the Penal Code*"

According to the article 3: "*the following are excluded from the provisions of this law:* […] *assassinations or attempted assassinations of religious or political leaders and Arab and* foreign diplomats".

This amnesty law is selective: it distinguishes between two categories of political homicide, one covered by impunity, the other not. Assassinations of religious leaders and Arab and foreign diplomats are thus excluded from the amnesty (article 3.3 above). The crimes of abduction and enforced disappearance, widespread during the civil war, as well as hostage-taking were not excluded from the amnesty. Moreover, article 2(f) of the law extends amnesty to the crime of torture, which contradicts the obligation of States under international law to investigate crimes of torture and prosecute the perpetrators. Lebanon did not ratify the Washington Convention against Torture (1984) until 2000, and Article 6 of that Convention contains this obligation. But the prohibition of torture and cruel and degrading treatment is enshrined in the 1966 International Covenant on Civil and Political Rights (ICCPR) (article 7), which Lebanon ratified in 1972. This treaty also requires States Parties to "*ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy*", to "*ensure that any*

[25] *Massacres of "El Mozote"*…, para.330.

person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities" and to "*ensure that the competent authorities shall enforce such remedies when granted*". These provisions therefore commit Lebanon to investigating cases of serious violations of the rights protected by the Covenant and to offering the victims of such violations the possibility of obtaining satisfaction before the domestic courts.

This law covered crimes committed by armed groups and militias during the civil war. Some critics suggested that it was essentially designed to protect the leaders of some warring factions from prosecutions and enable them to occupy high-level positions in the country's post-war political institutions[26]. This amnesty would be part of a "*pact of oblivion*" endorsed by the Taef agreement in order to turn the page on a civil war from which no faction emerged victorious or defeated[27].

The amnesty law was criticized by the United Nations Human Rights Committee, which monitors compliance by Lebanon and other States Parties with their obligations under the ICCPR. In the Committee's words: "*The Committee notes with concern the amnesty granted to civilian and military personnel for human rights violations they may have committed against civilians during the civil war. Such a sweeping amnesty may prevent the appropriate investigation and punishment of the perpetrators of past human rights violations, undermine efforts to establish respect for human rights, and constitute an impediment to efforts undertaken to consolidate democracy*[28]*"*.

To characterize this type of amnesty from a legal standpoint, one cannot help but refer to the thinking of Brazilian judge A. Trindade in a concurring opinion to the Inter-American court of human rights' judgment in *Almonacid-Arellano et al v. Chile*:

> "*Self-amnesties are far from satisfying all these requirements. They are not true laws insofar as they are devoid of their intrinsic generic nature, of the idea of Law that inspires them* […] *and of the search for the common good. They do not even seek the organization or regulation of social relations in furtherance of the common good. They are only designed to keep certain facts from justice, cover gross rights violations and*

[26] R. SAADEY, "On Justice Denied : Interrogating Amnesty and Amnesia in Post-conflict Lebanon"; Ch. J. SKAFF, "L'amnistie et la justice transitionnelle…".
[27] G.S. BATTEL, "Beirut's Sunset…", p. 148-149.
[28] Human Rights Committee, "*Consideration of reports submitted by States parties under article 40 of the Covenant. Concluding observations of the Human Rights Committee",* CCPR/C/79/Add.78, 5 May 1997, para.12.

ensure impunity for some individuals. They do not satisfy the minimum requirements of laws; on the contrary, they are illegal aberrations[29]".

However, there are amnesties which guarantee impunity for the perpetrators of serious human rights violations, and which are not deemed contrary to either international law or the constitutional law of the countries concerned. Although such amnesties are rare, especially as they infringe victims' right to access to the courts and reparation, they are strictly part of a reconciliation process that includes other measures designed to build peace. The price to be paid in terms of setting aside of victims' rights to punishment and reparation may be more or less significant, depending on the reconciliation and peacemaking transitional justice process, of which amnesty can only be one element but also on the conditions attached to it.

B. Amnesties linked to a transitional justice process

Though international law prohibits, as seen earlier, the granting of amnesty to perpetrators of war crimes or gross violations of human rights, this prohibition is not absolute. No treaty explicitly formulates such a prohibition. The ICRC "*rule 159*" uses the terms "*most amnesties*" and not "*all amnesties*". As for the caselaw, according to the Special Court for Sierra Leone (SCSL): "*it is accepted that such a norm* [prohibiting States to grant amnesty for violations of international crimes] *is developing under international law*[30]*"* i.e. this standard is not fully considered as a rule of international law. One author pointed out that "*the UN Human Rights Committee (HRC) has said that amnesties for State officials for torture are 'generally incompatible' with obligations to investigate, prosecute and prevent human rights violations, although the word 'generally' introduces some doubt into the matte*r" and concluded a few paragraphs later that "*A complete prohibition may not yet have completely emerged, but the scope for lawful amnesties has narrowed*[31]*"*.

The Security Council is also implicitly aligned with this interpretation. In 1996, it had "*commend*[ed] *the Government of Angola for the promulgation of the Amnesty Law*"[32] as one of several measures aimed at consolidating the peace process following the civil war in the country. The Security Council made no remarks as to the absence, in the Amnesty law, of an

[29] *Almonacid-Arellano et al v. Chile…*, Concurring opinion of judge A.A. Cançado-Trindade, p. 3, para.7.
[30] Case *Kallon and Kamara*, Special Court for Sierra Leone, Appeal Chamber, 13 March 2004, para. 82.
[31] R. CRYER, D. ROBINSON & S. VASILIEV, *An introduction to international criminal law and procedure*, Cambridge University Press, 4th ed., 2019, p. 537.
[32] UN Security Council resolution 1064 of 11 July 1996.

exclusion for war crimes or gross violations of human rights. This amnesty was branded "blanket amnesty" by an author[33] as it covered all crimes committed during the conflict without any conditions imposed on the perpetrators. But it was deemed, by the authorities and the UN Security Council, necessary to bring a definitive end to a long and bloody confrontation between a government army and a rebel force and to integrate the representatives of the latter into the democratic structures of the State. Indeed, in its resolution, the Security Council "*Urges […] the Government of Angola and UNITA to take all necessary steps for all elected members of Parliament to take their seats in the National Assembly, for moving constitutional issues forward in a spirit of national reconciliation, and for the formation of the Government of Unity and National Reconciliation, and for the incorporation of UNITA personnel into the State administration, the FAA and the national police*[34]".

The most prominent example of amnesty granted to perpetrators of serious human rights violations and considered fair and in accordance with the law is South Africa. Amnesty was part of a reconciliation process but, unlike Angola, it was also duly conditioned. It was anchored in the country's 1993 constitution which speaks, in its preamble, of the necessity to "*transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge […] In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past"*.

The above preamble expressly sees amnesty as a tool for overcoming deep-rooted divisions between communities and establishing lasting peace within society. The worst human rights violations were covered by amnesty, provided they were politically motivated at the time when they took place, in the period established by law, from the start of the Apartheid regime to the establishment of the new democratic regime. The legislative basis for the amnesty is the "Promotion of national unity and reconciliation Act 34 of 1995", which created the TRC, the body responsible for carrying out the reconciliation process. This law entrusts the TRC with the following objectives which go beyond a mere amnesty: establishing the causes and the facts related to gross human rights violations; granting amnesty to those who "*who make full disclosure of all the relevant facts relating to acts associated with a political objective*"; "*establishing and making*

[33] J. V. WICK, "Amnesty for War Crimes in Angola: Principled for a Day?", *International Criminal Law Review* 12 (2012) 743–761, p. 748.
[34] UN Security Council resolution 1064 of 11 July 1996.

known the fate or whereabouts of victims", restoring the dignity of surviving victims by involving them in hearings organized by the TRC and recommending compensation for them; compiling a final report with the findings and recommendations aimed at preventing future violations of human rights[35].

In this 1995 Act, amnesty cannot be dissociated from the other objectives mentioned, insofar as it is one of the indispensable elements of the reconciliation process. This influenced the way in which the Constitutional court of South Africa considered that the amnesty provided for in the law was not in contradiction with international law[36]. The court was careful to point out the specific nature of the conflict in South Africa, which goes beyond the strict scope of the 1977 Protocol II related to non-international armed conflict between a State and a non-State group seeking to liberate the country from foreign rule. It is rather a "*struggle between the armed forces of that state and other dissident armed forces operating under responsible command, within such a state*[37]*"*. And the crimes committed during this struggle do not qualify as war crimes, but rather as crimes against humanity or gross violations of human rights. In the absence of any norm expressly provided for in international law for this type of internal conflict, the court relied as much on doctrine as on an extended interpretation of article of 6 (5) of Protocol II.

With the end of the conflict comes the need to repair the wounds and rebuild the country, imperatives which, for the South African constitutional Court, are not compatible with a demand for punishment. Combatants of the two sides must learn to coexist, to reconcile and overcome the trauma of the conflict together with the rest of the population, which is itself also divided. Here, the constitutional Court sees nothing in international law which would prohibit the new constitutional powers in charge of the country to grant an amnesty to the perpetrators of the most serious crimes committed during the conflict[38].

The South African court also addressed the dilemma posed by any amnesty and, even more so, by an amnesty that includes the perpetrators of gross human rights violations: by facilitating the restoration of lasting peace and the reconstruction of the country, the rights of victims or their families to demand criminal condemnation and to seek financial compensation

[35] Promotion of national unity and reconciliation Act 34 of 1995, chapter 2.
[36] *AZAPO vs. The president of the Republic of S.A and others*, Constitutional Court of South Africa, Case CCT 17/96, decision of 25 July 1996.
[37] *AZAPO vs. The president of the Republic of S.A and others*, para.31.
[38] *Ibid.*, para.29-31.

for the harm suffered are set aside[39]. For the court, it is justified, in the South African context, to extend the "act of oblivion" - which applies to criminal liability - to civil liability, as it is the price to pay if the planned objective is to be met: "*Without that incentive [of oblivion] the wrongdoer cannot be encouraged to reveal the whole truth which might inherently be against his or her material or proprietary interests* [40]". The constitutional judges perceived that for many victims' families, the most important thing was to know the truth about the circumstances surrounding the death of their son, father or parent. In his foreword to the TRC's final report, the Commission's chairperson Archbishop D. Tutu wrote:

> "*I recall so vividly how at one of our hearings a mother cried out plaintively, "Please can't you bring back even just a bone of my child so that I can bury him." This is something we have been able to do for some families and thereby enabled them to experience closure*[41] *".*

This objective of revealing the truth in all its aspects, even the most difficult and painful as described above, enables the families concerned to take a step forward on the long road to repairing wounds and overcoming suffering. This is what characterizes this type of transitional justice, which is essentially restorative and not punitive. The truth was actually revealed (when it is revealed, which has not always been the case in practice) in public, during sessions that were often broadcast on radio and television so that the whole country could be informed.

The depth of the divide in South African society - where part of the population had supported the apartheid system - made it difficult, if not impossible, to opt for a punitive and retributive justice system to address the crimes of the past. The restorative justice was chosen not only because of its capacity to heal the wounds and to restore dignity for the victims[42], it also dealt with the restoration of the offenders, their families, and the community at large[43]. As the TRC final report states:

> *"The potential of an individualized, accountable amnesty process as a contribution to the rehabilitation of perpetrators and their reintegration into the new society should not be underestimated. Judge Mahomed*[44] *has stressed that amnesty also exposed perpetrators to*

[39] Victims are entitled to reparation measures from the State, but this assistance remains modest due to the State's limited resources.
[40] *Ibid.*, para.33-35.
[41] TRC Final report, vol. 1, p. 7, para.29. <https://www.justice.gov.za/trc/report/index.htm>, consulted on July 5, 2023.
[42] Their dignity was doubly violated: as blacks or Indians, their social and economic status was inferior to that of whites; as resistance fighters against the system, they were subjected to repression, murder, torture and imprisonment.
[43] TRC Final report, vol. 1, p. 125.
[44] Judge at the Constitutional court of South Africa.

"opportunities to obtain relief from the burden of guilt or an anxiety they might have been living with for years". Without this opportunity, many might remain "physically free but inhibited in their capacity to become active, full, and creative members of the new order[45]".

It is worth mentioning here an additional reason why transitional justice was chosen, in South Africa as in other countries that have introduced it, Rwanda in particular: the physical inability of traditional courts to cope with the influx of requests at a time when the country lacks the financial means to train judges and cannot afford to drag out the reconciliation process over long periods of time.

The emphasis on liberating the expression of the truth is central to South Africa's amnesty mechanism, and the centerpiece of the transitional justice process. For this reason, the Commission in charge of this process is called the "Truth and Reconciliation Commission". The unleashing of the truth is also central for the legality of the transitional justice process. The amnesty mechanism was judged by the Constitutional Court to be in conformity with the country's constitution and international law because, as already mentioned, it was conditional on full disclosure of the truth by the perpetrators of gross human rights violations, not to mention the fact that it was also part of a reconciliation process including other measures such as the formation of a government of national unity, the organization of free and fair elections and the drafting of a new democratic constitution. As we saw above, there was no such mechanism of truth disclosure (and no TRC at all) in the amnesty law in Angola. That amnesty was total and unconditional but was still deemed acceptable and commendable because it was necessary and complementary to the process of integrating members of the rebel forces into the institutional structures of the State (government, parliament, army, etc.). The aim was to build understanding and trust between yesterday's military adversaries[46].

The experience of the TRC and its public hearings, widely publicized by the media, has inspired other countries to choose the transitional justice model. This is all the more true as the revelation of the truth about crimes committed has, since the experience of the South African TRC, become a legal requirement and a condition for success in most reconciliation and transitional justice processes around the world. But problems may arise regarding the legality and the legitimacy of these processes. The right to know the truth is put into practice through

[45] *Ibid..*, p. 130.
[46] Colombia's amnesty law, mentioned in this article, is also part of a transitional justice process that includes other measures, but the amnesty itself is conditional on the surrender of weapons and does not cover serious human rights violations.

the widespread use of the spoken word in an extra-judicial or non-conventional judicial setting, characteristic of transitional justice. Such non-conventional frameworks are *a priori* devoid of the guarantees offered by the judicial system in terms of the balance between the rights of the defense and the prosecution. This balance may also be threatened by the celerity sought by transitional justice.

II. The right to the truth and the liberation of speech before transitional justice

Freeing up the right to speak for victims, perpetrators of human rights violations and the community as a whole is at the heart of many transitional justice systems. The two most emblematic examples, and at the same time different from each other, are South Africa and Rwanda. As we have seen, the South African mechanism is characterized by amnesties granted by the commission and conditional on the revelation of the truth. The Rwandan transitional justice mechanism is not steered by a truth commission and makes no provision for amnesties for perpetrators and participants in the 1994 genocide. Non-judicial tribunals, named "Gacaca", have been set up and hold hearings with the participation of the population, who are encouraged to express their views on the facts of which they have knowledge.

The right of victims, perpetrators of human rights violations and the community to have their voice heard is associated with the right to the truth, insofar as the truth emerges from debate and the cross-fertilization of testimonies. The TRC hearings in South Africa were held in buildings whose entrances were adorned with posters or banners bearing the words: "The truth shall set us free". The examples of South Africa and Rwanda confirm the recognition of the right to the truth as a human right and a legal obligation of the State, a consecration adopted in the legal systems of other countries, in particular Lebanon. This obligation is also anchored in international law (A). But unlike Lebanon and other States, South Africa and Rwanda have made the right to speak out and the right to the truth central tools in the transitional justice process, with the risk, particularly in Rwanda, of affecting the balance between the rights of the defense and the prosecution (B).

A. The recognition of the right to know the truth in domestic and international law

The Rwandan law of 2004 creating the transitional justice mechanism speaks, in its preamble, of a "*duty to testify*" which is *"a moral obligation of every patriotic Rwandan, no one*

being entitled to shirk it for any reason whatsoever[47]*"*. This moral obligation is a legal obligation, as indicated by the Article of this law, which states that "*Participating in the activities of the Gacaca Jurisdictions is an obligation for every Rwandan*".

There is a direct justification for the State to make the right to speak an individual duty for every Rwandan. It is provided by the same preamble: "*Considering that these offences were committed publicly, before the eyes of the population, that it must therefore relate the facts, reveal the truth and participate in the prosecution and judgment of the presumed perpetrators*[48]*"*. The characteristic feature of the Tutsi genocide – close to a million deaths - is that it took place in the streets and public spaces, and with the participation of a section of the population of Hutu origin. In many instances, Tutsis were murdered by their neighbors, indoctrinated by the genocidal ideology conveyed by the media, in particular by the "*mille collines*" radio station[49]. After the defeat of the genocidaires and the end of the massacres, surviving victims and participants in the genocide had to coexist. As Rwanda president P. Kagamé put it:

> "*What does justice mean when millions of people participated? What does reconciliation mean when perpetrator and victims see each other in the market every day? The rebuilding process required us to find the right balance. To achieve this, we chose Gacaca, a community-based system of conflict resolution that would deliver restorative justice, as well as bring the society back together*[50]".

These words from President Kagamé clearly demonstrate the importance of the oral testimonies in the transitional justice process and help us to understand the decision to create extra-judicial tribunals, the *Gacaca*, to deal with the mass of crimes committed and the mass of people involved in them. In the space of 10 years, some two million cases have been handled by these courts[51], competent to issue prison sentences. No conventional justice system could

[47] Loi organique n° 16/2004 du 19/6/2004 portant organisation, compétence et fonctionnement des juridictions *Gacaca* chargées des poursuites et du jugement des infractions constitutives du crime de génocide et d'autres crimes contre l'humanité commis entre le 1er octobre 1990 et le 31 décembre 1994 (Organics Act on the organization, jurisdiction and operation of the Gacaca courts responsible for prosecuting and trying offences constituting the crime of genocide and other crimes against humanity committed between October 1, 1990 and December 31, 1994).
[48] *Ibid*.
[49] See, among the books written on the subject: J. CHATIN, *Paysages après le genocide. Une justice est-elle possible au Rwanda?*, Le temps des cerises, 2007, p. 280; G. PRUNIER, *The Rwanda Crisis: History of a genocide*, Colombia University press, 1995, p. 389.
[50] P. KAGAME, <https://www.paulkagame.com/speeches/>, accessed April 23, 2014.
[51] These extra-judicial tribunals are exclusively composed of non-professional magistrates.

have achieved this, *a fortiori* in a country where institutions were partly destroyed after the genocide.

The public's obligation to testify includes a duty to tell the truth. Refusal to testify and false testimony are both mentioned in the same article 29 of the 2004 Organic Act. Their violation leads the Gacaca to pronounce the same sanction, in the form of a prison sentence of 3 to 6 months, extended to one year in the event of recidivism[52].

The duty to tell the truth also applies to the exclusively non-professional judges who make up the Gacaca courts[53]. The law states that these judges must be Rwandans of integrity, which means, among other criteria, that they did not participate in the genocide but also that they "*always tell the truth*" and "*be characterized by the spirit of sharing the floor*[54]".

The duty to tell the truth applies, of course, to the suspects themselves as the Gacaca courts receive "*confessions, guilty pleas, repentance and apologies from the perpetrators of crimes of genocide*[55]". This is a special procedure that allows perpetrators of crimes – even of the most serious ones - to have their sentences commuted[56]. Article 54, which regulates this procedure, requests from the defendants that: "*To be received as an admission of guilty plea, repentance and apology, the statements* […] *must contain: a detailed description of everything related to the admitted offence* […] *information on co-authors and accomplices [...] apologies for the offences committed* […]". The same article shows that the right to the truth, which is the counterpart of the duty to tell the truth, is not only an individual right but also a collective one: "*The request for an apology is publicly addressed to the victims, if they are still alive and to Rwandan society as a whole*". The combined implementation of the duty to tell the truth and the right to the truth is therefore central to showing that transitional justice has a primarily non-punitive aim and is intended to reconcile people and reconstitute the social fabric of the country.

[52] Article 29 of the 2004 Organic Act.
[53] These judges are elected by district general assemblies. Among the other criteria of election: no political activities, no employment contract with the state administration. Article 14 of the 2004 Organic Act.
[54] *Ibid*.
[55] Article 34 (2) of the 2004 Organic Act.
[56] Article 55 of the 2004 Organic Act. According to article 72: "*Defendants in the first category who did not wish to resort to the procedure of confession, plea of guilty, repentance and apology [...] or whose confession, plea of guilty, repentance and apology were rejected, shall incur the death penalty or be sentenced to death. confession, guilty plea, repentance, and apology have been rejected, shall be liable to the death penalty or life imprisonment. Defendants in the first category who have used the procedure of confession, guilty plea, repentance and apology [...] are liable to a prison sentence of between a maximum of twenty-five (25) to thirty (30) years' imprisonment*".

In South Africa, in contrast to Rwanda, the gross violations of human rights and crimes against humanity did not take place in the public arena, and the entire country was only able to gauge the scale of these crimes thanks to the mass of testimonies presented publicly before the Commission[57]. As the TRC's final report notes: *"Each of the statements had to be investigated so that the Commission could be assured of its veracity. This task was carried out by the Investigation Unit and is fully described in its report[58]".*

Regarding the duty to tell the truth in the South African transitional justice mechanism, the 1995 Act requires the person applying for amnesty to make "*a full disclosure of all relevant facts" and to show that "the act, omission or offence to which the application relates is an act associated with a political objective committed in the course of the conflicts of the past*[59]". This political motive requirement excludes acts committed for personal gains, acts "*out of personal malice, ill-will or spite, directed against the victim of the acts committed*[60]". The collective nature of the right to the truth is also present, as indicated by the words of the President of the TRC: "*apart from the most exceptional circumstances, the application is dealt with in a public hearing. The applicant must therefore make his admissions in the full glare of publicity*[61]".

In Lebanon, the right to the truth did not emerge with the amnesty law, which, as we have seen, was not conditioned by a requirement to reconstitute the truth about the civil war. The right to truth is crystallized in the law on missing persons passed in 2018, 28 years after the end of the civil war during which many people went missing or forcibly disappeared[62]. Implementing this right is the aim of the law. As stated in its article 2:

> *"Family members and close parties have the right to know the fate of their missing or forcibly disappeared family members and relatives, their whereabouts, the location of their detention or abduction, and the location of their remains, which they shall also be entitled to obtain. This*

[57] In South Africa, in contrast to Rwanda, the numerous violations and crimes against humanity did not take place in the public arena, and the entire country was able to gauge the scale of these crimes thanks to the mass of testimonies presented publicly before the Commission.
[58] TRC report, vol. 5, p. 9.
[59] Promotion of national unity and reconciliation Act 34 of 1995, article 20. Paragraph 3 of this article lists and explains the criteria required for an act to be considered politically motivated.
[60] Promotion of national unity and reconciliation Act 34 of 1995, article 20.
[61] TRC Final report, vol. 1, p.7.
[62] Law 105 "Missing and Forcibly Disappeared Persons". Article 1 of the law makes a clear distinction between these two situations. Unlike people who disappear in the general context of war or natural disaster, there are people who disappear following arrest, detention or abduction organized by agents of the state or armed groups, who refuse to provide information about these disappearances.

right also includes burial site location, collection, exhumation, and examination of remains, and determining the identity thereof".

In conjunction with this individual right to the truth, article 3 of the law gives families the right to access all information on the fate of their missing relative. This right is a claim on the State, which is obliged to inform a commission in charge of centralizing information and conducting research on missing persons[63] or to directly inform the families upon decision of the judiciary. To give full effect to the right to the truth, this right is translated into various obligations. The law creates an obligation to disclose any information relating to the fate of a missing person. This obligation applies not only to the State and its administration, but also to any public or private institution or individual in possession of such information[64]. It is not owed directly to the families of the people concerned, but to the commission and to the committee responsible for exhuming and identifying the remains of missing persons found dead. Another obligation arising from the right to the truth is that of the State to exchange information and cooperate with "*the International Committee of the Red Cross (ICRC), the [United Nations'] Office of the High Commissioner for Human Rights (OHCHR), the Commission, the Lebanese Red Cross, or with any other humanitarian organization, in accordance with their respective mandates*[65]*"*.

The right to the truth - and the rights and obligations that flow from it - are anchored in international law, as demonstrated by certain treaties, resolutions of United Nations bodies and the caselaw of regional courts.

First, there's the Protocol I additional to the 1949 Geneva conventions, which is not only an international convention, but also, for most of its provisions, a crystallization of international customary law, and therefore binding on all States. Article 32 enshrines, as a general principle of humanitarian law, the right of the families to know the fate of their relatives. As a consequence of this principle, article 33 obliges the parties to a conflict to "*search for the persons who have been reported missing by an adverse Party*". The parties in question are States, as this protocol applies to international armed conflicts. Additional Protocol 2, which applies to non-international armed conflicts (such as civil wars, involving non-State groups), is considerably more succinct, but makes implicit reference to the right of families to know the fate of their

[63] The National Commission for the Missing and Forcibly Disappeared in Lebanon established by this law. Article 9 of the law specifies that the commission is not an organ of the State as it "*shall be established with a legal personality and administrative and financial independence*" and its "*members shall carry out their tasks in complete independence from any other authority*".
[64] Law 105 "Missing and Forcibly Disappeared Persons", art. 6.
[65] *Ibid.*, art. 7.

missing relatives when it obliges the parties to the conflict "to search for the dead, prevent their being despoiled, and decently dispose of them[66]".

The International Convention for the Protection of All Persons from Enforced Disappearance (2010) protects specifically the "*right of any victim to know the truth about the circumstances of an enforced disappearance and the fate of the disappeared person*" and imposes on States obligations which derive from this right. But this text is less well ratified than the additional protocols to the Geneva conventions[67].

Nevertheless, it can be said that the right to the truth for the families of the missing has become part of international customary law, not only because of the Additional Protocols to the Geneva Conventions, but also because it was the subject of a resolution of the United Nations General Assembly adopted without a vote (i.e. by consensus of all States)[68]. Furthermore, the General Assembly declares in this resolution that the right to the truth is important in helping to put an end to impunity for the perpetrators of serious human rights violations and calls on the States concerned by this impunity to establish an extra-judicial transitional justice mechanism, including, for example, the establishment of a truth and reconciliation commission modelled on those already set up by other States.

The right to the truth is enshrined in international jurisprudence, notably by the Inter-American Court of Human Rights, which has dealt with a number of cases linked to enforced disappearances, one of the most common human rights violations in situations of armed conflict in Latin America. In the *Aledaños* case, the right to the truth, linked to the right of access to information, is an individual right for victims which entails for the State an obligation to investigate: *"the right of access to justice must ensure, within a reasonable time, the right of the presumed victims or their next of kin that everything necessary is done to discover the truth about what happened and to investigate, prosecute and punish, as appropriate, those eventually found responsible*[69] *"*.

But the Court also relies on the right to expression to enshrine the right to the truth, since Article 13 of the American Convention on Human Rights (the Court's first legal reference)

[66] Protocol Additional to the Geneva Conventions of 12 August 1949, Article 8. Lebanon is party to this convention.
[67] 71 States parties. Lebanon has still to ratify the convention.
[68] Resolution 68/165 "Right to the truth" of 18 December 2013. A year earlier, the United Nations Human Rights Council had also adopted by consensus a resolution on the right to the truth, with similar content. See Resolution 21/7 of 27 September 2012, document A/HRC/RES/21/7.
[69] *Aledaños v. El Salvador*, Inter-American court of Human rights, 25 October 2012, para.242.

makes the right of access to information (coupled with the right to the truth) a component of freedom of expression and protects it in the same way as the latter[70]. The Court thus declared: "*Regarding the alleged violation of Article 13 of the Convention, the Court recalls that any person, including the next of kin of victims of grave human rights violations, has the right to know the truth, under Articles 1(1), 8(1) and 25 and also, in certain circumstances, Article 13 of the Convention; therefore, they and society in general must be informed of what happened*[71]". In this extract, the court also makes the right to the truth a collective right, in reference to the context of society's post-conflict transition, which must go through a phase of truth-telling and reconciliation. This position of the court is a constant jurisprudence[72]. But the judges make it clear that the establishment of a transitional justice process does not exempt the State and its classic courts from their duty to seek out and establish the truth:

> *"In addition, the Court considers it pertinent to reiterate, as it has in other cases, that, in compliance with its obligation to guarantee the right to know the truth, States may establish truth commissions, which contribute to the creation and preservation of the historical memory, the elucidation of the facts, and the determination of the institutional, social and political responsibilities during certain historical periods of a society.482 Nevertheless, this does not complete or substitute for the State's obligation to establish the truth through judicial proceedings*[73]*".*

The common practice of enforced disappearances during armed conflicts in Latin America, and in particular in El Salvador (to which several of the Court's cases refer) and the silence kept by certain States over the fate of the victims have led the Court to consider this silence as a violation of victims' rights as much as the crime of kidnapping itself: "*the lack of*

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[70] Article 13 (1) states: "*Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice*". The right of access to information appeared initially in the 1948 declaration of human rights as a component of freedom of expression (article 19). The 1966 International Covenant on Civil and Political Rights, a binding text for the 173 States that have ratified it (unlike the Declaration), also protects the right of access to information as included in freedom of expression.

[71] *Aledaños v. El Salvador*, para.298. The articles *1(1), 8(1) and 25* referred to by the Court concern respectively to the undertaking by States parties to respect the rights recognized in the American Convention on Human Rights, the right to an independent and impartial tribunal and everyone's "*right to simple and prompt recourse […] to a competent court […] for protection against acts that violate his fundamental rights recognized by the constitution or laws of the State concerned or by this Convention*".

[72] As example of previous rulings, in the case *Romero v. El Salvador*, the Court held that: "*The right that all persons and society have to know the full, complete, and public truth as to the events transpired, their specific circumstances, and who participated in them is part of the right to reparation for human rights violations, with respect to satisfaction and guarantees of non-repetition. The right of a society to have full knowledge of its past is not only a mode of reparation and clarification of what has happened but is also aimed at preventing future violations". Romero v. El Salvador,* Inter-American court of Human rights, 25 October 2012, para.148.

[73] *Aledaños v. El Salvador*, 13 April 2000, para.298.

complete, objective and truthful information about what happened during these periods has been a constant, a State policy and even a 'war strategy', as in the case of the practice of forced disappearances[74]". As long as access to information is denied to the victims' next-of-kin, the weapon used by the State still has an effect on them. Putting an end to it is therefore essential to put an end to their suffering.

As we have seen so far, the right to know the truth, as anchored in international law, is essentially a claim on the State to reveal information in its possession or to investigate the fate of victims and pass on information to their next-of-kin. This is a fundamental human right. But in the context of a transitional justice process not limited, as in Lebanon, to an unbalanced amnesty law and a law on people forcibly disappeared, this right must be articulated with the need to involve not only the State and its agents, but also the victims, their families and the largest possible number of people in the population, in order to bring out the truth from all angles. As we have seen, this helps to foster reconciliation. This has been the case in South Africa and Rwanda, both of which have passed legislation to encourage this process of freeing speech, with Rwanda going so far as to establish a duty to tell the truth[75]. But the reliance on oral testimony and the liberation of speech before non-conventional, transitional justice bodies has not been without tension with the right to know the truth and the right of defense for the accused.

B. The right to the truth in tension with the freedom of speech and the rights of the defense

The relationship between the right to know the truth and the duty to speak and tell the truth is not straightforward under international law. The obligation to tell the truth established in the Rwanda 2004 legislation does not exist in international law, but it is not *a priori* contrary to it as it is not addressed to accused persons and therefore does not breach the fair trial principle[76]. It rather constitutes a social (patriotic) necessity for the success of the transitional

[74] Inter-American Commission of Human Rights, "Compendio sobre Verdad, Memoria, Justicia y Reparacion en Contextos Transicionales", OEA/Ser.L/V/II., Doc. 121, 2021, p. 77, para.109.
[75] As seen above, the 2004 Rwandan law which establishes a "duty to testify" and makes it an obligation for every citizen to participate in the activities of the extrajudicial Gacaca courts.
[76] The principle of fair trial is protected, among other texts, by the International Covenant on Civil and Political Rights, which guarantees the rights of the defense, including the right to silence and, implicitly, the right not to tell the truth. According to Article 14 (3) of the ICCPR: "*In the determination of any criminal charge against him,*

justice process. The aim is not only to reconstitute the truth but also to reconcile the population insofar as the 1994 genocide was a mass crime which was accomplished in public places.

Nevertheless, the emphasis placed on unleashing the word in trials conducted by non-judicial tribunals has led to some difficulties. First, the difficulty of striking the right balance between rigorous respect for the search for truth and the need for therapeutic and restorative justice. Second, the difficulty of striking the balance between the rights of the defense and the rights of the prosecution in proceedings before non-conventional, judicial bodies.

The first difficulty stems from the potentially insufficient reliability of testimonies. The climate of violence that still persists in the aftermath of a conflict can lead to pressure and threats from those seeking to conceal their responsibilities against those who wish to speak out, particularly witnesses for the prosecution (victims) or even for the defense. Numerous gross violations of human rights were committed, in South Africa, by skilled professionals working as agents of the former Apartheid regime and trained, as the TRC final report wrote: " *in the art of concealing their crimes and destroying evidence*. *They are thus notoriously difficult to prosecute and to prove guilty beyond reasonable doubt*[77]". The report goes on to mention the difficulty of finding people willing and able to testify, and the problem of evidence gathered from the memories of survivors and other traumatized people, which hardly meets the criteria of objectivity and corroboration required by the rules of procedure and evidence used by conventional courts[78]. This justifies recourse to non-judicial tribunals which rely primarily on the oral testimony of any individual and cannot apply the same level of proof due to the difficulty of corroborating statements about alleged crimes which, in the case of South Africa, could have taken place many years before the TRC hearings or the virtual absence of eyewitnesses or even the difficulty of identifying the perpetrators[79].

Therefore, the TRC, in charge of corroborating statements openly rejected purely "technical" approaches of proof and evidence used by classic judicial tribunals and took into consideration most statements except those "glaringly inconsistent and false". Because the transitional process put the emphasis on restorative justice rather than on punishment, the TRC prioritized a "*moral and therapeutic process that aimed at acknowledging suffering and giving victims*

everyone shall be entitled to the following minimum guarantees, in full equality: […] (g) Not to be compelled to testify against himself or to confess guilt".

[77] TRC Final report, vol. I, para. 72, p. 122-123.

[78] *Ibid.*

[79] *Ibid.*

an opportunity to tell their stories[80]*"*. The constant challenge for the TRC was to guarantee the need for a therapeutic and restorative process without running the risk of accepting unreliable statements concerning the existence of serious human rights violations and supposed victims. The Commission's report acknowledges the difficulty of maintaining this balance: "*In general, the Commission sought to be both therapeutic in its processes and rigorous in its findings, but sometimes the effort to satisfy one objective made it more difficult to attain the other*[81]*".*

One can say here that transitional justice, with its non-judicial bodies and tribunals, does a work that ordinary justice cannot do, by giving greater weight to the spoken word and to testimony, but at the same time it remains at the mercy of errors detrimental to the right to know the truth. In this dilemma, the right to know the truth comes into conflict with the principle of restorative justice. In South Africa, this dilemma could only be resolved on a case-by-case basis by the TRC, whose decisions had sufficient legitimacy whatever they were, since this body had exclusive jurisdiction and enjoyed complete independence under the 1995 law that established it[82]. In Rwanda, the same dilemma could also be resolved by the *Gacaca* courts, which decided by consensus or, failing that, by an absolute majority of their members[83]. Both the TRC and the Gacaca also had legitimacy stemming from their composition[84]. This does not mean that all the decisions taken by these bodies have been accepted by everyone.

A second difficulty arising from the liberation of speech before non-conventional, transitional justice, bodies is specific to the judicial nature of bodies, such as the *Gacaca* courts in Rwanda and concerns the respect of the rights of the accused. The *Gacaca* in Rwanda had, as we have seen, powers like those of conventional criminal courts (investigations, hearings, sentencing) and were therefore subject to the requirements of the principle of fair trial, in particular the balance between the rights of the defense and the rights of the prosecution. Shortcomings were noted such as lack of competence on the part of certain *Gacaca* members,

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[80] *Ibid.*, p. 142-144.
[81] *Ibid.,* p. 144
[82] According to article 36 of the 1995 Act : "*The Commission, its commissioners and every member of its staff shall function without political or other bias or interference and shall, unless this Act expressly otherwise provides, be independent and separate from any party, government, administration, or any other functionary or body directly or indirectly representing the interests of any such entity*."
[83] 2004 Organic Act, article 29.
[84] TRC members were appointed by Head of State Nelson Mandela in consultation with the government (article 7 (1) of the 1995 Act), at the time a government of national unity representing the country's main political forces, including the opposition. The TRC was chaired by a man of consensus, the 1984 Peace Nobel prize winner, Archbishop D. Tutu and included representatives of different layers of society. In Rwanda, the legitimacy of the *Gacaca* tribunals was based, as we have seen, on the criteria of integrity required of their members, as well as on their election by the district assemblies.

lack of respect for the adversarial process, insufficient motivation of certain judgments, etc.[85] These shortcomings are not surprising, given that these are tribunals made up of non-professional magistrates, involved in intense work and subject to schedule imperatives[86]. Training courses have been organized for these tribunals, and the shortcomings observed have not, far from it, been such as to discredit the work carried out as a whole. It should also be remembered that these shortcomings did not concern the rights of the accused of the most serious crimes ("category I" in the law). These had their cases transferred to ordinary courts.

The two difficulties discussed above, which generate tensions between the search for the truth and the need for transitional justice, on the one hand, and between the rights of those accused of serious human rights violations and the rights of civilians and victims, on the other, have not been such as to derail the transitional justice processes in the two countries under consideration. In South Africa, however, some of the TRC's decisions (on amnesties in particular) met with criticism, and the final report was itself badly received by the political parties who had tried, unsuccessfully, to influence its content, which made reference to their factual responsibility for human rights violations[87]. But the politicians had to come to terms with the publication of this report in the name of the need, accepted in principle by all, for reconciliation and the need for them to address the people as a whole (beyond racial differences) in order to campaign and maintain their influence.

It is difficult to assess fully the degree of success of the TRC and the *Gacaca* in repairing wounds and reconciling society in each of these countries, as these processes take time and necessarily go beyond the mere lifespan of the transitional justice process itself. However, it seems undeniable that these transitional bodies have succeeded in bringing to the fore, much more than factual truth coming from evidence collected directly at the scene of the crime committed during the conflict, what the South African constitutional court judge A. Sachs called the "dialogue truth" or "social truth", "*the truth of experience that is established through interaction,*

[85] Avocats sans frontières, *Monitoring des juridictions Gacaca phase de jugement*, rapport analytique n° 5, janvier 2008 - mars 2010, p. 22 *ff*.

[86] The *Avocat sans frontières* report notes that, "*as many individuals and organizations have already pointed out, the Gacaca process was over-ambitious in terms of objectives, scope and timeframe. It was intended to bring about truth, reconciliation, the fight against impunity, reintegration and justice for most of the crimes committed during the genocide. Initially designed to deal with the cases of 130,000 people in pre-trial detention, it eventually led to the trial of over a million people. All this in a record time of five year*s". This report was written well before the end of the *Gacaca* work in 2012.

[87] A. Krog, *Country of my skull*, Vintage, London, epilogue to the 1999 edition, p. 426-449. The final report pointed to certain responsibilities on the part of N. Mandela's ANC, even though it also noted that this party was waging a just war. A. Krog noted (p. 433) the report's distinction between "*just war*" and "*unjust means*".

discussion and debate[88]". From this collective truth arose the beginnings of a collective narrative about the past, a foundation of collective memory in which the different components of the nation formerly in conflict could find themselves in order to overcome this painful past and envisage a common future. As the TRC final report put it: "*An inclusive remembering of painful truths about the past is crucial to the creation of national unity and transcending the divisions of the past*[89]".

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The various transitional justice processes carried out in South Africa, Rwanda and other countries we have mentioned in the course of this study provide some interesting lessons for Lebanon and its unfinished transitional justice process.

These transitional justice process required the participation of as large a section of the population as possible. This was not a simple task, given the deep divisions in the South African and Rwandan societies. The participation required was not just of all victims, but of the population as a whole, without discrimination and beyond any particular community. The bodies responsible for transitional justice, and thus for launching the reconciliation process, were endowed with real power. Amnesty (in the case of South Africa and Colombia) is just one of the mechanisms of transitional justice, which is itself linked to a process of institutional reform, in the case of South Africa and Rwanda, leading to a new constitution guaranteeing the equitable participation of different communities in power and their equal rights.

We must add here an important feature common to all these processes, and which conditions the effectiveness of their implementation: the reconciliation process can only be designed by the country concerned itself, and not under the pressure of external sanctions, let alone sanctions targeting individuals from a particular camp or community. International unilateral sanctions or pressure are capable of destabilizing efforts to ease tensions between different communities. Lebanon has not been exempted from partisan (community) political intervention and external pressure. As one author put it: "*political contingencies prevent the duty of justice from being fulfilled, or limit it to specific cases, such as the Special Tribunal for Lebanon (STL), which held the trial in absentia of the alleged perpetrators of the assassination of former Prime Minister Rafik Hariri in 2005. Indeed, this tribunal is not the fruit of an internal political agreement*[90]".

[88] TRC Final report, vol. 1, para.40, p. 113.
[89] *Ibid*., para.51, p. 116.
[90] P. CHRABIEH, « Pratiques de réconciliation au Liban Un état des lieux », p. 246.

This international tribunal, set up by the Security Council under pressure from France and the United States, has not met with the approval of Lebanese society as a whole, and has not produced the justice that was expected.

It is true that, for the reconciliation process to be designed by the country concerned itself, it must be implemented by stable institutions, principally an executive power enjoying a sufficient degree of legitimacy so as to convince the population that the decisions taken are in everyone's interest. This was the case for a number of countries, not only South Africa, Rwanda, Colombia or Angola mentioned in the present paper. The governments led by Nelson Mandela's African National Congress in South Africa, by Paul Kagamé's Rwandan Patriotic Front in Rwanda or by Juan Manuel Santos in Colombia have (to name but this few) enjoyed wide popular support and each of them, in their own way, proposed and embodied an inclusive long-term project for rebuilding a nation and its institutions, in which the transitional justice mechanism figured as an essential short-term step.

In Lebanon, the Taif Accords of 1989 led to a return to peace, with a stable institutional framework that has withstood the various political crises since then. However, these crises and the instability of the governments in place are not unrelated to the country's difficulties and slowness in repairing the suffering caused by the civil war. The two laws dealing with the consequences of the civil war on part of the population - the 1991 General Amnesty Law and the 2018 Law on Missing Persons - were not embedded in an institutional reconciliation mechanism. The challenge of building this mechanism, whatever form it takes, is still to be met, ideally taking into account the experience of the countries we have examined here.