IN THE EUROPEAN COURT OF HUMAN RIGHTS (GRAND CHAMBER)

JANOWIEC & OTHERS
v

RUSSIA

Application nos. 55508/07 and 29520/09

THIRD PARTY INTERVENTION

Interveners:

Human Rights Centre “Memorial”, Moscow

European Human Rights Advocacy Centre, London

Essex Transitional Justice Network School of Law, University of Essex

INTRODUCTION

1. On 19 December 2012, the President of the Grand Chamber granted leave to the Human Rights Centre "Memorial",[1] the European Human Rights Advocacy Centre[2] and the Essex Transitional Justice Network[3] to make written submissions as a third party in the case of *Janowiec and Others v Russia* (Applications nos. 55508/07 and 295290/09) under Rule 44(3) of the Rules of Court.

2. These submissions address the following issues upon which leave was granted to intervene:

   i. A comparative analysis of the obligations of States under customary international law towards the victims of war crimes and/or crimes against humanity;
   ii. Relevant jurisprudence of the Inter-American Commission on Human Rights ('IACHR' or the 'Commission') and the Inter-American Court of Human Rights ('IACtHR' or the 'Court') in this area; and
   iii. State practice of establishing truth commissions or similar investigative bodies in response to the commission of international crimes.

A. STATE OBLIGATIONS UNDER CUSTOMARY INTERNATIONAL LAW WITH REGARD TO VICTIMS OF WAR CRIMES AND/OR CRIMES AGAINST HUMANITY

3. The obligations of States in respect of the treatment of prisoners of war and the obligation to investigate suspected war crimes and/or crimes against humanity are specified by both international humanitarian law and international criminal law in international treaties as well as in customary international law. It is generally accepted that these are obligations that exist not only towards the victims of the crimes themselves but also towards the international community as a whole.

4. The International Committee of the Red Cross study on customary international humanitarian law[4] catalogues State practice underlying existing rules of customary international law as including the humane treatment of prisoners of war, prohibition of murder, the investigation of alleged war crimes, and an obligation to account for missing persons (including the provision of information to family members of their relatives' fate).

I. Obligation to Treat Prisoners of War Humanely and the Prohibition of Murder

5. Recognition of these obligations dates back to the Lieber Code 1863,[5] the Brussels Declaration 1874[6] and the Oxford Manual 1880.[7] Codification followed with the Hague Regulations of 1899[8] and 1907,[9] then the Geneva Conventions of 1864, 1906, 1929, and 1949.

6. Common Article 3 of the Geneva Conventions prohibits "*violence to life and person, in particular murder of all kinds*" of civilians and persons *hors de combat,* and Geneva Convention III 1949 prohibits causing death or endangering the health of prisoners of war.[10] All four Geneva Conventions list *"wilful killing*" of protected persons as a grave breach.[11] The prohibition of murder is recognised as a fundamental guarantee by Additional Protocols I and II.[12]Murder of civilians and prisoners of war was included as a war crime in the Charter of the International Military Tribunal at Nuremberg,[13] is a war crime under the Statute of the International Criminal Court with respect to both international and non-international armed conflicts and is also included in the Statutes of the International Criminal Tribunals for the former Yugoslavia, for Rwanda and the Special Court for Sierra Leone.[14]

II. The Obligation to Investigate and Prosecute War Crimes

a. *The obligation to investigate*

7. It is a norm of customary international law as established by State practice that "*States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and if appropriate, prosecute the suspects.*"[15] Further there is no limitation period applicable to prosecutions for war crimes.[16]

8. The primary emphasis of this obligation (as reflected in its wording) is the investigation itself. The allied obligation to prosecute arises where 'appropriate' and the primary obligation of the State to investigate is unaffected by external factors which may cause an eventual prosecution to be logistically impossible. This emphasis on the obligation of 'means' as opposed to 'result' is one that has been recognised in the European Court of Human Rights' ('ECtHR') case-law.[17]

9. The primacy of the investigation itself, with the objective of providing an accurate and transparent account of violations to victims, their families, the wider society and the international community, has been recognised by the UN General Assembly,[18] the Inter-American Human Rights system[19] and international treaty law,[20] as well as by extensive State practice in the establishment of truth commissions or similar fact finding mechanisms which provide a form of justice for grave violations of international humanitarian law and international human rights law.[21]

10. The failure to provide such information or to conduct an effective investigation has been held by both the European and Inter-American systems to constitute inhuman and degrading treatment of the relatives of the victims.[22]

b. *Obligation to provide information to family members about missing and dead relatives*

11. International law recognises the right of families to know the fate of their missing/dead relatives as a free-standing component of the duty to investigate. This right is a confirmed norm of customary international law, as codified in Additional Protocol 1,[23] and a recognised principle of Human Rights Law concerned with protecting the dignity and humanity of the person, and upholding and vindicating other related rights such as access to justice and a remedy, as well as ensuring accountability and transparency for egregious human rights violations on behalf of the national and international community. It is referred to in human rights instruments,[24] by human rights bodies[25], by regional human rights systems[26] and by States in their military manuals[27], as well as in their national legislation[28] and case-law.[29]

12. In particular, prominence is afforded to 'heinous' or systematic violations, for example:

    i. The UN 'Updated set of principles for the protection and promotion of human rights through action to combat impunity' states at Principle 2 that "*[e]very people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes*."[30]Further, Principle 4 asserts that the "*imprescriptible"* right to know exists irrespective of legal proceedings;[31]

ii. The practice of the Inter-American Human Rights system has recognised a free-standing right to information relating to gross human rights violations applicable to both the victims and society in general on the grounds that ensuring rights for the future requires a State to learn from past abuses;[32]

iii. National Laws, for example the Bosnia and Herzegovina Law on Missing persons 2004, Article 3, *"Family members have a right to know the fate of their missing family members/relatives, including their whereabouts, or, if dead, the circumstances and cause of their death, as well as the place of burial, if known, and to receive their mortal remains".*

13. It is evident from the above international and national law sources, among the many others footnoted, that a State's obligation to investigate atrocities and the individual and collective right to the truth is perceived by the international community as providing accountability that is critical to the restoration of peace and security, and the eradication of impunity[33]. The ECtHR, interpreting the European Convention on Human Rights as a living instrument, has reflected this growing trend emphasising accountable government and the dignity of the person in its case law, developing a positive obligation to investigate under Article 2 and acknowledging the devastating effect of lack of information on the victim's relatives under Article 3.[34]

B. THE INTER-AMERICAN SYSTEM, THE RIGHT TO KNOW THE TRUTH, AND THE DUTY TO INVESTIGATE, PROSECUTE AND PUNISH

14. The Inter-American Human Rights system has recognised the existence of the right to know the truth within Inter-American law. While the American Convention on Human Rights ('Convention') does not explicitly refer to such a right, the Inter-American Court ('IACtHR') has interpreted the right to know the truth to be part of and be inter-related[35] to various articles of the Convention. Notably, the IACtHR has linked the right to violations of the obligation to investigate, prosecute and punish under Article 8 (*right to fair trial*) and Article 25 (*right to judicial protection*) of the Convention in connection with Article 1.1 (*obligation to respect rights*) of the same instrument.

15. In the groundbreaking judgment of *Velásquez Rodríguez v Honduras* (1987), the IACtHR held that *"The duty to investigate facts of this type continues as long as there is uncertainty about the fate of the person who has disappeared. Even in the hypothetical case that those individually responsible for crimes of this type cannot be legally punished under certain circumstances, the State is obligated to use the means at its disposal to inform the relatives of the fate of the victims and, if they have been killed, the location of their remains."*[36]

16. In 2000, the IACtHR in *Bámaca Velásquez v Guatemala* held that the right to know the truth for the family of the victim of an enforced disappearance case had been incorporated into the State's investigation and punishment duties enshrined in Articles 8 and 25 in the light of Article 1.1.[37] This interpretation has been reiterated in cases of enforced disappearance;[38] however the IACtHR and the Commission have also recognised the right to know the truth with respect to other serious human rights violations, specifically invoking it in relation to Articles 8 and 25. Notably, in cases of extrajudicial killings torture and/or massacres, the obligation to investigate "*must ensure, within a reasonable time, the right of the presumed victims or their next of kin to know the truth about what happened*".[39] Consequently, the IACtHR has interpreted the right to know the truth as the right of the next of kin of direct victims of serious human rights violations, and of society as a whole to obtain an effective investigation, prosecution, and punishment of the perpetrators of serious human rights violations.

17. The IACtHR has further recognised the value of truth commissions to investigate atrocities and establish historical truth, and has stated that a truth commission "*depending on its object, proceedings, structure and purposes – can contribute to build and safeguard historical memory, to clarify the events and to determine institutional, social and political responsibilities in certain periods of time of a society*"[40]. The IACtHR position is that truth commissions should complement judicial proceedings and not substitute them.[41] Indeed the IACtHR itself has relied on the reports of various truth and reconciliation commissions to consider whether states have complied with their duty to investigate, prosecute and, if applicable, punish and whether the right of access to information of the next of kin and society as a whole has been fulfilled[42].

18. In its jurisprudence, the IACtHR stresses the importance of the right to know the truth in the context of gross human rights violations and grave violations of humanitarian law constituting war crimes, crimes against humanity, and genocide. With regards to these serious crimes, the IACtHR has highlighted the duty to investigate, prosecute and if applicable punish, in order to fulfil the right to know the truth of the victims' relatives and of society as a whole.[43]

19. In the landmark case *Barrios Altos v. Peru*, the first case where the IACtHR considered a large-scale massacre,[44] it held that all types of laws and procedural rules, specifically amnesty laws, "*intended to prevent the investigation and punishment of those responsible for serious human rights*"[45] and impede "*the victims and their next of kin from knowing the truth and receiving the corresponding reparation*", are "*manifestly incompatible with the aims and spirit of the Convention*".[46] Since then, the IACtHR has developed a consistent jurisprudence regarding the legal implications and obligations of States regarding crimes against humanity and war crimes.[47]

20. The qualification of a human rights violation as a crime against humanity or as a war crime has been fundamental to the IACtHR's decision to state that there is an obligation to investigate, prosecute and if applicable punish. The perpetrators of such crimes cannot be granted an amnesty.[48] This was the case, for example, in *Almonacid-Arellano v. Chile* where the killing of Mr. Almonacid by state agents took place under a military dictatorship on 17 September 1973. According to the IACtHR, since his killing was part of a sustained and systematic attack against the civilian population as a result of the threat of communism, it constituted a crime against humanity. The fact that Chile only ratified the Convention and accepted the jurisdiction of the Court in 1990 (some 17 years after the killing took place) was no impediment to the IACtHR's finding that there was an obligation to investigate, prosecute and if applicable punish the perpetrators of his killing from the moment the IACtHR had jurisdiction over Chile, because this obligation is of a continuous nature.[49]

21. The IACtHR has maintained this approach in its case-law in relation to massacres and other serious human rights violations which were found to have commenced before the Court had jurisdiction, but which continued after the critical date when it could assert jurisdiction over them.[50]

C. STATE PRACTICE OF ESTABLISHING TRUTH COMMISSIONS OR SIMILAR INVESTIGATIVE BODIES IN RESPONSE TO THE COMMISSION OF INTERNATIONAL CRIMES

22. State practice has acknowledged the requirement to investigate and account for gross violations of human rights by the establishment of truth commissions, in particular where prosecutions appear impossible due to political instability or a lack of the necessary infra-structure or resources in the aftermath of mass atrocities. In addition, experience in

attempting to respond to mass atrocities within the twentieth century has demonstrated that criminal proceedings may not be sufficient to satisfy the strong desire of victims and wider society to establish the truth. Such prosecutions in the context of widespread and systematic crimes are likely to address only a small proportion of the crimes committed and focus only on the facts relevant to the chosen charges against specific defendants. The information that emerges from these proceedings, although having the authority of a court decision, is not necessarily representative of the scale and complexity of the relevant conflicts or events. State practice has recognised that additional mechanisms are often required.

23. The UN Secretary-General has defined truth commissions as "*official, temporary, non-judicial fact-finding bodies that investigate a pattern of abuses of human rights or humanitarian law committed over a number of years.*"[51] Since the 1980's over 40 commissions of this kind have been established[52] and the involvement and support of the international community in many of these bodies demonstrates the worldwide recognition afforded to their aims. For example, the Commission on Truth for El Salvador, the Commission for Historical Clarification in Guatemala and the Sierra Leone Truth and Reconciliation Commission were provided for in the context of UN brokered peace agreements.[53] East Timor's Commission for Reception, Truth and Reconciliation (known by its Portuguese acronym, CAVR) was established by the UN Transitional Administration;[54] the Kyrgyzstan Inquiry Commission ('KIC') was established following the coordination of the preparation process by the OSCE Parliamentary Assembly,[55] and the Independent International Fact-Finding Mission on the Conflict in Georgia ('IIFFMCG') was established by the Council of the European Union following an EU brokered ceasefire agreement between Russia and Georgia in the aftermath of the August 2008 South Ossetian conflict. Notably, the EU placed importance on the establishment of a "common understanding of the facts" in this situation, even though the prospect of cross-jurisdictional or international criminal prosecutions is unlikely.[56]

24. While the mandates of truth commissions often vary, key objectives in establishing "the truth" (with a view to attaining some measure of accountability and consequently the potential for reconciliation) usually include the following: an objective and accurate record of the facts of the crimes or abuses under consideration (often including the personal perspective of and impact upon victims); attribution of institutional responsibilities; the preservation of evidence; the identification of suspected perpetrators and the formulation of recommendations on a range of subjects which might include policy on prosecution; suggestions for reparations, and institutional reforms (particularly in the security and justice sector). In spite of their non-judicial nature, truth commissions can have investigative prerogatives and powers in order to obtain official documents and to oblige witnesses, the perpetrators of crimes and other people with knowledge of the facts to appear before them. Additional powers include search and seizure[57]; witness protection and the power to grant immunity to persons appearing before them to prevent information provided being used against them in criminal trials.[58]

I. Mandates of the commissions

25. Initially, many of the early truth commissions were created to satisfy the need for a clear factual account of events in situations where the hiding of truth was an essential part of the criminality under consideration (such as the 'disappearances' carried out under military dictatorships). This need was felt particularly acutely in light of the apparent impossibility of criminal prosecutions in Latin America, primarily because of domestic amnesty legislation but also due to questions of political will and internal stability.

26. There have been developments in the remit of truth commissions over time: The Argentinean National Commission on Disappearance of Persons ('CONADEP'), generally

acknowledged to be the first such Commission, was mandated only to receive complaints that it could forward to the law enforcement authorities and establish the fate of the disappeared persons, including children taken into care, but not to make findings about any alleged violations of human rights law.[59]

27. The subsequent Chilean National Commission on Truth and Reconciliation ('NCTR') was created by an Executive Decree which recognised "*the moral conscience of the nation demand[ed] that the truth about the grave violations of human rights committed in [the] country… be brought to light*".[60] In its report, the NCTR understood this provision to be a reference to the Universal Declaration of Human Rights and international humanitarian law.[61] Similarly, the Commission on the Truth for El Salvador ('COT') was created to investigate "*serious acts of violence that have occurred since 1980 and whose impact on society urgently demands that the public should know the truth*".[62] While no specific reference was made to implementation of international or municipal human rights law, the COT interpreted its mandate as requiring it to assess the established facts under the provisions of the American Convention on Human Rights ('ACHR') and the International Covenant on Civil and Political Rights ('ICCPR') prohibiting arbitrary deprivation of life and torture, as well as under international humanitarian law.[63]

28. The mandates of more recently created commission directly refer to the rules of international law, alleged violations of which the commissions are called upon to investigate. One example is the Mapping Exercise Team, which was created to establish the facts of grave violations of international humanitarian law and human rights committed in the Democratic Republic of the Congo ('DRC').[64] The UN Security Council, acting under Chapter VII of the UN Charter, strongly condemned violations of international humanitarian law and human rights, urged all parties to prevent further such violations, reaffirmed that they had an obligation to respect human rights and international humanitarian law, and stressed the need to bring to justice those responsible.[65] The UN Security Council further encouraged the UN Secretary-General to assist the transitional authorities of the DRC to put an end to impunity.

29. Similarly, the Commission for Reception, Truth and Reconciliation in East Timor ('CAVR') was created by the UN Transitional Administration in East Timor ('UNTAET') following the UN Security Council's demand under Chapter VII of the UN Charter that those responsible for violence and acts in support of violence in East-Timor be brought to justice.[66] CAVR's functions were, among others, to inquire into the extent of human rights violations (including those which were part of systemic abuse), the nature and causes of the violations, which persons, authorities, institutions and organisations were involved in the violations, whether they were a result of deliberate planning or policy, and political accountability for the human rights violations.[67]

30. In a similar vein, the mandate of the Mission for the 2008 South Ossetia Conflict included the investigation of the origins and the course of the South Ossetia conflict, with regard to international law, humanitarian law and human rights.[68] The KIC terms of reference, approved by the Interim President of the Kyrgyz Republic, entrusted it, in particular, with the task of qualifying the violations and the crimes committed in South Kyrgyzstan in June 2010 under international law.[69]

31. A number of commissions' mandates refer to municipal human rights instruments: The Sierra Leone Truth and Reconciliation Commission ('SLTRC') was mandated, under Article XXVI of the Lomé Peace Accord and Section 6(1) of the Truth and Reconciliation Commission Act 2000, to address impunity and deal with the question of human rights violations since the beginning of the Sierra Leonean conflict in 1991. This was to be done "in the spirit of national reconciliation", providing forum to both victims and perpetrators, but the Peace Accord establishing the SLTRC, was signed by the Government of Sierra

Leone and the Revolutionary United Front "*committed to promoting full respect for human rights and humanitarian law*".[70] The SLTRC's work was also supplemented by the establishment and functioning of the Special Court for Sierra Leone.[71]

32. The mandate of the South African Truth and Reconciliation Commission ('SATRC') included the establishment of "*as complete a picture as possible of the causes, nature and extent of the gross violations of human rights*".[72] Those were the rights set out in the 1993 South African Constitution (right to life, prohibition of torture, and right to liberty and security), but the SATRC also had regard to the ICCPR and, importantly, the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid.[73]

33. It is evident that truth Commissions have come to be viewed by the international community and by states themselves as a necessary investigative fact finding mechanism in the aftermath of conflicts or atrocities, the terms of reference of which are international human rights and humanitarian law, as well as municipal law.

II. Functions of the commissions

34. An examination of the functions of the commissions demonstrates that, although non-prosecutorial, they routinely include all the components required by an 'effective investigation' into an atrocity.

Establishment of the facts

35. Even though commissions are not able to make findings of fact that equate to a criminal standard of proof, some of them nevertheless had powers of subpoena and/or search and seizure which enabled thorough investigations to be conducted. Some commissions also held public hearings where witnesses testified (South Africa and East Timor[74] are examples). Those commissions which had no such powers nevertheless adopted a methodology and standard of proof aimed at ensuring the production of comprehensive and reliable factual accounts. For example, the DRC Mapping Exercise, which recorded incidents province by province over 10 years, only included those events in the report which were confirmed by at least two sources; allegations of serious violations reported by one source only were not included.[75] The DRC Mapping Exercise, and more recently the KIC, assessed the evidence available to it on the basis of reasonable suspicion defined as "*necessitating a reliable body of material consistent with other verified circumstances tending to show that an incident or event did happen*.[76] The Fact-Finding Mission for Georgia, the only commission to have operated in the context of an international armed conflict, collected the evidence presented by all sides of the conflict, that is, Georgia, Russia and a number of non-State actors.[77] Any conclusions of the reported incidents were made only after the analysis of information obtained from all sides.

Legal Characterisation of the established facts

36. In accordance with their respective mandates, all commissions proceeded to qualify the established facts as violations of human rights law and/or international crimes. Even the CONADEP, which had no mandate to legally characterise the facts, qualified the human rights violations it found as, *inter alia*, torture, abductions, secret detention, and extermination.[78] Similarly the SLTRC specified the nature of the violations found (abductions, arbitrary detention, killings, and rape) while the Special Court for Sierra Leone held such violations to be crimes under IHL [79]

Attribution of responsibility

37. By focusing on a pattern of abuses rather than on isolated cases, commissions look not only at what actually happened, but also reflect on the roots and causes of events. The commissions thus identify political and institutional responsibility of authorities or non-State actors involved in violations of human rights and/or humanitarian law. Some

commissions could also recommend criminal prosecutions of individuals. This was the case in East Timor where the CAVR named allegedly responsible individuals and recommended that they be prosecuted.[80]Alternatively, commissions' reports could lead to prosecutions despite earlier amnesties, like the CONADEP report which was followed by the annulment of amnesties granted, and trials of the key leaders of military juntas.[81]

Reparations for victims

38. Public hearings before the commissions are, for the victims and survivors, an opportunity to speak out about what they suffered, which in itself may have a moral healing effect on them and help restore their sense of dignity.[82] In turn, the fact that a commission is an officially established State body is a form of recognition by the State of its wrongdoings.[83] The commissions have also made comprehensive recommendations on reparations to the victims, like the CNCTR's proposals on solemn symbolic commemorative measures, the introduction of legal remedies for the relatives of the disappeared, and social welfare reforms,[84] or the DRC Mapping Exercise Team and Sierra Leone TRC's proposals for comprehensive national reparation programmes.[85]

39. It is submitted that the practice of States and international and regional organisations, (including the UN Security Council acting under Chapter VII of the UN Charter), demonstrates that the implementation of international human rights and humanitarian law in practice require that the facts of gross human rights violations and international crimes be authoritatively established. The obligations to establish the facts of international crimes and/or gross violations of human rights, to attribute responsibility for those crimes and/or violations and to provide appropriate remedies[86] do not cease to exist if prosecutions are impossible for reasons such as the lapse of time, lack of resources or political reasons.

D. CONCLUSION

40. It is therefore submitted that the relevant position of international law, jurisprudence and State practice can be distilled into the following principles:

i. it is an established norm of international law (both custom and treaty) that there is a duty to investigate and account for international crimes and gross violations of human rights;
ii. the duty to investigate exists even if prosecution is not possible or appropriate;
iii. the duty is owed to the victims and their relatives; to the society in which the violations took place and to the wider international community;
iv. this duty is not subject to a statute of limitations and is therefore continuing in nature;
v. the accepted rationale for the above is international recognition of the importance of creating a historical record, of ensuring accountability, promoting reconciliation and eradicating impunity, as well as respecting individual human dignity.

16 January 2012

ENDNOTES

[1]**Human Rights Centre "Memorial**" is a Moscow-based NGO, founded in 1992. Together with Research and Education Centre "Memorial" it forms a part of the International Historical, Charitable and Human Rights Organisation "Memorial", itself founded in 1989. The Human Rights Centre "Memorial" works, among others, in partnership with the London-based European Human Rights Advocacy Centre in order to represent applicants in cases before the European Court of Human Rights. More than 200 applications have been lodged with the European Court within the framework of this joint project, concerning, for the most part, human rights violations in the North Caucasus region of the Russian Federation. At the same time, Research and Education Centre "Memorial" is engaged in the establishment of the facts and preservation of the memory of the mass repressions in the USSR, in particular, those of the mass executions in Katyn.

[2]**The European Human Rights Advocacy Centre (EHRAC)** was established in 2003 with the support of the European Commission. Its primary aim is to assist individuals, lawyers and NGO's within the Russian Federation, Georgia, Azerbaijan and Armenia to take cases to the European Court of Human Rights, whilst working to transfer skills and build the capacity of the human rights community.

[3]**The Essex Transitional Justice Network** was established at the University of Essex in 2009 to put together the significant experience and reputation on transitional justice of academic staff at the University. It permits Essex scholars and practitioners to explore legal and other issues faced by societies that are undergoing fundamental socio-political change, particularly the transition from a repressive to a democratic or constitutional regime, or from war and civil strife to peace.

[4]International Committee of the Red Cross Study of Customary International Law: Customary International Humanitarian Law, Volume I, Rules ICRC, Cambridge University Press 2005

[5]The Lieber Code 1863, Article 23 provides, "*Private citizens are no longer murdered, enslaved, or carried off to distant parts, and the inoffensive individual is as little disturbed in his private relations as the commander of the hostile troops can afford to grant in the overruling demands of a vigorous war."* Article 44 provides, "*All wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorized officer, all robbery, all pillage or sacking, even after taking a place by main force, all rape, wounding, maiming, or killing of such inhabitants, are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offense. A soldier, officer or private, in the act of committing such violence, and disobeying a superior ordering him to abstain from it, may be lawfully killed on the spot by such superior."* Articles 75 and 76 provide, "*Prisoners of war are subject to confinement or imprisonment such as may be deemed necessary on account of safety, but they are to be subjected to no other intentional suffering or indignity. The confinement and mode of treating a prisoner may be varied during his captivity according to the demands of safety."* Article 76 provides, "*Prisoners of war shall be fed upon plain and wholesome food, whenever practicable, and treated with humanity. They may be required to work for the benefit of the captor's government, according to their rank and condition."*

[6]The Brussels Declaration 1874, Article 23 provides, *"Prisoners of war are lawful and disarmed enemies. They are in the power of the hostile Government, but not in that of the individuals or corps who captured them. They must be humanely treated..."*

[7]Part II: Application of general principles; III. Prisoners of war; A. Rules for captivity; Article 63 provides, "*They must be humanely treated*."

[8]Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 29 July 1899 Annex to the Convention: Regulations respecting the laws and customs of war on land, Section I: On belligerents; Chapter II: On prisoners of war, Article 4 provides, "*Prisoners of war are in the power of the hostile Government, but not in that of the individuals or corps who captured them. They must be humanely treated. All their personal belongings, except arms, horses, and military papers remain their property.*"

[9]Convention (IV) respecting the Laws and Customs of War on Land and Its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907. Chapter II: Prisoners of war, reiterates Article 4 above. See supra note 8.

[10] Geneva Conventions Common, Article 3; Geneva Convention III 1949 Article 13 provides, *"Prisoners of war must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention…"*

[11]First Geneva Convention, Article 50; Second Geneva Convention, Article 51; Third Geneva Convention, Article 130; Fourth Geneva Convention, Article 147.

[12]Additional Protocol I, Article 75(2)(a) (adopted by consensus); Additional Protocol II, Article 4(2)(a) (adopted by consensus).

[13]Article 6 provides, *"The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes. The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility: (a) 'Crimes against peace: 'namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing; (b) 'War crimes:' namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory,*

murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity; (c) 'Crimes against humanity' namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan."

[14]Statute of the International Criminal Tribunal for the Former Yugoslavia, Articles 2 and 5, established pursuant to Security Council Resolution 827 (1993); Statute for the International Criminal Tribunal for Rwanda, Articles 2 and 3, established pursuant to Security Council Resolution 955 (1994); Statute of the Special Court for Sierra Leone, 16 January 2002, Articles 2 and 3.

[15] Rule 158, in Customary International Humanitarian Law, Volume I, Rules ICRC, Cambridge University Press 2005, Ch 44.

[16]1968 Convention on the Non-Applicability of Statutory Limitations.

[17]*Brecknell v the UK,* No. 32457/04 at 66, 27 November 2007; *McKerr v. the United Kingdom*, No. 28883/95, at 111 and 114, ECHR 2001-III. See also Varnava v Turkey 16064/90 18 September 2009 at 185: *Article 2 must be interpreted in so far as possible in light of the general principles of international law, including the rules of international humanitarian law which play an indispensable and universally-accepted role in mitigating the savagery and inhumanity of armed conflict (see Loizidou, cited above, § 43). The Court therefore concurs with the reasoning of the Chamber in holding that in a zone of international conflict Contracting States are under obligation to protect the lives of those not, or no longer, engaged in hostilities. This would also extend to the provision of medical assistance to the wounded; where combatants have died, or succumbed to wounds, the need for accountability would necessitate proper disposal of remains and require the authorities to collect and provide information about the identity and fate of those concerned, or permit bodies such as the ICRC to do so.*

[18]Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law:General Assembly Resolution 60/147 of 16 December 2005, Principle 11: "*Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim's right to the following as provided for under international law: (*a*) Equal and effective access to justice; (*b*) Adequate, effective and prompt reparation for harm suffered; (*c*) Access to relevant information concerning violations and reparation mechanisms";* Principle24:"*States should develop means of informing the general public and, in particular, victims of gross violations of international human rights law and serious violations of international humanitarian law of the rights and remedies addressed by these Basic Principles and Guidelines and of all available legal, medical, psychological, social, administrative and all other services to which victims may have a right of access. Moreover, victims and their representatives should be entitled to seek and obtain information on the causes leading to their victimization and on the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law and to learn the truth in regard to these violations."* UN 'Updated set of principles for the protection and promotion of human rights through action to combat impunity', Commission of Human Rights, 61stSession, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005: Principle 1 states that it is a general obligation of the State "*to ensure the inalienable right to know the truth about violations.*"

[19]IACHR: *Case of Ignacio Ellacria v El Salvador*, Report No. 136/99 of 22 December 1999, para 226,*"Regardless of the problem of eventual responsibilities, which in any case must always be individual and must be established by due process through a pre-existing tribunal imposing punishment consistent with the law existing at the time the crime was committed, every society has the inalienable right to know the truth about what has occurred, as well as the reasons and circumstances in which those crimes came to be committed, so as to avoid a repetition of such events in the future. In turn, no one can prevent the victims' relatives from learning what has happened to their loved ones. Access to the truth pre-supposes that freedom of expression must be unrestricted…"; Bámaca Velásquez Vs. Guatemala. Reparations and Costs, Judgment 22 February 2001,* Serie C No. 91, paras. 76 y 77, and *Masacres de El Mozote y lugares aledaños Vs. El Salvador, Reparations and Costs,* 25 October 2012. Serie C No. 252, para. 23.

[20]Additional Protocol I 1977 to the Geneva Conventions 1949, Article 32 (*General principle*):"*In the implementation of this Section, the activities of the High Contracting Parties, of the Parties to the conflict and of the international humanitarian organizations mentioned in the Conventions and in this Protocol shall be prompted mainly by the right of families to know the fate of their relatives.*" The preamble to the Statute of the International Criminal Court 1998 recalls that, "*it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes".*

[21] See section C in main text.

[22]*ECtHR Kurt v Turkey,* No.24276/94,25 May 1998; *Tas v Turkey and others*, No. 24396/94, 14 November 2000; *IACtHR Ignacio Ellacria v El Salvador*, see supra note 19; *Gudiel (Diario Militar) v. Guatemala,* paras. 286 and 301-302.

[23]Rule 117 in Customary International Humanitarian Law, Volume I, Rules ICRC, Cambridge University Press 2005, p.421: Rule 117 provides, "*Each party to the conflict must take all feasible measures to account for persons reported missing as a result of armed conflict and must provide their family members with any information it has on their fate.*" Also see Article 32, Additional Protocol I, see supra note 20.

[24]'Updated set of principles for the protection and promotion of human rights through action to combat impunity', UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005: Principle 1 states that it is a general obligation of the State "*to ensure the inalienable right to know the truth about violations*"; Principle 2 (*the inalienable right to the truth*) states,"*[e]very people*

has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes"; Principle 4 (*the victim's right to know*) provides, "*irrespective of any legal proceedings, victims and their families have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victims' fate"*; Principle 5(*guarantees to give effect to the right to know)* provides, "*States must take appropriate action, including measures necessary to ensure the independent and effective operation of the judiciary, to give effect to the right to know*"; UN Guiding Principles on Internal Displacement, Principles 16(1) and 17(4) UN Doc. E/CN.4/1998/53/Add.2, 11 February 1998 states, "*All internally displaced persons have the right to know the fate and whereabouts of missing relatives*".

[25] UN GA Res 59/189, 20 December 2004; UN GA Res 61/155, 19 December 2006; UN Commission on Human Rights, Res 2002/60, 25 April 2002 and Res2004/50, 20 April 2004 all affirm the right of families to know the fate of their relatives reported missing in armed conflicts. The Parliamentary Assembly of the Council of Europe has also expressed concern about the fate of missing and disappeared persons, and the right of their families to know their fate, with respect to*, inter alia*, Chile (31st ordinary Session, Order No. 381, 28 June 1979) and Cyprus (PACE Rec. 1056, 5 May 1987).

[26]See note 19 supra and section B of main text.

[27]The Military manuals of Argentina, Australia, Belgium, Cameroon, Kenya, Israel, Madagascar, Peru, Sierra Leone, Spain, Ukraine, the United Kingdom, and the United States of America all contain provisions on the right of families to know the fate of their relatives.

[28]Bosnia and Herzegovina Law on Missing persons 2004, Article 3, *see main text at 12.iii;* Chile: The Establishment of a National Authority for Compensation and Reconciliation (1992) (amended 2004), Article 10 (see above para 12(iii) main text).

[29]Human Rights Chamber of Bosnia and Herzegovina: '*Srebrenica Cases'* Decision on Admissibility and Merits, 7 March 2003, Cases Nos CH/01/8365 et al, Para 191, 181 and 220 (3) and (4) in which the Court found violations of Articles 8 and 3 (equivalent to ECHR rights) on the basis of the failure to inform the applicants of the truth of the fate of their relatives and to carry out an effective investigation; Colombia's Constitutional Case No. C-575/05, 25 July 2005, the Plenary Chamber of Colombia's Constitutional Court stated, "*The specific mention in..[Law 975 of 2005]of the victims and their relatives and the knowledge of the fate of the disappeared or kidnapped cannot be understood but as Congress' intention to underscore that it shall be the relatives of the kidnapped and disappeared who become the primary recipients of information regarding the victims, without this implying any restriction whatsoever to other victims' right to know the truth, or to society's more general right to know the truth." p.234;*Peru's Constitutional Court held in the *Genaro Villegas Namuche Case*, 18 March 2004, that, "*Besides having a collective dimension, the right to know the truth has an individual dimension. The holders of this individual right are the victims, their relatives and persons close to them. The right to know the circumstances in which human rights violations were committed and, in the case of death or disappearance, to know the fate of the victims, shall not be subject to a statute of limitations. Persons directly or indirectly affected by a crime of this magnitude shall always have a right to know, amongst others, who committed the crime, when, where, how and why the victim was executed and the location of his or her remains, even if much time has passed since the commission of the crime."*

[30]*See note 24 supra.*

[31]*See note 24 supra.*

[32]*See supra note 19.*

[33]Preamble to the Rome Statute of the International Criminal Court; General Assembly Resolution 2583 (XXIV) 15 December 1969 Punishment of war criminals and of persons who have committed crimes against humanity, held that the *"thorough investigation" of war crimes and crimes against humanity, as well as the punishment of those responsible for them "constitute an important element in the prevention of such crimes, the protection of human rights and fundamental freedoms, the encouragement of confidence, the furtherance of cooperation among peoples and the promotion of international peace and security."*

[34]See *Varnava and others v Turkey (No. 16064/90)* 18 September 2009 in which the Court found a continuing violation of Article 2 because of the failure of the authorities to conduct an effective investigation into the fate of the Greek-Cypriots who had disappeared in life-threatening circumstances; also *Brecknell v UK and McKerr v UK* supra note 17; and eg the Chechen disappearance cases violations of Articles 2 and 3: *Bazorkina v Russia* (App. 69481/01); *Betayev and Betayeva v Russia* (App. 37315/03).

[35]The Court has also noted the inter-relatedness of the right to know the truth with other Convention rights, for example, when considering the right to be able to impart and receive information under the Convention's right to freedom of expression (Article 13). See IACtHR, *Gomes-Lund et al (Guerrilha do Araguaia) v Brazil,* Preliminary Objections, Merits, Reparations, and Costs, 24 November 2010, para 83; IACHR, Annual Report of the Inter-American Commission on Human Rights, Report of the Office of the Special Rapporteur for Freedom of Expression, 4 March 2011, p. 283, para. 1.

[36]IACtHR, *Velásquez Rodríguez v. Honduras*, Merits, 29 July 1988, para 181.

[37]IACtHR, *Bámaca Velásquez v. Guatemala*, Merits, 25 November 2000, para 201.

[38]IACtHR, *Gonzalez Medina v República Dominicana,* Preliminary Objections, Merits, Reparations and Costs, 27 February 2012; *Gelman v Uruguay,* Merits and Reparations, 24 February 2012*; Chita Nech v Guatemala,* Preliminary Objections, Merits, Reparations, and Costs, 27 May 2010; *Gomes-Lund et al (Guerrilha do Araguaia) v Brazil,* Preliminary Objections, Merits, Reparations, and Costs, 24 November 2010; and *Radilla-Pacheco v Mexico,* Preliminary Objections, Merits, Reparations, and Costs, 23 November 2009.

[39]IACtHR, *El Mozote Massacre v El Salvador,* Merits, Reparations and Costs, 25 October 2012,para 242*; Río Negro Massacres v Guatemala,* Preliminary Objection, Merits, Reparations and Costs*,* 4 September 2012, para 191; *Las Dos*

Erres Massacre v Guatemala, Preliminary Objection, Merits, Reparations and Costs, 24 November 2009, para 105; *Ituango Massacres v Colombia,* Preliminary Objection, Merits, Reparations and Costs,1 July 2006, para 289; *Mapiripán Massacre v Colombia,* Merits, Reparations and Costs, 15 September 2005, para 216, and *Bulacio v Argentina*. Merits, Reparations and Costs.18 September 2003, para 114.

[40]*Zambrano Vélez y otros vs. Ecuador. Fondo, Reparaciones y Costas.* Judgment 4 July 2007. Serie C No. 166, para. 128

[41]IACtHR, *Almonacid Arrellano v. Chile*, Preliminary Objections, Merits, Reparations and Costs, 26 September 2006, para.150; *La Cantuta v. Perú*, Merits, Reparations and Costs, 29 November 2006, para.224; and,*Gudiel Alvarez y Otros (DiarioMilitar) v. Guatemala*, Merits, Reparations and Costs, 20 November 2012, paras. 294-302.

[42]See for example the way the Court uses the work of the Comision de Esclarecimiento Historico in Guatemala (CEH) to determine this - *Gudiel v. Guatemala*, supra note 41at 294 – 302.

[43]IACtHR, *La* Cantuta v *Perú*, Merits, Reparations and Costs, 29 November 2006, para. 157.

[44] Concurring opinion by Judge CancadoTrinidae in IACtHR, *Barrios Altos v. Perú*, Merits, 14 March 2001.

[45]IACtHR, *Barrios Altos v. Peru*, Merits, 14 March 2001, para 41.

[46]IACtHR, *Barrios Altos v. Peru*, Merits, 14 March 2001, para.43. The impossibility to grant amnesties for crimes against humanity and war crimes was reiterated in *Almonacid-Arellano et al v. Chile*, Preliminary Objections, Merits, Reparations and Costs, 26 September 2006, paras105-114.

[47]IACtHR, *Almonacid-Arellano et al v. Chile*, Preliminary Objections, Merits, Reparations and Costs, 26 September 2006, paras152 and 111; and *Goiburú et al. v. Paraguay*, Merits, Reparations Costs, 22 September 2006, para. 128.

[48]IACtHR,*Almonacid-Arellano et al v Chile*, Preliminary Objections, Merits, Reparations and Costs, 26 September 2006, paras 105-122.

[49]IACtHR,*Almonacid-Arellano et al v. Chile*, Preliminary Objections, Merits, Reparations and Costs, 26 September 2006, paras. 42-51.

[50]Among other examples stand the following: IACtHR, *Moiwana Community v. Suriname*, Preliminary Objections, Merits, Reparations and Costs, 15 June 2005, para. 43; *Rio Negro Massacre v. Guatemala*, Preliminary Objections, Merits, Reparations and Costs, 4 September 2012 (not available in English), para. 37 and 257; *Massacre of El Mozote y lugares Aledanos v. El Salvador*, Merits, Reparations and Costs, 25 October 2012 (not available in English), para. 30, 242 and 300; and *Las Dos Erres Massacre v. Guatemala*, Preliminary Objections, Merits, Reparations and Costs, 24 November 2012 (not available in English), paras. 45, 136, 148 and 151.

[51]*Report of the Secretary-General on the re-establishment of the rule of law and the administration of justice during the period of transition in conflict and post-conflict societies* (S/2004/616), para. 50.

[52]For an up-to-date comprehensive list see P. Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*, 2nd ed., London, Routledge, 2011, Annex chart I.

[53]The Mexico City Peace Agreements 27 April 1991 (El Salvador); the Oslo Accords 1994 (Guatemala); the Lomé Peace Agreement 1999 (Sierra Leone)

[54]*On the Establishment of a Commission for Reception, Truth, and Reconciliation in East Timor*, UNTAET Regulation 2001/10, 13 July 2001 (later amended by Parliamentary Laws 17/2003, 13/2004 and 11/2005).

[55]Report of the Independent International Commission of Inquiry into the events in Southern Kyrgyzstan in June 2010, May 2011 ("KIC Report"), Executive Summary, para. 1.

[56]IIFFMCG Report, Vol. I, September 2009, page 2.

[57]For example, South African Promotion of National Unity and Reconciliation Act No. 34 of 1995 establishing the South African Truth and Reconciliation Commission, chapter 29 (Powers of Commissions with regard to Investigations and Hearings).

[58]DRC Mapping Exercise Report, August 2010, paras. 1060-1061, and OHCHR, *Rule of Law Tools for for Post-Conflict – Truth Commissions*, 2006, p.10

[59]Decreto 187/83, *Comision Nacional sobre la Desaparicion de Personas*, del 15.12.1983, *Boletin Oficial* 19.12.1983.

[60]Supreme Decree no. 355, *Creation of the Commission on Truth and Reconciliation*, 2 April.1990, para. 1.

[61]CNCTR Report 1993, Ch. 2.

[62]Mexico City Peace Agreements, 27 April 1991, Article 2.

[63]Commission on the Truth for El Salvador, *From Madness to Hope*, UN Doc. S/25500, 1 April 1993, pp. 20-22.

[64]DRC Mapping Exercise Report, Terms of Reference, pages 542-544

[65]UN SC Res. 1493 (2003), 28 July 2003, paras. 8 and 10.

[66]UN SC Res. 1272 (1999), 25 October 1999, para. 16.

[67]UNTAET Regulation no. 2001/10, 31 July 2001, Section 13.1(a).

[68]EU Council Decision 2008/901/CFSP, 2 December 2008, para. 2.

[69]KIC Report, para. 2.

[70]SLTRC Report, Vol. 1, Ch. 1, para. 3.

[71]*Ibid.*, Vol. 3B, Ch. 6, *passim*, esp. paras. 1-4, 13-18, and 27-46.

[72]South African Promotion of National Unity and Reconciliation Act No. 34 of 1995, Section 3(1)(a).

[73]SATRC Final Report, Vol. 1, Ch. 4, para. 56.

[74]CAVR Final Report, *Chega!*, 31 October 2005, Part 2, paras. 19 and 20.

[75]DRC Mapping Exercise Report, para. 10.

[76]Ibid., para. 7, and KIC Report, para. 302.

[77]IIFFMCG Report, Vol. II, pp. 185 et seq.

[78]CONADEP Report, *Nunca Mas!*, 1984, Part I(A-F).

[79]SLTRC Report, Vol. 2, Ch. 2, paras. 86-87.

[80]CAVR Report, Part 8 and Part 11 (sub-paras. of para. 7.1).

[81]PACE, Political Affairs Committee, *Use of Experience of "Truth Commissions"*, Explanatory Memorandum, para. 10.
[82]See, e.g., CAVR Report, Part 8, paras. 85-98.
[83]PACE, Explanatory Memorandum, cited above, para. 35.
[84] CNCTR Report 1993, pp. 1059-1064. On similar measures and also medical assistance, see CAVR Report, Part 8, para. 176.
[85]DRC Mapping Exercise Report, paras. 1097-1125; SLTRC Report, Vol. 2, Ch. 4, paras. 52-236.
[86]Which could include public apology (including acknowledgment of the facts and acceptance of responsibility) as provided for by para 22(e) of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations, GA Res. 60/147 of 16 December 2005 and illustrated by the jurisprudence of the IACtHR, see for example IACHR: *Cantoral Benavides v. Peru* (reparations), judgment of 3 December 2001, Series C no. 88, para. 77 and item 7 of the operative provisions ; *Bamaca Velasques v. Guatemala* (reparations), judgment of 22 February 2002 (Series C no. 91, para. 83).