Out of the Crooked Timber of Humanity: The Conflict Between South Africa's Truth and Reconciliation Commission and International Human Rights Norms Regarding "Effective Remedies"

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"A legal right . . . is a claim that the law recognizes as valid, as to which it recognizes a legal obligation on the addressee, and whose benefit the legal system renders likely to be enjoyed. Ordinarily that likelihood depends on the availability of legal remedies in the hands of the right-holder."[1]

"On the one hand, rights precede remedies in the same way that chickens precede the eggs they sometimes lay; only if there first exist rights that are then violated can sanctions be imposed. On the other hand, remedies precede rights in the same way that eggs precede the chickens that cannot come into being without them: only if remedial force is credibly threatened in advance can there exist such a thing as a legal right in the first place. Thus the paradox of rights in relation to remedies is the paradox of chickens in relation to eggs: in both cases the question that leads to the paradox is 'Which comes first?'"[2]

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1. LOUIS HENKIN, THE AGE OF RIGHTS 38-39 (1990).

2. Louis E. Wolcher, *The Paradox of Remedies: The Case of International Human Rights Law*, 38 COLUM. J. TRANSNAT'L L. 515 (2000).

Introduction

The United States Constitution does not say what remedies should be provided to anyone whose constitutional rights have been violated. It was not until the early 19th Century that Chief Justice Marshall in *Marbury v. Madison*[3] established judicial review - going to court to vindicate our rights - as the principal remedy against governmental violation of our constitutional rights.[4] Judicial review is a strong and effective remedy.[5] It is, however, a limited remedy.[6] It is limited because the courts act only when asked and because courts have developed an entire jurisprudence of reasons why they cannot hear cases.[7] Judicial review is limited by the nature of the judicial process which does not ferret out all violations.[8] It is limited also in a larger sense - because courts are not legislatures.[9] Courts cannot otherwise make laws or appropriate money to ensure the enjoyment of rights.[10] They can refuse to give effect to unconstitutional acts, and they can often enjoin such acts.[11] But courts cannot undo or repair past violations; they cannot themselves punish and thereby deter violations.[12] For past violations there is no constitutional remedy; and there is no constitutional obligation upon Congress, or upon the States, to provide remedies, or to compensate victims for violations of their rights.[13]

In contrast to the U.S. Constitution, various comprehensive human rights and regional human rights treaties explicitly include, in some form, the right to a remedy for violations of the rights enumerated therein. The Universal Declaration of Human Rights (the "UDHR"),[14] Article 8, provides: "Everyone has the right to an

3. 5 U.S. (1 Cranch) 137 (1803).

4. *Id.* at 177 ("It is emphatically the province and duty of the judicial department to say what the law is.").

5. HENKIN, *supra* note 1, at 107; Louis Henkin, *Rights: Here and There*, 81 COLUM. L. REV. 1582, 1588 (1981).

6. HENKIN, *supra* note 1, at 107; Henkin, *supra* note 5, at 1588.

7. Henkin, *supra* note 5, at 1588.

8. HENKIN, *supra* note 1, at 107; Henkin, *supra* note 5, at 1588.

9. HENKIN, *supra* note 1, at 107; Henkin, *supra* note 5, at 1588.

10. Henkin, *supra* note 5, at 1588.

11. *Id.*

12. *Id.*

13. Louis Henkin, *Rights: American and Human* (University Lecture, Apr. 2, 1979) at 17; Louis Henkin, *Rights: American and Human*, 79 COLUM. L. REV. 405, 414 (1979).

14. G.A. Res. 217 (III), U.N. Doc. A/810 (1948).

effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law." Article 2(3)(a) of the International Covenant on Civil and Political Rights (the "ICCPR")[15] provides: "Each state party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity." Similarly, Article 25(1) of the American Convention on Human Rights (the "American Convention")[16] provides that "[e]veryone has a right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties." Lastly, Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the "European Convention")[17] provides that: "[e]veryone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."[18]

There is a body of work on transitional justice and the question of whether or not, in transitions from authoritarian to democratic rule, the transitional democracy ought to pursue and prosecute the former regime's crimes.[19] There is also a litany of titles specifically on

15. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, art. 2(3)(a), 999 U.N.T.S. 171.

16. American Convention on Human Rights, Nov. 22, 1969, art. 25(1), 9 I.L.M. 99, 108.

17. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

18. The African [Banjul] Charter on Human and Peoples' Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58, *entered into force* Oct. 21, 1986 [hereinafter African [Banjul] Charter] - which South Africa ratified on September 7, 1996 - does not have a similar provision.

19. *See, e.g.,* TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES (Neil J. Kritz ed., 1995); IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE (Naomi Roht-Arriaza ed., 1995); TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES (A. James McAdams ed., 1997); MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE (1998); RUTI G. TEITEL, TRANSITIONAL JUSTICE (2000); Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 (1991);

the issue of transitional justice and South Africa's truth and reconciliation commission.[20] This article does not weigh into the policy dimensions of the transitional justice debate but rather addresses a source of international human rights law that strongly suggests that states have an obligation to investigate and prosecute the crimes of a former regime. This analysis calls for further examination. The potential conflict between international human rights norms and South Africa's truth and reconciliation commission asks us to critically examine and scrutinize whether South Africa's truth and reconciliation commission constituted an "effective remedy" for the gross human rights violations committed during apartheid. For example, on November 11, 2002, eighty-five South African apartheid victims filed suit in the United States District Court for the Eastern District of New York against twenty-two multinational corporations and international banking institutions alleging that the banks and corporations aided and abetted the apartheid regime.[21] The complaint seeks an unspecified amount of damages and was brought "amid growing frustration in South Africa over long-delayed government reparations payments . . . ."[22]

Therefore, in Part II of this article, I will address the issue of what constitutes an "effective remedy" under various human rights treaties for the violation of the rights enumerated therein. In Part III of this article, I will analyze whether the South African Government's establishment of a truth and reconciliation commission constituted an "effective remedy" as that term has been defined under these various comprehensive human rights treaties, or whether South Africa's truth and reconciliation commission was in conflict with international human rights "effective remedy" norms.[23] The article concludes in

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Miriam J. Aukerman, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice*, 15 HARV. HUM. RTS. J. 39 (2002).

20. *See, e.g.,* Tyrone Savage, Barbara Schmid, Keith A. Vermeulen, *Truth Commissions and Transitional Justice: A Select Bibliography on the South African Truth and Reconciliation Commission Debate*, 16 J. L. & RELIGION 69 (2001).

21. *See* Khulumani v. Barclays, No. 02-5952 (E.D.N.Y. filed Nov. 11, 2002).

22. *See* Reuters, *U.S. Firms Face More Suits for 'Backing Apartheid'* (Nov. 12, 2002), *available at* http://www.sabcnews.com/south_africa/general/0,1009,47057,00.html (last visited Apr. 10, 2003).

23. The UDHR is not a treaty but a resolution adopted unanimously by the U.N. General Assembly in 1948. *See* UDHR *supra* note 14. It is considered either an authoritative interpretation of the U.N. Charter or a statement of customary law. *See* Filartiga v. Pena-Irala, 630 F.2d 876, 883 (2nd Cir. 1980). In either case, at least its basic provisions are now considered binding on member states of the United Nations.

Part IV that, based upon international human rights norms and "jurisprudence," South Africa's establishment of the truth and reconciliation commission might not have constituted an "effective remedy," and might have been in conflict with international human rights "effective remedy" norms for the gross human rights violations that were committed during apartheid.

I. What Constitutes An "Effective Remedy" Under Various Comprehensive And Regional Human Rights Treaties

A. The ICCPR

Although a judicial remedy is preferable, Article 2(3)(a) of the ICCPR states that, an "effective remedy" for the violation of any of the rights listed therein is not limited to a judicial remedy. International law scholar Professor Oscar Schachter has suggested that "undoing, repairing and compensating for violations" constitute appropriate remedies under Article 2(3)(a) of the ICCPR.[24] With respect to criminal law violations and serious human rights abuses, the right to an effective remedy provision under the ICCPR has been interpreted to include the obligation of states parties to investigate the human rights abuses, promptly and impartially, to criminally prosecute those indirectly or directly responsible, to provide compensation, and to prevent future abuses. Indeed, it has been interpreted that amnesty laws, the adoption of which exclude the possibility in certain cases of investigation of past human rights abuses, thereby preventing the ability of the state to criminally prosecute or to provide compensation, may deprive individuals of the right to an effective remedy under the ICCPR. Further, the ICCPR obligates states to provide monetary compensation for unlawful arrests, for deprivations of liberty, and for those punished as a result of a miscarriage of justice.

Id. South Africa became a member of the United Nations in 1945. *See* http://www.un.org/overview/unmember.html (last visited Feb. 6, 2003). South Africa ratified the ICCPR on December 10, 1998, i.e. after its truth and reconciliation commission was established. *See* http://www.unhchr.ch/pdf/report.pdf (last visited Feb. 6, 2003). South Africa is not a party to the regional American and European Conventions. As was stated above, the African [Banjul] Charter, adopted by the African States members of the Organization of African Unity (now the "African Union," of which South Africa is a member), does not have a similar "effective remedy" provision. *See* African [Banjul] Charter, *supra* note 18.

24. Oscar Schachter, *The Obligation to Implement the Covenant in Domestic Law, in* THE INTERNATIONAL BILL OF RIGHTS 311, 326 (L. Henkin ed., 1981).

Article 8 of the UDHR provides: "Everyone has the right to an *effective remedy* by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."[25] The ICCPR, which develops and specifies the civil and political rights enumerated in the UDHR, defines the right to a remedy in its Article 2(3). Article 2(3) provides:

> Each State Party to the present Covenant undertakes:
> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an *effective remedy*, notwithstanding that the violation has been committed by persons acting in an official capacity;
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
> (c) To ensure that the competent authorities shall enforce such remedies when granted.[26]

According to the *travaux preparatoires* of the ICCPR, the "proper enforcement" of its provisions depends upon guarantees of the individual's rights against abuse, which comprise the following elements: the possession of a legal remedy, the granting of this remedy by national authorities and the enforcement of the remedy by the competent authorities.[27] A judicial remedy was preferable, but the drafters thought that it might be impossible to impose upon states the immediate obligation to provide such remedies.[28] However, under paragraph (b) of Article 2(3), states must undertake to "develop the possibilities of judicial remedy."[29]

In its written views in response to individual communications submitted to it under the Optional Protocol, which alleged violations

25. *See* UDHR, *supra* note 14, art. 8.
26. *See* ICCPR, *supra* note 15, art. 2(3) (emphasis added).
27. U.N. GAOR, 10th Sess., Annex, Agenda Item 28 ¶ 15, U.N. Doc. A/2929 (1955).
28. *Id.*
29. *See* ICCPR, *supra* note 15, art. 2(3)(b).

of Articles 6(1), 7 and 9(1) of the ICCPR (which prohibit, *inter alia*, the arbitrary deprivation of life, torture, cruel, inhuman or degrading treatment or punishment, medical or scientific experimentation without free consent, and arbitrary arrest or detention), the Human Rights Committee[30] has urged states parties to carry out independent investigations, to institute criminal proceedings leading to the prompt prosecution and conviction of the persons responsible for the prohibited acts, to pay damages and to ensure that similar events do not occur in the future, notwithstanding any domestic amnesty legislation to the contrary.[31]

In General Comment 20 on the implementation of Article 7 of the ICCPR, the Human Rights Committee has stated that the remedies it considers to be effective and appropriate include the right of the victim to lodge a complaint against the maltreatment prohibited by Article 7, and the prompt and impartial investigation of the complaint by the competent authorities.[32] The Human Rights Committee also noted in General Comment 20 that amnesties, with respect to acts of torture, may deprive individuals of the right to an effective remedy, including compensation, and are generally

30. Article 28 of the ICCPR established the "Human Rights Committee," a treaty-based body charged with the authoritative interpretation of the ICCPR. *See* ICCPR, *supra* note 15, art. 28. Under Article 40 of the ICCPR, states parties to the ICCPR are to submit reports to the Human Rights Committee on the measures they have adopted which give effect to the rights recognized in the ICCPR and on the progress made in the enjoyment of those rights. *Id.* art. 40(1). The Human Rights Committee is then to study the reports and make a report and "such general comments" as it may consider appropriate. *Id.* art. 40(4). In addition, according to the first Optional Protocol to the ICCPR, a state party to the ICCPR can recognize the competence of the Human Rights Committee to receive and consider communications from individuals subject to the state party's jurisdiction who claim to be victims of a violation by that state party of any of the rights set forth in the ICCPR. *See Optional Protocol to the International Covenant on Civil and Political Rights*, 999 U.N.T.S. 302, art. 1 (1976) [hereinafter *Optional Protocol*]. The Committee is to consider such communications and forward its views to the state party concerned and to the individual. *Id.* art. 5(1), 5(4).

31. *See, e.g., Communication No. 821/1998: Zambia*, Hum. Rts. Comm., 70th Sess., Annex, ¶ 7, U.N. Doc. CCPR/C/70/D/821/1998 (2000); *Communication No. 540/1993: Peru*, Hum. Rts. Comm., 56th Sess., Annex, ¶ 10, U.N. Doc. CCPR/C/56/D/540/1993 (1996); *Communication No. 612/1995: Colombia*, Hum. Rts. Comm., 60th Sess., Annex, ¶ 10, U.N. Doc. CCPR/C/60/D/612/1995 (1997); *Communication No. 563/1993: Colombia*, Hum. Rts. Comm., 55th Sess., Annex, ¶ 10, U.N. Doc. CCPR/C/55/D/563/1993 (1995).

32. *General Comments Adopted by the Human Rights Committee under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights*, Hum. Rts. Comm., 44th Sess., Addendum, gen. comment No. 20 (44) (art. 7), ¶ 14, U.N. Doc. No. CCPR/C/21/Rev.1/Add.3 (1992).

incompatible with the duty of states to investigate such acts; to guarantee freedom from such acts within their jurisdiction, and to ensure that they do not occur in the future.[33] In response to individual communications, the Human Rights Committee has reiterated its expectations and its concerns regarding amnesties with respect to Article 7.[34]

Similarly, in its comments in response to Uruguay's Third Report, the Human Rights Committee expressed its deep concern on the implications of Uruguay's Expiry Law for the ICCPR.[35] The law, in pertinent part, provided that,

> as a consequence of the logic of the events stemming from the agreement between the political parties and the Armed Forces in August 1984 and in order to complete the transition to full constitutional order, any State action to seek punishment of crimes committed prior to March 1, 1985, by military and police personnel for political motives, in the performance of their functions or on orders from commanding officers who served during the *de facto* period, has hereby expired.[36]

In criticizing this law, the Committee emphasized "the obligation of States parties, under article 2(3) of the Covenant, to ensure that all persons whose rights or freedoms have been violated shall have an effective remedy as provided through recourse to the competent judicial, administrative, legislative or other authority."[37] The Committee noted "with deep concern that the adoption of the [Expiry] Law effectively exclude[d] in a number of cases the possibility of investigation into past human rights abuses and thereby prevent[ed] the State party from discharging its responsibility to

33. *Id.* ¶ 15.

34. *See Communication No. 328/1988: Nicaragua*, Hum. Rts. Comm., 51st Sess., Annex, ¶¶ 10.6, 12, U.N. Doc. CCPR/C/51/D/328/1988 (1994).

35. *See Concluding Oberservations of the Human Rights Committee: Uruguay*, Hum. Rts. Comm., ¶ 7, U.N. Doc. CCPR/C/79/Add. 19 (1993).

36. *See* Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374 and 10.375, Report No. 29/92, Inter-Am.C.H.R., OEA/Ser.L/V/II.83 Doc. 14 (1992) [hereinafter *Mendoza* case].

37. *See Concluding Observations of the Human Rights Committee: Uruguay, supra* note 35, ¶ 7.

provide effective remedies to the victims of those abuses."[38] The Committee was particularly concerned that "the adoption of the [Expiry] Law ha[d] impeded follow-up on its views on communications."[39] Additionally, the Committee was concerned that "in adopting the Law, the State party contributed to an atmosphere of impunity which may undermine the democratic order and give rise to further grave human rights violations."[40] This, the Committee noted, was especially distressing given the serious nature of the human rights abuses in question.[41] The Committee, therefore, recommended that Uruguay adopt legislation to correct the effects of its Expiry Law so that victims of past human rights violations may have an effective remedy.[42] The Human Rights Committee has subsequently reiterated these same concerns in response to an individual communication submitted to it by a Uruguayan citizen.[43]

Further, the Subcommission for the Promotion and Protection of Human Rights (the "Subcommission")[44], undertook a study on the impunity of perpetrators of human rights violations.[45] Mr. Louis Joinet, the Special Rapporteur on amnesty, completed the study in 1997.[46] In it, Mr. Joinet recommended 42 principles designed to

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* ¶ 11.

43. *See Communication No.* 322/1988: *Uruguay*, Hum. Rts. Comm., 51st Sess. Annex, ¶¶ 12.2-14, U.N. Doc. CCPR/C/51/D/322/1988 (1994).

44. In addition to the treaty-based body the Human Rights Committee, a United Nations charter-based body is the Commission on Human Rights (hereinafter the "Commission"). The Commission is a subsidiary body of the United Nations Economic and Social Council (hereinafter "ECOSOC"). *See* http://www.un.org/Depts/dhl/resguide/spechr.htm#commission (last visited Apr. 12, 2003). The main subsidiary body of the Commission is the Sub-Commission on Prevention of Discrimination and Protection of Minorities, now named the Subcommission for the Promotion and Protection of Human Rights (hereinafter the "Subcommission"). *Id.* The Subcommission's functions include undertaking studies and making recommendations to the Commission concerning the prevention of discrimination of any kind relating to human rights and fundamental freedoms and protections of racial, national, religious and linguistic minorities. *See* http://www.unhchr.ch/html/ menu2/2/sc.htm (last visited Apr. 10, 2003).

45. *See Final report prepared by Mr. Joinet pursuant to Sub-Commission decision* 1996/119, Hum. Rts. Comm., 49th Sess., U.N. Doc. E/CN.4/Sub.2/1997/20 (1997) and *Revised final report prepared by Mr. Joinet pursuant to Sub-Commission decision* 1996/119, Hum. Rts. Comm., 49th Sess., U.N. Doc. E/CN.4/Sub.2/1997/20/Rev.1 (1997) (hereinafter the "Joinet Report"), ¶¶ 1, 9, 10.

46. *Id.* ¶ 15.

protect and promote human rights through actions to combat impunity.[47] He organized the presentation of the set of principles into three sections: 1) the victim's right to know; 2) the victim's right to justice; and, 3) the victim's right to reparations.[48] In the section of the Joinet Report summarizing the set of principles, under the "victim's right to justice," Mr. Joinet stated:

> 26. [The right to a fair and effective remedy] implies that all victims shall have the opportunity to assert their rights and receive a fair and effective remedy, ENSURING THAT THEIR OPPRESSORS STAND TRIAL AND THAT THEY OBTAIN REPARATIONS. As pointed out in the preamble and in the set of principles, there can be no just and lasting reconciliation without an effective response to the need for justice; as a factor of reconciliation, forgiveness, insofar as it is a private act, implies that the victim must know the perpetrator of the violations and that the latter has been in a position to show repentance. For forgiveness to be granted, it must first have been sought.
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> 27. The right to justice entails obligations for the State: to investigate violations, to prosecute the perpetrators and, if their guilt is established, to punish them. Although the decision to prosecute is initially a State responsibility, supplementary procedural rules should allow victims to be admitted as civil plaintiffs in criminal proceedings or, if the public authorities fail to do so, to institute proceedings themselves.[49]

Specifically, Principle 18 provides:

> PRINCIPLE 18. DUTIES OF STATES WITH REGARD TO THE ADMINISTRATION OF JUSTICE
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> Impunity arises from a failure by States to meet their obligations to investigate violations, to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that they

47. *Id.* ¶ 16.
48. *Id.*
49. *Id.* ¶¶ 26-27 (emphasis added).

> are prosecuted, tried and duly punished, to provide victims with effective remedies and reparation for the injuries suffered, and to take steps to prevent any recurrence of such violations. Although the decision to prosecute lies primarily within the competence of the State, supplementary procedural rules should be introduced to enable victims to institute proceedings, on either an individual or a collective basis, where the authorities fail to do so, particularly as civil plaintiffs. This option should be extended to non-governmental organizations with recognized long-standing activities on behalf of the victims concerned.[50]

In addition, the Vienna Declaration and Programme of Action - adopted by the World Conference on Human Rights in Vienna in June 1993 - stated that it "view[ed] with concern the issue of impunity of perpetrators of human rights violations, and support[ed] the efforts of the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities to examine all aspects of the issue."[51]

Lastly, in addition to Article 2(3), the ICCPR specifically provides for monetary compensation for unlawful arrests, detention or deprivation of liberty. Article 9(5) states that "[a]ny one who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."[52] Article 14(6) of the ICCPR specifically requires compensation for those punished as a result of a miscarriage of justice.[53]

B. *The American Convention*

The American Convention[54] specifically provides that "recourse

50. *Id.* at Annex II (emphasis added).

51. *See Vienna Declaration and Programme of Action*, U.N. Doc. A/Conf.157/23 (1993).

52. *See supra* note 15, art. 9(5).

53. *See supra* note 15, art. 14(6).

54. The Organization of American States - an international organization made up of states parties located in the Americas that have ratified the Charter of the Organization of American States - signed the American Convention in 1969. *See supra* note 16. Under its Chapters 7 and 8, respectively, the American Convention established the Inter-American Commission on Human Rights (hereinafter the "Inter-American Commission"), as well as the Inter-American Court of Human Rights (hereinafter the "Inter-American Court"). *Id.* chs. VII and VIII. The functions of the Inter-American Commission, include, *inter alia*, preparing such studies or reports as it considers advisable in the performance of its duties, reviewing

to a competent court or tribunal" constitutes an effective remedy for the protection against acts that violate fundamental rights under the Convention. Additionally, similar to the ICCPR, in cases involving criminal law violations and serious human rights abuses such as unlawful arrest and detention, torture, rape and disappearance, the American Convention has been interpreted to include an obligation on states parties to investigate "exhaustively," to prosecute, to compensate and to prevent, including an obligation to reorganize the state apparatus. Likewise, it has also been interpreted to mean that amnesty laws that prevent access to justice in cases of serious human rights violations (as well as truth commissions that do not have the legal competency to mete out punishments or to award compensatory damages to victims and/or their family members), violate the effective remedy provision of the American Convention.

The relevant provision of the American Convention with respect to the right to an "effective remedy" is Article 25. Article 25(1) provides that:

> [e]veryone has a right to simple and prompt recourse, or any other *effective recourse*, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties."[55]

In *Velasquez Rodriguez*,[56] the Inter-American Commission submitted a case to the Inter-American Court against the State of Honduras requesting that the Court determine whether Honduras had violated Articles 4 (right to life), 5 (right to humane treatment) and 7 (right to personal liberty) of the American Convention in the case of Angel Manfredo Velasquez Rodriquez, a student who had

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petitions by individuals and/or non-governmental organizations alleging violations of the American Convention by states parties, and submitting cases to the Inter-American Court. *Id.* ¶¶ 41(c), 44, and 61(1). The jurisdiction of the Inter-American Court comprises all cases concerning the interpretation and application of the provisions of the American Convention that are submitted to it, provided that the states parties to the case have recognized the jurisdiction of the Court. *Id.* ¶ 62(3).

55. *See supra* note 16, art. 25(1) [emphasis added].

56. *Velasquez Rodriguez* case, Inter-Amer. Ct. H.R. (ser. C), No. 4 (1988) (judgment).

been violently detained, without a warrant for his arrest, by members of the National Office of Investigations and G-2 of the Armed Forces of Honduras.[57] Manfredo Velasquez was accused of alleged political crimes and was allegedly subjected to harsh interrogation and cruel torture.[58] Velasquez had not been seen since his unlawful arrest and was considered disappeared.[59]

The Government of Honduras raised a number of preliminary objections, all of which were rejected except for Honduras' preliminary objection regarding the failure to exhaust domestic remedies.[60] That preliminary objection was ordered to be joined to the merits of the case.[61] The Government argued that, although three *habeas corpus* petitions had been filed and two criminal complaints had been brought on behalf of Velasquez, there were other domestic remedies, for example, appeal, cassation, extraordinary *writ of amparo* or the *writ of habeas corpus*, *ad effectum videndi*, and a presumptive finding of death, that could have but had not yet been pursued.[62] The Inter-American Commission argued that, in cases of disappearances, the fact that a *writ of habeas corpus* or *amparo* had been brought without success was sufficient to support a finding of exhaustion of domestic remedies as long as the person does not appear, because those are the most appropriate remedies in such a situation.[63] It emphasized that neither the *writs of habeas corpus* nor the criminal complaints were effective in the case of Manfredo Velasquez.[64] The Commission maintained that exhaustion should not be understood to require mechanical attempts at formal procedures, but rather to require a case-by-case analysis of the reasonable possibility of obtaining a remedy.[65] Before reaching the merits, the Inter-American Court ruled first on Honduras' preliminary objection.

First, the Inter-American Court held that although a number of remedies exist in the legal system of every country, not all are adequate in every circumstance.[66] For example, the Court noted that

57. *Id.* ¶¶ 1-3.
58. *Id.* ¶ 3.
59. *Id.* ¶ 10.
60. *Id.* ¶ 23(1).
61. *Id.*
62. *Id.* ¶ 53.
63. *Id.* ¶ 72.
64. *Id.*
65. *Id.*
66. *Id.* ¶ 64.

the civil proceedings specifically cited by the Government as possible available remedies, such as a presumptive finding of death based on disappearance, the purpose of which is to allow heirs to dispose of the estate of the person presumed deceased or to allow the spouse to remarry, was not an adequate remedy for finding a person or for obtaining his or her liberty.[67] According to the Court, of the remedies cited by the Government, *habeas corpus* would be the normal means of finding a person presumably detained by the authorities, of ascertaining whether that person is legally detained and, if so, of obtaining the person's liberty.[68] If, however, as the Government had stated, the *writ of habeas corpus* requires the identification of the place of detention and the authority ordering the detention, it would not be adequate for finding a person clandestinely held by State officials, since in such cases there is only hearsay evidence of the detention, and the whereabouts of the victim are unknown.[69]

Second, the Inter-American Court held that a remedy must also be effective - that is, capable of producing the result for which it was designed.[70] With respect to the remedy of *habeas corpus*, the Court noted that procedural requirements can make it ineffective, if it is powerless to compel the authorities, if it presents a danger to those who invoke it, or if it is not impartially applied.[71]

Applying these considerations to the case before it, the Inter-American Court held that, although there may have been legal remedies in Honduras like the *writ of habeas corpus* or the extraordinary *writ of amparo*, which theoretically allowed a person detained by the authorities to be found, those remedies were inadequate and ineffective in cases of disappearances because the imprisonment was clandestine; formal requirements made them inapplicable in practice; the authorities against whom they were brought simply ignored them; or attorneys and judges were threatened and intimidated by those authorities.[72] More, therefore, was required: investigation, prosecution, compensation, and prevention, including a thorough reorganization of the state apparatus.[73] Specifically, the Inter-American Court held,

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67. *Id.*
68. *Id.* ¶ 65.
69. *Id.*
70. *Id.* ¶ 66.
71. *Id.* ¶ 66.
72. *Id.* ¶ 80.
73. Naomi Roht-Arriaza, *Sources in International Treaties of an Obligation to*

> [t]he second obligation of the States Parties is to 'ensure' the free and full exercise of the rights recognized by the Convention to every person subject to its jurisdiction. This obligation implies the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.[74]

Likewise, in a communication received by the Inter-American Commission against the Government of Haiti, a sixteen year old Haitian student was deceived by secret agents who asked her to accompany them claiming that a cablegram had arrived from her parents who were in exile living in Santo Domingo, Dominican Republic.[75] The young girl was then taken to the National Palace and then to the national penitentiary where she was tortured and raped and then put in jail.[76] She was in jail, without due process and without defense counsel, when the communication was filed with the Inter-American Commission.[77] The Government of Haiti failed to respond to the Commission's request for information that it deemed appropriate.[78]

The requisite time having passed without a response to Commission's request for information, the Commission presumed the events to be true and declared that the acts constituted a very serious violation of the young girl's right to personal integrity, her right to

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Investigate, Prosecute, and Provide Redress, in IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE 24, 34 (N. Roht-Arriaza ed., Oxford University Press 1995).

74. *See Velasquez-Rodriguez*, *supra* note 56 ¶ 166.

75. Case 6586, Inter-Am. C.H.R. 91, OEA/ser. L/V/II/61, doc. 22, rev. 1 (1983), at 91.

76. *Id.*

77. *Id.*

78. *Id.* at 91-92.

personal liberty and her right to judicial guarantees, protected by Articles 5, 6, and 8, respectively, of the American Convention.[79] Therefore, the Commission recommended, as remedies for the aforementioned violations, that the young girl be released immediately, that a complete and impartial investigation be conducted, and that those implicated be sanctioned.[80] The Commission also recommended that the Government inform it within a designated period of time of the steps taken to put its recommendations into effect.[81]

Similarly, in another communication to the Inter-American Commission involving Guatemala, a miner and trade-union leader was kidnapped by security forces at his place of work.[82] Once again, the Inter-American Commission requested information in relation to the case, and again the Government did not reply within the specified period of time.[83] The Commission, therefore, presumed the facts to be true concerning the kidnapping and disappearance of the miners' union leader and declared that the Government of Guatemala had violated Article 7 (right to personal liberty) of the American Convention.[84]

As remedies for the violation, the Commission recommended that the Guatemalan government order an exhaustive investigation of the events denounced, sanction the persons directly or indirectly responsible so that they could receive the proper legal punishment, and lastly that the Government communicate its decision to the Commission within a specified number of days.[85] In subsequent decisions on individual petitions, the Inter-American Commission has consistently held that Article 25 obliges states to investigate, bring to trial, and punish seriously and effectively those responsible for human rights violations and provide effective compensation for the victims of the violations and their families.[86]

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79. *Id.* at 93.

80. *Id.*

81. *Id.*

82. Case 7821, Inter-Am. C.H.R. 86, OEA/ser. L/V/II.57, doc. 6, rev. 1 (1982), at 86.

83. *Id.* at 87.

84. *Id.*

85. *Id.*

86. Case 11.481, Inter-Am. C.H.R. 671, OEA/ser. L/V/II.106 doc. 3, rev. (2000); Case 11.378, Inter-Am. C.H.R. 901, OEA/ser. L/V/II.106 doc. 3, rev. (2000); Case 11.291, Inter-Am. C.H.R. 370, OEA/ser. L/V/II.106, doc. 3, rev. (2000); Case 10.337, Inter-Am. C.H.R. 428, OEA/ser. L/V/II.106 doc. 3, rev. (2000); Case 11.725, Inter-

In the wake of the *Velasquez* judgment, the Inter-American Commission has ruled that laws restricting or prohibiting prosecutions of the military in El Salvador, Uruguay, and Argentina violate the American Convention.[87] In all three petitions, the Commission based its conclusions on Article 25's right to a remedy provision, read together with protections of the right to life and physical integrity, the obligation to ensure rights of Article 1, and the "right to due process" or judicial process of Article 8.

The El Salvadoran petition concerned an incident involving the massacre of approximately 74 civilians, known as the "Las Hojas massacre."[88] Thirteen members of the Salvadoran Armed Forces and the Civil Defense, a paramilitary organization that was under the control and direction of the Salvadoran Armed Forces, were charged with the murders of fifteen of the victims.[89] The actions of the perpetrators of the massacre were imputed to the Government of El Salvador.[90]

The Criminal Court of the First Instance for the District of Sonsonate (the "Trial Court") ruled that there was sufficient proof to proceed against three of the defendants. and provisionally dismissed charges against all remaining defendants, holding that there was a lack of sufficient proof presented against them.[91] The Criminal Appellate Court for the Western Region (the "Appellate Court") ruled that charges were to be provisionally dismissed against *all* defendants.[92] The prosecutor's office moved to reopen the case.[93] The Trial Court ruled that the prosecutor had submitted sufficient proof to warrant a reopening of the proceedings. Eight months later,

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Am. C.H.R. 494, OEA/ser. L/V/II.106 doc. 3, rev. (1999); Case 10.488, Inter-Am. C.H.R. 608, OEA/ser. L/V/II.106 doc. 3, rev. (1999).

87. Masacre Las Hojas v. El Salvador, Case 10. 287, Report No. 26/92, Inter-Am. C.H.R. OEA/Ser.L/V/II.83 Doc. 14 at 83 (1993) (hereinafter the "Las Hojas" petition); Mendoza et. Al. v. Uruguay, Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374 and 10.375, Report No. 29/92, Inter-Am. C.H.R., OEA/Ser. L/V/II.83 Doc. 14 at 154 (1993) (hereinafter the "Mendoza" petition); Consuelo et. al. v. Argentina, Case 10.147, 10.181, 10.240, 10.262, 10.309, 10.311 Report No. 28/92, Inter-Am. C.H.R., OEA/Ser.L/V/II.83 Doc. 14 at 41 (1993) (hereinafter the "Consuelo" petition).

88. The "Las Hojas" petition, ¶ 1.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

the Trial Court provisionally dismissed the case for the second time.[94]

The prosecutor appealed the Trial Court's decision to the Appellate Court, which overturned the Trial Court's ruling and ordered the defendants to stand trial.[95] Thereafter, the Trial Court issued an arrest warrant for one of the defendants, in response to which the defendant filed a *habeas corpus* petition with the Salvadoran Supreme Court (Constitutional Chamber).[96] Less than one month later, the Salvadoran Legislative Assembly passed the Amnesty Decree.[97] The decree provided in pertinent part that:

> [f]ull and absolute amnesty is granted in favor of all persons, whether nationals or foreigners, who have participated directly or indirectly or as accomplices, in the commission of political crimes or common crimes linked to political crimes or common crimes in which the number of persons involved is no less than twenty, committed on or before October 22 current year.[98]

The Salvadoran Supreme Court returned the case to the Trial Court, which ruled that the amnesty law provided impunity from prosecution to all of the defendants in the Las Hojas case, thus dismissing all charges.[99] The Appellate Court upheld the Trial Court's ruling that the amnesty law provided complete protection from prosecution for all of those who participated in the Las Hojas massacre, and the Salvadoran Supreme Court affirmed holding that the amnesty law applied to the Las Hojas case.[100] The Court determined that the crime had been committed by not less than 20 people, and therefore, that the amnesty law was properly applied to the case.[101]

The Inter-American Commission concluded that the Government of El Salvador violated, *inter alia*, Article 25 of the American Convention, and recommended that it: 1) carry out an exhaustive, rapid, complete and impartial investigation concerning

94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.* at Analysis, 1.
99. *Id.*
100. *Id.*
101. *Id.*

the events complained of, in order to identify all the victims and those responsible, and submit the latter to justice in order to establish their responsibility so that they receive the sanctions demanded by such serious actions; 2) adopt those measures necessary in order to avoid the commission of similar acts in the future; and, 3) remedy the consequences of the situation that have arisen from the violation of the above-mentioned rights and that it pay a fair compensation to the family members of the massacre victims.[102] In sum, the Commission found that El Salvador's treaty obligations under the Convention could not be overridden by contrary domestic law.[103]

The Uruguayan petition involved a challenge to Uruguay's Expiry law, also discussed above. The Petitioners argued that "inasmuch as the law denie[d] them their right to turn to the courts as a last resort, a thorough and impartial investigation of the human rights violations that occurred during the past *de facto* government [was] being obstructed."[104] Consequently, the Petitioners alleged that the law violated Articles 25 and 8 of the American Convention in relation to Article 1.1 thereof, in that the judicial effect of the Expiry law was "to deny them their right to judicial protection from the courts and to dismiss proceedings against those responsible for past human rights violations."[105] The Inter-American Commission found that the Uruguayan Government's "highest mission according to the obligations of the American Convention, which is to defend and promote human rights," was not being served and that the Expiry law was incompatible with, *inter alia*, Article 25 of the American Convention.[106]

Lastly, the Argentine petition involved the passage of two laws, one which set a 60-day deadline for terminating all criminal proceedings involving crimes committed as part of the "dirty war,"[107] and another that established the "irrefutable presumption that military personnel who committed crimes during the 'dirty war' were acting in the line of duty, thereby acquitting them of any criminal liability."[108] The latter law also "extended the protection to high-ranking officers who did not have decision-making authority or any

102. *Id.* at Conclusion, ¶¶ 3, 5.
103. *Id.* ¶ 1.
104. *See* the Mendoza petition, *supra* note 87, ¶ II(9).
105. *Id.* ¶ II(10).
106. *See* the Mendoza petition, *supra* note 87,¶ D(54) and Conclusion 1.
107. *See* the Consuelo petition, *supra* note 87, ¶ I(2).
108. *Id.*

role in drawing up orders."[109] Further, there was a Presidential Decree of Pardon ordering "any proceedings against persons indicted for human rights violations who had not benefitted from the earlier laws be discontinued."[110] The Petitioners argued that the effect of the laws "inasmuch as they curtailed and ultimately extinguished the criminal proceedings involving the egregious human rights violations that occurred during the *de facto* government, violated the American Convention."[111] The Inter-American Commission held that by denying "the victims their right to obtain a judicial investigation in a court of criminal law to determine those responsible for the crimes committed and punish them accordingly" the laws and the Decree were incompatible with and violated, *inter alia*, Article 25 of the American Convention.[112]

In petitions after the Las Hojas, Mendoza, and Consuelo petitions, the Inter-American Commission has consistently stated that its doctrine and practice on the question of amnesty is consistent with the conclusions of the Joinet Report - that amnesty laws that prevent access to justice in cases of serious human rights violations violate, *inter alia*, Article 25 of the American Convention.[113] The Inter-American Commission has also concluded that truth commissions that do not have the legal competency to mete out punishments or to award compensatory damages to victims and/or their family members, cannot reasonably be considered an adequate substitute for judicial proceedings that ensure an effective recourse.[114] Lastly, for its part, specifically with respect to amnesty laws, the Inter-American Court has stated (in a case brought by the Inter-American Commission to the Inter-American Court which originated with a complaint against Peru) that:

> 168. Under the American Convention, every person subject to the jurisdiction of a State Party is guaranteed the right to recourse to a competent court for the protection of his fundamental rights. STATES, THEREFORE, HAVE THE OBLIGATION TO PREVENT

109. *Id.*
110. *Id.* ¶ 3.
111. *Id.* ¶ 4.
112. *Id.* ¶ 50.
113. *See* Case 11.481, Inter-Am. C.H.R. 671, *supra* note 86; Case 11.725, Inter-Am. C.H.R. 494, *supra* note 86; Case 10.488, Inter-Am. C.H.R. 608, *supra* note 86.
114. Case 11.378, Inter-Am. C.H.R. 901, *supra* note 86, ¶ IV(B)(c)(61).

HUMAN RIGHTS VIOLATIONS, INVESTIGATE THEM, IDENTIFY AND PUNISH THEIR INTELLECTUAL AUTHORS AND ACCESSORIES AFTER THE FACT, AND MAY NOT INVOKE EXISTING PROVISIONS OF DOMESTIC LAW, SUCH AS THE AMNESTY LAW IN THIS CASE, TO AVOID COMPLYING WITH THEIR OBLIGATIONS UNDER INTERNATIONAL LAW. In the Court's judgment, the Amnesty Law enacted by Peru precludes the obligation to investigate and prevents access to justice. For these reasons, Peru's argument that it cannot comply with the duty to investigate the facts that gave rise to the present Case must be rejected.

169. AS THIS COURT HAS HELD ON REPEATED OCCASION, ARTICLE 25 IN RELATION TO ARTICLE 1(1) OF THE AMERICAN CONVENTION OBLIGES THE STATE TO GUARANTEE TO EVERY INDIVIDUAL ACCESS TO THE ADMINISTRATION OF JUSTICE AND, IN PARTICULAR, TO SIMPLE AND PROMPT RECOURSE, SO THAT, INTER ALIA, THOSE RESPONSIBLE FOR HUMAN RIGHTS VIOLATIONS MAY BE PROSECUTED AND REPARATIONS OBTAINED FOR THE DAMAGES SUFFERED. AS THIS COURT HAS RULED, ARTICLE 25 'IS ONE OF THE FUNDAMENTAL PILLARS NOT ONLY OF THE AMERICAN CONVENTION, BUT OF THE VERY RULE OF LAW IN A DEMOCRATIC SOCIETY IN THE TERMS OF THE CONVENTION.'

170. CONSEQUENTLY, IT IS THE DUTY OF THE STATE TO INVESTIGATE HUMAN RIGHTS VIOLATIONS, PROSECUTE THOSE RESPONSIBLE AND AVOID IMPUNITY. THE COURT HAS DEFINED IMPUNITY AS THE FAILURE TO INVESTIGATE, PROSECUTE, TAKE INTO CUSTODY, TRY AND CONVICT THOSE RESPONSIBLE FOR VIOLATIONS OF RIGHTS PROTECTED BY THE AMERICAN CONVENTION AND HAS FURTHER STATED THAT 'THE STATE HAS THE OBLIGATION TO USE ALL THE LEGAL MEANS AT ITS DISPOSAL TO COMBAT THAT SITUATION, SINCE IMPUNITY FOSTERS CHRONIC RECIDIVISM OF HUMAN RIGHTS VIOLATIONS, AND TOTAL DEFENSELESS OF VICTIMS AND THEIR RELATIVES.'"[115]

The Inter-American Court consequently ruled that Peru had "an

115. Inter-Am C H.R. (ser. C) No. 42 (1998), ¶¶ 168-170 (emphasis added).

obligation to investigate the facts in the instant case, to identify those responsible, to punish them, and to adopt the internal legal measures necessary to ensure compliance with this obligation (Article 2 of the American Convention)."[116]

C. *The European Convention*

The relevant provision of the European Convention[117] with respect to the right to an effective remedy is Article 13, which provides that: "[e]veryone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."[118]

In interpreting Article 13 of the European Convention, the European Court of Human Rights (the "European Court")[119] has held that an effective remedy before a "national authority" may not necessarily mean a remedy in all instances before a "judicial authority."[120] Nevertheless, the Court has held that the powers and procedural guarantees an authority possesses are relevant in determining whether the remedy is effective.[121] Further, the European Court has interpreted Article 13 to mean that everyone who *claims* that his or her rights and freedoms under the European Convention have been violated are guaranteed an effective remedy to have the claim of a violation of the Convention decided and, if appropriate, to obtain redress.[122] Therefore, according to the Court, there need not first be a finding that a violation has actually occurred.[123] Moreover, at least with respect to criminal law violations and serious human rights abuses, the European Court has held that the possibility of criminal prosecution may be a requirement under the European Convention; civil remedies may be insufficient.[124] Lastly, the European Commission of Human Rights (the "European Commission")[125] has held that where state authorities pursue a policy

116. *Id.* ¶ 171.

117. Open for signature by members of the Council of Europe. *See supra* note 17, art. 59.

118. *Id.* art. 13.

119. Established under Section 2 of the Convention. *Id.*

120. *Klass and others v. Germany*, 28 Eur. Ct. H.R. (ser. A) (1978) ¶ 67.

121. *Id.*

122. *Id.* ¶ 64.

123. *Id.*

124. *See X and another v. The Netherlands*, 91 Eur. Ct. H.R. (ser. A) (1985).

125. Also established under Section 2 of the European Convention, the European

or administrative practice of authorizing or tolerating conduct in violation of the Convention, for example, in cases of official torture or ill treatment, compensation alone will not be an adequate remedy.[126]

In the case of *Klass and others*,[127] five German citizens lodged an application against the Federal Republic of Germany with the European Commission.[128] The five applicants claimed that certain provisions of Germany's Basic Law were contrary to the European Convention.[129] The laws at issue pertained to the surveillance of mail, post and telecommunications.[130] Specifically, the five applicants maintained that because the laws permitted surveillance of certain persons' mail, post and telecommunications without obliging the authorities to notify those persons after the event, it excluded the possibility of any remedy before the courts against the ordering and execution of the surveillance measures.[131] The European Commission, considered the case to raise serious questions effecting the interpretation of the European Convention, and referred it to the European Court.

First, the European Court held that Article 13 must be interpreted as guaranteeing an "effective remedy before a national authority" to everyone who *claims* that his or her rights and freedoms under the European Convention have been violated.[132] Therefore, there need not first be a finding that a violation has actually occurred.[133] According to the Court, where an individual considers him or herself to have been prejudiced by a measure allegedly in breach of the Convention, Article 13 requires that he or she should have his or her claim of a violation of the Convention decided, and, if appropriate, obtain redress.[134]

With respect to the applicants' argument that the concept of an

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Commission became defunct on October 31, 1999. *See* http://www.echr.coe.int/Eng/EDocs/HistoricalBackground.htm#Subsequent (last visited Apr. 5, 2003).

126. *See Donnelly and six others v. The United Kingdom*, 4 Eur. Comm'n H.R. Dec. & Rep 4 (1975).

127. *See Klass and others, supra* note 120.

128. *Id.* ¶ 1.

129. *Id.* ¶ 10.

130. *Id.*

131. *Id.*

132. *Id.* ¶ 64.

133. *Id.*

134. *Id.*

"effective remedy" presupposes that the person concerned should be placed in a position by means of subsequent information to defend himself against any inadmissible encroachments upon his guaranteed rights, the European Court held that it could not be deduced that Article 13 included an unrestricted right to be notified of surveillance measures, especially considering that the Court had already pointed out that the secrecy of surveillance measures were necessary in a democratic society.[135] Assuming then that the secrecy aspect of the laws was necessary, the European Court decided whether, given that limitation, there were effective remedies available to the applicants under German Law.

The European Court first found that, in its opinion, the "national authority" referred to in Article 13 may not necessarily in all instances be a judicial authority.[136] Nevertheless, the Court held that the powers and procedural guarantees that an authority possesses are relevant in determining whether the remedy before it is effective.[137] Under existing German Law, a person believing him or herself to be under surveillance could complain to a commission created to supervise the surveillance laws or could complain to the Constitutional Court.[138] Once notified that surveillance measures had been taken, a person had various remedies before the courts; they could bring an action for damages or an action for restitution of documents.[139] Thus, the European Court held that, in the particular circumstances of the case, the aggregate of remedies provided satisfied the requirements of Article 13.[140]

In *X and Y v. The Netherlands*,[141] Mr. X lodged an application on behalf of himself and his daughter, Y, with the European Commission against the Kingdom of the Netherlands alleging that the Netherlands had breached its obligations under Articles 3, 8, 13 and 14 of the European Convention.[142] Applicant Y, a mentally handicapped child, was sexually assaulted while living in a privately-run home for mentally handicapped children.[143] The assailant, Mr. B, was the son-

135. *Id.* ¶ 68.
136. *Id.* ¶ 67.
137. *Id.*
138. *Id.* ¶ 70.
139. *Id.* ¶ 71.
140. *Id.* ¶ 72.
141. *See X and Y v. The Netherlands*, *supra* note 124.
142. *Id.* ¶¶ 1, 18.
143. *Id.* ¶¶ 7, 8.

in-law of the directress of the home.[144] Y had just turned sixteen when the assault occurred.[145]

Upon hearing of the assault, Mr. X went to the local police station to file a complaint.[146] He also asked that criminal proceedings be instituted.[147] According to the applicable Netherlands criminal code, however, because Y was 16 at the time of the assault, she had to be the one to file and sign any complaint brought against Mr. B.[148] But because of Y's mental condition, the police officer said that Mr. X could sign the complaint on his daughter's behalf.[149] The officer drew up a report and it was signed by Mr. X.[150]

The public prosecutor's office provisionally decided not to open criminal proceedings against Mr. B.[151] Mr. X appealed that decision.[152] The Arnhem Court of Appeal subsequently dismissed Mr. X's appeal because it found that since Y had not filed and signed the complaint herself and because Y's father could not, under the existing law, do so on her behalf, no criminal proceedings could be instituted.[153] Although this represented a gap in Netherlands' criminal law, which meant that persons in Y's situation (16 years of age but mentally handicapped) could not institute criminal proceedings, there was no possibility of appealing this point of law to the Supreme Court.[154]

Mr. X., thereafter, applied to the European Commission. He claimed that his daughter had been subjected to inhuman and degrading treatment, within the meaning of Article 3 of the European Convention, and that both his right and the right of his daughter to respect for their private life, guaranteed by Article 8, had been infringed.[155] Mr. X further maintained that the right to respect for family life had been abridged.[156] Lastly, Mr. X claimed that he and his daughter had not had an effective remedy before a national authority as required by Article 13, and that the situation complained of was

144. *Id.* ¶ 8.
145. *Id.*
146. *Id.* ¶ 9.
147. *Id.*
148. *Id.* ¶ 16.
149. *Id.* ¶¶ 9, 10.
150. *Id.* ¶ 10.
151. *Id.* ¶ 11.
152. *Id.* ¶ 12.
153. *Id.*
154. *Id.* ¶ 13.
155. *Id.* ¶ 18.
156. *Id.*

discriminatory and contrary to Article 14.[157] With respect to Article 13, Mr. X's argument was that because, under the existing domestic law, neither he nor his daughter could have instituted criminal proceedings against the alleged perpetrator of the sexual abuse, Y did not have an effective remedy against the interference of her right to the respect of her private life under Article 8 of the European Convention.[158] Mr. X argued that the ability to institute criminal proceedings was the most effective way to deter such conduct and was the most effective remedy for violations of the right to respect for private life.[159] Further, Mr. X maintained that the ability to appeal the prosecutor's decision to the Arnhem Court of Appeals did not constitute an effective remedy against the violation of the right to respect for private life.[160]

The European Commission held that there was no separate issue under Article 13 because it found a violation of Article 8 of the European Convention resulting from the gap in the law. [161] With respect to Article 8 of the Convention, the Commission found that because there was a gap in the law with respect to persons in Y's situation, and that, as a result, neither Mr. X nor Y could have instituted criminal proceedings under the existing domestic law, Y's right to respect for private life under Article 8 of the European Convention had been breached.[162] Since the Commission had found that Y's right to respect for private life had been violated because she did not have an effective remedy against any interference with that right, it decided that an analysis of whether Y's right to an effective remedy under Article 13 of the Convention had been violated did not need to be dealt with as a separate issue.[163] The Commission referred the case to the European Court to obtain a decision as to whether or not the facts of the case disclosed a breach by the Netherlands of its obligations under Articles 3, 8, 13 and 14 of the Convention.

With respect to Article 8, the European Court also found that Y was a victim of a violation because neither she nor her father could have instituted criminal proceedings.[164] The Court first found that the

157. *Id.*
158. *Id.* ¶¶ 21, 24, 25, 100.
159. *Id.*
160. *Id.* ¶ 35.
161. *Id.* ¶ 102.
162. *Id.* ¶¶ 85, 87, 91.
163. *Id.* ¶ 102.
164. *Id.* ¶¶ 27, 30.

civil law provided insufficient protection in the case of wrongdoing of the kind inflicted on Y.[165] The Court reasoned that fundamental values and essential aspects of private life were at stake in the case, and that effective deterrence was indispensable in this area. In the Court's view, such deterrence could be achieved only by criminal-law provisions.[166] Moreover, the Court noted that this was in fact an area in which the Netherlands had generally opted for a system of protection based on the criminal law.[167] The only gap in the law involved persons in the same situation as Y; in such cases, the system met a procedural obstacle that the Netherlands legislature had not foreseen.[168] Therefore, because neither Y nor her father could have instituted a criminal proceeding against the alleged perpetrator of the sexual abuse under the existing Netherlands criminal code, the European Court held that the system violated of Article 8 of the Europan Convention.[169] Similar to what the Commission had found, the Court felt that it did not have to examine the same issue under Article 13.[170]

However, although not directly decided under Article 13, the decision of the Court in *X and Y* suggests that at least for serious criminal law violations, the possibility of prosecution may be a requirement under the European Convention; civil remedies may be insufficient. The European Court has also consistently held that for criminal law violations or serious human rights abuses, the notion of an effective remedy for the purposes of Article 13 entails, in addition to payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible, including effective access for the relatives to the investigatory procedure.[171]

Lastly, in *Donnelly and others v. The United Kingdom*,[172] the applicants alleged that they were each victims of an administrative practice that violated Article 3 ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment.") of the

165. *Id.* ¶ 27.
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.* ¶ 30.
170. *Id.* ¶ 36.
171. *See Aksoy v. Turkey,* 1996-VI Eur. Ct. H.R. 2287, § 98; *Aydin v. Turkey*, 1997-VI Eur. Ct. H.R. 1894-96, § 103; *Kaya v. Turkey*, 1998-I Eur. Ct. H.R. 329-30, §§ 106-107.
172. *See Donnelly and six others, supra* note 126.

European Convention, and that such an administrative practice rendered the existing domestic remedy of compensation inadequate.[173] The European Commission agreed and held that compensation could not be deemed an effective remedy where the State had not taken reasonable measures to comply with its obligations under Article 3.[174] The Commission held that the "[c]ompensation machinery can only be seen as an adequate remedy in a situation where the higher authorities have taken reasonable steps to comply with their obligations under Art. 3 by preventing, as far as possible, the occurrence or repetition of the acts in question."[175] Compensation could not constitute an effective remedy if the conduct was authorized by domestic law or if higher authorities of the state pursued a policy or administrative practice in which they authorized or tolerated conduct in violation of Article 3.[176] However, in the particular case before the Commission, it found that the applicants were not victims of a policy or administrative practice of ill-treatment tolerated by higher authorities. Therefore, compensation was adequate.[177]

II. Was the South African Government's Establishment Of a Truth and Reconciliation Commission in Conflict with International Human Rights Norms on "Effective Remedies?"

As explained in detail above, various comprehensive and regional human rights treaties - specifically, the ICCPR and the American and European Conventions - explicitly include a right to an "effective remedy" for violating the rights enumerated in those treaties. Although what constitutes an "effective" remedy under those treaties is not limited to a "judicial" remedy (the American Convention, however, does specifically provide that "everyone has a right to . . . effective recourse, to a competent court or tribunal"), international jurisprudential standards under both the ICCPR and the American Convention are consistent in their finding that with respect to criminal law violations and serious human rights abuses, the right to an "effective remedy" includes the obligation of signatories to investigate the human rights abuses, promptly, impartially and

173. *Id.* at 232.
174. *Id.* at 234.
175. *Id.*
176. *Id.*
177. *Id.* at 236-238.

exhaustively, to criminally prosecute those responsible, to provide compensation, and to prevent future abuses. Under the European Convention, also with respect to criminal law violations and serious human rights abuses, criminal prosecution may be a requirement. Civil remedies alone may be insufficient.

In addition, under the ICCPR and the American Convention, amnesty laws (as well as truth commissions, under the American Convention) have been interpreted as depriving individuals of a right to an "effective remedy." Thus, as explained below, with respect to the criminal law violations and serious human rights abuses that occurred during apartheid in South Africa, the South African government's creation of a truth and reconciliation commission might have been in conflict with international human rights norms on "effective remedies" and may not have constituted an "effective remedy."

A. A Brief Overview of South Africa's Truth and Reconciliation Commission

In 1995, the South African Parliament enacted the Promotion of National Unity and Reconciliation Act 34[178], also known as the Truth and Reconciliation Act.[179] The Truth and Reconciliation Act established a Truth and Reconciliation Commission (the "TRC").[180] The objectives of the TRC were to:

> [P]rovide for the investigation and the establishment of as complete a picture as possible of the nature, causes and extent of gross violations of human rights committed during the period from 1 March 1960 to the cut-off date contemplated in the Constitution, within or outside the Republic, emanating from the conflicts of the past, and the fate or whereabouts of the victims of such violations; the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective

178. Promotion of National Unity and Reconciliation Act, No. 34 of 1995, in 1 1995 JSRSA 2-385 (hereinafter the "Truth and Reconciliation Act") *available at* http://www.polity.org.za.

179. *The Azanian People's Organization and Others* v. *The President of the Republic of South Africa and Others* (Case No. CCT 17/96) *at* http://www.truth.org.za/legal/azapo.htm, at ¶ 3.

180. *See* Truth and Reconciliation Act, *supra* note 178, ch. 2.

> committed in the course of the conflicts of the past during the said period; affording victims an opportunity to relate the violations they suffered; the taking of measures aimed at the granting of reparation to, and the rehabilitation and the restoration of the human and civil dignity of, victims of violations of human rights; reporting to the Nation about such violations and victims; the making of recommendations aimed at the prevention of the commission of gross violations of human rights . . . .[181]

Three Committees were created in order to help the TRC to achieve these objectives: the Committee on Human Rights Violations, the Committee on Reparation and Rehabilitation and the Committee on Amnesty.[182] The Committee on Human Rights Violations was mandated, *inter alia*, to:

> (a) facilitate, and where necessary initiate or coordinate, inquiries into - (i) gross violations of human rights, including violations which were part of a systematic pattern of abuse; (ii) the nature, causes and extent of gross violations of human rights, including the antecedents, circumstances, factors, context, motives and perspectives which led to such violations; (iii) the identity of all persons, authorities, institutions and organisations involved in such violations; (iv) the question whether such violations were the result of deliberate planning on the part of the State or a former state or any of their organs, or of any political organisation, liberation movement or other group or individual; and (v) accountability, political or otherwise, for any such violation; (b) facilitate, and initiate or coordinate, the gathering of information and the receiving of evidence from any person, including persons claiming to be victims of such violations or the representatives of such victims, which establish the identity of victims of such

181. *See* Truth and Reconciliation Act, *supra* note 178, pmbl. ¶ 1. The cut-off date was originally December 6, 1993, but was later extended to May 11, 1994. *See* http://www.doj.gov.za/trc/trccom.htm (last visited Apr. 10, 2003).

182. *Id.*

> violations, their fate or present whereabouts and the nature and extent of the harm suffered by such victims; and (d) determine what articles have been destroyed by any person in order to conceal violations of human rights or acts associated with political objective.[183]

The Committee on Reparation and Rehabilitation was mandated to consider matters referred to it by the TRC in terms of the exercise of its powers, the performance of its functions and the carrying out of its duties, the working procedures that should be followed and the divisions that should be set up in order to deal effectively with the work of the committee; consider matters referred to it by the Committee on Human Rights Violations in terms of a finding by the Committee on Human Rights Violations that a person was a victim of a gross violation of human rights; to consider matters referred to it by the Committee on Amnesty where the Committee on Amnesty was of the opinion that a person was a victim in relation to an act, omission or offence for which amnesty had been granted; and to gather evidence "from any person, including persons claiming to be victims of such violations or the representatives of such victims, which establish the identity of victims of such violations, their fate or present whereabouts and the nature and extent of the harm suffered by such victims."[184] The Committee on Reparation and Rehabilitation could, but was not obligated to, *inter alia*, make recommendations as to appropriate measures of reparations to victims, including measures that should be taken to grant urgent interim reparations to victims, and to "make recommendations to the President with regard to the creation of institutions conducive to a stable and fair society and the institutional, administrative and legislative measures which should be taken or introduced in order to prevent the commission of violations of human rights."[185]

The Committee on Amnesty had the power to grant amnesty in respect of any act, omission or offence to which the particular application for amnesty related, provided that the applicant concerned had made a full disclosure of all relevant facts. Moreover, the relevant act, omission, or offence must have been associated with

183. *See* Truth and Reconciliation Act, *supra* note 178, ch. 3.
184. *Id.* ch. 5.
185. *Id.* ch. 5, ¶ 25(1)(b)(ii).

a political objective committed in the course of the conflicts of the past, in accordance with the provisions of sections 20(2) and 20(3) of the Truth and Reconciliation Act.[186] Once a person had been granted amnesty in respect of an act, omission or offence, that person could no longer be held "criminally liable" for such offence and no prosecution in respect thereof could be maintained against him or her.[187] In addition, a person who had been granted amnesty could not be held personally liable for damages sustained by the victim, nor could such civil proceedings be successfully pursued against him or her.[188] If the person was an employee of the state, the state was equally discharged from any civil liability with respect to the act or omission of such an employee, even if the relevant act or omission was effected during the course and within the scope of his or her employment.[189] Other bodies, organizations or persons were also exempt from any liability for any of the acts or omissions of a wrongdoer which would ordinarily have arisen in consequence of their vicarious liability for such acts or omissions.[190]

Although the TRC was to consider gross violations of human rights committed during a 34-year time period, the TRC was to complete its work within 18 months "from its constitution or the further period, not exceeding six months, as the President may determine," under section 43 of the Truth and Reconciliation Act[191] The Act was subsequently amended in 1998 to, *inter alia*, provide that the TRC would complete its work on July 31, 1998 and be suspended within three months after July 31, 1998.[192] The final date for the submission of applications for amnesty was September 30, 1997.[193] As was explained above, being granted amnesty for an act meant that the perpetrator was free from prosecution for that particular act.[194] The activities of the TRC were officially suspended on October 28, 1998, and an initial report of the TRC, consisting of five volumes, was presented to the former South African President, Nelson Mandela in

186. *Id.* ch. 4, ¶ 20(1).
187. *Id.* ¶ 20(7)(a).
188. *Id.*
189. *See id.*
190. *See id.*
191. *Id.* ch. 7, ¶ 43(1).
192. Promotion of National Unity and Reconciliation Amendment Act, 1998 section 2, *available at* http://www.up.ac.za/publications/gov-acts/1998/act33.pdf (last visited Apr. 15, 2003).
193. *See* Truth and Reconciliation Act, *supra* note 178.
194. *Id.*

October 1998.[195]

Notwithstanding the suspension of the TRC's activities, the Committee on Amnesty was to continue its functions until a date determined by the President by proclamation in the Government *Gazette*.[196] In addition, the Committee on Amnesty had to perform the duties and functions of the Committee on Human Rights Violations as well as the Committee on Reparations and Rehabilitation in respect to responses to matters not finalized before July 31, 1998 by those Committees, excluding inquiries, hearings, and matters emanating from the amnesty process.[197] By proclamation dated May 23, 2001, current South African President Thabo Mbeki stated that the Committee on Amnesty was to dissolve on May 31, 2001.[198] Also by proclamation, President Mbeki reconvened the TRC on June 1, 2001 in order to complete its final report and he set the date of December 31, 2001 as the date for dissolution of the TRC.[199] The TRC "administratively" closed on December 20, 2001 but was only to dissolve at the end of March 2002 in order to finalize the last two volumes of its report (to be added to the five earlier volumes that had been presented to President Mandela).[200] Approximately 7,112 amnesty applications were filed with the TRC.[201] A total of 1,146 applicants were granted amnesty.[202] The Human Rights Investigative

195. *See* Adv M Coetzee, CEO of the TRC Regarding the Administrative Closure of the TRC (Dec. 20, 2001), *available at* http://www.polity.org.za/html/govdocs/pr/2001/pr1220b.html (last visited Feb. 2, 2003) and *see* Government Communication and Information System, GOVZA: System – Justice (2002) *available at* http://www.gov.za/structure/justice.htm (last visited Feb. 2, 2003).

196. *See* Adv M Coetzee, CEO of the TRC Regarding the Administrative Closure of the TRC (Dec. 20, 2001), *available at* http://www.polity.org.za/html/govdocs/pr/2001/pr1220b.html (last visited Feb. 2, 2003).

197. *Id.*

198. *See* Proclamation No. R. 31 of 2001, *available at* http://www.polity.org.za/html/govdocs/proclamations/2001/proc031.html (last visited Feb. 2, 2003).

199. *See* Proclamation No. R. 32 of 2001, *available at* http://www.polity.org.za/html/govdocs/proclamations/2001/proc032.html (last visited Feb. 2, 2003).

200. *See* Adv M Coetzee, *supra* note 196.

201. *See* Amnesty Hearings & Decisions, *available at* http://www.doj.gov.za/trc/amntrans/index.htm (last visited Feb. 2, 2003).

202. *See* NCBuy: Country Reference – South Africa Human Rights Report, *available at* http://www.ncbuy.com/reference/country/humanrights.html?code=sf&sec=4 (last visited Feb. 2, 2003).

Unit has authority to prosecute those persons who either failed to seek amnesty or to whom amnesty had been denied.[203] The Unit scrutinizes all human rights abuses that were addressed by the TRC's Committee on Amnesty.[204] It received approximately 11,000 amnesty applications.[205] It is estimated that no more than 20 cases potentially could be prosecuted.[206]

With respect to reparations, again, the task of the Committee on Reparations and Rehabilitation included identifying those victims who were eligible for reparation and/or rehabilitation and to make recommendations in this regard.[207] Its duties did not include implementing the recommendations.[208] In its Reparatinon and Rehabilitiation Policy, the Committee on Reparations and Rehabilitation proposed that each victim be paid an amount between R17,000 and R23,000 each year for 6 years.[209] Seventeen thousand reparation applicants would likely be eligible for reparation payment totaling upwards of around R2.3 billion.[210] The Government of South Africa did not approve the Committee's recommendation.[211] The Government has set aside R800 million for reparation payments but as of August 2002, it had not made a final decision regarding reparation payments.[212]

B. Was the TRC in Conflict with International Human Rights Norms Regarding "Effective Remedies"?

The Truth and Reconciliation Act limited the TRC's

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203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *See* Adv M Coetzee, *supra* note 196.

208. *Id. See also* A Summary of Reparation and Rehabilitation Policy, *available at* http://www.doj.gov.za/trc/reparations/summary.htm (last visited Feb. 6, 2003).

209. *See* A Summary of Reparation and Rehabilitation Policy, *available at* http://www.doj.gov.za/trc/reparations/summary.htm (last visited Feb. 6, 2003).

210. *See* Franz Krüger, *A Partial Truth is Better Than No Truth* (May 12, 2002), *available at* http://www.suntimes.co.za/2002/05/12/insight/in01.asp (last visited Feb. 6, 2003) and *see* NCBuy: Country Reference – South Africa Human Rights Report, *supra* note 202, *available at* http://www.ncbuy.com/reference/country/humanrights.html?code=sf&sec=4 (last visited Feb. 6, 2003).

211. *Id.*

212. *Id. See also* Mbeki to Approve Appartheid Reparations (Aug. 16, 2002), *available at* http://www.sabcnews.co.za/politics/government/0,1009,40892,00.html (last visited Feb. 6, 2003).

investigation to gross violations of human rights which were defined, *inter alia*, as the "killing, abduction, torture or severe ill-treatment" of any person and the "attempt, conspiracy, incitement, instigation, command or procurement to commit" such acts.[213] For such criminal law violations and serious human rights abuses, the various human rights treaties discussed above impose certain obligations upon states parties. With respect to those obligations, South Africa's establishment of the TRC may not have constituted an effective remedy and may have been in conflict with international human rights effective remedy norms.

As explained above, although the UDHR is not a treaty, its provisions arguably are binding on member states of the United Nations, including South Africa. The UDHR extends a right to a remedy for violations of fundamental rights, presumably including the right to life and freedom from torture and arbitrary detention. The remedy provided for under the UDHR must be individualized and adjudicatory. Thus, the mere payment *ex gratia* of compensation without a corresponding right to civil or criminal adjudication in cases of torture or disappearance would arguably be insufficient under Article 8 of the UDHR.

In the case of South Africa, fundamental rights were definitely violated during apartheid. However, the TRC is not a judicial body. Additionally, there can be no civil or criminal adjudication, even in cases of torture or disappearance, once amnesty has been granted. Thus, South Africa's establishment of the TRC and its power to grant amnesty would arguably be in breach of any obligations under Article 8 of the UDHR.

Likewise, under the ICCPR, the American Convention and the European Convention, with respect to criminal law violations and serious human rights abuses, the right to an effective remedy has been interpreted to include the obligation of states parties to investigate the human rights abuses, promptly, impartially, and exhaustively, to criminally prosecute those indirectly or directly responsible, to provide compensation, and to prevent future abuses. Indeed, amnesty laws in general have been found to be incompatible with a state party's obligation to provide effective remedies to victims of human rights abuses under both the ICCPR and the American Convention. Further, the American Convention includes an obligation to reorganize the state apparatus. Lastly, the European

213. *See* Truth and Reconciliation Act, *supra* note 178, pmbl. ¶ 1, Ch. 1(1)(ix).

Commission has held that where state authorities pursued a policy or administrative practice, as was the case in South Africa, of authorizing or tolerating conduct in violation of the European Convention, compensation alone will not be an adequate remedy.

First, although the Human Rights Violations Committee is required to "investigate" gross human rights violations under the Truth and Reconciliation Act, the purpose of the investigation is to construct as full of an account as possible of the nature, causes and extent of gross violations of human rights committed during the designated period. In contrast, under the ICCPR, the American and the European Conventions, the purpose of the obligation to investigate fully and impartially is to identify the perpetrators of the gross human rights violations so that the perpetrators can be pursued for criminal and/or civil sanctions. Further, under the Truth and Reconciliation Act, those persons who meet the requirements of full disclosure of all relevant facts and whose act, omission or offence was associated with a political objective committed in the course of the conflicts of the past, in accordance with the provisions of sections 20(2) and 20(3) of the Truth and Reconciliation Act, are granted amnesty, which means that neither that person, nor the state if the person was a state employee, nor any other body, organization or persons under a theory of vicarious liability, can be held criminally or civilly liable, nor can there be criminal prosecution or civil proceedings brought. Therefore, given the criminal law violations and serious human rights abuses that occurred during apartheid (and which the TRC was limited to investigating), the South African Government's establishment of the TRC does not appear to constitute an "effective remedy" and indeed appears to have been in conflict with international human rights "effective remedy" norms for those gross human rights violations as the term has been defined under the UDHR, the ICCPR, the American, and the European Conventions.

Conclusion

This article does not address the value of amnesty laws or truth commissions in the rebuilding of a broken society such as South Africa's before its transition to democracy. It addresses what is the scope of the term "effective remedy" as it has been defined by various human rights treaties, and analyzes whether South Africa's establishment of the TRC was in conflict with those "effective remedy" norms.

Because the TRC was limited to investigating the gross human rights violations that occurred during apartheid, South Africa's TRC may not have constituted an "effective remedy," and may have been in conflict with "effective remedy" norms as the term "effective remedy" has been defined under the various human rights treaties discussed above. In cases of criminal law violations and serious human rights abuses, the provisions rearding the right to an effective remedy in each of the human rights "treaties" discussed herein - the UDHR, the ICCPR, the American and the European Conventions - have been interpreted to obligate signatories to investigate the human rights abuses, to criminally prosecute those responsible, to provide compensation, and to prevent future abuses.

Under the Truth and Reconciliation Act, reparations may be and were recommended. However, compensation alone is inadequate for certain human rights violations. Inquiry into such gross human rights violations is mandated under the Truth and Reconciliation Act. However, the purpose, according to the Truth and Reconciliation Act, is to complete an historical picture, not to identify perpetrators so that they can be criminally prosecuted. Lastly, under the Truth and Reconciliation Act, amnesty can be granted, a situation under which neither criminal nor civil proceedings can be brought. Arguably, therefore, South Africa's establishment of the TRC did not constitute an "effective remedy" and was in conflict with international human rights "effective remedy" norms as expressed under the UDHR, the ICCPR, the American Convention or the European Convention, given the gross human rights violations that were committed during apartheid.