As we move forward into the third millennium, many African countries are in a state of collapse, torn asunder by conflicts which, in turn, cause serious violations of human rights. These systematic violations, ranging from violations of the right to life to those of civil and political rights, and also social and economic rights, have taken on alarming dimensions, while, paradoxically, new international instruments, to which there is broad adherence by the States Members of the United Nations, are steadily improving the international law relating to human rights with a view to combating the practice of impunity.

Human rights in Africa are in a state of extreme neglect and this, in turn, is disturbing the balance and the cohesion within the African States affected by this malaise. In addition, this disarray also affects the institutions of those countries, the rules by which the countries are administered, even the mindset and the values of the people themselves. Invocations of traditional and universal ethics are blithely flouted. The recourse to extreme violence is more likely to open doors to the institutions of the state than to lead to the condemnation of the perpetrators.

Impunity is unacceptable for a range of reasons which it would perhaps be as well to recall, albeit briefly, so as to reaffirm, on the one hand, the validity of this tenet, so beloved of human rights activists, and, on the other, to demonstrate the limitations of the measures which both politicians and some rebels advocate and implement with a view to facilitating the conclusion of peace agreements and reconciliation between the protagonists and the ordinary citizens who find themselves torn apart in bloody and violent conflicts.

Governments and public authorities in general bear the major responsibility for this catastrophic state of affairs, which calls for the involvement not only of non-governmental organizations, but also of social and political associations. All these players are concerned, to various degrees, by the emergence of a new dynamic process capable of putting a halt to the scourge of impunity and promoting justice and reconciliation. Compared to these national arrangements for combating impunity, the development of comparable international arrangements is slow because the innovative procedures introduced by international conventions and treaties are impeded in their application by forces – working both openly and underhand – which fear the effects of a national or international justice capable of punishing their crimes against humanity, the war crimes and their political and economic crimes.

In any society aspiring for peace, human rights and democracy, justice must play a dominant role. The forms that justice takes today, however, are more and more variable, subtle and complex in the light of the tangled situations to which they try to bring more or less satisfactory answers. That which we call transitional justice tries to reconcile the need for justice with political realism. Transitional justice can be defined in general terms as a body of judicial and extra judicial measures thought up by a given society as a way of dealing with certain serious human rights violations that took place at a given historical moment within that society, with the aim of achieving lasting national reconciliation.
Finding a means of dealing with human rights violations carried out in the recent or distant past is a Herculean task. Between the concept of ideal justice, which cannot be guaranteed in certain circumstances and total impunity, which one acknowledges must be categorically refused, certain interim proposals have been made which form a new discipline, that of transitional justice, the subtlety of whose workings merits careful attention.

In the final analysis, justice is the principal element in any genuine process of reconciliation leading to national reconstruction.

1. The concept of impunity

Let us recall here the two main forms of impunity.

De facto impunity is a result of the poor functioning or ineffectiveness of the police force or the judiciary. De facto impunity can be seen in cases where a police officer or a judge in the prosecutor’s office does not seek to establish the facts in the charges brought against a particular person, denies these facts or deliberately covers them up, or in cases where a judge wilfully refuses to pass sentence on the perpetrators of human rights violations or hands down a sentence which he knows full well to be derisory or, in any case, far short of what would be expected given the gravity and sheer extent of the crimes committed. The latter situation can often be seen in military tribunals where the judges, themselves army officers, tend to show leniency towards members of their regiment implicated in a conflict which is also theirs. In the end, failure to enforce judicial decisions or their inadequate enforcement lead to another form of impunity.

Legislative impunity is the use of legislative or statutory means to achieve amnesty or other measures of clemency designed to obstruct investigations, the search for truth, the prosecution of the perpetrators of offences, their judgement or the enforcement of their sentences. Amnesty means that the authorities renounce every part of the judicial process while other measures of clemency entail the renunciation of only some of these procedures.

Impunity is a serious phenomenon and one that has disastrous consequences from any point of view. Impunity is the breakdown of the rule of law, a return to the law of the jungle and the survival of the fittest, the negation of the principle of equal rights for all before the law, the disintegration of judicial power, the betrayal of human dignity, the moral destruction of society, the perpetuation of human rights violations, the encouragement of recidivism, the obstructing of democracy, the absence of a lasting peace, a hindrance to reconciliation and the loss of all credibility on the part of officialdom in the eyes of the people.

The concept of impunity also extends to the economic and social domain. When State officials are corrupt or line their own pockets from State coffers, they are breaking the law and committing acts that fly in the face of morality. They are all the more culpable in that the money in question was meant for development and for satisfying the basic needs of the citizens. The misappropriation of public funds is thus a human rights violation.

Impunity encourages the notions of collective culpability and other blanket generalizations under which all the members of a particular ethnic group, nationality, political body or party are held responsible and blamed for the crimes committed by a small number of individuals from within the group. The presumption of guilt has been substituted for the
presumption of innocence. Anonymous, collective responsibility has replaced the responsibility of the individual. An entire population or group should never be held accountable for the serious depredations and humanitarian catastrophes perpetrated by their leaders.

To abdicate responsibility in the face of impunity is tantamount to planting evil in our consciences and sacrificing future generations by bequeathing them a legacy of corruption. Impunity is an international phenomenon and a violation of international law.

Even if we accept that the judicial apparatus and the services responsible for conducting investigations into crimes and violations of human rights lack the necessary human, material and financial resources for the full performance of their tasks, this is still not explain their oversights and inability to suppress the culture of impunity. It would, however, be unjust to think of attributing this responsibility to the judicial authorities alone as they are, after all, only one link in the chain.

At the institutional level the principle of the separation of powers is an essential element in any democratic system. This separation is never completely effective. Executive power and legislative power often belong to the same grouping, which enables them to agree on the laws to pass and the budgets to allot to ministerial departments, institutions or the judiciary.

The room for maneuver of the judiciary is limited by the two other authorities which determine its prerogatives, its scope and its operating procedures. Amnesty laws are not voted on by judges.

Furthermore, in many African countries the professional career of a judge and consequently his living conditions are still determined by the executive, which can easily reward his obedience by promoting him or punish his professional rigour by subjecting him to all kinds of harassment.

The independence of the magistracy is only exercised within the framework of the constitution and the law. It is also practised within the framework of the universal principles of international law and the international conventions that a State has ratified or to which it adheres. The supremacy of these international standards over national law is often misunderstood or completely ignored by certain judges.

The independence of the judiciary is the sine qua non of its effectiveness. This independence should not only be pursued in relation to the executive, it must also be manifested in respect of the social and economic environment, with the aim of guaranteeing the principle of impartiality and the equality of all before the law. Have we not often seen judges deciding in favour of one of the parties to the proceedings in accordance with their political or ethnic affiliation or according to the amount of money received as a bribe?

Alongside these corrupt judges, the over-zealous judges who bend to the will of the authorities and those who are known for being passive or observing a complicit silence, there also exists a category of judges who are courageous and committed to their role of maintaining equilibrium in society by standing up against abuses emanating from the executive, from financially powerful men and women or from officers and other members of the military who
believe themselves to be above the law. The role of judges is crucial in the establishment of a State governed by the rule of law.

Each person who has powers vested in him is responsible for his actions. Every authority must be held accountable for its actions. If these rules are not respected it would be absurd, even offensive, to talk of a State being governed by the rule of law, or of the primacy of the law. The question of the immunity of heads of State and leaders responsible for the running of a country remains highly topical, for the favours they enjoy offend morality and conscience. Discussions currently under way, together with the progress that has been made in recent years, should help bring to completion constitutional reforms in this area on a universal scale. The ruling handed down on 14 February 2002, however, might slow down the pace of this reform since the International Court of Justice annulled the arrest warrant ordered by a Belgian judge against the former Minister of Foreign Affairs of the Democratic Republic of the Congo, Abdul aye Erode Mombassa, charging him with incitement to racial hatred and serious violation of international humanitarian law.

A certain number of conflicts spring from government mismanagement, characterized mainly by abuses of power, official corruption, the embezzling of public money, glaring social inequalities, unequal distribution of the national revenues and the growing misery of the population who do not benefit from national wealth.

Economic factors, whether admitted or denied, are often the underlying cause of violent conflicts. What is at stake economically is what determines the duration of such conflicts. The examples of Sierra Leone, Angola and the two Congas speak for themselves. The causes that the war leaders claim to defend are usually no more than empty pretexts or arguments designed to win over gullible populations, manipulate them and embroil them in meaningless wars that never end.

When power has been seized in this way by a group of leaders fearing neither God nor man, supported by the law enforcement agencies as well as by outside forces, these leaders and their henchmen, politically and economically powerful, dig themselves in and refuse to cede power until they receive assurances as to their impunity.

If the necessity of ending a war that has caused enormous loss of life, together with the relations between the opposing forces, can result in abandoning the pursuit of dangerous criminals nationally, universal ethical imperatives demand the intervention of the international community to ensure that the perpetrators of atrocities and others held responsible will not be able to escape international justice.

Nothing, absolutely nothing can justify resorting to violence against an innocent civilian population. Nothing can justify the crimes against humanity and the appalling war crimes which have spread like wildfire throughout Africa over the last two decades. If such acts are not to go unpunished and if any efforts are to be made to suppress them, it is essential to implement national and international mechanisms, judicial and extra judicial.

2. Justice and other weapons in the fight against impunity
How many of the countless victims on the African continent have any idea what has happened to them and why? How many people whose rights have been trampled have been able to achieve their quest for justice? How many of these victims have been rehabilitated and obtained just reparation?

And yet all these appalling crimes which have been committed ought to be punished so that they will never be repeated. It is both a national duty and an international obligation to investigate the facts and bring the culprits to book.

2.1 Judicial mechanisms

Judicial mechanisms can be national, regional or international.

National judicial bodies apply domestic law. Not only do they have the obligation to judge those who infringe the country’s law but also those who contravene sections of the international instruments which a State has ratified or to which it adheres. As soon as the formalities have been accomplished these accords become binding on the State and it is obliged to respect them and to ensure that they are respected.

National courts can also decide to pass judgement on the perpetrators of certain offences committed outside their country’s territory and by foreign nationals. For this, they are empowered with the universal competence to track down major criminals wherever they can be found. The most recent example of this is Belgium, whose statute on universal competence would seem to raise the issue of the principles of territoriality and immunity. This law is retroactive, so it can equally be applied to offences committed before it came into force. It is a progressive law which has unleashed a wave of complaints against various world leaders, some still in power and some deposed.

At the regional level, the protocol to the African Charter of Human and Peoples’ Rights on the creation of an African court of human and peoples’ rights has not yet come into force as it does not have the required number of ratifications. A complaint cannot be deemed admissible by this court until all domestic remedies have been exhausted. In any case, the effectiveness of this court will be limited given that the executive force of its decisions will depend on the good will of the no suited State.

International juridical bodies to which cases can be brought may be ad hoc, such as the International Criminal Tribunal for the Former Yugoslavia (1993) and the International Criminal Tribunal for Rwanda (1994), set up by the United Nations Security Council. The International Criminal Tribunal for the Former Yugoslavia has as its mandate the judgement of individuals presumed responsible for serious violations of international humanitarian law carried out in the territory of the former Yugoslavia after 1991. The International Criminal Tribunal for Rwanda has as its mandate the judgement of those presumed responsible for acts of genocide and other serious violations of international humanitarian law carried out on the territory of Rwanda and those Rwandan citizens presumed responsible for such actions or violations of international law carried out in neighbouring States between 1 January and 31 December 1994.

The results achieved by these International War Crimes Tribunals are somewhat disappointing in terms of the small number of judgements handed down in their seven or eight
years of operation. Furthermore, they cost considerable amounts of money to run, leading the United Nations and the other donors to question the wisdom of their continued existence. These two tribunals have only very partially met the expectations of the populations concerned and the world as a whole.

By common agreement between the United Nations and a specific State, the jurisdiction may be of a joint kind, that is to say, half made up of international magistrates and half of national magistrates. Sierra Leone is the most recent example of this.

International courts can be standing bodies, as is the case with the International Criminal Court. Rome saw the adoption in July 1998 of the Statute on the International Criminal Court, which is a permanent judicial institution with a mandate to prosecute persons presumed culpable of crimes of genocide, crimes against humanity, war crimes and crimes of aggression. Although the crime of aggression falls theoretically within the court’s competence, it has not been clearly defined and remains in the realms of theory. In the course of time another conference will formulate a definition of the crime of aggression, which will then take the form of an amendment to the Statute of Rome.

War crimes are also subject to special rules. Article 124 of the Statute permits States, at the moment of ratification, to make a special declaration excluding the competence of the International Criminal Court to judge war crimes concerning the said State for a transition period of seven years.

The competence of the Court is subsidiary; it only arises in cases when the State in question fails to prosecute the accused person at the national level. The Court is therefore complementary to national criminal jurisdiction, but does not act as a substitute for it. National tribunals will always have the right to pursue those responsible for these crimes before the Court considers doing so. Moreover, the Court is not retroactive, it can only exercise its powers to judge cases which have emerged after it entered into force.

Of the approximately 160 States represented in Rome, 120 voted in favour of the final text of the Statute. As the 60th instrument of ratification was lodged with the Secretary-General of the United Nations on 11 April 2002, the International Criminal Court can come into force 60 days from then. Since the official entry into force of the International Criminal Court has been announced for 1 July 2002, only persons accused of having committed offences after this date will be deemed subject to the authority of this court.

Among the first 66 States to ratify the Statute of Rome are 14 African countries. It is also important to note the recent statement by the United States of America of their intention to withdraw from the list of signatories of the Statute of Rome, meaning, therefore, that they do not have the least intention of ratifying it.

As for the International Court of Justice, only member States of the United Nations can appear before it. A ruling made by the International Court of Justice is definitive and there is no channel of appeal. In the event of a refusal on the part of the losing State to carry out a sentence, the prevailing party is given the right of appeal to the United Nations Security Council.
The issue relating to the warrant of arrest ordered on 11 April 2000, which brought the Democratic Republic of the Congo and Belgium into conflict, has just come to a conclusion with the ruling of 14 February 2002, which concluded that the issue of a warrant of arrest against Mr. Abdulaye Erode Ndombasi on 11 April 2000 and its international dissemination, constitute violations of the Kingdom of Belgium’s obligations towards the Democratic Republic of the Congo inasmuch as they have not taken due account of the inviolability and immunity from criminal prosecution which was enjoyed under international law by the Minister for Foreign Affairs in office and that, in consequence, the Kingdom of Belgium was obliged, by means of its own choosing, to set aside the ruling of 11 April 2000 and to give due notification thereof to the authorities to whom the warrant had been distributed.

It is to be wondered whether this ruling of the International Court of Justice does not call into question the universal competency which Belgium vested in itself, when it determined that immunities under customary international law, including those of ministers for foreign affairs, may still be challenged before the tribunals of a foreign State, particularly when these tribunals exercise an extended criminal jurisdiction based on various international conventions aimed at the prevention and suppression of certain serious crimes.

There is also a risk of conflict in the field of international law between, on the one hand, the International Court of Justice and, on the other, the two ad hoc international criminal courts (for the former Yugoslavia and for Rwanda) and the International Criminal Court. Indeed, both of the ad hoc international criminal courts recognize that the official status of accused persons does not relieve them from criminal responsibility, whereas the International Criminal Court is even more explicit and in article 27, paragraph 2, of its statute stipulates that any immunity or special rules of procedure which attach to a person’s official status by virtue of international or national law do not prevent the Court from exercising its competence with regard to that person.

This ruling of the International Court of Justice threatens to set a precedent and to provide a loophole for States who protect all kinds of criminals, by using the submission of cases to the International court of to tie the hands of the international criminal courts.

2.2 Extrajudicial mechanisms

When it comes to extrajudicial measures most countries favour the establishment of commissions with such names as Truth; Truth and Reconciliation; Truth and Justice; Historical Clarification; Investigation into Missing Persons; Investigation of Human Rights Violations, etc.

The goals pursued by these commissions are usually five-fold:

- To throw light on events of the past to make the public aware of the atrocities perpetrated by the guilty individuals or institutions;
- To help victims ascertain the fate of their families and enable them to claim reparations;
- To support the cause of justice in the sense that information gathered by the commission can help with legal proceedings;
- To establish clearly the institutional responsibilities of the different parties to the conflict and to make recommendations on how best to avoid similar violence in the future;
• To lay the foundations of lasting national reconciliation.

These extrajudicial mechanisms differ from judicial mechanisms in several ways, although this does not detract from their complementary nature. A commission of this type is not the same as a tribunal. The purpose of a commission is not to determine the criminal responsibility of individuals nor to pronounce sentence. Its focus is to identify instances of serious human rights violations throughout the world. It also investigates the political and social factors which have led to the violence, as well as the internal structures of the culpable forces. A commission submits a report which enumerates a list of political recommendations and suggestions for legal and administrative reform. Members of commissions are usually chosen for their independence and impartiality.

2.3 Role of civil society in the implementation of these mechanisms

The administration of justice and the combating of impunity are not just the prerogative of leaders, legal practitioners or those citizens chosen to sit on the said truth commissions. While the responsibility of government departments is unquestionable and inescapable the role played parliamentarians in the fight for justice and reconciliation and the struggle against impunity is not always so very perceptible. In principle, however, their mandate does not give them the right to be indifferent.

The citizens of a country are naturally concerned about justice, whether as its beneficiaries, or as those directly or indirectly involved in its administration. As witnesses they make their contribution to the revelation of truth. The best investigators in the world will never be able to solve a crime if the witnesses decide to keep silent or to misrepresent the truth. Ordinary citizens, distrustful and traumatized by authoritarian regimes, are not going to express themselves freely and describe the atrocities inflicted on them. Some need time before putting themselves through an ordeal such as this, which often demands a great deal of courage.

At another level, human rights leagues or associations can lead serious investigations into human rights violations and produce reliable facts or proofs of guilt which can be used by the police, judges or truth commissions. These investigations can deal equally well with recent events or crimes committed in the past. Human rights bodies can engender national human rights institutions, independent and trustworthy, with the potential of becoming a real social and moral force. The members of these bodies can be directly included in the truth commissions.

As these community human rights movements are tough and stick to their human rights principles, their involvement sometimes breaks through the sterile, demagogic debates often pursued by politicians whose main concern is to defend their partisan interests, casting aside all truth and objectivity. These politicians are very easily tempted by a process of self-amnesty which would give them immunity from prosecution for crimes for which they acknowledged their guilt. If this were ever to happen, human rights activists could activate a process of international justice, which we might also call “justice sans frontières”, so that, at the end of the day, the perpetrators of appalling crimes would not be able to escape justice.

That last step could also be taken by the victims. Those who do not feel bound by the arrangements in their countries for national reconciliation will always have the possibility of
taking their case before an international court or a national judicial body that has universal jurisdiction.

Ultimately, it is important to involve the traditional structures of the societies in which ordinary people live, so that they can assume their role of conciliation and reconciliation at the grassroots level. Grassroots communities must look for the truth of what happened in the upper reaches of their societies, they must help in identifying the criminals and promoting a process of sincere reconciliation. In Rwanda, faced with the enormous challenge of trying all those implicated in the genocide of 1994, the Rwandan authorities decided to resort to the “gacaca” courts – a blend of traditional and conventional justice – to establish truth in the public arena, with the participation of prominent members of the community, and to lay the foundations of reconciliation. Given the complexity and gravity of the situation prevailing in Rwanda after a genocide of such magnitude, to make such an unpredictable mixture succeed would be an exceptional achievement.

3. Process of reconciliation

The process of reconciliation comprises several stages, some more complex than others.

Without a cessation of hostilities there can be no peace. Ending war, however, has its own cost. Before agreeing to a ceasefire the belligerent parties look for an amnesty or some other guarantees of impunity. Promises of amnesty or other clemency measures are extorted in exchange for a peaceful transition or an escape from hell. This context of violence has an unmistakable influence on the approach followed in dealing with the contentious issue of the bloodshed of the past. It is practically impossible to ignore completely the context within which the law is to be applied and the environment in which the reconciliation process is being initiated.

Nevertheless, any reconciliation process which has no room for justice is doomed to failure. Neither lasting peace nor true reconciliation can be brought about without justice, or rather, without a minimum of justice. The choice of criminal proceedings as a mechanism for reconciliation and for combating impunity is not a unanimous one in the light of political and economic realities and power struggles.

Are we really in a position to try the tens of thousands of criminals who have been perpetrating their crimes over decades? Are our national judicial systems strong enough to carry out this task? Do they have adequate means in terms of money and human resources to succeed in this mission? Are some of these wanted people not too powerful today?

Given that it may not be feasible to try all the criminals, it is essential that a certain number be brought to book, so that the idea of justice can be preserved in the eyes of a population that has been deeply traumatized by waves of serious human rights violations. If not a single culprit or sponsor of these crimes is apprehended, then the need for justice will not have been met and the concept of impunity will remain deeply anchored in the collective memory. The evil personified by those sponsoring these violations must be condemned and a moral judgement must be made. Contrary to what some people believe, the abdication of justice can never be a precondition of reconciliation.
The justice in question here is not simply a matter of punishing criminals, it relates more to reconciliation, reparation, memory and the elimination of the inequality and dysfunction that lie at the heart of injustice and conflict within society.

We have a duty to remember the victims. This duty belongs first and foremost to the State. The right to know the truth and the right to knowledge are essential elements in the process of peace and reconciliation. A society needs to be able to clarify the facts of its history. Even if truth is difficult to establish, this procedure is a requirement without which the most appalling crimes could well be repeated and peaceful cohabitation could turn out to be no more than an illusion or pious hope.

The right of the victims to reparations should not be sacrificed for the sake of lessening the resentments that feed the cycle of violence. The search for resources to compensate the victims must form part of the reconstruction strategy. Unfortunately, these resources are often lacking in under-developed countries. Any gesture, no matter how small, is a mark of attention that will give some comfort to the victims. Recognition of the injustices they have suffered and the creation of an appropriate memorial to give homage to the victims are also forms of reparation.

As for amnesty, pardons, and all the different measures of clemency that can be envisaged, they will all be meaningless if they do not take due account of the various indispensable steps that lead to reconciliation. To grant amnesty without first having established the truth only serves to trivialize evil and constitutes an affront to human dignity. It is difficult if not impossible for a victim to pardon a criminal who shows no regret for the atrocities he has committed. “To turn over a new leaf” is not a mere formality for, as the Latin Americans so aptly put it, “first you have to read the page before you can turn it”!

The gravest of crimes such as genocide, war crimes and crimes against humanity are unpardonable and imprescriptible. As long as the perpetrators of serious human rights violations award themselves amnesty they are triggering a delayed-action bomb whose future victims may be their own children. The time has come to consider assigning serious economic offences, perpetrated by State authorities, to the category of imprescriptible crimes.

Amnesty is sometimes sought for crimes, categorized as “political”, on the grounds of the motives for which they were committed. There is some dispute over this issue, as some writers and researchers believe that no motive should be able to impede criminal proceedings, while others think that in the interests of national reconciliation a total amnesty should be considered, as was the case in Mozambique.

In conclusion, justice is an essential element in the reconciliation process which seeks to heal a society that is sick, torn apart, traumatized and weighed down by indifference in the face of the most terrible crimes. During and after a period of conflict and violence, a long and arduous process of national reconstruction begins and requires the maximum amount of good will if it is to reach a successful conclusion. The necessary good will can be found at every level, but the effort must be made to put it to work!