

Peace processes and international law

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■ Executive summary

No political solution to internal armed conflict that seeks to secure lasting peace can be based on impunity for crimes against humanity, genocide and war crimes; the denial of the rights to justice, truth, and reparation for victims, their relatives, and society; contempt for the basic principles of the rule of law; or the continuation of the doctrines, policies, structures and practices that gave rise to such crimes. In any peace process the state must comply with its international obligations regarding justice, truth, reparations and guarantees of non-repetition. Although international law permits amnesties for political offences or participating in hostilities, they are prohibited for crimes against humanity, genocide and war crimes. As far as guarantees of non-repetition are concerned, institutional and legal reforms need to be instituted, state practices need to be changed, and public administration needs to undergo a vetting process so that the full and effective enjoyment of human rights can be ensured. Any negotiating process that fails to address and resolve these issues will at most only halt the actions of some of the actors in the armed conflict; it will not lay the foundations for lasting and sustainable peace.

Introduction

History shows that no political solution to internal armed conflict that seeks to build lasting peace can be based on impunity for the gross human rights violations, crimes against humanity, genocide and war crimes that were committed; the denial of the rights to justice, truth, and reparation for the victims, their relatives, and society; contempt for the basic principles of the rule of law; or the continuation of the doctrines, policies, structures and practices that gave rise to such crimes. As the United Nations (UN) secretary-general reported in his 1999 report to the General Assembly, it is imperative that the perpetrators of gross human rights violations and international crimes be brought to justice in order to deter further crimes and give peace a chance: "Any appearance of impunity for the perpetrators could become a real obstacle to the process of finding a peaceful solution to the conflict through negotiation" (UNSC, 1999, para. 32). He also said that in peace processes the victims' right to truth, justice and reparation must be fully respected (e.g. see UNSC, 2004a). No negotiating process for ending an internal armed conflict can lay the foundations for lasting and sustainable peace if it does not decisively address the crimes committed by military personnel, the security forces and paramilitary

groups; if the state does not acknowledge and condemn such crimes; if public administration is not subjected to a vetting process to reform the system that permitted abuses; and if the necessary legal and institutional reforms are not undertaken to ensure that such crimes are not repeated and that the whole population is able to effectively exercise its democratic rights and freedoms. Any negotiating process that fails to address and resolve these issues will at most only halt the actions of some of the actors in the armed conflict; it will not lay the foundations for lasting and sustainable peace.

Even during transition processes and while seeking to end an internal armed conflict, it is incumbent on the state to comply with its obligations under customary international law, treaties, and instruments relating to the suppression of gross human rights violations, crimes against humanity, genocide and war crimes, in order effectively to guarantee the right of victims and their relatives, both as individuals and collectively, to justice, truth and reparation, and to provide guarantees of non-repetition, including institutional reforms.

Justice and crimes under international law

International law places an obligation on states to investigate crimes such as gross human rights violations, crimes against humanity, genocide, and war crimes, and to bring to justice and punish the perpetrators and others involved in such crimes in courts that form part of the ordinary justice system. These obligations are expressly established in numerous human rights treaties and other international instruments, as well as in customary international law, and have been reaffirmed in international jurisprudence – both that relating to human rights and that developed by international criminal courts – and by the UN Security Council (e.g. see UNSC, 2003; 2004b) and General Assembly (e.g. see UNGA, 2002a; 2002b). Although some treaties do not specifically refer to these obligations, international jurisprudence has concluded that, by virtue of the duty of guarantee established in human rights treaties and the general principles of law, such treaties place an obligation on states to investigate, bring to justice, and punish the perpetrators and others involved in crimes under international law. What is more, as reiterated by the Inter-American Court of Human Rights, the obligation to investigate such crimes and to bring to justice and punish those responsible is a binding obligation of international law (e.g. see Inter-American Court of Human Rights, 2006a; 2010).

This has specific consequences:

- The state cannot refuse to investigate and bring to trial the perpetrators of such crimes under international law.
- Gross human rights violations, crimes against humanity, genocide and war crimes cannot be the subject of amnesties, pardons or other similar measures that prevent such crimes from being investigated and/or exonerate the perpetrators of such crimes from criminal liability.
- International law does not consider gross human rights violations, crimes against humanity, genocide and war crimes to be political offences, even if those responsible had political or ideological motivations for committing them.
- The fact that the person who committed a crime under international law served as head of state, head of government, a member of a government or parliament, an elected representative, or a government official, or held any other official post under no circumstances exempts that person from criminal liability and is not a basis for reducing the penalty or claiming the existence of mitigating circumstances.
- Commanders and other senior officers are criminally liable for crimes committed by their subordinates if they knew, or ought to have known, that the latter were going to commit or were committing such crimes and failed to take all reasonable and necessary measures at their disposal to prevent them from doing so or, once committed, to punish those responsible.

- Due obedience cannot be used as grounds for removing criminal liability or justifying gross human rights violations, crimes against humanity, genocide and war crimes.
- Domestic criminal legislation can be applied retroactively to acts that, at the time they were committed, were already crimes under international law without this implying a breach of the principle of the legality of offences (*nullum crimen sine lege*) or that of the non-retroactivity of criminal law.
- Those who have committed gross human rights violations, crimes against humanity, genocide or war crimes cannot be granted asylum or refuge.
- Those allegedly responsible for committing gross human rights violations, crimes against humanity, genocide or war crimes should be tried in courts under the ordinary justice system and not in military courts.

The above does not prevent the establishment of a substitute system of custodial sentences, subject to specific conditions, for members of armed opposition groups convicted of crimes under international law. Nevertheless, such a system should meet certain criteria. Firstly, the convicted person should accept legal responsibility for the crimes in question; effectively co-operate with the courts in clarifying such crimes; and publicly apologise to the victims, their relatives and society for the crimes of which he/she has been convicted. Secondly, consideration may be given to the level of involvement and responsibility of the convicted person in the commission of the crimes, as well as to his/her personal circumstances (e.g. age). In such cases, depending on the circumstances, consideration may be given to substituting the custodial sentences provided in domestic criminal law with, among others, the loss of political rights, the imposition of community work or work in the public interest, or conditional enforcement of the custodial sentence.

The issue of political offences, amnesties and other similar measures

While international law prohibits the granting of amnesties and other similar measures for gross human rights violations, crimes against humanity, genocide and war crimes, it does allow them to be granted for political offences and ordinary offences committed for political reasons. The UN General Assembly, the UN Human Rights Committee and the Inter-American Commission on Human Rights have recommended the release of those responsible for political offences, as well as the granting of amnesties and other similar measures for such offences (e.g. see UNGA, 1977a; 1977b; 1977c; HRC, 1994a; 1994b; 1998; 2001; IACHR, 1981). International humanitarian law also recommends that amnesties be granted to those who have fought against governments in situations of internal armed conflict. Indeed, Article 6 (5) of the Protocol Additional to the Geneva Conventions of August 12th 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts (Protocol II) states that “[a]t the end of hostilities,

the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained". Nevertheless, as spelled out by the International Committee of the Red Cross, international human rights bodies and criminal courts, and the UN Security Council (Henckaerts & Doswald-Beck, 2005: 611ff.), such amnesties cannot include war crimes and breaches of international humanitarian law, such as arbitrary killings, torture and enforced disappearances.

Indeed, gross human rights violations, crimes against humanity, genocide and war crimes, on the one hand, and political offences, on the other, are two distinct categories of criminal wrongdoing and subject to different rules, especially with regard to extradition, asylum and amnesty. Although international law does not provide a definition of a "political offence", it recognises the concept, especially in the context of extradition, the right to asylum, amnesties, and penalties. International law establishes different rules for political offences, on the one hand, and gross human rights violations, crimes against humanity, genocide and war crimes, on the other. In contrast to what it stipulates in the case of the latter, extradition does not exist for political offences and the principle of *non-refoulement* applies, refuge or asylum can be granted for acts that amount to political offences, and amnesties can be granted for such offences.

Under international law, it is therefore legitimate to grant amnesties to all members of armed opposition group for political offences and ordinary offences committed for political reasons in the course of an internal armed conflict, with the exception of gross human rights violations, crimes against humanity, genocide and war crimes.

The right to the truth

The right to the truth for the victims of crimes under international law and their relatives is extensively protected in international law by both international instruments and jurisprudence, and the UN General Assembly (e.g. see UNGA, 2011) and the General Assembly of the Organisation of American States (e.g. see OAS, 2012). This right, which has been characterised as inalienable and imprescriptible, means knowing the full, complete and public truth about the crimes committed, their specific circumstances, the identity of those responsible and their motives (e.g. see UNHCHR, 2006; UNGA, 2005a). In cases of enforced disappearance, secret execution and clandestine burial, the right to the truth also has a special feature: knowing the fate and whereabouts of the victim. Similarly, in the case of the disappearance and/or removal of children while their parents, who have been subjected to enforced disappearance, are being held captive, the right to the truth also means the right of the children to know their true identity. In addition to the victims and their relatives, society as such also has the right to know the truth

(e.g. see HRC, 1996; IACHR, 1999b; Inter-American Court of Human Rights, 2004). By definition, the right to the truth is closely linked to the right to justice, since it implies the determination of individual criminal responsibility by a court.

In this context, although truth commissions and other similar mechanisms may help to clarify crimes, international jurisprudence has pointed out that their scope is limited. For example, in several cases the Inter-American Commission on Human Rights and the Inter-American Court have said that, while truth commissions may help to build and preserve the historical memory; clarify the facts; and establish institutional, social and political responsibilities during specific periods of a society's history, they do not fulfil or replace the state's obligation to establish the truth through judicial proceedings and launch criminal investigations to determine the corresponding liabilities (IACHR, 1999b; Inter-American Court of Human Rights, 2006b). In this regard, the UN special rapporteur on extrajudicial, summary or arbitrary executions concluded that "[a] commission is not a substitute for a criminal prosecution" (Alston, 2008: para. 55). Truth commissions and other extrajudicial mechanisms for clarifying gross human rights violations and crimes under international law cannot therefore supplant the action of the courts or exonerate the state from its obligation to establish the truth through judicial proceedings, conduct judicial investigations into what happened and impose criminal penalties on the perpetrators.

The international principles and standards governing the creation and operation of truth commissions are set out in the UN's Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (UNGA, 2005a). All truth commissions must comply with these principles and ensure that their work to clarify what happened helps the courts.

Reparation

It is a general principle of international human rights law that transgression of the obligation to ensure the effective enjoyment of human rights and refrain from infringing them entails the obligation to provide reparation. This obligation is established in international treaties and instruments, has been reiterated in international jurisprudence, and is a rule of customary international law (e.g. see Inter-American Court of Human Rights, 2002; UNHCHR, 1993: para. 41). International law also states that the granting of reparation to victims does not exonerate the state from complying with its obligations to investigate, bring to justice and punish those responsible (UNHCHR, 1994: paras. 688, 711; Inter-American Court of Human Rights, 1998: para. 72). The UN General Assembly's Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (UNGA, 2005b) serve as a legal referent

on the subject for both human rights violations and breaches of international humanitarian law.

Reparation must be comprehensive, in other words, it must repair all harm, both material and non-material, caused by the crimes that have been committed under international law. It must be adequate, proportional to the harm suffered, fair and prompt, and may be individual or collective, depending on the nature of the right violated and the group of people affected. For example, indigenous peoples and communities of African descent have the right to collective reparation measures.

There are various forms of reparation, including restitution, compensation, rehabilitation and satisfaction. In terms of satisfaction, it is extremely important for both the victims and society in general that the state and the armed opposition groups who are parties to a peace accord publicly acknowledge the crimes that were committed and their responsibility for them, and apologise to the victims, their relatives and society.

Under international law the right to reparation extends to all

persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law (UNGA, 2005b: art. 8).

This right also extends to the relatives of the victims of gross human rights violations, crimes against humanity, genocide and war crimes, as well as to people who have suffered harm when intervening to provide assistance to victims who are in danger or to prevent them from becoming victims. Also included within the concept of victims who are entitled to the right to reparation are members of armed opposition groups who have been subjected to acts and methods that are prohibited under international humanitarian law and amount to war crimes, including in situations in which they have not been placed *hors de combat*.

Reparation measures can also encompass “legal entities”, such as political parties, trade unions, and social or human rights organisations, if their members have been persecuted and/or victimised for belonging to these organisations or for activities undertaken by them (e.g. see HRC, 2007; 2010; ECHR, 2004; 2008).

Guarantees of non-repetition

The state has an obligation to provide guarantees of non-repetition for crimes under international law. This obligation is directly linked to the state’s obligation to adapt its governmental apparatus, legislation, and practices in order to ensure the full and effective enjoyment of human

rights and compliance with its international obligations (e.g. see Inter-American Court of Human Rights, 1990; HRC, 1981). The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (UNGA, 2005b) and the Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (UNGA, 2005a), both developed by the UN, systematise states’ international obligations in relation to guarantees of non-repetition.

Guarantees of non-repetition can include many different measures, some of the most important being:

- the establishment of a vetting process to remove from public administration, including all three branches of government, without prejudice to any corresponding criminal or disciplinary proceedings, any public officials involved, by act or omission, in crimes under international law or paramilitary activities, or who caused such crimes and/or paramilitary activities to go unpunished;
- the derogation of any institutional doctrines or state legislation that orders or encourages the commission of crimes under international law or the promotion of paramilitary groups and activities;
- the derogation of any laws or norms that caused crimes under international law to go unpunished;
- measures that ensure that the armed forces are subordinate to civilian power;
- measures that ensure the effective exercise of freedom of opinion, expression and association;
- measures to strengthen the judiciary, especially the ordinary justice system;
- the effective dismantling of paramilitary groups; and
- the strengthening of international human rights protection.

Guarantees of non-repetition are a key element of any negotiating process for ending internal armed conflict, because they help to ensure that the crimes of the past will not be repeated, that fundamental freedoms can be exercised without fear of victimisation and that the rule of law, which is the guarantor of human rights, becomes established.

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