



# Dealing with the Past and Transitional Justice: Creating Conditions for Peace, Human Rights and the Rule of Law

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Dealing with the Past – Series



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Dealing with the Past – Series

**Dealing with the Past and Transitional Justice:  
Creating Conditions for Peace, Human Rights  
and the Rule of Law**

Mô Bleeker, General Editor

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## About the Organizers of the Conference held in Neuchâtel, Switzerland on October 24-25, 2005



Schweizerische Eidgenossenschaft  
Confédération suisse  
Confederazione Svizzera  
Confederaziun svizra

Federal Department of Foreign Affairs FDFA

The Political Affairs Division IV of the Federal Department of Foreign Affairs has human security as its focus and has identified the following areas of concentration for its work: Peace Policy, Human Rights Policy, Humanitarian Policy and Migration, and the Expert Pool for Civilian Peacebuilding.

Dealing with the past is a crucial strategic issue for PD IV with **Mô Bleeker** as the desk officer in charge.



Kompetenzzentrum Friedensförderung  
Centre pour la promotion de la paix  
Centro per la promozione della pace  
Center for Peacebuilding

**K O F F**

The Center for Peacebuilding (KOFF) - swisspeace was founded 2001 within swisspeace and is sponsored by the Swiss Federal Department of Foreign Affairs (FDFA) and numerous Swiss non-governmental organizations. The Center's objective is to strengthen Switzerland's capacities in civilian peacebuilding by providing information, training, advisory services and platform activities.

**Jonathan Sisson**, program officer at KOFF – swisspeace responsible for dealing with the past and reconciliation, collaborated in the preparation of the conference. He is the president of the International Fellowship of Reconciliation (IFOR) and represents that organization at the UN Commission on Human Rights in Geneva.



The International Center for Transitional Justice (ICTJ) assists countries pursuing accountability for past mass atrocity or human rights abuse. The Center works in societies emerging from repressive rule or armed conflict, as well as in established democracies where historical injustices or systemic abuse remain unresolved. Founded in 2001, the Center now has close to forty staff and has offices in New York, Cape Town, Brussels, and Geneva.

The person responsible for the preparation of the conference on behalf of ICTJ was **Priscilla Hayner**, Director of the International Policymakers Unit.

We wish to thank Lukas Heinzer, Dorothee Schnyder, Hugh Brown, Mary Louise Mettler, Philipp Thüler and swisspeace for their support in publishing this report. We express our appreciation to Jonathan Sisson for the authorization to use images from his lithography "joie de vivre" as illustrations.

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## Abstract

The conference *Dealing with the Past and Transitional Justice, Creating Conditions for Peace, Human Rights and the Rule of Law* took place on October 24-25, 2005 in Neuchâtel, Switzerland, and was co-organized by the Political Affairs Division IV of the Swiss Federal Department of Foreign Affairs, the Center for Peacebuilding (KOFF) – swisspeace, and the International Center for Transitional Justice (ICTJ).

The goal of the conference was to deepen the issue of transitional justice as a bridge between peace promotion, human rights, and the rule of law. The conference focused on guiding principles and ethical issues in connection with transitional justice and shared lessons learned and best practices in this regard.

The conference was attended by professionals from European governmental institutions, multilateral institutions, and international NGOs working in the different areas of foreign policy (conflict prevention and promotion), development cooperation, humanitarian aid, peace promotion, and human rights. It is hoped that the conference will be a first step toward the creation of a European network working on dealing with the past issues.

The report contains the text of the presentations which were delivered during the conference. As such, the opinions expressed in the presentations are those of the authors and do not necessarily represent the views of the Political Affairs Division IV.





# 1 Introductory Remarks

## Urs Ziswiler

The report of the UN Secretary-General of August 2004 on the rule of law and transitional justice during conflicts and in post-conflict societies has given new and especially pertinent impetus to current thinking on preventing the outbreak of new conflicts and on dealing with difficult questions about the past, to which answers are needed for establishing a lasting peace.

The report also highlights the many errors made and the lessons learned. It stresses several points which will be the focus of our discussions during this seminar, including:

- the impossibility of developing a single and universally applicable model;
- the need to carry out these initiatives with local governmental and non-governmental players;
- the importance of supporting a system to combine the instruments of transitional justice which addresses the factors linked to the conflict, as well as structural transformations, development and reconstruction, the restoration of the rule of law;
- the need to strengthen the political will to come to terms with the past, prepare a peaceful democratic future, and a new national ethos;
- the imperative not to develop transitional justice in the sense of “victors’ justice” but to assist with the rehabilitation of victims and society as a whole;
- the absolute need to apply international norms and standards: Strengthening the rule of law, human rights and peace cannot be done to the detriment of international standards.

Failure to respect international standards undermines efforts to achieve the desired result and negates the claim to be acting in the name of justice.

The report also critically analyses the many instances of incoherence and the lack of effective coordination between external players at the different phases of a conflict, as well as the absence of a holistic vision. For example, we must acknowledge that the mechanisms of accountability of external actors towards their national partners must be developed along the lines of those that permit the structured and binding participation of civil society. It is the duty of international justice to strengthen international norms and standards. Any initiative that does not respect these standards and norms risks endangering the valuable and fragile gains made in these areas. The Secretary-General’s

report has relaunched an indispensable process of reflection that in one way or another we will pursue in our discussions today and tomorrow.

Why has Switzerland taken the initiative to convene this conference? Because we think that it is important, given the complexity of the subject, to create a space for dialogue and reflection that will help us take the best political decisions and develop the best practices on the ground. In addition, Europe has experienced the processes of conflict and transitional justice, for example in Germany following the Second World War, or the process of vetting and lustration in Hungary, the Czech Republic and Slovakia, as well as other experiences currently under way or under discussion in Spain and the Balkans. The participants at this seminar are mostly European because we would like to strengthen the dialogue and a network on these themes in Europe, and because we also have a lot to learn from our own past experiences.

Switzerland has made a major contribution to the development of the Rome Statutes and to the establishment of the International Criminal Court, but we also understand that the judicial aspect does not solve everything. We have therefore undertaken an in-depth review of the direction of our thinking and actions in the area of transitional justice, and we have decided to address those aspects of transitional justice which are in contradiction to peace promotion, human rights, and the rule of law. The theme of dealing with the past is central to our peace-promotion programs in the Balkans, Guatemala, Africa and Asia. As a new member of the United Nations, Switzerland was the initiator of a resolution on transitional justice with other countries, some of which are represented here today. This resolution was adopted by the Commission on Human Rights in spring 2005.

We have also gone ahead with an exercise in internal transitional justice. The Bergier Report analysed Swiss politics during the Second World War, and we have learnt many lessons for our country. This exercise shows the real depth of our interest in this subject. The initiative for this conference is therefore part of the continuation and prolongation of our earlier efforts.

But we also want to gain a better understanding of these complex transitions. We must all admit that many errors have been made. And we are also alarmed by the possibility of new conflicts arising which may involve crimes against humanity and new acts of genocide.

While on this subject, we see it as a very interesting sign of the times that Mr. Juan Méndez is both President of the International Center for Transitional Justice (ICTJ) and Special Adviser on Prevention of Genocide. To us, this double role symbolises precisely the challenge of transitional justice: that we must think and act simultaneously in the areas of conflict prevention, conflict resolution, and long-term post-conflict work.

Ladies and Gentlemen, the facts seem to show that there is an empirical and causal relationship between initiatives in transitional justice and lasting peace, but we must get a better idea of these relationships, and address the large number of outstanding questions.

For example:

- In countries with dictatorial regimes, how is it possible to strengthen the emergence of a culture of democratic participation?
- In countries that have endured several decades of armed conflict, how can we support the emergence of a culture of non-violent management of conflicts?
- In countries where conflicts have been linked to structural exclusion, including ethnic exclusion, how do we strengthen the implementation of political, social and economic reforms in a way that can help correct the structural causes of violent conflict at their roots?
- How do we take the political, cultural and social contexts adequately into account without adopting an overbearing universalism?
- How do we promote sufficient participation of civilian, non-military players in the processes of negotiating and developing peace agreements?
- Does an adequate response for victims exist?
- What role can or should external players take?
- What are the limits of external players' interventions? How do we avoid imposing models or processes?
- How do we strengthen local ownership?

This conference will not result in any form of declaration, decision or initiative. We hope that this space for dialogue will be free of the constraints of *realpolitik*. We have come here to reflect together in a creative and critical way. The participants at this conference come from various areas of activity such as humanitarian aid, cooperation and development, and include political decision-makers, peace-builders, leaders of processes under way, as well as governmental and non-governmental professionals. We hope that a creative dialogue will take place.



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## 2 Panel 1

*The Contribution of Dealing with the Past and Transitional Justice to Promotion of Peace and Respect for Human Rights and the Rule of Law: Critical Reflections and Emerging Principles for Internal and External Actors*

Panelists: Juan Méndez  
Helen Mack  
Kieran Prendergast

Moderator: Mô Bleeker

### **Guiding Questions:**

Transitional justice has been criticized as a new moral agenda imposed on post-conflict societies by western countries. An ongoing critical reflection on the guiding principles and the moral values underlying transitional justice is necessary, if it is to be developed into a viable instrument which serves to promote peace, human rights, the rule of law, and reconciliation in different social and political contexts. Issues of particular interest in this regard: What effect does a lack of justice for victims have on the victims themselves and on a post-conflict society in general? How should civil society confront a lack of political will to deal with the past? What are some of the challenges to be faced in linking justice and peace promotion? How can dealing with the past be an effective instrument for reconciliation? And finally, in the context of globalization, what opportunities exist and which obstacles must be overcome in the development of international norms and standards for dealing with the past?



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## **2.1 Dealing with the Past and Powerful Groups: Challenges to Peacebuilding, Justice and Reconciliation**

**Helen Mack**

### **2.1.1 Introduction**

In preparing these reflections on the effects of impunity and lack of justice for the victims of armed conflict in societies confronted by post-conflict challenges, I found myself involved in a very intimate self-assessment as a Guatemalan, while reflecting on the situation in countries which have had similar experiences. I have also been deeply influenced by the experiences of others, as though they were my own, since I left behind the life of an ordinary citizen to engage in the struggle for justice.

As I see it, post-conflict dynamics in other nations, and the interrelation with the struggle for justice and establishment of the rule of law, have many similarities with the Guatemalan experience.

Violent, bloody and heartbreaking conflicts in many countries have produced a huge population of victims whose suffering seems endless. The actual violence is only the beginning of a process of victimization that deprives everything of value: life, health, family, community, possessions, etc.

Impunity for the perpetrators of the horrors endured by the victims, in a society unable to guarantee the rule of law, justice, social welfare and the prevention of future repression, inevitably adds to the suffering.

Some societies after decades of struggle have managed to break out and create a space, however small, for truth, justice and reparation.

### **2.1.2 Guatemala and how it deals with the past**

Guatemala is a society traumatized by violence and impunity, as if frozen in time.

There are dynamics that open and then close the door of opportunity for justice for the victims. But the opening and closing are never complete. Political dynamics sometimes open up a small space and steps are taken. Subsequently the dynamics result in closing the space and the small gains are reduced or eliminated altogether.

These post-conflict dynamics depend on the political forces: the military that resists exposure to truth and justice; the economic powers and other

conservative forces that try to control the state and the extent of democracy; and the political parties that constantly negotiate their permanence in positions of privilege, even at the cost of important national transformation. It is these forces that determine when spaces are opened or closed, and the size of the steps taken.

The Peace Accords that ended 36 years of armed conflict in Guatemala are a fairly good model for dealing with the past. They should make it possible to establish a degree of transitional justice, coherent grounds for steps towards institutional transformation, and to create effective peace conditions.

The Peace Accords have yet to be implemented, however, in essentials such as the promotion of reconciliation, which powerful groups find discomforting and reject. They could be the starting point for a socio-political and legal process for dealing with the past, transition from impunity and the denial of justice, movement towards a state in which legality and equality guarantee the judicial reparation that victims need so badly.

### **2.1.3 Victims of many evils**

There is little comfort for the victims in such a context however. They have little or no influence in the management of the public policies that concern them. To date they have only experienced the impunity of the malefactors, the denial of justice, rejection, marginalization, stigmatization and relentless social and economic injustice.

Apart from their cruel, inhuman and degrading treatment by the state, many victims have also suffered the loss of their families, of emotional stability, of their roots, their sense of belonging and social structure. Previous generations, particularly in the case of certain ethnic groups and peasants in rural areas, had already suffered economic, political and social injustice and marginalization.

Guatemala has a control system rooted in colonial times and validated historically by an authoritarianism that fosters social and economic injustice. For over 500 years, the state apparatus has worked exclusively for the most powerful. Initially a system that favored the conquerors, it was adapted to serve the elite that emerged when Guatemala gained its independence from Spain and the republican structure was created.

The victims of this system endure hunger, extreme poverty, and lack of access to health care, education and development. Under such conditions, it has not been difficult to subject them to the conditions of war that are even worse, rendering them even more vulnerable.



### 2.1.4 Victims and the denial of justice

What do the victims now feel about this lack of justice? Their feelings have changed little, reflecting an ancestral history of abandonment and lack of opportunity, their dignity trampled under foot by those who deny them justice and remain indifferent to the pain they continue to feel.

Indeed their situation has been aggravated by new factors:

- Mental health problems;
- The covert refusal of officialdom to explore the past as part of a healing process;
- A pattern of political violence that seeks to limit the people's political and social activities through threats, harassment, attacks and murder;
- Ineffective legal redress due to system deficiencies, obstructive court officers, deceitful lawyers and others who act out of fear or corruption;
- New types of violence and corruption involving organized crime and petty criminals, at national and local levels, who show no mercy to a people already marginalized by state institutions;
- Political institutions unable or unwilling to prevent further violations of fundamental rights and freedoms;
- A thoroughly corrupt political system;
- A timid formal democracy constantly under threat from those who cling to the authoritarian ways of the past;
- Lack of attention to the social and economic needs of the general population.

The extent of impunity and the denial of justice with regard to the past has broadened.

The judicial system and state institutions used to protect military personnel who violated human rights, as well as politicians and landowners who supported inhuman practices.

Today the incompetence and partiality of the state allows drug traffickers, corrupt individuals of all kinds and organized crime to act freely. Their evil ways have gradually permeated society. While the mechanisms of impunity are the same as in the past, more intensive polarization and political violence act as reinforcing factors.

So, in addition to the lack of justice for the victims of the internal armed conflict, who are still awaiting decisions on the systematic terror they had to face for 36 years, the institutions tolerate new crimes against the general population.

### 2.1.5 The inability of the state

Returning to the question of the victim/justice relationship, I ask myself if it is possible for justice processes that address the past in such a negative context to heal the pain? I think not: it has penetrated too deeply into the very heart and soul of the victims.

Legal rulings, whether at the national or international level, delivered in memory of those who died, punishing criminal conduct, clarifying deeds and shedding light on the perverse institutional practices that made such crimes possible, could help to mitigate the pain of the living and restore their dignity.

What happens when the day of judgement is postponed *sine die*? Impunity seems destined to be permanent. This is what we are living through now. There was no justice at the time of the armed conflict with its horror and there is no justice now for the victims of drug trafficking, petty and organized crime, corruption and political violence.

The result is a society already plagued by decades of violence at the hands of counterinsurgents which finds itself living through a so-called “post-conflict era” marked by new kinds of violence, due to factors such as:

- Powerful groups and a politico-economic elite that keep institutional transformation under control ;
- Limits that are imposed on the independence, impartiality and autonomy of agencies in charge of guaranteeing peace, justice, democracy and human rights;
- A government and political system that loses credibility and trust;
- State agencies that are penetrated and controlled by emerging criminal powers;
- Globalization and the constant reshaping of international relations that uncontrollably impact the social, economic and political life of the country.

### **2.1.6 The big challenge**

These conditions have hampered certain peace commitments and institutional transformations now underway or pending, and which offer a broad perspective of what might be attained.

One of the big challenges is to try to penetrate the solid defenses of the real power base and show the positive side of addressing the past and supporting institutional transformation, making it clear that changes would create a healthier environment for all.

### **2.1.7 Reconciliation**

I am convinced that reconciliation is possible in Guatemala and in countries with similar characteristics. But it is essential that the interests of the victims and the need to build a better society be identified as the sole priorities. This would mean setting aside personal interests that can be harmful to such a process.

Reconciliation should not be limited to truth, justice and reparation. While these components are essential, other factors and dimensions should not be excluded. Above all, there is a need to create the social, economic and political conditions required for the development and progress of society on the most inclusive basis possible.

The approach must be holistic, and should link care for the victims with democracy, institutional strengthening, human development, economic progress and social welfare – reconciliation is not the sole responsibility of the victims. A broad and complex vision is needed that addresses the following issues:

- Helping victims from a personal, intimate and subjective perspective;
- Processes to improve local community life and to rebuild the social fabric;
- Public policies that promote truth, justice and reparation, which means eliminating the prejudices and stigmatization with which the state apparatus treats the victims – such policies should promote institutional transformation within acceptable democratic parameters, dismantling attitudes harmful to personal dignity, social welfare and legal certainty;

- The elite forces wielding real power must acknowledge the importance of reconciliation, the need for democratic ways out of the conflict and for the resolution of structural problems that have been eluded for so long.

Reconciliation, dealing with the past, and a justice system capable of addressing social demands will be successful only if the groups that hold real power participate and become convinced that these processes can generate new and better relationships, and new social dynamics to promote competitiveness, peace, democracy and political stability.

The big challenge is to create opportunities to discuss these issues from a perspective that includes all social and political actors. Otherwise all of our efforts will remain partial, isolated, and limited in scope.

## 2.2 Peace, Justice and Prevention: Dilemmas and False Dilemmas

**Juan E. Méndez**

We must begin by recognizing that “peace versus justice” can be a real dilemma. Formulated in such a blunt manner as a “choice” between two fundamental human values (and policy objectives), the nature of the dilemma is clear: insistence on punishment for flagrant violations of human rights undoubtedly complicates the negotiation process intended to bring a conflict to an end. Conversely, a peace process that concentrates solely on silencing the guns as soon as possible, and regardless of the concessions made, almost always creates obstacles for the redress of massive, systematic atrocities.

On the other hand, there are situations in which the dilemma is artificial. Perpetrators of abuses, their instigators and protectors will always insist on a “forgive and forget” policy with regard to those abuses. In so doing, they will invariably give the fanciful name of “national reconciliation” to what is actually an imperious demand for blanket impunity. It does not take much thought to realize that the proposal amounts to blackmail: “Either you let us get away with murder or we shall continue murdering.” For this reason, an important first step must be to determine in each case whether the dilemma is real – leaving us to make a difficult choice – or an artificial one created by elements who care neither for peace nor for justice.

It may be helpful to distinguish at this point between different forms of reconciliation. For the purpose of this analysis, we shall distinguish between three kinds of reconciliation – between warring factions, between affected communities, and between perpetrators and their victims. The latter kind of reconciliation is in fact a misnomer. Some victims may be ready to forgive, but this should be seen as a highly personal choice that must always be free and voluntary. It should never be considered a policy initiative, imposing reconciliation on all victims. Reconciliation between warring factions, or between affected communities, does on the other hand present us with the challenge of striking an appropriate balance between measures for peace and measures for justice.

Blanket amnesties that would make it impossible to even consider past abuses are illegal in international law, precisely because they constitute “reconciliation” between perpetrators and their victims. A recent example is the amnesty currently offered in Algeria to violators of human rights on all sides. Another example, cloaked in the language of demobilization, is the impunity granted to paramilitary leaders in Colombia. Heinous crimes are thus allowed to go unpunished, or in the case of Colombia are “punished” with no more than a slap on the wrist. The implication is that the victims are party to the conflict, and that their views are represented at the bargaining

table by the faction opposed to the perpetrators. Besides being historically inaccurate, this is immoral in that it fails to recognize the right of victims to help shape the peace and justice of tomorrow.

Reconciliation between warring factions is important as a way of persuading those who have used violence to achieve political objectives to surrender their weapons and join the democratic political process. In countries devastated by war, this objective must have a high priority. Since armed insurgents are not likely to agree to surrender if they face prosecution or jail, amnesty should always be considered as a way of ending the violence. The real issue is: who and what should be covered by the amnesty?

In the case of internal armed conflict, a generous and broad reciprocal amnesty is not only compatible with international law but is actually required by Article 5 of Additional Protocol II to the Geneva Conventions. This calls for an amnesty of forgiveness for the crime of sedition or rebellion, i.e. the offence of rising up in arms against the legal order. Rebellious combatants in internal conflicts are not exempt from punishment for their acts in the same way, as are soldiers in a conventional war.. That Protocol II should envisage an amnesty for such rebellious acts, as a way to end the conflict, is reasonable. Any combatant however can be brought to justice for war crimes. The amnesty of Protocol II cannot be extended to war crimes, whether committed by insurgents or by official forces. The Geneva Conventions and Protocols require the punishment of war crimes. Rebels who have committed no violations, or whose participation in violations is relatively minor, should be granted amnesty if they lay down their arms. But persons who have attacked civilians, tortured or killed enemies who were *hors de combat*, or otherwise violated their obligations as combatants, should be liable to prosecution and punishment, especially if they bear a large share of responsibility for the crimes in question.

In many recent examples including El Salvador and Sierra Leone, attempts to end hostilities between warring factions have overlooked this distinction in an effort to achieve "peace at any cost". This impunity has left open wounds in society and unsatisfied demands for justice among victims. In the case of the Lomé Agreement of 1999, ending the conflict in Sierra Leone, the process entirely failed to achieve peace. Even if they do succeed in silencing the guns, reconciliation processes between warring factions that fail to listen to the victims and other stakeholders in civil society are objectionable. The lack of participation by sectors not represented at the bargaining table deprives the nation of an opportunity to incorporate their views into the post-conflict arrangements.

A peace agreement between warring factions does not automatically lead to reconciliation between communities affected by the violence. Communities that have borne the brunt of a conflict, fought with no protection granted to civilians, also face collective stigmatization for the sins of those who claimed to represent them. As in Darfur, terrible crimes committed against innocent victims often create animosity and resentment that smolders under the surface ready to erupt in new violence. In such cases, reconciliation between communities is badly needed. Victims must be able to distinguish between individual perpetrators and their tribes when it comes to discussions about the return of property, land tenure, use of land, water and natural resources, and the return of refugees and displaced persons to their places of origin. Badly needed efforts to achieve reconciliation between communities cannot even begin until the vicious circle of impunity is broken. Before the urgent talks can start, perpetrators must be weeded out from the communities they claimed to represent, and prosecuted for crimes which must not be imputed to the communities themselves.

International law and the practice of states and international organizations provide guidelines to policymakers in framing the questions that a peace process must address. This is not to say that mediators cannot use their own discretion in offering incentives at the negotiating table. The law provides a framework, not a straitjacket. Even so, there are ethical and legal limits to the pursuit of peace, beyond which peace may be little more than silencing of the guns, without justice. This legal framework consists of norms, most of which were put in place immediately after World War II. Other standards, especially those applied to internal conflicts, have emerged in the last two decades, arising from efforts to implement multilateral treaties and deal with human rights violations. This is not the time or the place to elaborate on the many and diverse precedents and judgments that form this substantial body of law.<sup>1</sup> It is worth noting that scholars and practitioners generally agree on their significance. Norms originating from the Nuremberg trials at the end of World War II, or which have emerged in the last twenty years, lead us to the following general conclusions:

1. Human rights violations committed in a systematic or widespread fashion form a special category as war crimes or crimes against humanity, the most notable being genocide.

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<sup>1</sup> For complete surveys of these precedents, see the reports of Special Rapporteurs and Experts of the United Nations on the issues of reparations, impunity and best practices in transitional justice (Theo Van Boven, Cherif Bassiouni, Louis Joinet and Diane Orentlicher).

2. In such cases the state is under an obligation to investigate, to prosecute and punish the perpetrators, and to disclose the evidence to the victims and the public.
3. Amnesties and other forms of clemency that interfere with that obligation are contrary to international law.
4. If the state primarily concerned is unwilling or unable to meet this obligation through international tribunals or national courts, the resulting impunity for such crimes is a challenge to the international community and its responsibility.
5. When the international community is called upon to mediate in a conflict or to assist in post-conflict reconstruction, its representatives are bound by the principles embodied in these norms.<sup>2</sup>

Some commentators object that this legal framework ties the hands of peace-makers, making their task impossible without the offer of impunity. Since they leave no room for impunity imposed at the point of a gun perhaps they do make the process more complicated and uncertain at the beginning. But it is still possible to make peace with those genuinely willing to end the conflict. It is a question of offering the right combination of incentives (including amnesty for those who are innocent of crimes) to achieve demobilization, disarmament and rehabilitation, without ignoring the legitimate interests and expectations of justice of the victims and society at large. Refusing to consider immoral forms of impunity may well encourage a more responsible approach to peace-making, and eventually lead to a more fair and lasting peace.

A final question with regard to peace and justice is how best to discourage future human rights violations. Clearly, if it could be shown that a policy of “forgive and forget” was the best way to achieve this, the argument against prosecutions would be more persuasive. One hastens to add however that truth and justice must be pursued for their own sake, not because they may be instrumental in achieving other important objectives. It is in any case difficult to say with certainty what would be the best deterrent against future human rights violations. In this context neither those who favor peace over justice nor those who put justice first have convincing arguments.

It may help at this point to make some additional clarifications. Conflict prevention has a long history and much literature. Although they are not

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<sup>2</sup> See UN Report of the Secretary General, Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, August 2004. See also UN Guidelines for Peace-Makers, 1999 and an upcoming revision.



always successful, there are strategies that can help to avoid conflict, or at least to prevent one from descending into a spiral of violence. This concept differs from peace-making, which aims to bring fighting to an end rather than to prevent it. That said, peace-making is of course only effective to the extent that it prevents a recurrence of the conflict.

The prevention of human rights violations is a different challenge, and one that non-governmental organizations have yet to master, despite their well-known concern with establishing the rule of law and encouraging education in human rights. Preventing human rights violations is difficult because of the many different structural causes that can lead to a breakdown in the rule of law. Ideology always plays a part, and especially authoritarian tendencies on both the right and left. But anti-democratic, intolerant thinking does not alone explain why countries descend into massive, systematic violations of human rights. There is a clear temptation to use the “exceptional” nature of a given situation as an excuse. A country may recognize the importance of the rule of law and the prohibition of certain types of behavior by the state, and yet make exceptions in its own case, citing a perceived “clear and present danger” to the state. In this context the threat of terrorism is often given as a reason for setting the normal rules aside.

Past experience with human rights violations points to the need to strengthen institutions to prevent their recurrence. It is particularly necessary to insist on the independence of the judiciary as the ultimate guarantee of human rights. The judiciary must be independent and it must also be effective. In this regard it is important that magistrates be willing to develop remedies against abuses. In the absence of a clear basis in existing legislation, such remedies may have to be created. They must also consciously recognize the need to provide access to justice for powerless citizens and sectors of society that have been traditionally excluded. Police and the military must be brought under civilian control, through the authority of legally constituted civilian leadership and through special mechanisms of citizens’ supervision. An atmosphere in which freedom of expression and association is vigorously exercised can also help to prevent human rights violations, providing “vertical accountability” on a daily basis in a way that is complementary to the periodic review provided by free and fair elections.

And what about the prevention of conflict and of human rights violations at the time of peace-making? Insistence on prosecuting abuses can certainly make peace-making difficult. But to achieve a lasting peace, it is important to create the favorable conditions just described at the time of solving the conflict. The peace agreement must allow for the creation of a robust, independent judiciary and institutions that protect the citizens and that are transparent. Creating new institutions and then preventing them from

inquiring into the recent past is not a good way to begin. State institutions need to establish their credibility and impartiality from the beginning. Their ability to deal with the past is a major test of this credibility and reliability.

Needless to say, it may not be possible to prosecute each and every violation. The sheer number of cases will require a sort of “natural selection” on the basis of the availability of evidence. It is not enough to reject out of hand any form of clemency or amnesty. It is also necessary to have a well-planned program for dealing with the past, based on formal justice. Non-judicial mechanisms, including truth-telling, reparations, institutional reform and reconciliation, must also play a role. Only then can the program hope to meet the broad expectations of justice among all stakeholders. Prohibiting examination of the past will almost surely leave open wounds in society. Promising more than one can hope to deliver will only create new resentment. While we can never be completely sure of preventing new conflicts and abuses from ever occurring again, we can at least help to build institutions that will be able to defend individuals and communities and prevent the resurgence of violence.

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## 3 Working Groups

The Working Groups were an important component of the conference and were designed to address substantive issues and dilemmas in connection with dealing with the past and transitional justice. The topic of each Working Group, as listed below, was introduced by a brief input on the part of the facilitator and followed by a round of discussion. The texts of the facilitators constitute the content of the present chapter.

### **Working Group 1**

*The Challenge of Criminal Justice: Lessons Learned from International, Hybrid, and Domestic Trials*

Facilitator: Paul van Zyl

### **Working Group 2**

*Reforming Institutions after Widespread Abuse: The Challenge of Vetting and Lustration Programs*

Facilitator: Alexander Mayer-Rieckh

### **Working Group 3**

*Memory, History, and Truth-Telling: Lessons Learned from Truth Commissions and Memorialization*

Facilitator: Priscilla Hayner

### **Working Group 4**

*Restoration of Dignity and Social Trust: Reparations and Compensation for Victims*

Facilitator: Pablo de Greiff

### **Working Group 5**

*Strategies for Reconciliation: Are Justice and Peacebuilding Complementary or Contradictory?*

Facilitator: David Bloomfield



### **3.1 The Challenge of Criminal Justice: Lessons Learned from International, Hybrid and Domestic Trials**

**Paul van Zyl**

It is more than a decade since the establishment of the International Criminal Tribunal for the Former Yugoslavia, and there is now a sufficient body of experience regarding efforts to prosecute persons responsible for gross violations of human rights for the lessons to be learned. This presentation will make a number of observations regarding the state of the field and then seek to identify policy implications for governments, civil society organizations and donors involved in these activities.

#### **3.1.1 Greater emphasis on domestic prosecutions**

Over the past five years the pendulum has swung away from international justice and towards in-country domestic or “hybrid” trials. This is partly attributable to the fact that the *ad hoc* tribunals for the former Yugoslavia and Rwanda (the ICTY and ICTR) are now seen as too expensive and slow. Policy-makers have therefore turned to justice models they hope will be cheaper and quicker. There is greater emphasis on “local ownership” and participation in accountability efforts, and in-country trials have obvious advantages in this respect. The establishment of the International Criminal Court (ICC) has somewhat paradoxically placed additional emphasis on domestic justice because its jurisdictional approach stipulates that justice should first be sought domestically and that the Court will only acquire jurisdiction if a state is unable or unwilling to prosecute those responsible for international crimes. Even if the ICC does obtain jurisdiction it will only be able to investigate and prosecute a very small number of perpetrators in a limited number of countries (perhaps as few as three or four countries), and the pursuit of domestic justice will therefore continue to be central to any accountability efforts. This has the following policy implications:

- a) **Emphasis on domestic capacity building:** There is an urgent need for intensive programs specifically designed to strengthen domestic capacity for the prosecution of human rights crimes. These programs should not simply replicate the usual criminal justice training programs. They should be specifically tailored to train personnel who will be able to investigate, prosecute and adjudicate “system crimes”. Genocide, war crimes and crimes against humanity are all crimes that do not occur in an isolated or random manner. They require planning and orchestration and involve hundreds if not thousands of participants who play very different roles. System crimes are commit-

ted by individuals who mastermind the crimes, individuals who plan and order the crimes and individuals who physically carry out the crimes. The successful prosecution of such crimes requires specialized investigative and prosecutorial methodologies. There is currently a massive need to furnish and fund this kind of training, and governments, donors and civil society organizations should act in a concerted fashion to meet it.

- b) Benchmarks for evaluating the success of justice efforts: It is critically important to generate a consensus on the benchmarks or criteria that will be used to judge the success or failure of prosecutorial efforts. Trials cannot be evaluated and international investments in justice-sector capacity building should not be assessed solely on the number of prosecutions obtained per dollar per year. While the cost of justice efforts and the rate and number of prosecutions are not irrelevant considerations, they are inadequate as benchmarks and success indicators. There has been a surprising lack of policy development and clarity here. The following set of benchmarks or indicators should also be taken into account when evaluating the success or failure of justice initiatives:
  - o Outreach and communication: Justice efforts should give priority to outreach and communication. If the population as a whole, and victim communities in particular, are either unaware of justice efforts or do not understand the procedures or goals, then these efforts will fail to make an enduring societal impact. Outreach is not a luxury that should only be funded once “core” judicial functions have obtained support – it is an absolutely essential part of sustaining support for trials, managing expectations and demonstrating accountability and the rule of law in action. There now exists an important set of experiences regarding successful and unsuccessful outreach and communication initiatives that have generated educational materials and used radio and television programs to communicate with local communities. There is a need to identify a set of best practices and successful methodologies and then implement these before, during and after trials.
  - o Leaving a legacy: Justice efforts should not only focus on the successful prosecution of perpetrators but should also invest in programs and activities that will create capacity in order to leave a legacy once they have completed their work. This should not be regarded as an added extra or a luxury. The entire design and execution of international assistance to

domestic trials or international participation in hybrid trials must leave behind a criminal justice system with enhanced physical and human resources. Everything from court buildings and detention facilities to translation and stenography to database management and information technology should be included in legacy planning. Legacy projects should include projects to train investigators, prosecutors and judges; to interface with local law schools; and should even explore the catalytic effect of these processes in prompting substantive reform of criminal law and criminal procedures. This is expensive and may even at times appear to be distracting, but there is no better opportunity to impart and transfer skills in the course of building and running a prosecutorial process. Donors and policymakers must not regard legacy as a non-core item.

- o Priority for the needs and interests of victims: A prosecution process should not be regarded as successful only when victims and witnesses feel that they are treated with dignity, consulted, listened to and taken seriously. It includes witness protection programs; proper communication with witnesses before, during and after trials (it is scandalous that there is often no direct followup with witnesses that in many cases have testified in human rights trials at great risk to themselves); and proper disclosure to witnesses and victims who cooperate with prosecutors to ensure that they fully understand the risks they may face and have realistic expectations regarding the outcome of the trial. Victims and witnesses need proper psycho-social assistance during the process. It is vital to manage expectations before, during and after trials and to be honest about what trials are able to achieve. Prosecutors should resist the temptation to portray trials as a panacea that will bring all to justice. In this context it is important to mention victim and community surveys. The International Center for Transitional Justice (ICTJ) has undertaken or assisted with these in half a dozen countries including Iraq, Uganda, Timor-Leste, Afghanistan and Sierra Leone. Gathering this information can provide invaluable insights into victim expectations, perceptions of justice, the value and weight victims attach to peace processes and victims' understanding of what trials can and cannot deliver. It is startling how often major justice interventions are embarked upon without listening properly to the purported beneficiaries of these programs.

- o Equality of arms: A prosecution process should not be regarded as successful if there is no true equality of arms. This is a serious problem in many international or hybrid proceedings. In almost every international or hybrid tribunal, including those in Timor-Leste, Kosovo, Sierra Leone, Rwanda and the former Yugoslavia, there have been significant complaints about the fact that accused have not had access to the resources and personnel necessary to provide a proper defense. Funding and supporting defense counsel may not be politically attractive, particularly in contexts where the accused are standing trials for atrocious crimes, but without a decent defense, trials are all too easily dismissed as preordained exercises in victor's justice.
- c) Consistent criteria for engaging with domestic and hybrid trials: If there is going to be an engagement with domestic and hybrid tribunals, then donors and policymakers need a consistent and coherent set of policies regarding the terms and extent of engagement, particularly setting out the circumstances in which there will or will not be engagement.
  - o The Extraordinary Chambers in the courts of Cambodia: The debates and controversies associated with the United Nations' decision to lend international assistance to the Extraordinary Chambers highlight the need to define objective criteria that will govern whether governments or the United Nations will offer resources or lend support to such initiatives. What are the proper circumstances for engagement? What are the minimum standards? What assurances and safeguards will be necessary? How do you strike the right balance between local and international control? Which local practices and customs are appropriate and which are unacceptable? It is not enough simply to assert that international actors or the United Nations must always be in control. An assertion that there must always be a majority of international judges, prosecutors, investigators or administrators will rightly be seen as patronizing and arrogant. But on the other hand one should not completely capitulate to local demands, particularly when they are made by actors who may not have a genuine interest in accountability and who are using the mantra of local ownership to subvert rather than enhance the prospects of obtaining justice.



- o Iraqi Special Tribunal: The controversy surrounding the Iraqi Special Tribunal (IST) is a perfect illustration of the dilemmas involving local ownership and international engagement. The ICTJ carried out an extensive survey of Iraqi attitudes to justice and discovered a strong desire articulated by Iraqis for local control and ownership of the justice process as well as overwhelming public support for the death penalty. These factors combined with controversies around the way the tribunal was established (without sufficient consultation, largely in secret, by occupying powers), fears of political interference by both Iraqi politicians and American officials, and continued misgivings about the war in Iraq have meant that the only country prepared to provide significant assistance to the Iraqis has been the United States. This assistance has, by any objective measure, been enormous. The IST has a budget of approximately \$13 million, while the US-controlled Regime Crimes Liaison Office (RCLO), which provides it with support, has a budget of \$128 million. The RCLO has over two hundred United States investigators and prosecutors working to provide “behind the scenes” assistance. This means that the United States exerts a very high degree of *de facto* control over this process with all the negative implications that this entails. If the unwillingness of the United Nations or European governments to assist in cases such as these is to be principled and consistent (and I am not suggesting the contrary), then it should be based on a set of clearly articulated principles. The United Nations has made some progress in this regard by articulating a limited set of criteria for engagement in the Secretary-General’s report on Transitional Justice and the Rule of Law in Conflict and Post-Conflict Societies. A similar set of standards is needed for other key actors and donors.

### **3.1.2 Amnesties for gross violations of human rights are increasingly viewed as unlawful and unacceptable**

It is beyond the scope of this paper to offer a full account of recent developments in domestic and international law regarding the legality of amnesties for gross violations of human rights. The Inter-American Court on Human Rights, the European Court on Human Rights and the Human Rights Committee (established pursuant to the International Covenant on Civil and Political Rights) have all held that states are under an obligation to prosecute those responsible for gross violations of human rights and that amnesties for

such crimes are therefore unacceptable. The establishment of the ICC and the ratification of the Treaty of Rome by over 100 countries means that dealing with human rights abuse is no longer a matter of purely domestic concern in more than half the countries of the world. Moreover, it is hard to imagine the Pre-Trial Chamber of the ICC or the Prosecutor deciding to defer to blanket amnesties.

Furthermore the UN Secretary-General's report on Transitional Justice and the Rule of Law in Conflict and Post-Conflict Societies now clearly and publicly states that amnesties for genocide, war crimes and crimes against humanity are unacceptable. In recent years there have also been landmark domestic developments, particularly in Peru, Chile and Argentina, with amnesties granted by national courts being overturned or disregarded.

But as *de jure* amnesties have become increasingly unenforceable and unacceptable, those seeking to avoid accountability for atrocious crimes have increasingly come to rely on *de facto* amnesties. As legal standards have become established and more stringent, and local and international NGOs have become more effective in challenging amnesties, so too have certain governments become more skilled in ducking their responsibility for genuinely pursuing justice. The clear policy implication is that one should look to the substance, conduct and intentions of transitional justice institutions before they are supported and used as a basis for reducing pressure on governments to hold perpetrators to account.

The pursuit of accountability for human rights abuse in Indonesia is a perfect example of this phenomenon. The domestic trials of senior military figures before the *ad hoc* human rights court resulted in wholesale acquittals and were universally regarded as a sham. They served to delay and reduce the extent and urgency of calls for justice. Indonesia now has a bilateral Truth and Friendship Commission (TFC) with Timor-Leste. The TFC has the power to grant amnesty, and is strongly opposed by victim groups and civil society because they correctly suspect it has not been established to deal with the justice deficit in Timor-Leste but rather to produce a watered-down and cosmetic truth as opposed to real justice. It has been prevented by its mandate from identifying responsibility for human rights abuses and from recommending justice measures. The TFC has nonetheless succeeded to a considerable extent in reducing pressure on Indonesia to pursue real justice for the crimes that occurred in Timor-Leste, and it is succeeding in removing justice for these crimes from the UN Security Council's agenda. The TFC has succeeded both with UN member states and within the UN Secretariat in muddying the waters, and there is a very real prospect that there will be *de facto* impunity for human rights crimes without there being a *de jure* amnesty. The same is

true of the Colombian government's Peace and Justice law which provides a flawed framework for paramilitary demobilization, ultimately leading to exoneration.

This gives rise to a very clear policy implication: governments and donors need specialists who can properly evaluate and consult widely before supporting any transitional justice initiative, and they need to create a network of experts inside and outside the government who are able to analyze whether transitional justice initiatives are efforts to pursue accountability in good faith or cynical exercises designed to delay or destroy the prospects of obtaining justice.

### **3.1.3 The globalization of justice**

The globalization of justice has created several important opportunities to pursue accountability that should be properly analyzed and acted upon. The linkages between domestic and international justice are now stronger than ever before, and these create possibilities for new programs and campaigns. The following is a non-exhaustive list of such opportunities:

- Incorporation of the ICC statutes into domestic law: The most newsworthy aspect of the ICC's work will be the cases that are chosen for investigation and prosecution and the indictments that are issued by the Prosecutor. An unheralded but no less important aspect will be the ICC's impact as a catalyst for domestic law reform as its provisions are incorporated into domestic law. This can and should have major institutional and legal consequences.
- The European Union accession process: The EU accession process has had a major impact on transitional justice processes in countries which seek to become members, and will continue to do so. Croatia's accession process was delayed because of a failure to fully cooperate with the ICTY, and Turkey's accession will create significant pressure on that government to pursue accountability for human rights abuse. Turkey's accession process will put human rights abuse (both recent in the case of torture in prisons, and more distant in the case of the Armenian genocide) back on the agenda. The EU accession process therefore provides a major strategic opportunity... but also a hidden danger. Unless external pressure is translated into a genuine domestic movement to confront the past, then there is a real risk that governments and populations will confront the past for the wrong reasons. You should not prosecute war criminals or stop torturing people in jail because a failure to do so will jeopardize your entry into

a club of rich nations. The EU accession process must be used to build and strengthen domestic movements genuinely committed to transitional justice.

- **Accountability for Heads of State:** There is a need to strengthen the legal and institutional framework for the prosecution or extradition of perpetrators in general and Heads of State in particular. It is not acceptable that Japan has (until recently) been harboring Alberto Fujimori, Nigeria has granted asylum to Charles Taylor, Zimbabwe is offering sanctuary to Mengistu Haile Mariam, Senegal has failed to extradite Hissen Habre and Indonesian military leaders have not been sent to face justice at the Serious Crimes Panel in Timor-Leste.

### **3.1.4 Accountability in powerful countries**

To date transitional justice mechanisms have mostly dealt with the formerly powerful in relatively weak countries, but until it begins to deal with the powerful in powerful countries the entire enterprise risks being seen as an exercise in hypocrisy and double standards. The failure to pursue the accountability of senior United States military and civilian leaders for torture in Iraq, Guantanamo Bay and Abu Ghraib is one example. There is now ample evidence that US leaders created the legal, institutional and political conditions that made torture inevitable, and rewarded the results of torture when it happened. This is virtually identical to the situation in South Africa under Apartheid and in dozens of other countries where political leaders diluted or destroyed *habeas corpus* and other human rights protections while simultaneously instructing interrogators that information should be extracted from prisoners quickly and aggressively. Complaints and signs of torture were disregarded, inadequately investigated or ignored. Support must be provided to those seeking to achieve justice for these crimes, and accountability must be pursued actively. This is particularly important since powerful countries waging “the war against terror” serve as role models and standard setters for others.

### **3.1.5 Time is not always an enemy of justice**

More often than not, claims for justice do not go away merely because of the passage of time. There are now several examples of justice being achieved decades after the crimes were committed, notably in Chile and Argentina. The clear implication is that activists, lawyers, policymakers and donors should not always focus on quick fixes or succumb to justice fatigue just because an

issue is no longer in the headlines. It may not always be propitious to push for maximum justice immediately. As long as the ultimate goal is preserved and unethical compromises are not allowed to place substantial obstacles in the path to eventual justice, then it may be better to lay the groundwork and undertake the necessary preparations for justice to prevail at a later date.

It is therefore particularly important to take steps to preserve evidence for use in subsequent trials. There is now considerable international expertise in establishing and running centers to document human rights abuse. There is also a growing body of expertise in the forensic field and a number of organizations that train local groups to enable them to gather and preserve forensic evidence. It is important to develop strategies to pursue justice in the medium to long term if conditions are unfavorable in the short term.

### **3.1.6 Developing holistic approaches to justice**

Even in the most propitious circumstances where clear evidence is available, criminal justice institutions are robust and effective, perpetrators are either in custody or do not pose a threat to a new democracy, victims and witnesses are willing and able to testify and there are no legal impediments to prosecution, it is not possible to prosecute more than a small percentage of the total number of perpetrators responsible for widespread or systematic human rights abuses. It is therefore necessary to supplement prosecution strategies with other initiatives designed to deal with the needs and interests of victims. Truth seeking measures, vetting programs, reparation schemes and measures to end conflict and promote reconciliation should therefore be contemplated in all circumstances. They will not all be appropriate or necessary but they should at least be considered as part of a comprehensive approach to dealing with the past and ending impunity.

### **3.1.7 Civil society will always play an essential role**

One of the most important contributing factors towards achieving justice and accountability is a strong and vibrant civil society. Civil society organizations play a crucial role in gathering evidence, generating political support for justice, ensuring access to victims and witnesses, communicating the goals and outcomes of trials and providing feedback and criticism. Key staff members from civil society organizations have been seconded to work for justice initiatives and often play vitally important roles.

### **3.1.8 Creating justice networks**

There are now a relatively large number of skilled practitioners who have worked on international, hybrid and domestic justice initiatives throughout the world. This creates a significant opportunity for sharing experiences, undertaking comparative policy analysis, launching joint campaigns and providing mutual support and solidarity.

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## 3.2 Vetting, Institutional Reform and Transitional Justice

Alexander Mayer-Rieckh

### 3.2.1 Why vet civil servants?

Vetting ordinarily refers to a process of assessing integrity to determine suitability for public employment. Integrity refers to a person's adherence to relevant standards of human rights and professional conduct, including financial propriety. In societies emerging from conflict or authoritarian rule, vetting has the specific aim of transforming institutions involved in serious abuses into public bodies that enjoy civic trust and protect human rights. The public, and particularly victims of abuses, is unlikely to rely on institutions that retain or hire individuals with serious integrity deficits. Vetting processes aim at excluding such persons from public service in order to re-establish civic trust and restore legitimacy to public institutions. Vetting public employees, in particular in the security and justice sectors, is now widely recognized as an important measure of institutional reform in countries emerging from conflict or authoritarian rule.

But to have significant and sustainable impact, vetting generally needs to be part of a much broader reform of the institution concerned. More often than not, integrity deficits are not the only shortcomings of public institutions in post-conflict or post-authoritarian situations, and the exclusion of persons who lack integrity may not bring about the changes needed to build public institutions that function fairly and efficiently.

Institutional reform is also an integral part of a comprehensive transitional justice policy. Reforming institutions is not only essential for preventing the recurrence of human rights abuses, it also enables institutions in the security and justice sectors to address the issue of criminal accountability for past abuses.

While vetting is an institutional reform measure that states are encouraged to pursue under international law, it should not be a pretext for avoiding criminal prosecutions. However in a post-conflict or post-authoritarian context, the scarcity of resources, as well as legal impediments and the sheer scale of past crimes makes the criminal prosecution of all abusers a virtual impossibility. In such circumstances, vetting can help to fill the "impunity gap" by ensuring that those responsible for past abuses are at least prevented from enjoying the rewards and privileges of public office.

Vetting processes can take a number of forms, and should in any case be adapted to the historical and political reality of the society in question, as well as to the specific requirements of each institution. The fundamental rights of the persons being vetted must of course be respected.

### 3.2.2 Vetting conditions and risks

The period of transition is an extremely challenging one, and provides a unique historic opportunity. Certain basic conditions must be in place before a proper vetting process can begin. It is a process that can have undesirable consequences however, and these must be carefully avoided.

- a) Basic conditions:
  - o Political conditions: government authority and political will: An effective vetting process requires stability, government authority and political will. The vetting process regulates access to positions of power and is highly political, particularly in a period of transition. Resistance to reform is common in countries emerging from conflict or authoritarian rule, and the position of transitional governments is often tenuous. Individuals who risk losing power will resist a vetting process. Those involved in past abuses have an interest in covering up and protecting their positions. The support of government authority and political will are essential for vetting any institution. Potential resistance should be carefully considered before beginning a vetting process. The level of political commitment is a key factor. The vetting of civil servants in office is likely to meet with considerable political resistance. The softer option of screening only new appointments will be less controversial, requiring a lower level of governmental authority and political will.
  - o Institutional conditions: positions subject to vetting: It is important to clearly determine the positions that most need vetting. In periods of transition the public sector is in crisis, usually functioning within structures associated with the previous authoritarian rule. Some institutions may not be functioning at all, and others may have overlapping mandates. The number of civil servants is often excessive. Such institutions rarely meet the needs of a state governed by the rule of law, and are unrepresentative of the public they are intended to serve. The entire public sector may have to be revamped to meet the new circumstances, merging or consolidating institutions, reducing or enlarging, creating new institutions or abolishing existing ones. It may be necessary to adapt institutional staffing to more accurately reflect the composition of the population, and to integrate ex-combatants. This reorganization will affect the job requirements and the number



of posts available for each gender, ethnic and religious group and geographical region. It is best to wait until after the reorganization to begin a vetting process to avoid having to dismiss or transfer those already vetted, thus undermining the credibility of the reform. However if the reorganization risks being lengthy, vetting may have to take precedence. The vetting process must also be adapted to the nature of the institution. In the judiciary for example the most important considerations must be independence and the separation of powers. Vetting elected officials or candidates should aim to minimize the risk of interference with the will of the electorate. The challenge of vetting the security sector is usually the large numbers involved.

- o Individual conditions: Who is to be vetted? Identifying individuals to be vetted is a major challenge in a period of transition. The number and nature of dependents may be unknown in certain institutions. This is particularly true in the case of clandestine bodies operating within or at the behest of the state. Boundaries between institutions are often porous. The solution may be a census or registration process, and controlling access to and departure from such bodies. The vetting process may have to include external candidates. This can help to minimize the risks of “governance gaps” and provide useful information on the time and resources needed to train replacements. Reliable information on the integrity of those being vetted is essential. During periods of conflict, information about abuses is often covered up and evidence destroyed. The police, prosecutors and courts may have maintained a climate of impunity. Non-governmental organizations (NGOs) may have been suppressed to prevent the monitoring of human rights abuses. Reliable data on personal integrity may have to be gathered from other sources. These include personnel files, court records, secret police files, election registers, reports of the United Nations, NGOs, truth commissions, media, or independent investigations. The general public can also be a useful source of information.
- o Legal conditions: the mandate: The vetting process needs a solid legal basis to overcome political resistance. Negotiators should encourage the inclusion of vetting provisions in peace agreements or Security Council resolutions. Another solution is national legislation, which should be clear and precise and conform to constitutional requirements and international standards.

- o Operational conditions: adequate resources: The success or failure of vetting processes depends on a thorough evaluation of operational needs to ensure adequate time and resources. Capacities are generally limited and resources scarce in a society emerging from conflict or authoritarian rule. Reform projects compete for funding and the requirements of vetting processes are generally underestimated. Vetting processes are complex, time-consuming and resource-intensive exercises requiring multi-disciplinary skills, in particular when they concern institutions with large numbers of employees. International support is often absolutely necessary.
  - o Temporal conditions: timing: A vetting process may conflict with other transitional processes. Political transition may rely on individuals that could be affected by a vetting process, which can also impact on the electoral process. The timing of the vetting process in relation to other transitional processes and political developments is very important. Timing is also a factor in designing the vetting process, its priorities and mechanisms, and the composition of a vetting commission.
- b) Undesirable consequences:
- o Political misuse: A vetting process can be misused for political purposes. Vetting could be a tool for undermining the independence of the judiciary, or for reinforcing group or party affiliations, targeting political opponents, ending up as a political purge. Abused in this way the process would undermine rather than reinforce human rights and the rule of law, creating resentment and hindering reform. International human rights standards must be integrated in the vetting process to avoid political misuse.
  - o Governance gap: By eliminating large numbers of senior or expert public employees, vetting can disrupt the proper functioning of public institutions and create a governance gap. Imperfect public service is preferable to no service at all. Interim arrangements may be required, with gradual implementation of the vetting process.
  - o Destabilization: Civil servants who fail the vetting process and cannot find alternative employment may drift into criminal activities and destabilize the political balance. Former security personnel may turn to crime and become a threat. This should be taken into consideration when establishing a vetting

process, and options such as severance pay and temporary assistance should be explored. Vetting processes could also be linked to disarmament, demobilization and reintegration (DDR) programs. The rights of victims must also be considered however. Any assistance to those removed by vetting must be balanced against the needs of victims.

### 3.2.3 Different types of vetting

The nature and scope of a vetting process can vary considerably. The following descriptions apply only to the main categories.

- a) **Setting priorities:** A vetting process can target all civil servants and officials or just certain posts. Vetting all civil servants would ensure that minimum standards of integrity are met. This might not be feasible however, particularly for institutions with a large staff. It might be best to give priority to vetting senior managers. This requires fewer resources and can be implemented more quickly. Improving the quality of those with authority over the reform process sends a clear message that the reform will move forward. The managers can then address the question of integrity at lower levels themselves. Vetting senior managers is likely to meet considerable resistance, however, and requires greater political commitment. Another possibility is to target specific units with well-documented histories of human rights abuses or professional misconduct. Such units might stand in the way of the reform process.
- b) **Review vs. Reappointment:** In a review process, a special mechanism such as an independent vetting commission is established to screen existing civil servants and remove the “bad apples”. Basic due process standards apply, with the burden of proof on the reviewing body. A review process is best when broader staff reform is not necessary. In a reappointment process, the institution is disbanded, and a new institution established with competition for all posts. All civil servants must reapply, in competition with external candidates. To ensure continuity, staff may remain in office until a final decision is made. This process shifts the burden of proof to the applicant, who must demonstrate suitability for the post. The difference with a review process is that applicants generally have no right to a hearing or judicial review if they are not selected. This streamlines the vetting process significantly. The reappointment process is also more conducive to fundamental reforms, such as striking a new gender or ethnic balance, and downsizing or merging institutions. There are

however serious risks, such as political interference from the executive branch in otherwise independently operating sectors, undermining the basic due process, and a governance gap. The demand for qualified staff might also be too high. The reappointment process should therefore be limited to institutions that are fundamentally dysfunctional or compromised. The process should be implemented as quickly and early as possible to avoid a protracted period of legal uncertainty.

- c) Vetting candidates: Rather than vetting sitting civil servants, the vetting process could be limited to new appointments, transfers, promotions, and vacant posts. The political stakes are lower since this process is less intrusive, less controversial and can help to professionalize the civil service. This soft option does not, however, ensure removal of the “bad apples”, slows down the renewal of staff, and does not accomplish fundamental reform. This approach can serve as a good first stage, before extending the vetting process to sitting civil servants when the political climate is more favorable.
- d) A special or a normal mechanism: In general, a special *ad hoc* commission has to be established to implement a vetting process. In some cases, it may be best to remove the most unsuitable civil servants through normal procedures that do not infringe legal certainty and are less costly and disruptive. These can be internal disciplinary procedures or, in the case of political appointments, executive decisions. Normal disciplinary procedures are most appropriate when the numbers involved are small, the institution remains functional and there is no urgent need for wider reform. However, the conditions in a transitional period might overtax normal disciplinary procedures, and the ability and will of public institutions to reform themselves are usually limited. Executive dismissals do not require due process and can ensure speedy changes. Such decisions are more open to abuse, however, and may be seen as biased. They are often highly contested, especially in situations where delicate peace processes have resulted in power-sharing. The establishment of a more formal vetting process to accompany executive appointment and removal decisions should be considered.

### 3.2.4 International standards

Vetting processes that do not respect international human rights standards are likely to undermine rather than reinforce human rights and the rule of law as well as civic trust. International standards require vetting processes based on

assessment of individual conduct, not membership in a particular group or institution. Purges and other large-scale exclusions on the sole basis of group affiliation not only violate international standards but also tend to be too sweeping, excluding persons of integrity with no responsibility for past abuses. Group exclusions may also overlook individuals who committed abuses but were not members of the group. Such collective processes are unlikely to achieve the reform goals and may exclude employees whose expertise is needed, creating a pool of malcontents prepared to resist the transition.

The rights in a vetting process depend on the type of process. In a review process the minimum due process standards required in administrative proceedings should be respected, with the initiation of proceedings within a reasonable time, generally in public, and notification of the parties of the accusations, enabling them to prepare a defense and have access to relevant data. They must be able to present their own arguments and evidence to the vetting body, and if desired can be represented by counsel. The parties must be notified of the decision and the reasons for the decision, and they have a valid right of appeal. Persons unlawfully appointed may, however, be removed without any need for justification.

A “balance of probabilities” standard is generally appropriate in a review process, with the burden of proof on the vetting body. The burden of proof may be reversed however if the group to which a civil servant belonged has an established history of human rights abuses. In such cases, civil servants must prove they were not involved in the abuses.

International and constitutional safeguards designed to guarantee the independence of the judiciary include separation of powers, the guaranteed tenure of judges, and immunity to executive or other interference in the judicial process. The vetting and review processes must safeguard the independence of judges. Judges should be vetted by their peers.

As already mentioned, in a reappointment process a civil servant must establish his or her suitability for the post like any other applicant. A civil servant who is not selected does not usually have any right to a hearing or judicial review.

Appointments by executive order are reversible without due process. A political appointee who is removed by executive order has generally no right to a hearing or judicial review.

### 3.2.5 Vetting criteria and outcomes

The question of integrity refers to the observance of international human rights standards, professional conduct, and financial propriety. The criteria for vetting civil servants should be based on a realistic assessment of the requirements for ensuring the fair and efficient functioning of public institutions. Too high a standard of integrity would result in the exclusion of an unacceptably high number of persons.

The vetting process should be linked to broader staff-related reform measures. The integrity of civil servants is not the only issue in post-conflict or post-authoritarian contexts. Those in office may simply lack the necessary qualifications and skills, or fail to represent the population at large. The vetting process may therefore need to include such criteria as professional ability and physical aptitude, and representation on the basis of gender, ethnicity, and geographical origin.

The criteria for a staff reform program must be carefully balanced. The legitimacy and effectiveness of the reform will depend on achieving minimum standards in the three categories of integrity, ability and representation. Involvement in flagrant violations of human rights or serious crimes under international law – notably genocide, war crimes, crimes against humanity, extrajudicial execution, torture and other forms of cruel, inhuman and degrading treatment, enforced disappearance and slavery – should always disqualify a person from public employment. These are serious crimes which in fact states have an obligation to prosecute.

The criteria of integrity, ability and representation may be complemented by formal criteria such as compliance with the vetting process, appearance at the announced interview time, full completion of the registration and vetting forms, submission of the required documents such as birth or school certificates, and appearance on a list of staff members. Such formal criteria are increasingly important in cases where reliable background information is unavailable. Individuals of dubious integrity are often reluctant to subject themselves to the screening process and even to meet the minimum formal requirements.

Insofar as civil servants who do not meet the minimum criteria are concerned, their fate must depend on the reasons for their removal and the context. Those who fall short on integrity could be disqualified from a certain category of posts, from all posts in a given institution, or from any form of public service. Their disqualification might be permanent or temporary. Reemployment might be possible for those who fulfil certain conditions such as acknowledgement of guilt or some form of compensation. Other possibilities include reassignment, probation, demotion, and ineligibility for promotion.

Anyone removed for lack of professional ability should be allowed to apply for a different position or for the same post after acquiring the necessary skills. Anyone simply made redundant could immediately apply for a position elsewhere. Care should also be taken to avoid or alleviate the detrimental effects removal would have for persons whose integrity is not in question, for example by providing alternative employment, severance pay, reintegration assistance or retraining opportunities.

### 3.2.6 *Ad hoc* commissions

Normal disciplinary proceedings are unusually inappropriate in a post-conflict or post-authoritarian context, and a special *ad hoc* commission has to be established. Such commissions should be independent to ensure an impartial and legitimate vetting process. Establishing an independent commission may not be an easy task under such circumstances. Its members should be distinguished and respected individuals who are not associated with any warring faction or with the former authoritarian regime. Broad consultations should precede their appointment by a high-ranking independent authority such as the constitutional court, the head of state, or an international institution. Senior members should be appointed for the duration of the staff reform process and should not be removable until it is complete.

The commission needs a well-staffed secretariat to prepare information and support the decision-making process. This multi-disciplinary secretariat should include project managers, information system managers, lawyers, and technical experts. The commission and its secretariat must have adequate financial and material resources, which under the circumstances may require international support.

A vetting commission is likely to make unpopular decisions that could put its members at risk. Arrangements must be made to ensure their security.

National “ownership” is preferable to internationalization of the process, contributing to its legitimacy, ensuring the application of local know-how, and providing a better basis for domestic acceptance and the sustainability of the process. Vetting will however meet resistance, in particular when representatives of former warring factions continue to wield power in the post-conflict period. Strong international support at the political and operational levels will often be critical. The inclusion of international members will be seen to increase the independence and legitimacy of an *ad hoc* commission.

International leadership may be unavoidable in certain cases. Even then every effort should be made to involve domestic actors as broadly as possible, and to ensure incorporation into domestic law, achieving a seamless changeover from the *ad hoc* vetting process to normal recruitment and disciplinary procedures.

### **3.2.7 Conclusion**

Vetting civil servants in societies emerging from conflict or authoritarian rule involves complex conceptual and operational challenges. While international law obliges states to reform institutions to prevent the recurrence of abuses, there is much flexibility as to the form of vetting. The process should be adapted to the specific needs of the society, in particular those of the victims of abuse. There can be no 'one-size-fits-all' response to vetting. Public consultations are essential to ensure the appropriateness of the vetting process, to re-establish civic trust and restore the legitimacy of public institutions.



### 3.3 The Power of Memory and the Difficulty of Truth: Assessing Recent Experience

**Priscilla Hayner**

“The wounds are not old. The wounds are still here. The wounds are present. The wounds walk up and down our street.” The Reverend Mazie Butler Ferguson, president of the Pulpit Forum in Greensboro, North Carolina (USA), captured the central messages that came through in the public hearings of the Truth and Reconciliation Commission of Greensboro in early October 2005. The events in question took place in 1979, but the impact of those events are still present today, and fundamentally affecting community relations. Speaker after speaker took the stage to talk of subtle or explicit racism and hidden histories that lurk in the shadows, and of economic disparities that continue to be at the root of these events. Many speakers insisted that the disparities, and the racial inequalities, are much worse today. If we cannot face this painful past, if people are unwilling to face what happened, they asked, how can we expect the present to be better?

On November 3, 1979, the Ku Klux Klan and the American Nazi Party joined forces in Greensboro to attack an anti-Klan march. In broad daylight and in the view of several television cameras, a group of men drove to the rally, took out their guns, and methodically shot into the crowd of protesters: five were killed, ten seriously injured. State and federal criminal trials, with all-white juries, resulted in the acquittal of all accused. A civil suit found them responsible for the death of one person only. Records emerged that raised serious questions about whether the Greensboro police and the Federal Bureau of Investigation were involved in the events – planting an informant and removing police from the area immediately prior to the events, for example. The victims and survivors, including the widows of those killed, were pilloried in the press and by the public, were black-listed from any job, could not get housing in the town of Greensboro, and were accused of causing the problem through their affiliation with the Communist Workers Party. Over the next 25 years, the event went largely unaddressed in any official manner, other than the failed criminal trials.

Five persons killed and ten injured: this is hard to compare with almost any other context in which a truth commission has been created. Furthermore, unlike most truth commissions, the Greensboro Truth and Reconciliation Commission was created through a primarily private initiative (although gaining broad backing and a diverse membership of commissioners). But the Greensboro initiative serves to show how powerful the idea of non-judicial truth-seeking has become, and how this idea is being shaped to serve the needs of a wide variety of contexts and political histories. Indeed, many throughout the United States have seen the Greensboro commission as an

example for other US cities or states to follow, especially those many communities that have still-unaddressed legacies of racist policies and practices that resulted in outright discrimination and violence.

The Greensboro case shows us the power and attraction of a non-judicial truth-seeking model. For example, while this is certainly not true of all victims who engage with truth commissions, many of the Greensboro survivors have insisted from the beginning they are no longer interested in a judicial process of prosecutions, but instead prioritize knowing the truth – and importantly, having this difficult truth publicly acknowledged.

But the Greensboro case also shows how a truth commission model can be equally powerful in what are considered established democracies with well-functioning judicial systems. The initiators of the Greensboro commission looked to the South African Truth and Reconciliation Commission as their model, just as other countries often do. (There is of course a risk in this, as the South African situation is unique and not an appropriate model for many other places, but if studied wisely and with a critical eye, there is certainly much to learn from the South African experience.) They brought in South Africans and Peruvians, in the course of their planning, to hear about how these experiences worked elsewhere. They pulled many central elements from the global experience in truth commission practice, but – as should always be done – ultimately crafted their own unique approach.

Similarly, conversations are under way in Canada to address the legacy of the Residential Schools program, which for many decades provided a state-sanctioned method of effectively pulling apart the fabric and identity of the indigenous populations of Canada. One component under consideration in Canada is to employ a truth commission model in order to research and officially acknowledge the breadth and depth of what took place, as well as to help shape a broad reparations program. Past efforts by Canada to address this legacy have not been insignificant, but more is seen to be needed.

We should be wary however of viewing all truth commission initiatives uncritically, or failing to appreciate the potential political impact they may have, and thus the risk that they may be created for politically self-serving purposes rather than for the genuine purpose of revealing very difficult truths. In addition to the risk of political bias, some non-judicial truth-seeking initiatives have simply been done poorly – in a rushed, non-consultative, or under-resourced manner which may guarantee from the start that they will have very limited success. Some recent developments only confirm this risk. A truth commission created in the Democratic Republic of Congo has lost the support of civil society, and has had little success in carrying out its basic programs, largely due to the unsatisfactory, political faction-based

composition of the commission, as well as the unconsultative way in which the members were selected. Liberia also struggled with the fact of commissioners being appointed before its TRC legislation was even drafted; this group of commissioners was criticized as inappropriate for the task, and some of them too closely associated with the former government of Charles Taylor. But Liberia has found a way out of this unfortunate beginning. An 18-month process of debate and consultation took place, through June of 2005, in which legislation was drafted that ultimately included mechanisms for vetting the appointed commissioners. A selection panel interviewed those commissioners and recommended that only two of the original commissioners remain. In addition, the selection panel vetted and interviewed finalists from a pool of 146 persons nominated from the public, suggesting a final list for appointment. On October 19, 2005, the head of state announced the new list of nine commissioners.

Indonesia is currently stretching the concept and purpose of a truth commission in the context of two very different initiatives. After years of quiet discussion, the parliament passed legislation for an Indonesian truth commission in September 2004. Amongst the many elements of this law, which has been criticized by rights advocates, is an arrangement that conditions victim reparations on the willingness of victims to state their forgiveness of their perpetrator, and which then facilitates the granting of amnesty to those perpetrators. Separately, the Indonesian government agreed with East Timor to create a Commission for Truth and Friendship. Unfortunately, this was agreed to at the governmental level, with little invitation for input by others, and in a manner which raised many questions as to the aim and intent of the initiative. Observers wondered if the purpose was to head off any more serious international action that might result from the UN Commission of Experts report on accountability for East Timor, which was to be released at about the same time. The Commission's membership and the structure of its reporting requirements raise questions of its independence. Furthermore, the Truth and Friendship Commission is not vested with powers to undertake serious inquiries into the truth, and is focused instead, on the whole, on advancing friendship between the two states. This commission is just beginning, and it will be important to watch it closely.

Recent questionable practices such as those outlined above should not however lessen the appreciation for the hard-hitting and effective truth reporting done elsewhere. Indeed there are current examples of non-judicial truth-seeking initiatives that are seen to be so effective that some investigators or commissioners have been put at risk. This is especially true where the inquiries may have the potential to advance judicial accountability. In unprecedented developments, members of the Peruvian truth commission

have recently been receiving serious death threats – two years after they completed the work of the truth commission and released their report. (While it is not unusual for a truth commission to receive death threats, this is the first case where such threats continued, or increased, long after the commission ended.) The chair of the Peruvian commission, Solomon Lerner, and other commission members have been under direct threats in the last weeks and months; judicial authorities working on cases involving high level officials have also been harassed, and perhaps threatened. The threats have increased as cases recommended for prosecution by the commission have moved forward, including recent indictments. The bitterness towards the commission is also seen in continued attacks against the commission in the media. The threats ironically seem to confirm how effective the commission was: in addition to collecting specific information on cases and strongly urging prosecutions, the commission also helped to build social support for prosecutions by informing the public of the extent of past atrocities, which had not been previously appreciated.

The leadership of the Guatemalan Forensic Anthropology Team has also been receiving significant threats in the last months (in the summer and early fall of 2005). Effectively digging into the truth, whether searching for bones or taking down the accounts of witnesses and the names of perpetrators, is clearly still dangerous work.

### **3.3.1 Memory, History and Truth**

Let us return to the question of memory and history. If “the wounds are present. The wounds walk up and down our street”, as noted by the religious leader and community activist in Greensboro quoted above, then an exercise of looking at the past must also by definition be an exercise of understanding the present. It should attempt to address these legacies in a way that will change the dynamics of the present and the realities of the future.

Those who have worked in the field of memory and memorials have much to teach those whose focus is digging up the truth. There is the relatively simple, but critical, fact of the questionable reliability of memory in piecing together what happened around any particular event. Even if an inquiry is undertaken immediately after events took place, and even if all motives in getting to the truth are pure, there are likely to be contradictions, differing understandings of what happened, and very real experiences or viewpoints that point to different conclusions about the facts of the case. The memories may be – or seem to be – competing and contradictory, representing different perspectives on events, even if they are each honest and, from at least one perspective, true.

Memory is not always simple. One noted scholar, James E. Young, author of *The Texture of Memory: Holocaust Memorials and Meaning*, argues that, “Memory is never shaped in a vacuum; the motives of memory are never pure.”<sup>1</sup> Motives vary, he notes. “There the aim of some memorials is to educate the next generation and inculcate in it a sense of shared experience and destiny, other memorials are conceived as expiations of guilt or as self-aggrandizement.” He argues also that it is important not to lose sight of the many social and political forces underpinning national memory. “If part of the state’s aim, therefore, is to create a sense of shared values and ideals, then it will also be the state’s aim to create the sense of common memory, as a foundation for a unified polis. Public memorials, national days of commemoration and shared calendars thus all work to create common loci around which national identity is forged.”

Memorialization is another important area, separate but closely linked to memory, truth, and history. Memorialization goes to the core of the question of how a nation, or a people, chooses to remember and to preserve their memory of events that may seem to shape their very identity – be that individual or national identity. The recent controversy around the proposed International Freedom Center, which was to be built at Ground Zero in lower Manhattan where the World Trade Center once stood, makes this point clearly. Many families of those killed on September 11 felt that they were not sufficiently consulted in the process of design, and disagreed with a memorial that was to be largely focused globally, rather than on the specifics of September 11. After considerable controversy, and despite years of planning and significant donor backing, the plan for an International Freedom Center was recently dropped, so that the families’ vision and experience could be more centrally incorporated.

The potential power of memorialization, and its link to national and political identity, is also clear in the recent visit by Japanese Prime Minister Junichiro Koizumi to the Shinto shrine in Japan, which houses the remains of persons responsible for major atrocities in the World War II. The reaction by Japan’s neighbors was immediate and intense: in strong protest, China and South Korea canceled planned meetings or official visits, including talks in relation to North Korea.

Memorials “tend to concretize particular historical interpretations,” James Young writes, and just as memory is not always pure, memorials are never

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<sup>1</sup> James E. Young 1993: *The Texture of Memory: Holocaust Memorials and Meaning*, New Haven and London: Yale University Press.. Quotes here are taken from the introduction to this book, 1-15.

devoid of political context and purpose. For example, Young argues, “In reference to the fascist era, monuments may not remember events so much as bury them altogether beneath layers of national myths and explanations.”

Ironically, memorials can sometimes freeze or even help to bury memory, especially if the memorials are static. Young argues that “To the extent that we encourage monuments to do our memory-work for us, we become that much more forgetful. In effect, the initial impulse to memorialize events like the Holocaust may actually spring from an opposite and equal desire to forget them.”

As formal and informal methods of addressing the past continue to be developed around the world, it is important to continue to learn from recent experience, and to be honest about how difficult these processes of remembering, and these processes of finding, telling, and memorializing the truth, can so often be.

### 3.4 Reparations and the Role of International Cooperation<sup>1</sup>

**Pablo de Greiff**

The ICTJ has just finished an ambitious research project on reparations for victims of gross and systematic human rights violations. In this paper, I will not summarize the results of this entire project, but will offer:

- 1) a sketch of a conception of justice for these massive cases, a thorny issue that had not been tackled systematically up to now;
- 2) some policy recommendations based on our research, and
- 3) some thoughts about the role that international cooperation could play in this issue.

Before getting to my first topic, however, a few remarks about the history of the practice of reparations involving large numbers of beneficiaries – as opposed to reparations benefits stemming from the adjudication of individual and relatively isolated cases in a court of law – are in order.<sup>2</sup>

The idea of providing reparations to the victims of various sorts of harms is of course not new. Aristotle, in book V of the *Nicomachean Ethics*, articulates what was surely not a novel view even at the time, according to which, ‘rectificatory justice’ requires the judge to “equalize by means of the penalty, taking away from the gain of the assailant.”<sup>3</sup>

However, the contemporary practice of providing reparations for victims of human rights violations has its more immediate roots both in national torts legislation – the idea of repairing harms is part and parcel of all established

<sup>1</sup> This paper draws heavily from my “Justice and Reparations”, and “Reparating the Past”, both in *The Handbook of Reparations*. Pablo de Greiff, ed., Oxford: Oxford University Press, 2006. and also from my “Reparations Efforts in International Perspective: What Compensation Contributes to the achievement of Imperfect Justice”, in *To Repair the Irreparable: Reparation and Reconstruction in South Africa*. Erik Doxtader and Charles Villa-Vicencio, eds., Cape Town: David Phillips, 2004. *The Handbook* is the result of the massive research project on reparations undertaken by the ICTJ. It contains eleven case studies, ten thematic papers, and basic documents on reparations efforts in different parts of the world.

<sup>2</sup> I distinguish between reparations efforts and reparations programs. The latter term should be reserved to designate initiatives that are designed from the outset as a systematically interlinked set of reparations measures. Most countries do not have reparations programs in this sense. Reparations benefits are most often the result of relatively isolated initiatives that come about incrementally, rather than from a deliberately designed plan. More on this below.

<sup>3</sup> Cf. Aristotle, *Nicomachean Ethics*, Book V, chs 2-4.

legal systems – and in inter-state, post-bellum reparations, which themselves have a long history. Grotius, in his *On the Law of War and Peace*,<sup>4</sup> published in 1625, already gave expression to a view of inter-state reparations that he did not articulate as if it were a new obligation, but rather, an already familiar view. In the domain of practice, not of mere texts, the Treaty of Westphalia of 1648 already includes reference to reparations, in particular to restitution. The conclusion of the wars of 1830, 1870, and, famously, of World War I, included provisions for extensive reparations paid for by the defeated parties.

But it is the reparations paid by Germany after the Holocaust that constitute a watershed in the history of reparations. Although they included elements of the inter-state paradigm in the form of transfer of resources from one state (Germany) to another (Israel), these reparations measures also included novel elements:<sup>5</sup> first, they were the outcome of negotiations that included not only state actors, but what would come to be known as non-governmental organizations (NGOs); and crucially, it was understood that the provision of benefits to individual victims was an essential point of the effort.<sup>6</sup>

Since then, in the wake of the different waves of ‘democratization’ and of transition out of conflict, the obligation to provide reparations to victims has come to be understood to apply also to the victims of intra-state conflicts and harms. All of the transitions to democracy since the 1980s have included discussions about reparations and a good number of these countries have actually implemented some sort of ‘reparations program.’

Despite the prevalence of the practice it is surprising that there is so little systematic and comparative information available on reparations programs. This is particularly shocking given that reparations occupy a special place among transitional justice measures: in contrast to other transitional justice initiatives, reparations are measures taken explicitly on behalf of victims, and not primarily against perpetrators. They are measures that provide benefits to victims directly, rather than impersonally or in the long run.<sup>7</sup> It is even more

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<sup>4</sup> Book XVII, Ch. X.

<sup>5</sup> The fact that the recipient state, Israel, came into existence only after the conflict, makes the case novel even from the perspective of inter-state reparations.

<sup>6</sup> See Ariel Colonomos and Andrea Armstrong, “German Reparations To The Jews After World War Two: A Turning Point In The History Of Reparations” in *The Handbook*.

<sup>7</sup> The ‘impersonally’ requires some explanation; it is not that there have been many reparations programs that tailor their benefits to each particular case (those that have attempted to do so have encountered peculiar difficulties). Notwithstanding this, reparations programs provide some sort of benefit to each beneficiary. The same cannot be said by truth-telling efforts, which are rarely able to disclose new information to other than a small



surprising to find out that while there seems to be consensus among international lawyers that there is an emerging right to reparations in the case of grave violations of human rights, there is no consensus about the criterion of justice to be employed in the massive cases.

The criterion of justice in reparations that underlies most national and international law instruments is *restitutio in integrum*, full restitution, the restoration of the status quo ante, or when the harm is such that it is literally impossible to go back to the pre-harm situation, compensation in proportion to harm.

This criterion of reparatory justice is unimpeachable for the relatively isolated case of rights violations. It is meant to neutralize the effects of the harm on the victim, and to prevent the perpetrator from enjoying the spoils of crime. The problem is that international experience suggests that it is virtually impossible to satisfy this criterion in the massive cases of abuse. It would be too facile to conclude that therefore these ‘programs’ have simply been ‘unfair,’ for even if true, this judgment would not help distinguish between earnest efforts to provide reparations to victims and those that have been a sham.

But the impossibility of compensating victims in proportion to the harm they have suffered – and the blow to victims’ expectations when they are led to believe that this is what they are entitled to but never get – are not the only reasons to seek a criterion of justice suitable to the massive cases. Ultimately, I think that there is a difference between awarding reparations within a basically operative legal system that in the relatively isolated case of abuse can be said that it should have, and could have, fared better, and on the other hand, awarding reparations in a system that in some fundamental ways, precisely because it either condoned or made possible systematic patterns of abuse, needs to be reconstructed (or, as in some countries, built up for the very first time). In the former case it makes sense for the criterion of justice to be exhausted by the aim to make up the particular harm suffered by the particular victim whose case is before the court. In the case of massive abuse, however, an interest in justice calls for more than the attempt to redress the particular harms suffered by particular individuals. Whatever criterion of justice is defended must be one that has an eye also on the preconditions of reconstructing the rule of law, an aim that has a public, structural dimension.<sup>8</sup>

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number of victims, or by institutional reform initiatives, which although might end up benefiting large numbers of people, normally do so indirectly and in the long run, and not targeting victims specifically.

<sup>8</sup> In my “Justice and Reparations,” I spell out in some detail why the procedure that would have to be implemented in order to satisfy the criterion of full restitution may end up underserving the notion of justice that is called for in the latter type of situation. The problem has to do with the fact that in the effort to repair each individual in proportion to the harm

Examining in detail reparations programs and the history of their design, enactment, and implementation allows one to reconstruct an account of the sort of justice at which massive programs aim;<sup>9</sup> it can be argued that they have pursued two goals that are themselves closely related to justice: the first is to provide a measure of recognition to victims. The crucial point here is that the benefits provided by the program are not meant to solidify the status of victims as victims, but rather, as citizens, as bearers of rights which are equal to those of other citizens. The benefits become a sort of symbolic compensation for the fact that rights that were supposed to protect the basic integrity, possibilities, and interests of citizens were violated.

One important consequence that flows from this conception of reparations is that a fundamental function of a massive reparation scheme is to provide a reliable indication of the fact that the successor regime takes seriously the equality of rights of all citizens, and giving this indication clearly involves both a retrospective and a prospective element; retrospectively, the benefits must be sufficient in magnitude to constitute an adequate expression of the perceived seriousness of the violation of the equal rights of fellow citizens. Prospectively, and by the same token, the magnitude of the benefits must be sufficient to signal the successor state's intentions to do things differently in the future.

The second important consequence that flows from this conception of the ends of reparations is that the design and implementation of reparations programs calls for the participation of those whom the program seeks to recognize, since recognition is not something that is simply bestowed, independently of whether the persons on whom it is bestowed feel thereby adequately recognized.

The other main goal that can be attributed to reparations efforts – again, one related to justice – is to make a (modest) contribution to the fostering of trust among citizens, and particularly, between the citizens and the institutions of

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s/he has suffered, the procedure ends up “disaggregating” both the victims and the reparations efforts. In the process, a dangerous nonegalitarian message might be sent, namely, that the violation of the rights of the affluent is a more serious offense than the violation of the rights of the less well-off. See also the paper I co-authored with Marieke Wierda, “The Trust Fund for Victims of the International Criminal Court: Between Possibilities and Constraints,” in *The Right to Reparation for Victims of Gross and Systematic Human Rights Violations*, M. Bossuyt, P. Lemmens, K. de Feyter and S. Parmentier, eds. (Brussels: Intersentia, forthcoming).

<sup>9</sup> It is important to be clear about the nature of the claim being made. There is no naturalistic fallacy here, no attempt to derive an ‘ought’ from an ‘is,’ to construct an obligation starting from mere observation. The move is rather reconstructive; it constitutes an effort to reconstruct the aims that actual reparations program may be said to pursue.

the state. While in isolation from other justice initiatives including criminal prosecutions and truth-telling reparations benefits might be counterproductive, becoming too much like a payment in exchange for the silence or acquiescence of victims and their families, as part of a comprehensive transitional justice policy, reparations might provide beneficiaries with a reason to think that the institutions of the state take their well-being seriously, that they are trustworthy.

Like recognition, trust is not something that is merely desirable; it is also closely related to justice. Trust is both a condition and a consequence of justice. Absent totalitarian supervision, legal systems cannot but rely on the trust of citizens at each different level of their operation, starting with the trust that is necessary for citizens to report crime to the authorities. At the same time, a well functioning legal system is capable of catalyzing the trust in which citizens regard it, and also, probably, the trust that citizens have for one another, not the least because law stabilizes expectations and lowers the risks of trusting others, and both factors can be trust-inducing.

I will leave normative considerations aside for the moment, in order to describe a set of policy recommendations that are grounded on the evidence gathered by our research, and I will do so using some of the categories that were developed in order to clarify some of the critical design variables of reparations programs:

- Ideally, the class of beneficiaries of the program should coincide with the class of victims of abuse or conflict. That is to say, the program should be 'complete.' Special care should be taken not just in implementing effective outreach measures to publicize the existence of the programs. Similarly, care must be taken to adopt procedures and evidence standards for qualification that do not exclude deserving victims.
- More importantly, great attention should be paid to the way in which the categories of crimes that give rise to benefits through the program are selected. Frequently, such categories have been selected in a way that excludes from benefits those who have been traditionally marginalized, including women and some minority groups. (To compensate all victims, of course, does not mean that all of them have to be compensated equally, that they must receive the same benefits.) The possibility of achieving completeness, of providing benefits to all the victims of abuse or conflict, thus, is related to the program's 'comprehensiveness,' that is, to the breadth of categories of crimes it chooses to redress. Focusing on a very narrow set of categories of

crimes means that the program will exclude large numbers of victims, which is not only unfair, but also guarantees that those victims' claims will remain in the political agenda for a long time to come.

- In order to make it feasible to provide benefits to all victims of all relevant categories of crime, it is important to design a program that distributes a variety of material and symbolic benefits, and does so in a 'coherent' way. A reparations program is internally coherent if it establishes relations of complementarity or mutual support between the various kinds of benefits it distributes.
- In addition to coordinating the benefits it distributes, a reparations program should itself operate in coordination with other justice measures, for otherwise, the program may easily become the target of justified criticism. As pointed out before, reparations programs that function in the absence of other justice measures invite the interpretation that the benefits they distribute constitute the currency with which the state tries to buy the silence of victims. Hence, it is important to make sure that reparations efforts cohere with other justice initiatives including criminal prosecutions, truth-telling, and institutional reform. A reparations program that operates in coordination with other justice initiatives such as criminal prosecutions, truth telling, and institutional reform is 'externally coherent.'
- If two of the critical aims of a reparations program are to provide recognition to victims (not just in their status of victims but also of citizens, of bearers of equal human rights), and to promote their trust in the institutions of the state, it is important to get victims involved in the process of designing and implementing the reparations program. Open, deliberative, and participatory processes must be designed.

Finally, I would like to address a question that is of particular relevance to this audience, namely, the role of international cooperation in the sphere of reparations. To begin by attending to the facts themselves, despite the expectations of many post-conflict or transitional societies, the international community rarely provides significant resources to finance reparations initiatives. The reason for this reluctance is two-fold: first, given that reparations benefits are not simply the equivalent of a crime insurance scheme, but rather, should always involve a dimension of acknowledged responsibility, the international community has often argued that reparations should be primarily a local initiative (this is not unreasonable in those cases in which the responsibility for the conflict is solely local, a topic to which I shall

return). Second, given that implementing reparations plans always involve sensitive political decisions, the international community has little incentive to get involved in a potentially divisive arena.

By contrast, the international community is heavily involved in the area of development. This warrants a cautionary comment. Post-conflict or transitional governments everywhere have been consistently tempted not just to fold reparations programs into development programs, but to argue that development *is* reparations. Thus, for years, even a government that was particularly sympathetic to victims, such as Mandela's in South Africa, for many years stalled the implementation of the recommendations on reparations issued by the SATRC, arguing that the development programs it was putting in place constituted all the reparations it needed to provide.<sup>10</sup> This temptation is nearly universal.

I would like to suggest that international cooperation, given its own involvement in development programs, should resist the temptation to erode the distinction between reparations and development. Strictly speaking, a development program is not a program of reparations. In fact, development programs have a very low reparative capacity, for they do not target victims specifically, and what they normally try to achieve is to satisfy basic and urgent needs, which makes their beneficiaries perceive such programs, correctly, as ones that distribute goods to which they have rights as citizens, and not necessarily as victims. In the second place, there is an issue of timing: development programs are both complex and long-term. This threatens the success of the institutions responsible for making recommendations concerning reparations, such as truth commissions, which operate on much shorter time frames, and may raise questions about the seriousness of the transitional process in general.

Here it is worth returning to the distinction between reparations in their strict sense, and the reparative effects of other programs. Development, just as criminal justice, for example, may well have reparative effects. Nevertheless, this does not make either of them part of the domain of responsibility of those who design programs of reparation. Naturally, we may reiterate here that reparations programs must cohere with other aspects of the transitional policy. In the last analysis, a transitional government in a poor country will most likely propose a development plan, and ideally, the program of reparations must also cohere with that plan. But the point I want to emphasize

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<sup>10</sup> As is well known, President Mbeki's government in April 2003 finally proposed a reparations program that provided a fraction (about a fifth) of the benefits recommended by the TRC.

is that it is important to set boundaries of responsibilities between different policies, for strictly speaking, the responsibilities of a program of reparation are not the same as that of a development or social investment plan.

The previous recommendation to the international community, to resist the idea of dissolving reparations into development programs, however, should not be taken by the international community as an excuse for inaction in this field. In my view, the international community could:

- rethink, at least in some cases, particularly in those in which international actors have played an important role in a conflict, its reluctance to provide direct material support to reparations efforts;
- provide technical assistance in the design and implementation of reparations programs;
- support local groups involved in reparations discussions;<sup>11</sup>
- pressure multilateral institutions to foster conditions under which post-conflict economies can afford to pay due attention to the victims of conflict;
- in connection with the support that international cooperation often provides to different peace making initiatives, including reintegration plans for ex-combatants, the international community can pressure local governments to establish meaningful reparations programs for victims. Indeed, it might not be a bad idea to establish conditionalities to that effect: international support for reintegration plans can be made conditional on comparable local commitment to reparations for victims.

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<sup>11</sup> This is important not just for the reasons mentioned before, namely that recognition requires participation, and that technical capacity on this issue needs to be strengthened all around. Beyond this, there is an additional important consideration: in the end, whether a reparations plan is implemented or not depends heavily on a political struggle in which the participation of local groups is absolutely imperative.

### 3.5 Strategies for Reconciliation: Are Justice and Peacebuilding Complementary or Contradictory?

**David Bloomfield**

This paper is offered not as a definitive statement on the topic, but rather to stimulate reaction and provoke thought. It is an extract from a work in progress. There are a series of complex questions which arise when we start to unpack the dense concepts of justice, truth, reconciliation, human rights and peace in a post-violence context. My own feeling is that only a holistic view, which sees these and other complex concepts as interlinked and interdependent in a broader peacebuilding framework, can help us develop a meaningful framework and effective strategies for the transformation of a once violent and authoritarian society into a genuinely non-violent, democratic one.

Transitional justice is now addressing a post-violence agenda, and this must be acknowledged as a major step forward. The International Criminal Tribunal for the former Yugoslavia must take some credit for this very positive change. Compared to even 10 years ago, there is far more focus on exploring the nature and dynamics of transitional justice after violent conflict not just among scholars but also among practitioners, victims, politicians and community leaders, and perhaps more significantly among many key international actors. We are learning at a much faster rate than before. And the whole concept of transitional justice, by turning the spotlight of enquiry on issues of truth-seeking, legal reform, reparations, etc, has contributed to the development of a richer framework within which to position our efforts at peacebuilding. At the same time, it has acknowledged the role of justice as a primary ingredient in so many aspects of peacebuilding. All this is to be welcomed.

But there have been problems, too. Until quite recently there has been much talk of the “justice versus peace” problem. This simplifies a complex debate, but also acknowledges that some of that debate has been simplistic. Some of this is a result of the South African Truth and Reconciliation Commission (TRC). While certainly not the first of its kind, the South African experience definitely had the highest international profile of any TRC. Much argument – some of it academic, but also painful and difficult thinking by victims and practitioners – concentrated on the offer of amnesty to offenders in exchange for the acknowledgement of guilt and some expression of remorse. If an offender thus escaped the legal implications of his/her actions, it was argued, this clearly meant that justice (punishing the wrongdoer) was compromised in the interests of peace (acknowledging the wrong done and helping victims to move on). It was then argued that there is a tension between justice and peace and a trade-off between the two. The rigorous pursuit of justice, with condemnation and punishment, requires compromises that could undermine

efforts to rebuild social relations between formerly opposed communities. Denial of amnesty would greatly reduce the impact of the TRC. Meanwhile, the wider reconciliation work required to establish a peaceful society now and in the future may well require compromises in carrying out full-fledged justice against wrongdoers. In order to manage an effective TRC – and indeed to involve perpetrators in the TRC process – justice has to be compromised by amnesty.

Donna Pankhurst made a telling comment describing prevailing attitudes on this in 1999: “No common understanding has yet emerged of the political conditions under which efforts at reconciliation should be restrained and justice promoted, or vice versa, in order to achieve the ‘best’ peace.”<sup>1</sup> Clearly implicit in this remark – note the vice versa – is the assumption that there is a trade-off between one instrument and the other. And it is fair to speculate that this may have a lot to do with the process of truth-telling, especially in examples where truth (and by implication reconciliation) has been achieved at the price of amnesty, or negotiated compromises have been reached at the expense of accountability for past misdeeds. Another excellent text on the subject is the edited collection by Robert Rothberg and Dennis Thompson, published a year after Pankhurst’s article. This book contributed significantly to the development of further thinking on reconciliation, but its title was telling: “Truth v. Justice: the Morality of Truth Commissions.”<sup>2</sup> The antagonism thus established between the two processes – truth versus justice – was persistent.

To make matters worse the perspectives of those in a post-violence situation and international experts and actors, especially in the case of national reconcilers versus international lawyers, created further tension. Pankhurst again: “There is a much greater potential role for outsiders with regard to justice”<sup>3</sup>, while “reconciliation is generally a more domestic affair”<sup>4</sup>. This was never more true than in the case of post-genocide Rwanda. Faced with the task of providing legal process for vast numbers of prisoners, and a legal infrastructure that had been almost demolished and was completely incapable of responding, the new Rwandan government devised the modernized *gacaca*

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<sup>1</sup> Donna Pankhurst, 1999: “Issues of justice and reconciliation in complex political emergencies: conceptualising reconciliation, justice and peace.” *Third World Quarterly*, Vol. 20, No. 1, 239-256, 240.

<sup>2</sup> Robert Rothberg and Dennis Thompson (eds.), 2000: *Truth v. Justice: the Morality of Truth Commissions*, Princeton, Princeton University Press.

<sup>3</sup> Pankhurst, 1999, 239.

<sup>4</sup> *Ibid.*, 255.



process based on a traditional restorative justice process which had generally dealt with much less serious crimes, in an effort to combine elements of justice and reconciliation. But when it initially announced its plan it was met with howls of derision from the international community, not least from human rights and international law experts. Universal human rights entitled prisoners to due process of law, etc, which would be completely denied by the *gacaca* process. Rwanda retorted that, given the impossible scale of the challenge (it would take at least a century to process each of the hundred thousand-plus prisoners through a classical court of justice), a compromise was better than nothing given the urgency of reconciliation. The debate was heated. Some development cooperation agencies found that, for human rights reasons, they could not support the Rwandan process. The Rwandan government felt that it was again being ignored or obstructed by the same international community that had averted its eyes from the events of 1994. Over the following years the heat has eased somewhat, but the widespread sense of antagonism between reconciliation and justice has not completely disappeared.

I do not wish to hold Donna Pankhurst too responsible for any of these views: she did us all a service by concisely reflecting at a particular point in time. That was six years ago, and thinking and practice have moved on. Nonetheless, the sense of antagonism between truth and justice, or reconciliation and justice, is not dead.

The present situation can be described as follows: the international community and in particular the multilateral and bilateral agencies now tend to insist on the establishment of “reconciliation” processes after a peace agreement is signed. This often takes the form of a TRC, and almost always involves legal reform on a broad scale. But the two are still not seen as completely complementary, and the tensions remain.

A certain amount of tension may be healthy. With post-violence peacebuilding we are dealing with a complex area of human activity – violent conflict and its aftermath – which by its very nature involves a degree of confused, illogical and contradictory thinking and behavior. Simple, neat solutions would immediately be suspect. But part of the tension is very counter-productive, and I would argue, makes a difficult situation worse. There is no simple answer to this complexity, but in my view at least a part of it stems from the definition of justice utilized in such contexts.

So let us take a brief look at how we define terms here. I would suggest that all too often in this reconciliation versus justice debate, the definition of justice employed is the too-narrow one of retributive justice. Justice here concentrates on the classical process of calling the guilty to account, and punishing them

for wrongdoing. I do not wish to diminish the importance of retributive justice: it clearly has a role not only in rebalancing the scales of society, but also in establishing precedents to discourage future wrongdoing. Victims understandably gain a sense of satisfaction when they see their perpetrators punished in the name of society. Thus, the full weight of the law must fall upon offenders, accepted standards of legal process must be adhered to, and the guilty must be punished. This is a key part, not only of doing justice after violence, but of setting the limits of acceptable behavior for the future, and in so doing establishing a more “just” or fair society.

But a fair society depends not only on the legal process. There are other definitions of justice, not contradictory to the retributive one but complementary to it, and essential for reconciliation and peacebuilding. Restorative justice is one: focusing more on the victim and the hurt than on the offender and the crime. Ways are sought to “restore” or compensate for the hurt, focusing on restoring relationships between the communities of victims and offenders. This of necessity moves outside the narrow confines of crime and punishment. Then there is social justice. This is not just a matter of producing a society where “those who do wrong are punished”. Social justice aims to do more than deter: it aims to provide a systematized definition of right and wrong, and an underlying shared value that the justice system applies to all, is fair, and can be trusted. It aims to show society, and especially victimized communities, that everyone is subject to the same rules of fairness. Thus, not only are all equal in the eyes of the law, but society itself operates on principles of fairness for all. Social justice, especially when combined with distributive justice (including economic justice), ensures that all the “goods” of a society (economic, political and social) are shared in a fair way.

It is this wider concept of justice that relates directly to reconciliation and peacebuilding work. Joseph Montville sees justice as “the most fundamental element of peace” since: “In its most general sense, justice implies order and morality... the basic rules governing right and wrong behavior,”<sup>5</sup>. Similarly, Hezkias Assefa comments that, “Reconciliation necessitates the transformation of unjust relationships to more just ones”<sup>6</sup>, while Wendy Lambourne observes,

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<sup>5</sup> Joseph V Montville, 2001: “Justice and the Burdens of History,” in: Mohammed Abu-Nimer, (ed.), *Reconciliation, Justice and Coexistence: Theory and Practice*. Lanham, MD, Lexington Books, 129-143, 129.

<sup>6</sup> Hezkias Assefa, 2001: “Coexistence and Reconciliation in the Northern Region of Ghana,” in: Mohammed Abu-Nimer, ed., *Reconciliation, Justice and Coexistence: Theory and Practice*. Lanham, MD, Lexington Books, 165-186, 181.

“Reconciliation... values the justice which restores community, rather than justice which destroys it,”<sup>7</sup>. None of this is meant to devalue the importance of punishment, of retributive justice. But it cautions against too tight a grasp of the sanctity of legal principles in a situation where compromise and imperfection are all too necessary. To risk simplicity we might say then in Lambourne’s words that it is a broad multi-dimensional definition of retributive, social, restorative, distributive and economic justice which forms the “justice which restores community,” in distinction from a sole focus on retributive justice which, when used alone, does indeed threaten to destroy, or at least impede and undermine, community-building. This is precisely the point of interaction between reconciliation and justice, where as Erin McCandless says, “Our working justice-reconciliation conceptual framework is one that prioritizes justice concerns (of means, ends, and relational) in a process of constructive intergroup relationship building. It recognizes that the two share a dynamic interdependent relationship, mutually informing and benefiting each other,”<sup>8</sup>.

Justice and reconciliation then are intertwined, interactive and interdependent. To focus too much on one side of the relationship risks undermining the intricate balance between the two. This is easy to say, and indeed increasingly it enters the rhetoric that we all use. But how do we make it more real in practice? Why has the argument of peace versus justice eased but not gone away?

Part of the answer may have to do with the fact that we still approach the two activities separately, as interdependent and interrelated, but separate processes addressing different parts of the peacebuilding process. But it is possible to think of them in a more complementary way which could help us to move away from thinking and rhetoric to more effective action.

Two years ago International IDEA published a policy-oriented handbook on reconciliation processes<sup>9</sup>. It was a brave attempt to try to move such thinking further along. There, we argued that reconciliation is the overarching process of (re)building broken communal relationships after violence. Within that process, we located justice not as a separate, parallel or complementary

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<sup>7</sup> Wendy Lambourne, 2004, “Post-Conflict Peacebuilding: Meeting Human Needs for Justice and Reconciliation.” *Peace, Conflict and Development*, Issue 4, April 2004, 24.

<sup>8</sup> Erin McCandless, 2001: “The Case of Land in Zimbabwe: Causes of Conflict, foundation for Sustained Peace”, in: Mohammed Abu-Nimer, (ed.), *Reconciliation, Justice and Coexistence: Theory and Practice*. Lanham, MD, Lexington Books, 209-222, 214, emphasis added.

<sup>9</sup> David Bloomfield, Teresa Barnes and Luc Huyse (eds.), 2003: “Reconciliation After Violent Conflict: A Handbook.” Stockholm, IDEA.

process, but rather as one constituent part of the reconciliation process along with truth-seeking, healing and reparation. We proposed using reconciliation as the umbrella-term for an “overarching process which includes the search for truth, justice, forgiveness, healing and so on”<sup>10</sup>. In a handbook for policymakers, intended to be as practical and readable as possible, the implications of that slight reconceptualization were perhaps downplayed. But such an approach is interesting. It does not see the various instruments of reconciliation as competing or antagonistic with each other or with the instrument of reconciliation, but rather as complementary and interdependent instruments for the overall relationship-building process of reconciliation. Thus reconciliation is not one instrument among several, (including justice, healing, truth-telling and reparations). Rather, it is the overall relationship-oriented process, and the instruments are component parts. This has the conceptual virtue of reorienting these instruments so that they move in the same direction, rather than as so often happens (especially reconciliation and justice) being seen as antagonistic. Reconciliation in this view is a process of gradually (re)building broad relationships between communities alienated by sustained and widespread violence, so that with time they can negotiate the realities and compromises of a new, shared socio-political reality. It has four main instruments:

- A justice process that punishes past violence and deters future repetition; justice reform that is built on human rights principles, democratic practice, and international legal norms; and social justice in the distribution of social goods that promises fairness for all in the future;
- A process of acknowledging experiences, uncovering unknown events, giving voice to the previously unheard, and addressing interpretations of history, often referred to as truth-seeking or truth-finding;
- A process of healing, whereby victims repair their lives by coming to terms with their suffering (something more straightforward to understand at the individual level but very unclear at communal and national levels despite Brandon Hamber’s best efforts<sup>11</sup>);
- A process of reparation through real and/or symbolic compensation for loss.

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<sup>10</sup> Ibid., 12.

<sup>11</sup> Brandon Hamber, 2003: “Healing,” in: Bloomfield, Barnes and Huyse (eds.): *Reconciliation After Violent Conflict: A Handbook*. Stockholm, IDEA, 77-96.

There is a strong parallel with the work of John Paul Lederach, whose words on this subject always deserve attention, since he is that rarest of entities, a deeply reflective and richly experienced practitioner. Where he finds his own, slightly different, four ingredients of reconciliation (peace, justice, truth and mercy), he too sees them as necessarily interrelated within a framework of reconciliation:

“My conviction is this. The single greatest challenge of all conflicts, particularly those with a long history of violence and suffering is to create the social space where it is possible to hold together and interdependent, not separate and isolated, the impulses of these four social energies. Where they meet, are connected, and relate, we create the pathway leading toward reconciliation. Where they are ignored, isolated from one another, or chosen one over the other, we often are unable to create sustainable peace processes.”<sup>12</sup>

He characterizes these four instruments as “family”, and asserts that, “the key is how to create the social space and processes where they meet and are held together”.<sup>13</sup>

We could then offer a simple response to the question in the title of this paper: of course justice and peacebuilding must be complementary! But once we begin to unpack these concepts, that complementarity becomes, at least in practice, more problematic and demanding of greater effort to reorient these two vital ingredients of post-violence reconstruction. IDEA’s small conceptual reorientation might offer a first step to more clear thinking about the interrelationship, but there is a long way to go to make it real in practice.

One last unfinished thought on the nature of justice. As justice – the rule of law, and so on – gives us the underpinning of fairness in society it is often held to be a non-negotiable set of principles or even morals which cannot be compromised, even in the murky impossibilities of post-genocide Rwanda. Moreover, this argument of the primacy of law is often made on behalf of victims, who are said to deserve full justice without compromise. Any such compromise, especially if made in an effort to strengthen a reconciliation process at the expense of justice, would be unfair to the victims. But consider the words of a representative of victims groups in Algeria as reported in *The Economist*, following the recent ratification of a Charter on Peace and National Reconciliation which incorporated widespread amnesty provisions:

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<sup>12</sup> John Paul Lederach, 2001: “Civil Society and Reconciliation,” in: Chester A Crocker, Fen Osler Hampson and Pamela Aall (eds.): *Turbulent Peace: the Challenges of Managing International Conflict*. Washington DC, USIP, 841-854, 848.

<sup>13</sup> *Ibid.*, 854.

“We want the courts to deal with those who ordered and those who carried out acts of violence, even if Mr Bouteflika later pardons them.”<sup>14</sup>

At first glance the statement seems absurd. It suggests subjecting perpetrators to the full justice system, trial, verdict and sentence, even if their punishment is then cancelled. But it is not absurd. In this instance what seems more important to the victims than the punishment of offenders is that they accept responsibility for their wrongdoing, and that society acknowledges their responsibility and guilt. In other words social justice, however symbolic or partial. Clearly, victims can think these issues through for themselves, and can do so conscious of all the complexities, compromises and imperfections of real life. This is an imperfect and almost contradictory form of justice. And yet it works for these victims. Perhaps, as is increasingly said of the retributive justice system where victims are rendered almost invisible in the concentration on punishment of the offender, we could allow victims more say and more control in resolving the complexities with which we wrestle.

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<sup>14</sup> *The Economist*, “A Flawed Charter,” 8 October 2005, page 48.

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## 4 Panel 2

*Promoting and Protecting Human Rights in "Transitional Societies":  
The Challenge of Dealing with the Past*

Panelists: Toni Pfanner  
Adrien-Claude Zoller  
David Marshall

Moderator: Jonathan Sisson

### **Guiding Questions:**

It is important to address transitional justice issues during the entire process of transition and not only in the post-conflict phase. In this respect, particular attention needs to be focused on the negotiation of peace agreements: What initiatives and guarantees on the part of the international community are necessary to secure respect for human rights among the signatories, especially in view of the pressing issue of impunity and a general lack of political will to implement agreements in this regard? How can we strengthen public participation and broaden the space for dialogue between civil society and government in the different phases of transition?

Other questions concern the link between transitional justice and international humanitarian law. How can international humanitarian law contribute to the prevention of war crimes and crimes against humanity in connection with violent inter-state or intra-state conflicts? To what extent can transitional justice contribute to the enforcement of international humanitarian law and to the promotion of human rights? How might instruments in dealing with the past contribute to related issues such as disarmament, demobilization, and reintegration (DDR) and the return of refugees?





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## 4.1 Truth Commissions and the International Committee of the Red Cross (ICRC)

**Toni Pfanner<sup>1</sup>**

Truth Commissions of the last 30 years have all had different mandates and working methods. Nevertheless they can generally be identified as bodies of inquiry with the following characteristics:

- a truth commission focuses on the past;
- it investigates a pattern of abuses over a period of time, rather than a specific event or individual case;
- it is a temporary body, typically operating for six months to two years, and completing its work with the submission of a report;
- it is officially sanctioned, authorized or empowered by the state (and sometimes as in a peace accord by the armed opposition).

Truth commissions serve a variety of purposes. Their investigations establish an accurate and authoritative record of the past, acknowledged by the government. This documentation of abuses and the government's involvement in them is itself a complementary mechanism to prosecution in that it provides a fuller account of the pattern of abuses than individual criminal trials could. This documentation can be crucial to later prosecutions when handed over to the judiciary.

A truth commission provides victims with a platform to tell their experiences, which many consider necessary for the healing process of reconciliation. Truth commissions also serve as a means to identify victims so they may obtain some form of redress. Furthermore, they can recommend the institutional or legislative reforms needed to avoid the repetition of past abuses.

Some truth commissions have helped to establish who was responsible and to provide a measure of accountability in relation to the perpetrators. They are not however the same as judicial bodies. They clearly have less power than a court of law, since they can neither impose punishment such as a jail sentence, nor compel testimony. When truth commissions take on even quasi-judicial functions difficulties arise. For example, they often face the dilemma of whether or not to name suspected perpetrators. Naming names is part of the truth-telling process, especially when the judicial system clearly does not function well enough to expect that the guilty will be prosecuted. This need to reveal the truth, however, collides with the principle of due process, which

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<sup>1</sup> This contribution reflects the views of the author and not necessarily those of the ICRC.

requires that individuals receive fair treatment and be allowed to defend themselves before being pronounced guilty. Establishing an outline of fair standards of proof by which a truth commission should abide would alleviate some of these due process concerns.

Additional Protocol II to the Geneva Conventions provides that the authorities in power should grant the broadest possible amnesty to those who have participated in an (internal) armed conflict (Article 6,5). It does not however suggest impunity for war criminals. Nonetheless, if a state's decision-makers choose to deal with alleged perpetrators of war crimes (or gross violations of human rights) by means of an amnesty law, they should be fully aware that not to prosecute or extradite would be a violation of the state's international legal obligations<sup>2</sup> and possibly also national laws. The state must also be aware that those granted amnesty would not be immune from prosecution elsewhere.<sup>3</sup> When making this choice the state must consider whether its objective in granting amnesty is not ultimately undermined by acting contrary to the rule of law. Perhaps the decision-makers were right in concluding that the purpose of the law requiring prosecution of war criminals would not be fulfilled by the actual prosecution and that, in fact, fulfilling the original purpose of the law required disregarding it in the circumstances. This is an extreme position, teetering on the brink of a very slippery slope. It raises the following questions: What purpose does prosecution or punishment serve? What is the role of penal repression (criminal prosecution) in relation to the search for justice, peace and reconciliation?

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<sup>2</sup> At least for those war crimes with an absolute obligation to prosecute (rather than mandatory universal jurisdiction for non-international armed conflicts).

<sup>3</sup> It would not be contrary to Article 14,7 of the International Covenant on Civil and Political Rights to bring a defendant who has benefited from an amnesty in the territorial state to justice in another state on the basis of universal jurisdiction. Procedures for awarding amnesties do not amount to "acquittal" within the meaning of Article 14,7. The prohibition against *ne bis in idem* contained in that provision therefore does not apply. Even if it were assumed that the procedures of some truth and reconciliation commissions are sufficiently judicial in character to meet this standard, the Human Rights Committee has held that Article 14,7 does not prohibit trial for the same offense in another state. *A.P. v. Italy*, Comm. No. 204/1986, 2 Nov. 1987, U.N. Doc. A/43/40, at 242. Menno T. Kamminga, *Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses*, 23 Human Rights Quarterly 940, 958 & n.81 (2001).

#### 4.1.1 The ICRC's policy towards transitional policy: a balancing act

The issues surrounding transitional justice I wish to address here chiefly concern the ICRC in relation to implementation of its rule of confidentiality<sup>4</sup> as well as the principles of neutrality and impartiality, which sometimes clash, or appear to clash, with the various ways the ICRC assists and protects persons affected by armed conflicts or other violent situations, requiring the ICRC to perform a delicate balancing act.

The ICRC's approach is determined essentially by one criterion: the interests of the persons its mandate requires it to protect and assist. Its ability to fulfil that mandate depends upon the willingness of the parties to the conflict to grant access to the persons in need, and such willingness, in turn depends upon the ICRC's adherence to the Movement's principles of impartiality and neutrality and, in particular the rule on confidentiality. However, these principles and this rule can conflict with the ICRC's duty to succor persons affected by violence. In such cases, the ICRC must find a "happy medium". In fact, the ICRC is always performing a delicate balancing act. Providing assistance in the short term must be weighed against medium- and long-term needs. Action taken in one context must be weighed against its impact on ICRC operations worldwide.

The question of amnesty helps to illustrate this need for a balancing act. Should not the ICRC promote grants of amnesty conditional on the provision of information on missing persons? This could certainly help end the anguish of family members awaiting news of a loved one and, in that regard, the ICRC would be fulfilling its mission. However, it must be recalled that the decision to grant amnesties is an extremely political one. Intervention in a specific context could risk undermining the perception of the ICRC worldwide, particularly its neutrality and impartiality. Promoting amnesty would be narrow and short-sighted – narrow because in the same context other persons in need, who have no missing relatives, might receive less assistance because of the resulting lost credibility for the ICRC. It is short-sighted in that it focuses on elucidating the fate of missing persons at the expense of the needs of their families, such as bringing perpetrators to account – which might be

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<sup>4</sup> Cf. Jakob Kellenberger, Speaking out or remaining silent in humanitarian work, *International Review of the Red Cross*, Vol. 86 No. 855 September 2004, pp. 593-610; Stéphane Jeannet, Recognition of the ICRC's long-standing rule of confidentiality, *International Review of the Red Cross*, Vol. 82 No. 838 June 2000, pp. 403-426 and "Action by the International Committee of the Red Cross in the event of breaches of international humanitarian law or other fundamental rules protecting persons in situations of violence", *International Review of the Red Cross*, Vol. 87 No. 858 June 2005, 393-400.

impossible after an amnesty. Since the decision to grant amnesty is a political one, the ICRC in its balancing act must be very careful about involving itself, despite the perceived benefit for those it is trying to assist.

Problems also arise at the level of the ICRC's role as guardian of international humanitarian law (IHL). As part of its humanitarian mission to protect the lives and dignity of persons affected by armed conflict, the ICRC strives to promote respect for international humanitarian law. In this context the ICRC Advisory Service helps states to set up the structures and adopt the legislation needed to more effectively protect persons affected by armed conflicts and discourage war crimes (and other IHL violations). If successful, this consultation, analysis and harmonization of legal instruments can help to ensure that no perpetrator will go unpunished. Yet the ICRC's reticence to condemn violations of IHL and its privilege not to testify before tribunals<sup>5</sup> seem to contradict its role as guardian of humanitarian law and its desire to see perpetrators brought to justice. But out of respect for the rule of confidentiality the ICRC does not transmit (confidential) information, either in the form of written reports or as direct testimony.

The Humanitarian Liaison Working Group in June 1995 discussed the subject of "Impunity versus accountability: the role of mechanisms for accountability in resolving humanitarian emergencies". The ICRC explained its position regarding the International Criminal Tribunal for Rwanda and the situation in Burundi. During the meeting, the then prosecutor for the ICTY and ICTR (Goldstone) said he could understand the impossibility for the ICRC to divulge confidential information to the Tribunal, but he spoke of the possibility of organizations like the ICRC or UNHCR transmitting "secret information", which the Tribunal would not use as evidence during a trial but only to help it find other admissible evidence (Rule 70 of the Procedure). It is not a question, however, of ICRC cooperation being kept confidential, but whether the ICRC can truthfully claim that it does not cooperate with such tribunals. The ICRC explained unambiguously that it could never transmit information to the Tribunal, since to do so would harm its credibility in future conflicts and spoil its ability to gain access to victims.<sup>6</sup>

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<sup>5</sup> Decision of 27 July 1999 of the International Criminal Tribunal for the former Yugoslavia (ICTY) (Prosecutor vs. Simić et al., IT-95-P.) and Rona Gabor, The ICRC privilege not to justify: Confidentiality in action, *International Review of the Red Cross*, Vol. 84 No. 845 March 2002, 207-220.

<sup>6</sup> Document 202 (204), Note of 21 June 1995 concerning "Réunion du Humanitarian Liaison Working Group" (HLWG) du 19 juin 1995, consacrée au rôle de mécanismes de punition de crimes (de guerre) dans la solution de crises humanitaires" (internal ICRC note DDM/JUR 95/990).

The ICRC's inability to cooperate with criminal tribunals does not mean it is hostile or indifferent to their task. Insofar as the ICRC, the tribunals and complementary mechanisms have in common the objective of ensuring respect for international humanitarian law, the ICRC supports the existence of mechanisms for the repression of criminal violations of IHL. However, since the ICRC has a mandate to assist and protect persons affected by violence and cannot risk losing its access to them, its role can only be seen as complementary to that of the tribunals, not identical or similar.

The ICRC must meet the challenge of striking the proper balance in this complementary role so that its actions do not undermine the objective of protecting victims. The challenge might be considered a minor one. For although bringing perpetrators to justice may be important for the victims and the communities, it can be argued that it is an indirect or secondary consideration compared to that of gaining access to persons in desperate need. However, this line of argument ignores the fact that impunity creates or at the very least contributes to the creation of those very dangerous situations that require ICRC intervention. If impunity is not combated further abuses will arise, creating a vicious circle in which the ICRC will need access to more and more persons. The question is, what is the correct balance?

#### 4.1.2 Cooperation with Truth Commissions

The *gacaca* process in Rwanda is a dramatic example of the ICRC forced into a precarious balancing act. In Rwanda the ICRC did not transmit individual information about Rwandan detainees in the context of the *gacaca* jurisdictions, as it did not want to be associated with this "judicial" process. Nevertheless, transmitting such information might have facilitated the release of some detainees from conditions that were clearly below minimum standards, while helping to end already lengthy periods of detention for which there were no legal hearings in sight.

The ICRC's relationship with the Peruvian Truth and Reconciliation Commission is another case in which the ICRC had to balance its rule on confidentiality with the criterion already mentioned, namely the interests of the persons concerned. When the Peruvian Truth and Reconciliation Commission began its work, the ICRC was confronted with the dilemma of providing the Commission with information which only it possessed, to enable the Commission to solve cases of missing persons. Investigating the fate of missing persons is clearly part of the ICRC mandate, to respond to the immediate or direct needs of victims (including family members). If the ICRC has information and does not have the resources to search for these persons itself, should it not assist others to the extent possible? In this case, the ICRC did provide limited information.

In purely operational terms, the issue of missing persons is probably the most important potential area of cooperation between a truth commission and the ICRC. Certain conclusions can be drawn from past experiences. If a commission chooses to clarify the fate of individual missing persons, it should:

- inform the families and witnesses testifying about disappearances about its working methods and chances of success;
- inform families individually and before the report is published on its findings concerning their relatives;
- whenever it clarifies the fate of an individual, it should locate and inform the next-of-kin;
- if resources are insufficient, priority should go to clarifying the fate of the individuals concerned.

A truth commission that chooses to clarify only the general picture of human rights abuses and violations of international humanitarian law, rather than individual cases, should:

- inform the families and witnesses testifying about disappearances that it will not try to clarify the fate of individual persons;
- if during its work it nevertheless learns of information which assists in clarifying the fate of individual persons, it should provide such information to the families concerned or to another body that is willing and able to clarify individual fates;
- include in its report as many details as possible thus permitting families of missing persons to understand whether or not a relative must be presumed dead and/or the probable fate of each category of missing persons;
- include in its report the names of all persons reported missing, with the consent of the families concerned.

If no multilateral ad hoc mechanism to clarify the fate of missing people exists or can be created, the ICRC stresses the importance of including in a potential truth commission the clarification of the fate of people unaccounted for, with a case-by-case approach in order to provide families with answers. However, in doing so the ICRC must make clear that it only provides information under certain conditions. If the ICRC is the sole or primary holder of information on missing persons, it usually underlines the complementarity of both mechanisms.

The ICRC has an interest to support a truth commission which seeks to solve missing person cases where such collaboration has real potential to actually solve cases. The ICRC can support a truth commission in the following ways:

- by sharing legal expertise in the area of international humanitarian law
- by sharing technical expertise on tracing
- by sharing expertise on human remains exhumation and identification processes
- by sharing information on cases of people unaccounted for and on events.

Even when confidentiality agreements exist, there is no absolute guarantee that ICRC communications will not be forwarded to third parties once the material has left the hands of the ICRC. A confidentiality agreement does not necessarily protect a party from being required to turn over information that it has received from the ICRC, as the enforceability of any agreement depends upon external factors, such as the independence of the judiciary, the applicable law or successor governments.

The ICRC has to bear in mind that previous truth commissions have passed files on to prosecuting authorities. The records established by truth commissions often serve as a good source of evidence for many years in the future, not only for domestic trials but also for international prosecutions. There can be no guarantee that testimonies or documents given to the truth commission will not be used later in other proceedings or perhaps made public because the restriction for releasing this material in the terms of reference may be quite vague. The fact is that exposing the truth is the primary role of a truth commission. Moreover, even if a list of names is not made public, the truth commission may interpret its mandate as requiring it to support the judiciary and prosecuting authorities.

The extent of the information and its sensitivity determine the degree of concern which the ICRC will give to the following three primary issues:

- whether the truth commission itself will assume judicial functions
- the truth commission's relationship with the judiciary/prosecuting authorities
- its use/publication of information provided

With respect to these three issues, before considering support for a truth commission, at least the following six points must be addressed:

- whether the terms of reference clearly state that the truth commission can or cannot assume judicial functions proper to the courts (see below);
- whether the truth commission will grant or be involved in the process of granting amnesties;
- whether the truth commission will name suspected perpetrators –if so, it must at least outline fair standards of proof in accordance with due process;
- whether the truth commission will pass on its files and, if so, to whom;
- whether, according to the terms of reference, a final report of the truth commission will be presented to state officials and whether it will be made public (the subject matter of the final report should also be known);
- what will happen to the remaining archives of the truth commission;
- whether the truth commission will grant reparations or be involved in the process.

### 4.1.3 Conclusions

International law says that no immunity should be given to war criminals and that impunity should not prevail. However from a socio-political perspective, it must be admitted that there is no clear answer to the question of whether violations of international humanitarian law should be punished in all situations or if there might be cases when priority should be given to national reconciliation or the peaceful development of a country, since it all depends on circumstances.

Achieving national reconciliation while continuing to combat impunity is a topic the ICRC addressed briefly, as early as 1996, at its first workshop on IHL and protection.<sup>7</sup> The workshop concluded that "the so-called dilemma arising from the dual ambition to prosecute violators whilst also fostering national

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<sup>7</sup> A report of this workshop is entitled *Protection: Toward Professional Standards, Report of Workshop (17-19 March 1998)*, eds.: Carlo Van Flüe & Pascal Daudin, available at the ICRC Publication Department (ISBN 2-88145-096-2).



reconciliation was in fact a false dilemma – if the cycle of impunity was never properly addressed, true reconciliation would never occur."<sup>8</sup> While that antagonism may prove to be a false one, dilemmas clearly remain for the ICRC in responding to such issues, requiring it to perform a delicate balancing act. It must be remembered that such mechanisms are always in flux, with new ones being created. Many people associate "reconciliation" with pardoning and forgetting, i.e., do not "provoke the dragon on the patio". Others hold the contrary view. What remains indisputable is that there exists no single universal model for reconciliation. This is due not only to the varying contexts but also to the varying understandings of the term "reconciliation"<sup>9</sup>. The corresponding mechanisms are contextual and the ICRC must respond accordingly.

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<sup>8</sup> *Protection: Toward Professional Standards, Report of Workshop (17-19 March 1998)*, eds.: Carlo Van Flüe & Pascal Daudin, available at the ICRC Publication Department (ISBN 2-88145-096-2), at 74. For additional conclusions, see pages 74-75.

<sup>9</sup> The Oxford English Dictionary defines "reconcile" as "to bring (a person) again into friendly relations... after an estrangement... To bring back into concord, to reunite (persons or things) in harmony." "Reconcile", *The Oxford English Dictionary*, 2nd ed., vol. 13 (Oxford: Clarendon Press, 1989), p. 352-353. In the context of political conflict or violence, reconciliation has been described as "developing a mutual conciliatory accommodation between antagonistic or formerly antagonistic persons or groups." Louis Kriesberg, "Paths to Varieties of Inter-Communal Reconciliation, paper presented at the Seventeenth General Conference of the International Peace Research Association, Durban, South Africa, June 22-26, 1998.



## 4.2 Transition and the Protection of Human Rights

Adrien-Claude Zoller

### 4.2.1 Countries in transition

For many countries, the road leading to democracy and respect of the rule of law is a lengthy and tortuous one. After years of foreign occupation, internal conflict, and/or dictatorship, the emerging democratic forces face huge challenges: the past is still present, it cannot be ignored; those who committed abuses, particularly the armed forces, too often still control significant parts of the effective power; most basic laws need to be changed; human resources and expertise are lacking; both the judiciary and law enforcement systems are not working; lack of security, divided population, and widespread lack of public confidence in any form of authority are common; and a human rights culture is inexistent. Often the state authority has broken down and criminality is better organized.

After each political 'Tsunami', everything needs to be re-built. And each task constitutes an emergency. The international community, in particular the United Nations and the specialized Inter-Governmental Organizations (IGOs), do indeed have programs, experience and expertise, but foreign-conceived programs do not always respond to the specific needs of the country. Time is running out, and the new authorities are being confronted with international realities, the conditions imposed by international financial institutions, as well as other geo-political considerations. They are having to comply with all of the state's international obligations, in particular under international human rights law. Human rights must be implemented, without further delays.

Under these circumstances, the increasing focus of the international community on countries in transition is a genuine one. Emphasizing the need for a coordinated, coherent, comprehensive and integrated approach to conflict resolution and post-conflict peacebuilding, and recognizing the need for a dedicated institutional mechanism to address the special needs of countries emerging from conflict towards recovery, reintegration and development, the Heads of State and Government participating in the UN Summit of 14-16 September 2005 in New York decided to establish a Peacebuilding Commission as an intergovernmental advisory body to assist and mobilize support to countries emerging from conflict.<sup>1</sup> Unfortunately, the mandate intended for this Commission does not seem to include concerns for human rights and the rule of law.

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<sup>1</sup> Declaration adopted by the Heads of State and Government, New York, 16 September 2005 (para. 97).

In view of the current political trends in the UN Commission on Human Rights, the observation should be made at the outset that, obviously, not all countries may claim to be in transition. Over the last decade, the Commission on Human Rights has become a chamber of impunity, with most of the worst human rights violators succeeding in being elected and in ensuring that no resolution against them would be passed. Having the absolute majority, these states easily blocked public scrutiny and condemnation, and instead requested and obtained advisory services. Obviously, such technical assistance may be useful to assist a Government having the political will to respect human rights, but does not constitute adequate international response to situations of mass killings and systematic human rights abuses. The new debate on countries in transition should not constitute yet another alibi for violators to obtain impunity.

Hence the need for criteria to identify those countries that are genuinely in transition and those that are not. In our reflection on transitional justice, transition implies the end of a political situation of conflict, dictatorship or occupation, the beginning of a new era and a process with a (necessary) period to rebuild, to lead the country into democracy and respect for the rule of law and human rights. Transition implies both a change of authorities (a real new situation), and the political aim and will to restore (or install) democracy and the rule of law and to implement human rights obligations.

### **What is transitional justice?**

The question of transitional justice was on the agenda when the Security Council met at the ministerial level on 24 September 2003 to discuss the role of the UN in establishing justice and the rule of law in post-conflict societies. The Council met again on 26 January 2004 to discuss post-conflict national reconciliation and requested the Secretary-General to submit a report on the issue.

As the Secretary-General of the United Nations stated in his report to the Security Council: "The notion of transitional justice (...) comprises the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions,

reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.”<sup>2</sup>

The Secretary-General’s report starts with a critical assessment of the challenges to human rights during periods of transitional justice: “Our experience in the past decade has demonstrated clearly that the consolidation of peace in the immediate post-conflict period, as well as the maintenance of peace in the long term, cannot be achieved unless the population is confident that redress for grievances can be obtained through legitimate structures for the peaceful settlement of disputes and the fair administration of justice. At the same time, the heightened vulnerability of minorities, women, children, prisoners and detainees, displaced persons, refugees and others, which is evident in all conflict and post-conflict situations, brings an element of urgency to the imperative of restoration of the rule of law.”<sup>3</sup>

#### 4.2.2 Normative framework

Since the proclamation by the General Assembly of the Universal Declaration of Human Rights on 10 December 1948, the United Nations has elaborated and adopted dozens of human rights conventions, declarations and bodies of principles. Known as ‘UN Instruments’, the UN conventions and declarations concern a large number of specific rights and cover a variety of violations. They contain detailed provisions to promote human rights effectively and to protect many vulnerable and/or marginalized groups. These new standards considerably developed international human rights law. The International Labour Organisation standard-setting process has been similarly impressive. In the field of humanitarian law, under the impulse of the International Committee of the Red Cross, the community of states has also adopted several crucial Conventions and Protocols.

These international human rights and humanitarian standards have been developed and adopted by most of the states across the world and have been accommodated by the full range of their different legal systems. As the Secretary-General of the United Nations in his report to the Security Council stated: “These norms and standards bring a legitimacy that cannot be said to attach to exported national models which, all too often, reflect more the

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<sup>2</sup> ‘*The rule of law and transitional justice in conflict and post-conflict societies*’, Report of the Secretary-General to the Security Council, 3 August 2004, Doc. United Nations S/2004/616 (para. 8).

<sup>3</sup> Report of the Secretary General, op. cit. (para. 2).

individual interests or experience of donors and assistance providers than they do the best interests or legal development needs of host countries.<sup>4</sup>

These standards are legal obligations for the states and therefore constitute the normative framework for any reflection and definition of strategies to implement these rights, including periods of exceptional circumstances and periods of transition. Two core obligations should be highlighted at the outset of this consideration.

### **Non-derogable rights**

Gradually, the international community has given an almost absolute quality to several rights which should not be subject to derogation under any circumstances. During and even after internal and international conflicts, states often invoke the exceptional character of their situations to suspend the application of certain basic rights. Although Article 4 of the International Covenant on Civil and Political Rights (ICCPR) allows a state party to unilaterally derogate temporarily from a part of its obligations under the Covenant, the provision contains specific limitations to these derogations. Fundamental conditions must be met: the situation must constitute a public emergency which threatens the life of the nation; the state party must have officially proclaimed a state of emergency; the measures derogating from the provisions of the Covenant must be of an exceptional and temporary nature (e.g. determining the duration, geographical coverage and material scope of the state of emergency). Furthermore, the principle of proportionality has to be respected: measures should be limited 'to the extent strictly required by the exigencies of the situation'; and the restoration of a state of normalcy, with full respect for the rights guaranteed in the Covenant, must remain the predominant objective.<sup>5</sup>

A key provision for our reflection is that Article 4, paragraph 2, of the Covenant states that no derogation may be made from the following obligations:

- the right to life (ICCPR, Article 6),
- the prohibition of torture or cruel, inhuman or degrading punishment, or of medical or scientific experimentation without consent (Article 7),

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<sup>4</sup> Report of the Secretary General to the Security Council, *op. cit.* (para. 10).

<sup>5</sup> International Covenant on Civil and Political Rights, adopted by General Assembly resolution 2200A (XXI) of 16 December 1966. The Covenant entered into force on 23 March 1976.

- the prohibition of slavery, slave-trade and servitude (Article 8, paragraphs 1 and 2),
- the prohibition of imprisonment because of inability to fulfil a contractual obligation (Article 11),
- the principle of legality in the field of criminal law, i.e. the requirement of both criminal liability and punishment being limited to clear and precise provisions in the law that was in place and applicable at the time the act or omission took place, except in cases where a later law imposes a lighter penalty (Article 15),
- the recognition of everyone as a person before the law (Article 16),
- and the freedom of thought, conscience and religion (Article 18).

In its General Comment No. 29 on Article 4, the Human Rights Committee further specified that other fundamental elements cannot be derogated under Article 4:<sup>6</sup>

- the right to non-discrimination,
- the state party's other obligations under international law, particularly the rules of international humanitarian law,
- the right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person,
- the prohibitions against taking of hostages, abductions or unacknowledged detention,
- the international protection of the rights of persons belonging to minorities, which includes elements that must be respected in all circumstances,
- the deportation or forcible transfer of population without grounds permitted under international law, in the form of forced displacement by expulsion or other coercive means from the area in which the persons concerned are lawfully present,
- the right to a fair trial (as the protection of the non-derogable rights must be secured by procedural guarantees, including judicial guarantees),

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<sup>6</sup> Human Rights Committee, General Comment No. 29 on Article 4 of the International Covenant on Civil and Political Rights (ICCPR), 24 July 2001.

- and, obviously, no declaration of a state of emergency may be invoked as justification for a state party to engage itself in propaganda for war, or in advocacy of national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence.

### **International penal law**

The second core obligation for all states is the need for absolute respect of the provisions regarding international crimes, in particular war crimes and crimes against humanity. Successive attempts of the international community since World War II to deal effectively with these international crimes led to significant developments during the 90s. The United Nations promoted a common response to war crimes and crimes against humanity, and adopted specific conventions on genocide, on apartheid and on the imprescriptibility of most serious crimes. Furthermore, following the serious breaches of humanitarian law and large-scale massacres committed during certain internal and regional conflicts (former Yugoslavia, Rwanda and Great Lakes region, Liberia-Sierra Leone), the United Nations undertook a series of initiatives, including the creation by the UN Security Council of Special Tribunals for Yugoslavia and Rwanda, and the establishment of mixed criminal tribunals for Sierra Leone and Cambodia. Soon after the Vienna World Conference on Human Rights (June 1993), negotiations were started to establish a permanent international criminal court (1994-1998). On 17 July 1998, the United Nations Diplomatic Conference of Plenipotentiaries adopted the Rome Statute of the International Criminal Court. Following is a brief reminder of the main features in these recent developments.

### **The Nürnberg Principles**

The London Agreement creating the International Military Tribunal at Nürnberg (8 August 1945), and the Berlin Agreement specifying it (6 October 1945), constituted a major step in introducing the notion of individual responsibility for crimes against peace, war crime and crimes against humanity into international law. Establishing the jurisdiction of the Military Tribunal, these Agreements offered a first comprehensive definition of crime against humanity, 'whether committed in time of war or in time of peace', and stipulated that the Tribunal was competent to try and punish persons who, 'acting in the interests of the European Axis countries, whether as individuals or as members of organizations', committed any of the following crimes:



- crimes against peace defined as ‘planning, preparation, initiation, or waging of wars of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing’;
- war crimes defined as follows: ‘violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity’;
- crimes against humanity defined as ‘murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecution on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of domestic law of the country where perpetrated.’<sup>7</sup>

As exemplified by this definition and by the decisions of the Nürnberg Tribunal, international humanitarian law constitutes the backbone of the emerging international penal law. The two Geneva Conventions, adopted on 12 August 1949, and their two Additional Protocol of 8 June 1977, though not using the terms ‘war crimes’, but instead ‘serious breaches’ of humanitarian law, further specified the international obligations of the states, and the responsibility of the individuals participating in hostilities.<sup>8</sup> All four instruments contain common articles, whose definitions of these serious breaches are close to ‘war crimes’ as defined by the Nürnberg Statutes.

The definitions in the Charter of the International Military Tribunal at Nürnberg were endorsed by the UN General Assembly in its resolutions 3 (I)

<sup>7</sup> Art. 6 of the Statute of the International Military Tribunal at Nürnberg, signed in Berlin on 6 October 1945 by the Allied powers (USA, Soviet Union, France and the UK). The same article provides that ‘Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan’.

<sup>8</sup> Geneva Convention relative to the Treatment of Prisoners of War (12 August 1949); Geneva Convention relative to the Protection of Civilian Persons in Time of War (12 August 1949); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I, adopted on 8 June 1977); and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II, 8 June 1977).

of 13 February 1946 and 95 (I) of 11 December 1946, recognizing the international law principles contained in both the Statutes of the Tribunal and its decisions. One year later, with resolution 177 (II) of 21 November 1947, the Assembly mandated its International Law Commission to draft the principles of international law regarding this matter.

During its second session (from 5 June to 29 July 1950), the International Law Commission adopted the seven draft principles. Its proposals were similar to the definitions contained in Article 6 of the Statute of the Nürnberg Tribunal.<sup>9</sup> The definition of crimes under international law was contained in Principle VI, which reads:

'The crimes hereinafter set out are punishable as crimes under international law:

1. Crimes against peace:
  - a. Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;
  - b. Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (a.).
2. War crimes: Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave-labor or for any other purpose of civilian population of or in occupied territory; murder or ill-treatment of prisoners of war, of persons on the Seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.
3. Crimes against humanity: Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime'.

The Principles furthermore contained significant legal provisions, which would constitute a solid basis for further developments in international penal law. Thus:

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<sup>9</sup> 'Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgement of the Tribunal', International Law Commission', 2<sup>nd</sup> session, 1950, in document A/1316 and in 'Yearbook of the International Law Commission', 1950, Vol. II.

- ‘The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law’ (Principle II);
- ‘The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law’ (Principle III);
- ‘The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him’ (Principle IV).

### **Genocide and apartheid**

In the meantime, the UN General Assembly had approved the Convention on the Prevention and Punishment of the Crime of Genocide,<sup>10</sup> recognizing it as a crime under international law, ‘*whether committed in time of peace or in time of war*’ (Article I). The crime of genocide was defined in Article II of the Convention as follows:

‘...genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- Killing members of the group;
- Causing serious bodily or mental harm to members of the group;
- Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- Imposing measures intended to prevent births within the group;
- Forcibly transferring children of the group to another group’.

The punishable acts in the Convention concern not only the act of genocide, but also conspiracy to commit genocide; direct and public incitement to commit genocide; attempt to commit genocide; and complicity in genocide

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<sup>10</sup> General Assembly resolution 260 A (III) of 9 December 1948. The Convention entered into force on 12 January 1951.

(Article III). However, the above definition does not include genocide for political motives. It was further stipulated that 'persons charged with genocide (...) shall be tried by a competent tribunal of the state in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction' (Article VI).

Apartheid was overwhelmingly defined by the international community of states as another international crime. On 30 November 1973, the UN General Assembly adopted the International Convention on the Suppression and Punishment of the Crime of Apartheid.<sup>11</sup> In this treaty, the states parties declare 'that apartheid is a crime against humanity and that inhuman acts resulting from the policies and practices of apartheid and similar policies and practices of racial segregation and discrimination (...) are crimes violating the principles of international law, in particular the purposes and principles of the Charter of the United Nations, and constituting a serious threat to international peace and security' (Article I). The Convention, which is geographically limited to 'Southern Africa' (Article II) states that 'international criminal responsibility shall apply' (Article III).

### **Imprescriptibility and international cooperation**

Together with the definition of international crimes, the international community developed legal instruments to prosecute and punish those who are guilty worldwide. The principles of universal jurisdiction and imprescriptibility for such crimes were introduced gradually in specific conventions regarding certain crimes (see above) and in several declarations and proclamations. Three major instruments should be recalled in this regard.

Between 1969 and 1972, the UN General Assembly adopted several resolutions to enhance international cooperation and to ensure the prosecution and punishment of persons guilty of war crimes and crimes against humanity.<sup>12</sup> The Assembly adopted the 'Principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity' on 3 December 1973<sup>13</sup>. The following principles were proclaimed in this document:

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<sup>11</sup> General Assembly resolution 3068 (XXVIII) of 30 November 1973. The Convention entered into force on 18 July 1976.

<sup>12</sup> General Assembly resolutions 2583 (XXIV) of 15 December 1969, 2712 (XXV) of 15 December 1970, 2840 (XXVI) of 18 December 1971 and 3020 (XXVII) of 18 December 1972.

<sup>13</sup> General Assembly resolution 3074 (XXVIII).

1. 'War crimes and crimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment.
2. Every state has the right to try its own nationals for war crimes against humanity.
3. States shall cooperate with each other on a bilateral and multilateral basis with a view to halting and preventing war crimes and crimes against humanity, and shall take the domestic and international measures necessary for that purpose.
4. States shall assist each other in detecting, arresting and bringing to trial persons suspected of having committed such crimes and, if they are found guilty, in punishing them.
5. Persons against whom there is evidence that they have committed war crimes and crimes against humanity shall be subject to trial and, if found guilty, to punishment, as a general rule in the countries in which they committed those crimes. In that connection, states shall cooperate on questions of extraditing such persons.
6. States shall cooperate with each other in the collection of information and evidence which would help to bring to trial the persons indicated in paragraph 5 above and shall exchange such information.
7. In accordance with Article 1 of the Declaration on Territorial Asylum of 14 December 1967, states shall not grant asylum to any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime or a crime against humanity.
8. States shall not take any legislative or other measures which may be prejudicial to the international obligations they have assumed in regard to the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity.
9. In cooperating with a view to the detection, arrest and extradition of persons against whom there is evidence that they have committed war crimes and crimes against humanity and, if found guilty, their punishment, states shall act in conformity with the provisions of the Charter of the United Nations and of the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among states in accordance with the Charter of the United Nations'.

In adopting the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, the General Assembly decided that no statutory limitation shall apply to war crimes and crimes against humanity, 'irrespective of the date of their commission'.<sup>14</sup> Definitions contained in this Convention are the following:

- war crimes concern those crimes defined in the Charter of the International Military Tribunal at Nürnberg (8 August 1945) and confirmed by resolutions 3 (I) of 13 February 1946 and 95 (I) of 11 December 1946 of the UN General Assembly, "particularly the "grave breaches" enumerated in the Geneva Conventions of 12 August 1949 for the protection of war victims';
- and crimes against humanity, 'whether committed in time of war or in time of peace' include those defined in the Charter of the Nürnberg Tribunal (and confirmed by the same General Assembly resolutions), the eviction by armed attack or occupation and inhuman acts resulting from the policy of apartheid, and the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, 'even if such acts do not constitute a violation of the domestic law of the country in which they were committed'.

This 1968 Convention provides that states parties undertake to adopt 'any legislative or other measures necessary to ensure that statutory or other limitations shall not apply to the prosecution and punishment' of these crimes (Article IV) and to 'adopt all necessary domestic measures, legislative or otherwise, with a view to making possible the extradition, in accordance with international law, of the persons referred to in Article II of this Convention' (Article III).

This fundamental principle of non-statutory limitation for the most serious crimes gradually became part of international human rights law together with the principle of universal jurisdiction for the most serious crimes. Universal jurisdiction was included among the provisions of the 1984 Convention Against Torture.<sup>15</sup> Over the last years, an increasing number of alleged criminals have been brought to the national courts of third-party states for serious crimes under this principle of universality.

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<sup>14</sup> Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, adopted by General Assembly resolution 2391 (XXIII) of 26 November 1968. The Convention entered into force on 11 November 1970.

<sup>15</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by General Assembly resolution 39/46 of 10 December 1984, Art. 5, al.2, 6, 7, 8, 9. The Convention entered into force on 26 June 1987.

Most of these norms have been integrated in the mandates given to the various special criminal tribunals, which the United Nations established or contributed to establishing during the last 15 years (former Yugoslavia, Rwanda, Sierra Leone, Cambodia, Bosnia and Herzegovina, Timor-Leste). These norms also constitute the backbone of the International Criminal Court, which started its operations on 1 July 2002, following the entry into force of the Rome Statute.<sup>16</sup>

### **International Criminal Court**

The most comprehensive and recent definition of international crimes is contained in the Rome Statute of the International Criminal Court of 1998, which provides, in Article 5, that the following most serious crimes are within the jurisdiction of the Court: the crime of genocide, crimes against humanity, war crimes and the crime of aggression.

In Article 6, the Rome Statute defines the crime of genocide as follows: 'For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- Killing members of the group;
- Causing serious bodily or mental harm to members of the group;
- Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- Imposing measures intended to prevent births within the group;
- Forcibly transferring children of the group to another group'.

Crimes against humanity are defined in Article 7 of the Rome Statute as any act 'committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack' and specifies:

- Murder;
- Extermination;

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<sup>16</sup> Adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, the Statute entered into force on 1 July 2002. As of 30 September 2005, 100 countries have become States Parties to the Rome Statute of the International Criminal Court. Out of them 27 are African states, 12 are Asian states, 15 are from Eastern Europe, 21 are from Latin America and the Caribbean, and 25 are from Western Europe and other states.

- Enslavement;
- Deportation or forcible transfer of population;
- Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- Torture;
- Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- Enforced disappearance of persons;
- The crime of apartheid;
- Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health’.

War crimes are defined under Article 8 of the Rome Statute as:

- ‘Grave breaches of the Geneva Conventions of 12 August 1949, any act against persons or property protected under the provisions of the relevant Geneva Convention (e.g. wilful killing; torture or inhuman treatment, including biological experiments; wilfully causing great suffering, or serious injury to body or health; extensive destruction and appropriation of property, not justified by military necessity; wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial; taking of hostages);
- other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law (e.g. intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities; intentionally directing attacks against civilian objects; attacking or bombarding towns, villages, dwellings or buildings which are undefended and which are not military objectives; the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, the



deportation or transfer of all or parts of the population of the occupied territory within or outside this territory; employing poison or poisoned weapons; committing rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization; intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;

- in the case of an armed conflict not of an international character (thus not in situations of internal disturbances and tensions), serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause;
- other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law (intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities; intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission; intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected; rape, sexual slavery, enforced prostitution, forced pregnancy; conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities; etc).'

### 4.2.3 Challenges during the transition

#### States obligations

Dealing with international crimes and fully respecting non-derogable rights constitute the very core of the international obligations of the states in the field of human rights and humanitarian law. These obligations are non-negotiable. Thus, peace agreements containing promise of amnesties for genocide, war crimes, crimes against humanity or gross violations of human rights are contrary to international human rights law. The question therefore cannot be

whether to strive for justice and accountability, or to guarantee all human rights, but rather when and how to proceed. It is a matter of timing and careful sequencing, not of exoneration of the state's responsibility.

In exceptional cases, the United Nations has been entrusted with the administration of certain countries and territories for a part of the transitional period (Namibia, Kosovo, Timor-Leste). To bring to justice those responsible for serious violations of human rights and humanitarian law, the UN also setup their own special criminal tribunals (former Yugoslavia and Rwanda) or actively participated in the creation of criminal courts in several countries (Sierra Leona, Cambodia, Bosnia and Herzegovina, Timor-Leste, Kosovo, Guatemala). Depending on the situation (and on the specific negotiations between the states), these tribunals had different institutional frameworks and were assigned different terms of reference, which nevertheless included all the international crimes described above.<sup>17</sup>

### **National processes**

But, in general, each state, not the United Nations, has the obligation "to respect and to ensure" human rights to all individuals within its territory.<sup>18</sup> With a few exceptions, the international community is not in a position to enforce human rights at the domestic level. Human rights law has to be implemented inside each country by the country itself. The United Nations cannot take the place of the state. The role of the UN and the specialized IGOs

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<sup>17</sup> These criminal tribunals are:

- *ad hoc* international criminal tribunal for the former Yugoslavia (International Criminal Tribunal for the Former Yugoslavia) established by the Security Council as subsidiary organs of the UN;
- International Criminal Tribunal for Rwanda (established by the Security Council as subsidiary organs of the UN);
- mixed tribunal for Sierra Leone (established as a treaty-based court);
- mixed tribunal for Cambodia (specially promulgated Cambodian national law);
- mixed tribunal for Bosnia and Herzegovina (Special Chamber in the State Court of Bosnia and Herzegovina);
- Panel with Exclusive Jurisdiction over Serious Criminal Offences in Timor-Leste (authorized by promulgated regulations of the United Nations Transitional Administration in East Timor);
- use of international judges and prosecutors in the courts of Kosovo (by authorization of regulations of the United Nations Interim Administration Mission in Kosovo);
- Commission for the Investigation of Illegal Groups and Clandestine Security Organizations in Guatemala (to be established by agreement between the United Nations and Guatemala, as an international investigative and prosecutorial unit operating under the national law of Guatemala).

<sup>18</sup> International Covenant on Civil and Political Rights, Art. 2,1.

is one of support and of solidarity. Their control mechanisms and their panoply of assistance programs simply constitute a tool to facilitate this process. Implementation therefore is a national process.

Such a process can obviously not be limited to the organs of the state only. Peace and justice will not be sustainable if all organs of the society are not seriously involved in the process. Public confidence in the administration and government needs to be restored. This implies public awareness (through education programs) and large public consultations. The country needs a national effort. Broad and significant participation is therefore indispensable; it should involve not only professional circles, but also the most affected and vulnerable groups. Such a goal cannot be achieved without correctly dealing with crimes of the past and without offering serious guarantees that these crimes will not occur again. As the UN Secretary-General noted in his report, 'The most successful transitional justice experiences owe a large part of their success to the quantity and quality of public and victim consultation carried out. Local consultation enables a better understanding of the dynamics of past conflict, patterns of discrimination and types of victims. Although the international community has, at times, imposed external transitional justice solutions, a more open and consultative trend is emerging.'<sup>19</sup>

A governmental program to restore or rebuild democracy, rule of law and respect for human rights and humanitarian law needs to encompass different objectives: legal (and sometimes constitutional) reforms, building the justice institutions, (re-)building the legislative power, (re-)establishing police forces, training of judges, lawyers, law enforcement officials, prisons reforms, support and compensation to the victims. All of these objectives are interdependent and indispensable for the future rule of law. The new political authorities therefore need to develop a comprehensive national program. By definition, such a program, integrating all the new state's policies, has to be based on an in-depth assessment of the country's needs.

### **National plan of action**

Such a comprehensive national program is similar to one objective adopted in June 1993 in Vienna, when the World Conference on Human Rights recommended that each state consider the desirability of drawing up a national action plan identifying steps whereby that state would improve the

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<sup>19</sup> Report of the Secretary General, op.cit. (para. 16).

promotion and protection of human rights.<sup>20</sup> Although all of the UN member states should one day adopt such a national plan, because no country can claim to fully respect all human rights, it is a strategy that seems to respond to the many challenges facing the new authorities during a period of transition.

As suggested in the Handbook published by the Office of the High Commissioner for Human Rights,<sup>21</sup> such a plan should be based on an assessment of the current situation. It should be developed as a substantial and comprehensive document and it should trigger activity in a wide range of areas of public administration. At the same time, there should be a broad and intensive consultation process with the civil society and the general public: the plan should be a national undertaking, involving all elements of society. The manual underlines that consultation and coordination within the government and between the Ministries are also crucial. The plan should be a public document incorporating a strong commitment to universal human rights standards. The plan should be comprehensive in scope. It should be continuous, with the conclusion of one plan leading to the commencement of another, and therefore include effective monitoring and review of implementation mechanisms.

The monitoring and review process of the implementation of the national plan should be entrusted to a national mechanism in which all the organs of the society concerned would participate: Government and the most important Ministries, Parliament, judiciary, police, armed forces, non-governmental organizations, media and academic circles. Such a monitoring and evaluation body should have high-level support and weight within the Government, so that governmental agencies respond to its recommendations and proposals. Ideally, a government minister should lead the monitoring process. As stated in the Manual: 'The monitoring and review process can thus feed into the planning of the next national action plan by identifying to what extent problems have been overcome and by focusing attention on areas where further action needs to be taken. Subsequent plans will also take into account emerging human rights issues and new international standards. The process of renewing the national action plan will itself reinvigorate the commitment of all stakeholders to the promotion of human rights and enhance the dissemination of information about human rights'. By June 2002, the following 15 countries had adopted such a plan: Australia, Malawi, Latvia, Philippines, Brazil, Ecuador, Indonesia, Mexico, South Africa, Venezuela, Bolivia, Norway, Democratic Republic of the Congo, Thailand, and Sweden.

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<sup>20</sup> Vienna Declaration and Program of Action, June 1993, Part II (para. 71).

<sup>21</sup> Handbook on National Human Rights Plans of Action, Professional Training Series, No.10, Geneva, 29 August 2002.

Though the adoption and the implementation of a national plan is a primary responsibility of the state, and despite the comprehensive character of the national process of each country in transition, priority should be given to the strengthening of two essential actors in the implementation of human rights and humanitarian law standards: the judiciary system and the human rights defenders. As long as the judiciary system does not work properly, the best laws will never guarantee the respect of human rights. The judiciary should be independent and impartial. As long as those investigating, reporting and defending the victims are threatened, harassed and repressed, their indispensable contribution to human rights protection will remain limited. Human rights defenders should be better protected.

In the national process of transitional justice, at all stages, the full participation of all sectors of the civil society is indispensable. In addition to their concern with questions of principle, human rights organizations and other representatives of civil society (social organizations, development groups and agencies) should be involved at the grassroots level for the protection of human rights and the identification of human rights problems. They have immense human resources, with commitment and energy, and they are often indispensable for the government in the implementation of social policies and development.

As the Secretary-General underlined in his report, another particularly important constituency to be integrated in the national efforts in post-conflict situations is the country's victims: 'The UN must assess and respect the interests of victims in the design and operation of transitional justice measures. Victims and the organizations that advocate on their behalf deserve the greatest attention from the international community'.<sup>22</sup> Their participation will depend on the trust they can regain from the authorities and on the capacity of the state to assure their immediate protection. Here also, the way the country deals with its past will affect the capacity of the country to adopt and realize a national plan towards justice and the rule of law.

### **The plight of impunity**

Too often, political constraints lead to a situation of impunity. The former power holders are still behind the scene and the new democratic forces prefer not to hurt them. At this stage, they argue, a direct confrontation would be counter-productive. There is vacuum in the rule of law. The existing legislation and a weak judiciary and law enforcement do not allow dealing

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<sup>22</sup> Report of the Secretary General, op.cit. (para. 18).

correctly with the past. Impunity also results from certain political agreements, which have led to the new situation, in particular all kind of amnesties and immunities. Finally, in view of the vast diversity of measures urgently needed to set up or strengthen the democratization process, the new authorities may adopt priorities other than trying to bring those responsible for serious violations of human rights and humanitarian law to justice.

Impunity constitutes an obstacle to democratic development and a considerable threat to democratization processes. As illustrated in the annual reports of many special thematic procedures of the UN Commission on Human Rights, impunity is one of the major causes for the continuing practices of extra-judicial killings, torture, enforced disappearances, arbitrary detention, violence against women, and the harassment of minorities, indigenous peoples and human rights defenders.

The urgent need to combat impunity has been stressed in many resolutions adopted by the United Nations. In 1997, Mr. Louis Joinet, expert and member of the 'Sub-Commission on Prevention of Discrimination and Protection of Minorities', submitted his final report on the question of impunity of perpetrators of violations of (civil and political) human rights. This report and the list of legal principles attached were transmitted to the Commission by the Sub-Commission.<sup>23</sup> In its resolution 2004/72, the Commission appointed an independent expert, Ms. Diane Orentlicher, to update these Principles in light of recent developments in international law and practice. Ms. Orentlicher's report<sup>24</sup> led the Commission to take note of the revised principles and to publish them in the compilation of UN instruments as a guideline to assist states in developing effective measures for combating impunity.<sup>25</sup>

In this resolution 2005/81, the Commission recognizes that: 'States must prosecute or extradite perpetrators, including accomplices, of international crimes such as genocide, crimes against humanity, war crimes and torture' (OP-2) and that 'amnesties should not be granted to those who commit violations of human rights and international humanitarian law that constitute crimes' (OP-3). It therefore welcomes 'the lifting, waiving, or nullification of amnesties and other immunities' (OP-3). The Commission urges the states 'to ensure that all military commanders and other superiors are aware of the circumstances in which they may be criminally responsible under inter-

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<sup>23</sup> Decision 1997/28 of the Sub-Commission.

<sup>24</sup> Report of the independent expert to update the Set of Principles to combat impunity, Diane Orentlicher, doc. No. E/CN.4/2005/12, 18 February 2005.

<sup>25</sup> Resolution 2005/81 of 21 April 2005.

national law for genocide, crimes against humanity and war crimes, including, under certain circumstances, for these crimes when committed by subordinates under their effective authority and control' (OP-6).

To end impunity, thus to prevent the continuation of the most serious crimes, states have to bring the perpetrators of the most serious crimes, and their accomplices, to justice. It is the responsibility of the states to investigate, try, and sentence those guilty, and to offer full reparation to the victims.<sup>26</sup> Rightly, the Secretary-General's report underlines the importance of criminal trials during transitional situations: 'They contribute to deterrence and express public denunciation of criminal behavior. They can provide a direct form of accountability for perpetrators and justice for victims. Criminal trials can also contribute to greater public confidence in the state's ability and willingness to enforce the law. They can help victim societies emerge from periods of conflict by establishing an official history of what happened and why, establishing detailed and well-substantiated records of incidents. They can help to delegitimize extremist elements, ensure their removal from the national political process and contribute to the restoration of civility and peace.'<sup>27</sup> And when the judiciary system is still too weak to undertake such a task, special criminal courts should be set up.

A good illustration of a comprehensive strategy is given by countries creating truth commissions as a complement to the ongoing criminal trials. When they have a broad mandate, investigative powers and adequate resources, these commissions may play an essential role in realizing a fundamental right of the victims, that of the truth. But justice still has to be done.

### **Cooperation between civil society and Government**

For human rights organizations, cooperating closely with the Government in transitional justice is not an easy matter. Firstly, their strategies and working methods have to change. The Government is no longer the only (genuine) target in case of human rights abuses, it also becomes a partner in the implementation of human rights. Their first challenge is therefore to continue investigating and denouncing abuses and at the same time to cooperate with authorities. Secondly, mistrust on the side of NGOs is not surprising, as a new government does not necessarily imply that the most important civil servants

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<sup>26</sup> Cf. 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, adopted by the Commission on Human Rights, resolution 2005/35.

<sup>27</sup> Report of the Secretary General, op.cit. (para. 39).

of the previous regime are not still in office. In many countries, vetting processes have not taken place. Thirdly, their strong feelings are corroborated by the climate of impunity. Finally, NGOs generally do not want to get involved in partisan politics. As long as the program to restore democracy and rule of law is not a real national enterprise, the government's policy is often considered by a majority of NGOs as being the initiative of the party in power for electoral purposes.

Even if the new authorities did not take part in the crimes of the past, the new Government starts with a significant deficit in public credibility. Even if the intentions of the Government are genuine, the authorities need to accept this reality: they have to take initiatives and the first reactions from the civil society are going to be distant, if not negative. Even more, in preparing and implementing the national plan of action, the new Government will have to accept the fact that those human rights organizations and other NGOs from civil society, which become a partner, will continue to be openly critical in view of the past and current human rights abuses. The necessary dialogue between civil society and Government is a difficult process in transitional justice.



## 5 Panel 3

*The Contribution of Dealing with the Past and Transitional Justice to the Promotion of Peace, Respect for Human Rights and Rule of Law: Critical Reflections and Emerging Lessons Learned from Case Studies*

Panelists: Isabel Amaral Guterres  
Nataša Kandić  
Jaime Urrutia Ceruti

Moderator: Priscilla Hayner

### **Guiding Questions:**

'Lessons learned' and 'best practices' are, of course, of central importance for a critical reflection of the evolving principles and practices in dealing with the past. A review of case studies is opportune in this regard, as it respects the specific nature of transition in different contexts and, at the same time, addresses the need to develop principled approaches for dealing with the past with a mid- and long-term perspective. In this case, the examples of East Timor, former Yugoslavia, and Peru were chosen to illustrate the different mechanisms and instruments in dealing with the past and transitional justice.

Specific questions in this regard: Which, if any, of the initiatives taken has been able to strengthen the political will against impunity? Has the process of dealing with the past and transitional justice been successful in addressing root causes of the conflict and in contributing to the structural transformation of society? How have state institutions, civil society organizations, and external actors been involved in this process? The role of victims, perpetrators, surrounding communities? Gender issues?



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## 5.1 Critical Reflections and Lessons from Case Studies

### Isabel Amaral Guterres

I would like to address the purpose of the CAVR and its historical context, and present some case studies before offering a conclusion.

#### 5.1.1 A Brief summary of the history of East Timor

East Timor was a Portuguese colony for over four centuries. In World War II, Japan invaded Timor a few months after Australian troops had landed. Between 40,000 and 60,000 East Timorese were killed by the Japanese on suspicion of collaborating with the Australians. In December 1975, after a brief civil war, Indonesia launched a large-scale invasion by land, sea and air. Indonesia occupied the territory for over 24 years, during which time gross human rights violations were committed. In January 1999, President Habibie declared that Indonesia would allow the people of East Timor to decide on their own future, including the possibility of independence. On 30 August 1999, under international supervision, 78.5% of the electorate voted for independence and 21.5% for special autonomy within Indonesia. After the results were announced on 4 September 1999, there were many more human rights violations and 250,000 people sought refuge in West Timor. Another 300,000 or so fled to the mountains. As many as 60,000 homes were burned, and countless schools and hospitals were destroyed. It is estimated that 1,000 people were murdered and many others assaulted and raped.

#### 5.1.2 A shaky peace

Peace is constantly under threat in our fragile country. There is tension between political leaders, violence between police and protesters, disputes over land and property, disputes between clans, attacks on homes, etc. External threats from Portugal, Japan and Indonesia have been replaced by internal divisions and conflicts, in some cases a legacy of the colonial powers. The changes benefited some, while others suffered. All learned to resolve their conflicts through the use of violence. Poverty, lack of opportunity, ignorance and resentment are endemic.

#### 5.1.3 Culture of peace

As a nation, Timor-Leste needs to consciously uphold and publicly recognize the people's efforts on behalf of peace. There are so many problems that it is easy to overlook the many acts of goodwill and efforts at peacebuilding in our

families, communities and the nation as a whole. Some communities are reintegrating former militia members. Men and women, old and young, in the districts, sub-districts and villages, have listened to these former militia speak of their experiences. They are trying to understand and somehow accept their return to the community. The same has been true of returnees to Maliana.

#### **5.1.4 The Truth Commission**

The Truth Commission is concerned with past memories, present lives and future hopes. CAVR, the Commission for Reception, Truth and Reconciliation, promotes mechanisms that enable individuals to give testimony, that enable community groups to map the effects of violence on their community, and that allow public hearings of both victims and perpetrators. Community reconciliation processes make it easier for those who committed minor crimes to be reintegrated into the community. The CAVR mandate includes establishing truth with regard to the human rights violations that occurred in East Timor between 25 April 1974 and 25 October 1999. It has involved special investigations, historical research, and a nationwide process of giving evidence. Testimonies have been heard from victims, perpetrators, and witnesses in relation to various crimes. Although not a court, the CAVR has power to require persons to give evidence so that the truth can be established. In this way it has documented human rights abuses for the historical record and the memory of the nation. It is a process that attempts to restore human dignity to survivors by granting them an opportunity to relate their experiences of abuse and persecution. It is hoped that sharing experiences and trying to understand will lessen the likelihood of recurrence.

#### **5.1.5 Statements, profiles and public hearings**

The collection of 7,900 statements as well as district and sub-district community profiles provided opportunities for recording human rights violations. Conducted in a safe environment, the process enabled East Timorese to acknowledge the persistent violations with which they and others were confronted during the 24 years of Indonesian occupation. Apart from the intrinsic value of the process in promoting healing and reconciliation, the documentation will be a permanent record for future generations. As a source of material for writing and analyzing the history of this period, it will contribute to the promotion of human rights values at all levels of the educational system. In the public hearings, witnesses and victims openly testified under oath about violations they witnessed or suffered. They provided a forum for discussing the nature of fundamental human rights and

of the restitution they sought in terms of justice, rather than impunity. Because the public hearings were organized on both a topical and chronological basis, they made it possible to distinguish gender-related aspects of the human rights violations such as rape and other forms of sexual violence and torture. Child victims also testified about human rights violations. Basic social and economic rights were evoked in public hearings and statements revealing the death and deprivation suffered due to famine and enforced displacement. Incidents of imprisonment, torture and killings were also revealed. One hearing examined the responsibility and culpability of the international community before and during the occupation. Since all the hearings were televised and broadcast live by radio, they reached large sectors of the population and thus served to build and reinforce the nation's conscience about human rights.

#### **5.1.6 *Acolhimento***

*Acolhimento* – the process of welcoming, accepting, and showing hospitality – may seem unusual in a truth and reconciliation commission, but it is important for the role of peacebuilding. *Acolhimento* is important in our culture and faith. We show formal courtesy to people because they are human beings with dignity, destiny and sacredness. It is best illustrated by the Biblical parable of the father and his two sons. The younger leaves home and leads a dissolute life, while the older stays with his family and works hard. The younger son returns home remorseful and begging for forgiveness. Despite the older brother's resentment and anger, the father generously embraces his younger prodigal son, celebrating the restoration of the family, and neither judging nor condemning. Although the father's embrace is evidence of *acolhimento*, the process of long-lasting reconciliation is difficult and will take time.

#### **5.1.7 Reconciliation**

The people are also patiently waiting for a time when those guilty of serious crimes will be brought to justice. For less serious crimes, the judicial process is in the hands of the Community Reconciliation Process (CRP). It enables former militia members to come forward and publicly confess their wrong doings, asking forgiveness from the community and more importantly from the victims, and to promise to renounce violence. It is a process that requires truth, admission of guilt, regret, efforts to make amends and forgiveness. There are perpetrators who are ready to admit their crimes and seek the mercy of the community, wishing to return to their land and families and to serve the nation.

When the Truth Commission was proposed, people were aware that a third of the population of East Timor had been driven into West Timor and there were serious concerns for their safe and rapid return. Some 100,000 returned spontaneously in the three months following October 1999. A further 120,000 have returned since, leaving about 30,000 East Timorese in West Timor. The return and reintegration of former militia civil servants, ex TNI, and pro-autonomy supporters presents another challenge. Some will prefer to relocate to Indonesian territory. Political leaders have spoken of extending *acolhimento* and involving these in the truth, justice and reconciliation process.

CAVR is based on the principle that genuine reconciliation requires justice and that individuals must accept responsibility for their actions. Revealing the truth and allowing justice to take its course increases the possibility of reconciliation. The CAVR community reconciliation process made it possible to deal with such crimes as theft, minor cases of assault, burning homes, killing animals, destroying crops, etc, if they occurred in the context of political conflict. This process helps perpetrators to understand, accept, and meet their obligations. Where appropriate it provides opportunities for dialogue between survivors and perpetrators. It helps the victims to testify about the impact of a human rights violation on themselves and their families. It makes it easier for the entire community to recognize human rights violations and respond.

The community reconciliation process was a voluntary one. A mixed panel of local leaders, both men and women and chaired by a regional commissioner, would call a meeting of perpetrators, victims, and community members to discuss the crimes and propose agreements by which perpetrators could do community work, make repayment, a public apology, or some other act of reconciliation. The aim was restorative justice for the benefit of the victim and the community. If cases were successful, the District Court agreed not to prosecute. The CAVR has no jurisdiction for crimes of a more serious nature such as murder, sexual offences or crimes against humanity. They are dealt with by the criminal justice system established by the UN and the East Timorese government

### **5.1.8 How has the CAVR process contributed to the rule of law?**

The Commission signed a Memorandum of Understanding with the Prosecutor General, whereby all statements taken from persons wishing to participate in the community reconciliation process would be forwarded to the Office of the General Prosecutor, which would then refer appropriate cases to this process. The ways in which the CAVR upholds international humanitarian law and human rights law can be seen in the findings and

recommendations of the final report, which will be made available in hard and soft covered copies and on a web site. The CAVR does not replace the need for the rule of law, for courts and police, but it does complement them. The aim is to heal relationships so that normal social and legal interactions can be reinstated.

### **5.1.9 Cultivating an environment for peace**

Government policies can create the material conditions for peace. Respect for human rights, opportunities for education, employment, housing, agriculture and health help to meet the basic human needs of our people. Lack of opportunities, unequal distribution of resources, and the inability to provide for oneself and family creates unrest and resentment. The frustrations of the younger generation must be addressed, since they are the nation's future.

The Commission is now in its final stages. Its report will run to many hundreds of pages. We are painfully aware that Timor-Leste is still one of the least literate societies in Asia. So it is important that the lessons learned be impressed in the hearts of those directly concerned and made known on the peaceful streets of their villages. A film, an exhibition and a shortened version of the report in the Tetum language will be used to reach the grass roots. It is hoped that the report will stimulate discussion and debate within East Timor and in international fora. The archive of the Commission's work will be an important national resource for generations to come.

### **5.1.10 Some case studies**

Even though Joao and Mario had similar jobs with the same organization, their political backgrounds and outlooks were different. They got along well, except for discussions about human rights violations of the past that led to a certain animosity. In October 1975, Joao had just finished his high school in what was still a Portuguese colony. Following the "Revolution of the Carnations" in Lisbon, the Portuguese government decided to give its colonies freedom to choose their own destiny. At that time there were five political parties in East Timor. The two major ones were FRETILIN, whose followers wanted immediate independence for East Timor, and the UDT which wanted to remain a part of Portugal. The small parties included APODETI, which favored integration with Indonesia, and KOTA which was concerned with labor rights. Joao joined APODETI. In the civil war that took place in August 1975 between the UDT and FRETILIN, the latter won. When it took power, the leaders of the opposition were arrested or concentrated in one place. Joao was

also detained. In December of the same year, with the invasion by an Indonesian military force, the prisoners were taken from the capital to other districts, including Aileu. There, many were later executed including Joao's father, brother, brother-in-law and several first cousins. Joao, who was 19 at the time, was lucky to escape. Mario, several years younger than Joao, joined FRETILIN in the mountains in 1975 and resisted the Indonesian occupation for several years. At the time of the Santa Cruz massacre, he was sentenced to 12 years imprisonment. He was tortured while in prison. A brother and a sister and several first cousins were killed by the Indonesian military. The way these two men view the past reflects their different experiences. In the light of such differences one needs to ask the following questions: "Who should serve as national commissioners?" "How should the balance be struck?" and "Should there be an international commissioner?"

A young man in his late teens took part in looting and burning his aunt's house. On the day of the CRP, he publicly confessed: "If I didn't do it, someone else would ... so I was forced to do it. I regret the pain I have caused my aunt and seek forgiveness from her and from the community." His aunt replied by saying that on his return from the refugee camps in West Timor her nephew brought roofing materials for her house, and she could understand the pressure on him at the time. But she wanted him to promise in front of all present that he would not take part in such acts again. He accepted and was embraced by those present at the end of the hearings. As an act of reconciliation he helped his aunt to rebuild her house.

At a hearing in one of the villages, a leader of the pro-autonomy faction came forward to set the record straight and establish his innocence of any wrongdoing to the community. Denying rumors of his involvement in killings, looting, arson, etc, he said he had often tried to use his position to save lives. After many questions were asked it was agreed that he had been wrongfully accused.

At another hearing, a man claimed he was never involved in acts of violence in the village, was not aware of any plans, and was somewhere else when the events took place. After questions and cross-examination, the victims and the community decided he was not telling the truth and did not seem concerned about his deeds. There was no desire for reconciliation. The case was referred to the Office of the General Prosecutor.

At a large reconciliation gathering in a remote area of Timor-Leste, a man stated his case without admitting to killings or other serious crimes, denying involvement when cross-examined. Shortly afterwards, a member of the community identified him as the man who had killed x. The Regional Commissioner, acting as team leader of the panel, decided to refer the case to the Office of the General Prosecutor.



At the National Public Hearings in Dili, a woman from one of the eastern districts of Timor-Leste testified that she had been forced to watch while her husband was buried alive during the Indonesian occupation. The Indonesian military suspected him of collaborating with the resistance forces in the jungle. He and several of his friends were assaulted in front of a gathering crowd, using machetes and swords. Her husband didn't die but orders were given to bury all of them. She pleaded with the commander to let her husband live. He contacted the administrator and military authorities and returned with the reply that her husband had to be buried. She watched as they dug the hole and put him in alive. Her husband was able to reach out and say: "please look after our children." The depth of her pain is difficult for us to imagine.

In testimony as part of the first national public hearings before the East Timor Commission on 11-12 November 2002, Esmeralda dos Santos told how she had been taken from the Suai church in September 1999 to a nearby school with other women, where they were kept for a week and repeatedly raped in front of others. They were then taken to West Timor, where the sexual violations continued. She asked the audience if she could present a daughter born from this experience. All welcomed her one-year old daughter "Mary Robinson", named after the then High Commissioner for Human Rights who had visited her in Suai in 2000 and met her new born baby. Esmeralda spoke with dignity, strength and clarity. With emotions running high, one young woman, surrounded by a group of crying friends, recalled the murder of her husband the day after her marriage in August 1999.

### 5.1.11 Conclusions

The potential of CAVR processes for documenting human rights violations, helping with restorative justice and national reconciliation can only be achieved with community support. Human rights violations injure survivors and the community. Just as violations wound, so justice heals. The principles of *acolhimento*, truth, and reconciliation seek to mend broken relationships and create better relationships. Restoring tolerance, justice, and peace in the community is the realization of education for peace.

We do not expect the CAVR report to solve every problem or heal every wound. We have listened to people across our small country who carry heavy burdens and have lived long with deep sorrow. We want them to know they have been heard, and for our children to know what their parents have lived through. In telling their story we pay tribute to them. Those who gave their lives for freedom and justice will inspire their compatriots to live in freedom and justice. We hope that the work of the CAVR in the past three years will make reconciliation possible in East Timor.



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## **5.2 A Contribution to Dealing with the Past and Transitional Justice: the Promotion of Peace, Respect for Human Rights and the Rule of Law**

Nataša Kandić

### **5.2.1 Concepts of justice**

Concepts such as “justice”, “the rule of law”, “dealing with the past”, and “transitional justice” are essential to understanding conflict and post-conflict societies.

The rule of law refers to a principle of governance in which all persons, institutions and entities, public and private, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights standards.

Justice is an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs. Justice implies regard for the rights of the accused, for the interests of victims and for the well-being of society at large.

The notion of transitional justice comprises the full range of processes and mechanisms associated with a society’s attempt to come to terms with a legacy of large-scale past abuses in order to ensure accountability, serve justice and achieve reconciliation.

### **5.2.2 Case study: the former Yugoslavia**

The challenge of dealing with the past in the current context of the former Yugoslavia revolves around multiple dimensions of justice and human rights: how to bring war criminals to justice, how to bring justice to the victims and survivors, and how to bring justice to the generations that will have to live with the legacy of past conflicts.

Two questions of interest are: how can countries fulfil their obligations towards victims regarding the right to truth and justice, and what is the role of non-governmental organizations (NGOs) in efforts to combat impunity and find out the truth about past violations of human rights?

### **5.2.3 Criminal justice**

Addressing the issue of impunity, the international community appointed international prosecutors and judges to deal with war crimes and ethnically

inspired crimes right after the war in Kosovo ceased. The War Crimes Prosecutor's Office was established in Serbia in 2003. Croatia adopted legislation to allow war crimes cases to be transferred to courts in its four largest cities, Zagreb, Split, Rijeka, and Osijek. With international support, the War Crimes Chamber (WCC) was established in Sarajevo within the Bosnia and Herzegovina (BiH) State Court in 2004. The WCC, with its national and international judges and prosecutors, officially opened in March 2005.

To date, war crimes trials in Bosnia and Herzegovina have revealed weak case preparation and limited competence on the part of the prosecution in the Federation of BiH. The judicial authorities of the Republic of Srpska (RS) have not seemed willing to begin trials. The application of double standards, against Serb defendants and in favor of Croatian defendants, has been a general rule in Croatia at all procedural stages from arrest to conviction. In Serbia, we have already had three cases in which individual perpetrators were brought to justice while police and military commanders were being protected.

#### **5.2.4 Support for human rights by non-governmental organizations**

The non-governmental human rights organizations in the former Yugoslavian countries are only now developing their programs and activities in support of criminal justice. The Humanitarian Law Center (HLC) launched an initiative in spring 2004 to establish a regional non-governmental team that would monitor war crimes trials. In November 2004 this team started monitoring three war crimes trials: The Korana Bridge Case in Croatia, the Matanović Case in the RS, and Ovčara Case before the War Crimes Chamber in Serbia. The monitors come from the HLC Research and Documentation Center (Sarajevo, BiH), and the Center for Peace (Osijek, Croatia), organizations that had signed the Protocol on Regional Cooperation for the Purpose of Investigation and Documentation of the Crimes of War in the Post-Yugoslav Countries. When the team was established, the NGOs from Croatia and BiH started monitoring local war crimes trials for the first time. Previously the task was exclusively in the hands of OSCE monitors. Today the team is monitoring the trial of eight Croatian police officers indicted for war crimes against Serb civilians, before the Split District Court (Croatia), as well as the first trial before the War Crimes Chamber in Sarajevo, and the ongoing Ovčara Case before the War Crimes Chamber in Belgrade (Serbia).

The HLC is currently trying to transfer its knowledge and experience in counseling and providing legal support to victims/witnesses to its regional partners in accordance with the NGOs' role of providing support for local war crimes trials. The HLC began its activities at the end of 2002 with the trial of

the two members of the “Scorpions” indicted for the killing of 14 Albanian women and children in March 1999 in Kosovo. The trial had begun before the court of a small town in which the majority of the population supported the accused and considered them heroes. People in the courtroom cheered the accused and issued direct threats to the Prosecutor and Court Counsel. Since the indictment was not supported by evidence, the HLC prepared a detailed report on the case which helped the Prosecutor to find the names of the victims and witnesses. Since the public, which did not approve of the trial, continued to put pressure on the Court Counsel, the HLC asked the Prosecutor's Office of the Republic of Serbia to move the case to a court where a fair trial would be possible. The Serbian Supreme Court decided to delegate the trial to the Belgrade District Court at the beginning of 2004. The problem facing the new Court Counsel was how to enable the victims and witnesses to appear before court. Thanks to its reputation in Kosovo, the HLC succeeded in convincing the victims and witnesses that their participation in the trial was essential to bring about justice. This trial was a major challenge for the Serbian police, being the first case in which the witness protection issue was raised. The witnesses were afraid to go to Serbia and rely on police protection. This caused them much suffering. At the request of the witnesses, the Court Counsel and the Ministry of the Interior of the Republic of Serbia allowed the HLC to suggest appropriate protection measures and to participate in their implementation. It was the one and only case in which the HLC succeeded in arranging for an ‘insider’ witness. This witness, a Serbian police officer, contacted the HLC after hearing the court testimony of the surviving Albanian children on TV. He decided to tell the truth and allow justice to be done. He gave his testimony in the presence of Albanian witnesses who, confused and doubtful, listened as he explained in detail how the members of his unit shot mothers with children in their arms and children who were holding hands. After the policeman had given his evidence, Albanian witnesses came to shake his hand, and one said in broken Serbian, “Thank you, this is the first time I feel better.”

In the ongoing Ovčara Case, the HLC arranged for the appearance in the Serbian court of witnesses and victims from Croatia, who lacked confidence in the court and did not respond to the official subpoena. Once more the reputation of the HLC succeeded in encouraging the witnesses to appear before the Serbian court and give evidence concerning a crime committed in November 1991 when Serbian forces executed 250 Croatian civilians and prisoners at the Ovčara farm near Vukovar. The HLC, in cooperation with the Mothers of Vukovar Association, made it possible for 20 family members of the victims to attend the trial. This also made the witnesses from Croatia feel better, and allowed the Croatian public to hear families of the victims express their views about the Serbian court's readiness to discover the truth regarding the most serious crime committed in Croatia by Serbian forces.

The HLC is currently negotiating a joint project with the Sarajevo Research and Documentation Center for counseling victims and witnesses in relation to the Zvornik trial, due to begin before the end of November before the Belgrade War Crimes Chamber.

### 5.2.5 Truth-telling

The most significant event in the area of truth-telling, the second pillar of transitional justice, is the decision of the Human Rights Chamber to establish the Srebrenica Commission that obliges the Republic of Srpska to conduct a full investigation of the events of 11-19 July 1995 in Srebrenica. The results of this investigation were summed up in the Report of the Srebrenica Commission on the events that resulted in the massacre of some 8,000 Bosnians in Srebrenica in July 1995. The report recognized the crimes committed by Serbs and led to reparation payments from the Republic of Srpska.

The report's significance was endangered by its rejection on the part of the majority of Bosnian Serbs. Moreover Bosnians had serious reservations as to the sincerity of the RS authorities' acceptance of responsibility, feeling it had been made under threat by the High Representative for BiH.

The second important event in telling the truth about the past, which also concerned Srebrenica, had considerable influence on public opinion and on the institutions, and was important in resisting efforts to deny the Srebrenica massacre.

After discovering that the police unit of the Serbian Ministry of the Interior was involved in the execution of Muslims from Srebrenica and that a video recording of the crime existed, the HLC spent two years searching for the tape and witnesses. It received the tape in November 2004 from a "Scorpion" member who had stored it for years in a secret place outside of Serbia. A friend, who knew it was he who helped the HLC find the 'insider' witness for the trial of the two "Scorpion" members indicted for the killing of Albanian children and women, persuaded the officer to surrender the tape to the HLC. At the same time, the owner of the tape submitted a copy to the ICTY investigators. In May 2005, when the witness was taken to a safe place, the HLC showed the tape to the War Crimes Prosecutor and to the head of the Republic of Serbia's Ministry of the Interior's War Crimes unit, subsequently allowing every local TV station to broadcast it. On the night of 1-2 June, the Serbian Ministry of the Interior arrested the five perpetrators. The video shocked Serbians and the international public, and silenced those who for years had denied the Srebrenica massacre. The highest government officials,

while admitting the authenticity of the recording, insisted that the “Scorpions” was a criminal enterprise in no way connected to the legal institutions of the Republic of Serbia. The War Crimes Prosecution filed charges in October 2005 and the trial is expected to begin soon.

There have been other valuable truth-seeking initiatives besides those just mentioned. The Center for Research and Documentation and the Humanitarian Law Center have set up war crimes databases. In the very near future, Documenta, the third member of the regional coalition for documenting war crimes and combating impunity, will begin work on its own war crimes database. The Sarajevo Center is completing a project called “Population Losses”, the aim of which is to determine the number of victims of the armed conflicts in BiH between 1992 and 1995. More than 90,000 victims had been identified and entered into the database by September 2005. Using similar methodology, the HLC has begun a project in Kosovo with the intention of including all victims from Kosovo, Serbia and Montenegro, and Croatia.

Another form of truth-telling is informing the local public about the work of the International Criminal Tribunal for the former Yugoslavia (ICTY). This is an approach favored by the NGOs. The Helsinki Committee for Human Rights in Bijeljina (Republic of Srpska) and the HLC in cooperation with the ICTY Outreach Office, are organizing regular events in which they present ICTY evidence and listen to the victims. The latest such event organized by the HLC took place in Serbia on 11 June 2005 when mothers of Srebrenica gave their testimonies before the public in Belgrade.

In addition to these truth-telling and truth-seeking initiatives, the HLC organized a regional NGO consultation on transitional justice on September 5, 2005 in the presence of Juan Méndez of the International Center for Transitional Justice (ICTJ). Participants discussed the idea of an International Victims Commission for the Former Yugoslavia.

They agreed on the need for an effective and independent regional truth-telling mechanism. There was also consensus that such a mechanism would require both international sponsorship and broad civil society support and leadership, including NGOs dedicated to human rights, victims' associations, and youth organizations.

The ICTY organized a second meeting on October 10-11, 2005 in Brussels in which participants from the HLC, the Research and Documentation Center, Documenta, and ICTJ discussed general regional approaches to truth-telling and in particular the idea of an International Victims Commission. Bearing in mind that the USIP has launched a new initiative for a Commission for Truth

in BiH, participants at the Brussels meeting agreed to inform the USIP of their proposals and to discuss a joint commitment to the creation of a transitional justice model in the former Yugoslavia.

### **5.2.6 Conclusions**

The establishment of the rule of law and respect for human rights in post-conflict societies is impossible unless the state and society find a suitable way to respond to past human rights violations. The good news is that the successor states of the former Yugoslavia have begun war crimes trials. These should become the most important instrument for determining individual responsibility. However, since these trials can target only a limited number of perpetrators, other transitional justice mechanisms are very important. The role of non-governmental organisations is to constantly remind governments of their obligations to investigate crimes, punish the perpetrators, and by so doing fulfil their obligation towards the victims in terms of justice. It is also their role to create the conditions for the implementation of victims' and society's right to learn the truth about the past. In this context, NGOs dedicated to human rights must promote awareness of the need for appropriate instruments which will provide facts about past human rights violations, preserve evidence, identify perpetrators, and provide a public platform for victims to address the nation with their personal stories, facilitating public debate on how to come to terms with the past.



## 5.3 The Truth and Reconciliation Commission (TRC) in Peru (2001-2003)

Jaime Urrutia Ceruti

### 5.3.1 Seeking the truth

In contrast to what happened in other countries, the Truth and Reconciliation Commission (TRC) established in Peru was not the result of a transition agreement but a consequence of the collapse of an authoritarian regime. Whereas in Chile and in Guatemala the armed forces have not only maintained their prerogatives but are also monitoring the transition, in Peru the guardians of forgetfulness are beating a retreat, fleeing the country or being imprisoned. It should be added that transition, or at least the initial phases of transition, involves extremely fluid processes which expand possibilities for the agency of "political will", in which official versions of history crumble, opening fissures through which other memories and readings of the past can penetrate.<sup>1</sup>

When the final TRC report was submitted two years ago, the country knew that the generally accepted figure of 25,000 dead was not definite and that there were far more fatalities. The facts have now been fairly clearly established and can be summed up as follows:

- The Final Report calculates that 70,000 persons were killed or "disappeared";
- More than 60% of these were rural inhabitants, for the most part peasants;
- More than 90% of the total fatalities occurred in the impoverished Andean and Amazonian provinces, particularly in Ayacucho (approximately 50%) where the conflict started;
- More than 70% were native speakers of Quechua, even though less than 20% of the country's inhabitants spoke this language at the time of the 1993 national census;
- If the intensity of violence nationwide had been of the same degree as in Ayacucho, an estimated 700,000 Peruvians would have died;
- If the intensity of violence in Peru had been the same as among the Ashaninka ethnic group in the Amazon region, more than 2 million Peruvians would have perished.

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<sup>1</sup> This introductory section summarises various articles written by Carlos Iván Degregori, a former member of the TRC.

Moreover:

- The Communist Party of Peru/Sendero Luminoso was responsible for more than 50% of the victims. This is a striking fact and indeed a unique case in Latin America, where guerrillas have never been responsible for more than 5% of the total number of victims.
- In contrast to Guatemala and also to the Cono Sur, most of the conflict (between 1980 and 1992) took place under democratic regimes, under the most advanced constitution that the Republic has ever had.

According to the TRC Final Report, the question Peruvians need to ask is: how were groups with these characteristics able to become such a serious threat to society and to the state? This was possible for a number of reasons, and notably the fact that subversive groups exploited fractures and malfunctions within Peruvian society and enlisted and mobilized marginal sectors that were not connected to the national processes of social and political democratization.

These fractures were as follows:

- The gulf between the rich and the poor is a factor more important than poverty itself.
- Apart from this division on the basis of class, Peru is polarized into two zones – the capital Lima, and the rest of the country. After Uruguay, Peru is the most centralized state in South America.
- There are also territorial divides between the coast, the mountainous Andean zones and Amazonia, which roughly parallel ethnic and racial divisions between Creoles, Mestizos and Indios.

Subversive groups recruited militants and sympathizers among young people socialized in state schools with traditional authoritarian structures, or with backgrounds in excessively ideologized institutes of higher education in which pluralism and democratic debate were non-existent. Moreover, the poor quality of education offered few real chances of professional advancement.

Given that Peruvian society is marked by the fractures listed above, subversive groups prospered by exploiting two factors: backwardness and a high level of social conflict, and the low profile of the state and political or social organizations capable of acting as intermediaries. In the absence of institutional mechanisms for channeling demands, subversives exploited social discontent to recruit members and impose a totalitarian order. The investigations of the Truth and Reconciliation Commission show clearly that

subversion was unable to establish itself where the state was more present and the political and social tissue stronger, since conflicts and tensions were channeled through institutional mechanisms.

Another reason for the dynamic nature of the violence is the inadequacy of the state's efforts to tackle subversion. In the first stage of the conflict, the state's response was purely military, amounting to a democratic abdication of authority. It amounted to repression, inspired by distrust of the population that in reality was the victim of the subversive groups. Correcting this error proved to be the key to the subsequent defeat of the groups. The strategy that bore the greatest fruit was to accept the armed conflict as fundamentally political rather than military, and thereafter develop an alliance between the state and those most affected by the action of the subversive groups.

The TRC Final Report also states: "The administration of justice is another area in which the limits of the state response to the challenge of subversion became dramatically evident. The legal system did not accomplish its mission satisfactorily with regard to the effective and lawful punishment of the actions of subversive groups, or safeguarding the rights of detained persons. It also failed to put a stop to the impunity enjoyed by agents of the state who committed serious human rights violations. Faced with this situation the competence and authority of the legal system ended up by becoming subservient to military justice".

The TRC of Peru had a wide-ranging mandate. It was not confined to investigating cases of imprisonment or disappearance as was the case in Chile. Its brief also covered:

- "assassinations and kidnappings;
- forced disappearances;
- torture and other serious injuries;
- violations of the collective rights of the Andean and native communities of Peru;
- other crimes and serious violations of human rights".

Finally, this mandate was endorsed by the main candidates for the presidency during the elections of 2001, all of whom promised in writing that if elected they would implement the recommendations of the TRC Final Report.

### 5.3.2 Recommendations of the TRC Final Report

The report made a general recommendation that there should be a clear pledge by political parties and social organizations not to use violence and to respect human rights. It regarded this as a prerequisite for operating within a system of legally recognized parties and social organizations. In addition, the TRC report proposed:

- institutional reforms to make the rule of law a reality and to prevent violence;
- full reparations to victims;
- a national plan for burial sites;
- mechanisms to ensure the followup of its recommendations.

In addition to these key points the TRC made the following recommendations:

- The Final Report should be actively promoted and distributed.
- Access to the Final Report and to the documentary material gathered or produced by the TRC should be as widespread as possible, and scientific and academic research into related matters should be encouraged.
- The Minister of Justice should institute proceedings as soon as possible against those allegedly responsible for the crimes investigated by the TRC.
- If the Minister of Justice does not comply with the above, the Public Prosecutor, who is in possession of all the documentary material, should publish the names of those who, in the opinion of the TRC, should be charged with crimes.
- The National Chamber against Terrorism of the Supreme Court of Justice in Lima should take into account the TRC's findings with regard to the crimes committed by members of Sendero Luminoso and the MRTA, as well as the criteria established for the attribution of responsibility to the command and to the leaders of the said subversive organizations in the framework of the current legal proceedings against terrorist crimes.
- The state authorities must not make discretionary use of amnesties, reprieves or other presidential pardons except within the strict limits defined by the Inter-American Court of Human Rights.

- The authorities should take measures against state officials who are convicted of grave human rights violations, including magistrates who did not carry out their duty to guarantee basic human rights.
- Protective and security measures must be provided for witnesses and for victims of serious human rights violations, establishing a system for this purpose using the resources of the legal authorities, the Ministry of Justice, the Ministry of the Interior and the Office of the Ombudsman.

### **Institutional reforms necessary for the realization of a state based on the rule of law and for the prevention of violence**

The proposals for institutional reform cover four main areas:

1. Recommendations to ensure democratic authority and state services throughout the national territory, taking into account and respecting popular organization, local identities and cultural diversity, and promoting citizen participation.
2. Recommendations to strengthen democratic institutions for national defense and for the maintenance of domestic order based on political leadership. The main objective is to reconcile the concepts of national defense and the security of citizens.
3. Recommendations for reform of the judicial system to enable it to fulfil its role as the defender of citizens' rights and the constitutional order effectively.
4. Recommendations for reforms guaranteeing a high level of education and promoting democratic values: respect for human rights; respect for differences, attaching importance to pluralism and cultural diversity; updated and complex perceptions of Peruvian reality, particularly in the rural areas.

### **Full reparations for victims**

In general, the TRC considers as victims “all persons or groups of persons who, because of or in connection with the domestic armed conflict that occurred in this country from May 1980 to November 2000, suffered deeds of commission or of omission which violated international human rights norms”. This includes the following crimes recognized in international norms that have been accepted by the state of Peru: forced disappearance, kidnapping,

extra-judicial execution, murder, forced displacement, arbitrary detention and lack of due process, forced recruitment, torture, rape, injuries, lesions or death in attacks that violate international humanitarian law.

Beneficiaries may be individuals or groups of persons. In the case of individuals, the damage that occurs to the individual or to close family members is recognized. In the case of groups, the damage is that done to the collective social tissue. These categories are not mutually exclusive, and beneficiaries may be entitled to both individual and collective reparation. However, they may not receive the same benefit twice.

The TRC proposed that the following categories should be recognized as individual beneficiaries: the wife or partner, the children whether legitimate or illegitimate, and the parents of the disappeared or deceased victim. However, the actual nature of the family nucleus in High Andean communities and in the jungle is different from that recognized by the norms of national law, which are closer to the Western concept of the family. The latter concept does not necessarily take into account relationships of consanguinity or of affinity, whereas in these communities various kinds of relationships are accepted in accordance with local traditions and customs or with the customary law recognized by the population of which the claimant is a member.

With regard to the application of the *Plan Integral de Reparaciones* (PIR), when we refer generically to the “universe of individual beneficiaries”, we include the following categories of persons: the families of disappeared victims, the families of deceased victims, displaced persons, innocent persons who have been imprisoned, victims of torture, victims of rape and sexual violence, kidnapped persons, recruits, members of the armed forces, the *Policia Nacional del Perú* (PNP) and committees of self-defense injured in the course of duty by acts which were in violation of international humanitarian law.

The TRC recommends that the following categories should also be considered as deserving of benefits of the PIR:

- children born as a result of rape
- minors who were members of a committee of self-defense
- persons unjustly charged with terrorism and treason
- persons who lost their identity documents as a result of the internal conflict

The TRC defines collective beneficiaries as follows:

- peasant communities, native communities and other centers of population affected by the domestic armed conflict
- organized groups of displaced persons from the affected communities who do not return and are now in new locations

### **Full reparation plan programs**

1. Program of symbolic reparations. The proposed components will include: public gestures, acts of acknowledgement, monuments or places of remembrance, acts leading to reconciliation
2. Program of reparation in the form of health provision will contain the following components: training, complete recovery by means of community intervention, recovery by means of clinical intervention, access to health, promotion and prevention
3. Program of reparation through education. The components of access and restoration of the right to education are: exemption from payment of school fees, program of full scholarships, adult education
4. Program of restoration of citizen rights includes the following components: regularization of the legal situation of the disappeared, regularization of the legal situation of persons interrogated, annulment of police, court and criminal records, regularization of the situation of those not in possession of documents, provision of legal advice, exemption from payment
5. Program of economic reparations includes economic reparation in the form of pensions and/or compensation
6. Program of collective reparations includes the following components: institutional consolidation, restoration and reconstruction of productive infrastructure, restoration and expansion of basic services, use and generation of income

### **5.3.3 The present situation**

Peru is still in the early stage of a long-term process that involves taking into account the recommendations of the TRC Final Report. It is a process that obligates the Executive, the Congress of the Republic, the Judiciary, the Minister of Justice, regional and local governments, private enterprise and civil society. It is now two years since this report was presented and the willingness to implement these recommendations seems greater than when the report was first presented.

On 23 November 2003 the President of the Republic, in a speech to the nation, asked for forgiveness on behalf of the state for acts of terrorism, disappearances, murders, injuries and all the suffering caused by the political violence between 1980 and 2000.

His words underlined the political will of the government to follow up the recommendations made in the Final Report of the TRC. In this speech, the President recognized the Truth and Reconciliation Report in its entirety, and announced the implementation of a Peace and Development Plan for the regions most affected by terrorism. He also announced that there would be collective reparations for victims, as well as an effort to coordinate public investment in regions with a high level of violence.

Further proof of the executive's willingness to implement the recommendations was the creation of the "Multisectorial High-Level Commission to Monitor the Actions and Policies of the state in the fields of Peace, Collective Reparation and National Reconciliation" (CM). The CM was established by the Supreme Decree 011-2004-PCM of 5 February 2004.

The CM has the following objectives:

- to develop a national policy of peace, reconciliation and collective reparation for approval by the Council of Ministers;
- to coordinate the implementation of specific public policies in order to achieve the objectives of peace, reconciliation and collective reparation;
- to supervise implementation of the objectives;
- to promote the cooperation and collaboration of civil society in its efforts to achieve the objectives of peace, reconciliation and collective reparation;
- to establish and to cultivate links with international human rights bodies with a view to securing international technical cooperation.

The CM is chaired by a representative of the Presidency of the Republic. Ultimate responsibility lies with the President of the Council of Ministers. The Commission consists of representatives of the Ministry of Justice; the Ministry of Economics and Finance; the Ministry for Women and Social Development; the Ministry of the Interior; the National Council for Decentralization; organizations for the promotion and defense of human rights; the National Association of Centers, (ANC), which is the technical secretariat of the National Conference on Social Development (CONADES); the National Assembly of University Vice-Chancellors (ANR) and the National Council of Deans of Professional Colleges of Peru.



Before outlining the Commission's main activities, I would like briefly to describe some of the constraints the CM has encountered since it was established.

It should be recalled that the presentation of the TRC report occurred when the national budget for the year 2004 had virtually been approved. Activities linked to the TRC recommendations have however been budgeted for the relevant state bodies in the present financial year.

This difficulty was compounded by the reduced availability of public funds and further aggravated by the complexity and wide distribution of responsibilities within the civil service, which is not very efficient at allocating expenditure prioritized on a territorial basis. Fiscal shortages clearly impose serious limits but so too does the negligence of certain civil servants who do not attach sufficient importance and priority to the TRC's recommendations.

The institutional reforms proposed in the Final Report would radically change the relationship between the state and society, especially marginalized sectors of society. The behavior of many civil servants is characterized by insensitivity and negligence. As a result, it is difficult to put in place coherent and effective policies. The CM is attempting not only to raise the civil service's awareness of the TRC's recommendations but also to implement the political will of the government in specific budgets, with explicit measures, goals and timetables. This can only be achieved if it is given concrete form in the state budget.

However, perhaps the main obstacle to implementation of the CM recommendations is the fact that there is scarcely any public debate about the subjects involved. This reflects the lack of interest in the TRC report, which indeed is opposed by various sectors, and its activities subject to questioning.

Various regional and local governments have also failed to devote sufficient attention to the zones affected by the internal armed conflict. The considerable efforts made by civil society have also been limited both by the size of the task, the wide distribution of the many organizations involved and the need to intensify dialogue between these organizations and the state.

The CM is aware that fulfillment of the many expectations created by the TRC Final Report and full implementation of its recommendations will require long-term measures. This in turn implies maintaining a commitment to the achievement of the objectives of peace, justice, reparation and reconciliation throughout the tenure of several governments.

### 5.3.4 Progress so far

#### **Coordination measures to create a sub-system of justice specializing in human rights**

Since the founding of the CM, one of the main objectives has been to support the establishment of a specialized system of justice that would be responsible for the defense of human rights. This would involve the creation of special judicial institutions that would particularly focus on areas where violence has had the greatest impact. This specialized transitional system would make it possible to overcome operational and legal obstacles in the existing penal system.

The sub-system for human rights would involve:

- the creation of a special prosecutor's office within the Ministry of Justice
- judicial extension of the functions of the Terrorism Chamber
- the creation by the Public Ministry of two complementary offices of the public prosecutor in Ayacucho

There is now an offer pending in the Ministry of Justice to appoint a public prosecutor charged with promoting penal measures with regard to human rights violations. This would be a major step towards the establishment of a specialized system of justice.

With regard to the judicial situation, we would like to mention that the TRC presented complete information about 43 cases where it was absolutely sure of the accuracy of the facts, including the identity of both victims and of the alleged perpetrators. 70% of these cases are in the Departamento of Ayacucho, where a prosecutor has been appointed to deal exclusively with these cases. The delays in dealing with them are due to the still pending implementation of the three bodies mentioned above.

Another specific measure related to the system of justice is the statement approved by the CM underlining the need to modify the system of military law and to make it subordinate to the Supreme Court of Justice.

#### **Full reparations program**

- One of the main obstacles to the implementation of the TRC recommendations is the wide distribution of responsibility and the complexity of the civil service. The CM has therefore agreed to a system of followup for public expenditure on reparations.

- According to investigations carried out in the eight departments most affected by violence (Apurímac, Ayacucho, Huancavelica, Huánuco, Junín, Pasco, San Martín and the provinces of La Convención–Cusco and Padre Abad-Ucayali), more than 700,000 people have been affected by the armed conflict out of a total population of five million. More than 550 peasant and native communities were seriously affected by the armed conflict.
- In order to ensure concerted action by the three levels of government, public funds have been allocated to reparation programs for the populations of the areas affected by violence through the Peace and Development Plan I (Apurímac, Ayacucho, Huancavelica and La Convención), and the Peace and Development Plan II (Huánuco, Pasco, Junín, San Martín and Padre Abad). The regional and local governments involved should also support this additional effort by the national government. Direct investments of 10 million soles were allocated in 2005 to affected communities in the Departments of Ayacucho, Junín, Huancavelica and Apurímac.
- One of the CM's actions was the approval of the Full Reparation Plan as a referential programmatic framework. On top of this, it also approved a housing program to complement the TRC proposal.
- As for economic reparations, this is a subject that will depend on the securing of adequate finance, bearing in mind that the present public budget allocation to this item is not at all sufficient. At the time of writing, Peru had not recognized any form of compensation for civilian victims of the domestic armed conflict.
- The CM is aware that the expectations of the victims are great and that the topic of reparations has led to repeated criticism of the state. It is argued that the political will should be reflected in public expenditure budgets of this and future governments. We calculate that a minimum of two periods of government (i.e. 10 years) will be needed to deal with reparation cases currently pending.
- The creation of the Single Register of Victims and the Council of Reparations is responsible for this. At the moment all that exists is a Register of Disappeared Persons, for which the Ombudsman is responsible.
- The government has also approved the provision of Act 28223 concerning internal displacement and the creation of a National Register of Displaced Persons for which MIMDES is responsible. This is currently in preparation.

- The CM has agreed to take charge of the implementation of a full program of non-financial reparations of the Ministry of Justice in favor of the beneficiaries of DD. SS. Nos. 002-2002-JUS and 005-2002-JUS, which allocate housing lots to a large group of innocent "reprieved" persons. Negotiations are now taking place to follow up this important initiative.
- It is important to underline the measures taken by the Ombudsman. In addition to the Register of persons "disappeared" during the domestic armed conflict in 1980-2000, we have also mandated this institution to establish an information center for the documentary material presented by the TRC, to support television campaigns raising awareness, and to distribute the book entitled "Hatun Willakuy", which is a summary of the TRC Final Report.

### **Coordination of exhumations**

The TRC report refers to the existence of 4,644 burial sites, 73% of which are in Ayacucho. At the time of writing, the Ministry of Justice has dealt with 120 burial sites. The CM has initiated several coordination measures with regard to exhumations. In view of the experience of the TRC, it is important to set up an inter-institutional platform involving the Ministry of Justice (specifically the Institute of Forensic Medicine), the Ombudsman, the National Coordinator of Human Rights and possibly the International Red Cross. It would prepare and carry out a national plan that would deal with the largest possible number of exhumations at burial sites. Setting up such a platform presupposes the training of qualified personnel so that more specialist teams are available. The cost of this massive exhumation project is estimated at \$US 400,000 per annum. This is the additional funding which the budget must provide for completion of this task.

### **Truth and memory**

The CM has carried out various measures on this subject, for example:

- The presentation of 18,000 copies of the summary of the TRC Final Report entitled "Hatun Willakuy" to the Ombudsman. They have now been distributed.
- Participation in various conferences and round table discussions on the implementation of the TRC recommendations. On these occasions the representatives clearly explained the progress of the CM and the obstacles to its work.

### **The relation between the state and society**

The CM believes that it is essential to establish greater links and greater dialogue with organizations representing those affected. It needs to do this to achieve its objectives, and it will support initiatives to coordinate the active participation of such organizations and to guarantee an active role for them in defining the measures to be taken by the state in the framework of the FRP.

The CM has taken the following measures in this area:

- The creation of a List of Organizations of Affected Persons, taking into account the institutional nature, the growing numbers and the territorial distribution of the organizations. The CM wishes to contribute to greater regional coordination for these organizations, with a view to facilitating dialogue and to channeling well-structured proposals in order to ensure more efficient and effective action by the state.
- Sustained coordination with international bodies and international cooperation. Negotiations to this effect are currently under way and cooperation agreements for the fulfillment of the objectives will shortly be signed. At the moment, the CM is using sums granted to the TRC by various international bodies and participating countries. Authorization to use these sums was given in a number of specific agreements signed by the President of the CM. The UN Development Program will continue to be the facilitating body for the administration of these funds, which will make it possible to complete the working plan.
- The CM presented an initial report to the Inter-American Commission of Human Rights in a public hearing that was expressly requested, in the framework of the sessions of October 2004. The purpose was to present the progress of its work in the areas of peace, collective reparation and reconciliation. The ICHR expressed a favorable opinion on the work of the CM and recommended that emphasis be given to reparations to victims of violence.
- The CM presented a second report on 26 February 2005 at the 122<sup>nd</sup> session of the ICHR, through the Ministry of Justice.



## 6 Panel 4

*Transitional Justice and International Accountability:  
Challenges and Opportunities*

Panelists:       Jürg Lindenmann  
                      Jean-Daniel Ruch  
                      Paul Seils

Moderator:      David Ashley

**Guiding Questions:**

As a relatively new field of expertise, the principles and practice of transitional justice have evolved in conjunction with the ad hoc tribunals in the Hague (International Criminal Tribunal for the former Yugoslavia ICTY) and in Arusha (International Criminal Tribunal for Rwanda ICTR) and, most recently, in connection with the International Criminal Court (ICC). The influence of these institutions on the discourse of transitional justice and, more particularly, on the development of international legal norms and instruments should not be underestimated. In this regard, a discussion of current developments and “lessons learned” from the experience of the ICTY (to take only this example) and the ICC seems warranted.

To what extent has the ICTY contributed to strengthening the respect for human rights and the rule of law in the region of its jurisdiction? Is this a reasonable expectation for the ICC, given the differences in its mandate? What can juridical institutions, such as the ICTY or the ICC, contribute to the promotion of peace and reconciliation in post-conflict societies? What are the main challenges which the ICC is facing with respect to the interface between international jurisdiction and national rule of law? How will lessons learned in the field of transitional justice be passed on to the ICC? Specific issues to be considered: enforcement, witness protection, cooperation with state institutions and civil society.





## 6.1 Transitional Justice and the International Criminal Court (ICC)

Jürg Lindenmann<sup>1</sup>

### Main messages

*International criminal tribunals attempt to bring peace through justice and the rule of law. Dispensing justice for past abuses is a precondition for the development of lasting peace. There is no peace without justice.*

*For many reasons, however, the reach of international criminal tribunals is limited both in fact and in law. To be fully effective, the activities of international criminal tribunals must be embedded in a comprehensive transitional justice strategy – a strategy which includes non-criminal, non-judicial, non-legal methods of truthfinding and redress for victims, for rebuilding structures respectful of the rule of law and for recreating confidence in them. Economic aspects are important, since dealing with the past makes sense only for those who hope to have a better future.*

*Thus, tribunals are not enough. A coherent and integrated transitional justice approach is needed for international tribunals to develop their full potential.*

### 6.1.1 Introduction

When negotiations on the establishment of the ICC started some ten years ago, those of us who were involved in them had the sense that this would be only a step in a much larger development. Despite some rhetoric attached, the ICC community never pretended that the ICC would be a cure-all. But it is true that the contours of the larger development were much more unclear at the time than they appear today. Thanks to much practical experience and important research, we know a great deal more about transitional justice processes and about the context within which international criminal tribunals must operate in order to contribute to those processes in a meaningful way. And what appears clearly today is the understanding that international criminal tribunals – including the ICC – are not enough.

I will first address the role of international criminal tribunals in conflict transformation generally. In a second part, I will concentrate on the limits of such tribunals, since it is not only important to know what tribunals can achieve, but just as important to know what they cannot reasonably be expected to achieve. In that context, I will focus on the ICC and on its

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<sup>1</sup> The views expressed are those of the author alone.

particular limits. I will then draw some conclusions from those limitations and speak about the complementary measures needed in addition to the activities undertaken by the ICC.

### **6.1.2 Role of international criminal tribunals in conflict transformation**

International criminal tribunals play an important role in dealing with the past. Regardless of their differences in terms of their establishment and of their mandate, their basic concept is the same. They attempt to bring about peace through dispensing justice and re-establishing the rule of law. Six elements through which international criminal tribunals contribute to transitional justice processes may be mentioned here.

#### **Establishment of facts / truth (vs. myths)**

“A lie may change history, but only truth can change the world.” Developing lasting peace can only be achieved when a society effectively addresses its past. The establishment of facts is an essential step towards finding truth. Assembling facts prevents the creation of legends, rumors, lies and myths, of heroes and martyrs – all which could be exploited in the future.

Although international tribunals cannot, of course, replace historians – nor for that matter truth commissions –, they can go a long way in establishing the objective facts of some of the most outrageous crimes committed in a particular historical situation. Thereby, they enable a society to take stock of where it stands and to draw a demarcation line between its painful past and a hopefully more promising future.

#### **Individualization of guilt (vs. collective guilt)**

Crimes, even the most horrendous ones, are not committed by abstract entities, but by individuals who are personally responsible for their conduct. Especially in conflicts stirred by national, ethnic or religious motives, it is important to acknowledge that the ultimate responsibility for crimes, however serious, is never with a group but always with the individual. Criminal procedures provide for the individual attribution of responsibility of the accused. By doing so, they help prevent the emergence of feelings of “collective guilt” which would constitute a danger to the prospect of a peaceful neighborhood.

**Culture of accountability (vs. impunity)**

Some of the greatest atrocities in the recent past have had their roots in a pre-existing climate of impunity. Potential perpetrators will more easily turn to violence if no consequences are attached to criminal behavior. And why should the victims themselves then not take recourse to violence in order to take revenge? Impunity undermines the foundations of a healthy society because it encourages the use of further violence. Therefore, the vicious cycle must be broken. The activities of an international criminal tribunal may, however limited in its effect, be an important signal in this regard.

**Restoring confidence and restating the law (vs. anarchy)**

Societies confronted with a legacy of past abuses are often characterized by the loss of confidence in the functioning of authorities and institutions (including international institutions) of any kind. Transition from war to peace or from despotism to democracy and the reconstruction of statehood, often necessary in such a process, is a difficult undertaking. International criminal tribunals can support these processes by sending several strong messages. They show that, after all, the international community cares. They also make clear that, yes, there is a law, and yes, it is applied. Moreover, that law is applied without discrimination and in accordance with an orderly and serene procedure assuring fairness to all persons involved.

**Restoring dignity of victims and of perpetrators (vs. victimization)**

Whoever went through war and experienced gross violations of human rights is highly traumatized. International criminal tribunals cannot offer an encompassing trauma therapy. What they can do, however, is to take victims seriously throughout the process. They can at least recognize the state of victimhood to those victims involved in the proceedings. They can thereby contribute – albeit modestly – to enabling those victims to regain confidence in their environment and to see their dignity restored.

At the same time, perpetrators also need to see their dignity restored. This is immediately clear when one thinks of child soldiers committing war crimes. But there may be many other categories of those perpetrators who are at the same time – at least to some extent – victims. International criminal tribunals would usually focus on those who bear the main responsibility and therefore not deal with these groups of “perpetrator-victims” directly. Still, by revealing some of the underlying mechanisms of violence of a particular conflict, international criminal tribunals help low-level perpetrators to address their

own role and responsibility more successfully. If this process fails, perpetrators tend to continue to put the blame on their victims – thereby adding to their victimization.

### **Prevention (vs. recurrence of violence)**

There is no definitive answer to the question of the extent to which international criminal tribunals are able to prevent violence. We can only speculate what Germany would have become without Nuremberg, Yugoslavia without the ICTY, Rwanda without the ICTR or Sierra Leone without the Special Court. It seems clear, though, that it would be expecting too much to believe that the intervention of an international criminal tribunal would have an instant effect and could, for example, stop ongoing genocide. The preventive effect of criminal law and criminal tribunals probably operates more indirectly. International criminal tribunals may contribute to a climate of accountability in which recourse to violence does not seem to be a worthwhile method of conflict resolution.

### **6.1.3 Limitations to ICC action**

Even though the contribution of international criminal tribunals to successful transition processes is important and in some instances even essential, there are also limits to what international criminal tribunals can accomplish by themselves. I will now focus on the ICC as the permanent tribunal with a general mandate and potentially global ambition. There are conceptual – legal – limitations to what it can achieve, but there are also purely factual limitations due to limits in resources and in time available.

#### **Conceptual limitations**

- **Complementarity:** Complementarity is the main feature of the ICC. The primary responsibility for investigating and prosecuting even the most serious crimes remains with the states. The ICC is competent to deal only with situations in which a state is “unwilling or unable genuinely to prosecute” (Article 17 of the Rome Statute). The ICC is a court of last resort. However ingenious this concept, there are a number of consequences. In its determination of whether a state is truly “unwilling or unable”, the Court may find that there are gray zones and it may refrain from intervening in a given case, even though the functioning of the judiciary in that state may seem far from perfect. The Court only intervenes when it is strictly necessary

and not where it might seem (for whatever good reason) “desirable”. In such a situation someone else should step in and assist the state whose justice system is not entirely up to its task.

- Jurisdictional reach: The ICC is competent for three types of crimes only: genocide, crimes against humanity, and war crimes. There is not much, however, it can do with regard to other crimes which are potentially also important in dealing with past situations: large scale corruption, illegal commerce with arms, drugs, diamonds etc. It might be added, however, that taking some of the warlords out of a conflict may also be a blow to organized crime so that the link between the two areas also works the other way around.
- The ICC cannot deal with perpetrators below the age of 18. This may be an important limitation in some conflicts (for example Sierra Leone).
- Non-retroactivity: A large part of the crimes committed in the Democratic Republic of Congo were committed prior to 1 July 2002 and therefore fall outside ICC jurisdiction.
- To date (25 October 2005), the ICC has jurisdiction for crimes committed on the territory or by citizens of 99 states. There is still a long way to go to universality.

#### **Factual limitations (resources and time)**

- Prosecutorial strategy: It seems probable that even in situations of a magnitude such as in the Democratic Republic of Congo or the Sudan, the Prosecutor will only deal with a few perpetrators and thereby focus on those who bear the main responsibility (or even – as he said in repeating the formula used for the Special Court for Sierra Leone – “those who bear the greatest responsibility”) for committing the crimes. Someone else will therefore have to deal with the more numerous perpetrators standing “in the second row”.
- It is equally probable that the Prosecutor, for purposes of efficiency, will not necessarily aim at indicting those persons for all the crimes they may have committed, but only for a few selected crimes which are not only particularly grave but also relatively easy to prove.
- Even though the ICC, as a permanent body, may be expected to be operational much faster than an *ad hoc* tribunal, there will always be a time-lag between the occurrence of the crimes and effective ICC intervention. The recruitment of qualified staff necessary for a particular situation may in itself take weeks or months.

- The Rome Statute includes ample provisions for the involvement of victims and for their protection. Therefore, expectations are high. Given the magnitude of the crimes, however, a realistic view identifies the many factual limitations. Even in the best of all circumstances, what the Court can do in favor of the great majority of victims is barely more than a drop of water on a hot stone. Most victims' issues will have to be dealt with elsewhere.
- There are further factual limitations deriving from the physical distance between the Court (whose seat is ordinarily The Hague) and the site of the crimes (so far, all situations investigated are in Africa). This distance may cause problems which may be described in the widest sense as "logistic", but it also has a potential "psychological" drawback in terms of a loss of the "sense of ownership". In both regards, it will be interesting to observe the effects of the three field offices that have been established by the Court until now.
- Perhaps the most important limitation to the effectiveness of the ICC is its dependence on concrete political support. Like all international tribunals, the ICC has no police force of its own and therefore depends on the support of national or international actors. The situation is particularly difficult if the states concerned are "unwilling".

All of these limitations illustrate that the ICC cannot be left alone in its endeavor to bring about justice and the rule of law for societies in transition. The ICC may be one essential element. But a design for a meaningful transitional justice process must include many other elements.

#### **6.1.4 Consequences for the ICC**

There are, of course, a few consequences flowing from these considerations for the ICC itself. They concern, *inter alia*, the difficult subject of how best to reach out to those concerned by ICC action and explain to them that the Court is here in order to assist them (outreach and perception), the question of how to avoid exaggerated expectations (expectation management) and the need for the ICC to show utmost sensitivity to the local context without compromising internationally valid standards. I believe that the ICC has recognized these challenges. However, the issues are not only within the sole responsibility of the Court. The international community, in particular states Parties to the Rome Statute, must also share the responsibility and be precise in their communication about what the ICC stands for, what it can do and what it cannot do.

### 6.1.5 Consequences for the international community

But there are further consequences for the international community, and it is those on which I would finally like to focus. One may distinguish between measures to be taken within the area of criminal law and those outside.

#### Measures within the area of criminal law

Within the area of criminal law, international actors may lend support to the ICC or directly to a state (in particular those states which are willing but unable) with a view to helping overcome what is called the “impunity gap”. This support may take very different forms. On the level of fact-finding, one may think of the International Fact-Finding Commission established under Art. 90 of Protocol I to the Geneva Conventions. The Justice Rapid Response initiative is another example. Its feasibility is currently being considered by a group of states. The purpose of Justice Rapid Response would be to respond quickly to a request to provide expertise and/or resources in support of efforts to identify, collect and preserve information about genocide, crimes against humanity and war crimes for any accountability mechanism deemed appropriate. The support of states could go further into the area of capacity building, helping a state which is willing to re-establish (or establish) a functioning criminal justice system. The newly established Peacebuilding Commission and the Rule of Law Assistance Unit referred to in the Outcome Document of the UN Summit last September may be mentioned in this context as well. Furthermore, the international community may wish to go as far as to establish, even in the era of the ICC, accountability mechanisms within the national judicial system of a particular state, for example hybrid courts or special chambers comprised of national and international judges. Regional criminal courts might also be an avenue to explore. The only condition, of course, is that all of these are genuine efforts, leading to a situation in which the national judicial system is willing and able “genuinely” to investigate and prosecute.

All of these measures will be most effective when a state is “willing” but “unable”. The situation is much more difficult with respect to a state which is “unwilling”. In such circumstances, it would seem important that all states and international organizations cooperate with the ICC with a view to exercising political pressure on that state in order to give effect to ICC action. In the case of the former Yugoslavia, for example, the criteria for admission applied by the European Union in some instances greatly encouraged cooperation between the states in the region and the ICTY. Apart from exercising political pressure, there are a number of concrete measures that states may consider with a view to enhancing accountability. states may wish,

in their national criminal jurisdiction, to apply the principle of passive personality and perhaps even the principle of universal jurisdiction. The principle of passive personality, meaning that a national court may deal with any crime in which a national of that state has been a victim, is undisputed internationally. This principle is sometimes quite effective: in the Pinochet case, Spain, Switzerland and Belgium each requested the extradition of Pinochet on the ground that nationals of their countries had been among the victims of Pinochet's regime. The principle of universal jurisdiction is more controversial. Its basic idea, though, is an old and a good one: the idea that there should be no safe havens for crimes that are of worldwide concern. It is therefore more the question of the implementation of this idea in concrete situations and not the idea as such which is controversial.

### **Measures outside the area of criminal law**

Justice is, of course, a wide concept and criminal justice is only one part of it. Therefore, transitional justice measures should also include measures outside the area of criminal law. Administrative and civil procedures come to mind: lustration and vetting for example, but also measures aimed at compensation, restitution and rehabilitation. In addition, a whole range of non-judicial measures exist, which have been the subject of other presentations. Truth commissions may be very important, measures aimed at the physical and psychological well-being of victims, training, capacity building in a large sense, etc. All of these efforts should of course be coordinated within themselves, since they tend to be interdependent. But they should also be coordinated with more general issues emerging as a result of a conflict (returning internally displaced persons, humanitarian relief, etc). Finally, the success of transitional justice processes is also related to measures aimed at the mid- and long-term economic recovery of a particular state. Training and education programs, for example, depend on this. Turning a warrior into a carpenter is not enough; if he does not find a job as a carpenter, he may return to his gun. This probably boils down to a very simple statement: Dealing with the past makes sense only to someone who hopes to have a better future. The question "Do I experience justice?" is related to questions like "Do I have food?", "Do I have shelter?", and "Is my family secure?".

### **6.1.6 Conclusion**

Too often in the past, peace and justice have been presented as concepts which oppose each other. There is ample evidence today that peace and justice are in no way mutually exclusive, but that, on the contrary, there is no lasting peace without justice. True, there may be a question of proper timing and of suitable sequencing.



International criminal tribunals, including the ICC, are an important – and in some cases even essential – element in transitional justice processes. The ICC is founded on the idea of complementarity. Taking complementarity seriously would mean that states supportive of the ICC should take all measures available to assist other states in discharging their primary responsibility. States which have invested much time, energy and resources in establishing the ICC should redouble their efforts now and create an international criminal justice environment in which the ICC can deploy its full effect.

A whole range of complementary measures may need to be taken in a coherent and well-coordinated manner. In order to become fully effective, the ICC must therefore become part of an encompassing strategy of dealing with the past and transitional justice. I do not mean by this an attempt to “coordinate” the ICC’s activities. Indeed, the ICC’s prosecutorial and judicial independence is the very basis for its legitimacy and must be fully preserved. Referrals or arrest warrants are not negotiable, for example. So there are narrow limits as to how far one can integrate the ICC. What can be done, however, is mainstreaming the ICC into all activities related to transitional justice and raising the general awareness that the ICC is there as one (but only one) important element in dealing with the past and transitional justice.



## 6.2 Transitional Justice and International Accountability: Challenges and Opportunities

**Jean-Daniel Ruch**

As an institution created by the Security Council and backed by several Security Council resolutions under Chapter VII of the UN Charter, the ICTY is in a very strong legal position. Even so, the authority invested in the Tribunal by the Security Council has been challenged by states of the former Yugoslavia unwilling to cooperate fully. Only when its formal judicial power was supported by *de facto* political power could the Tribunal begin contemplating a successful achievement of its mandate. Pressure from the European Union and the United States eventually persuaded Croatia, Serbia and Montenegro to work closely with the Tribunal on the transfer of indicted persons and for access to documents and witnesses. In other words, the numerous Security Council resolutions calling for these countries to cooperate with the ICTY would have been to no avail had it not been for the political and economic advantages to be gained from cooperation.

To give a few examples, it may be recalled that Slobodan Milosevic was transferred to The Hague on 29 June 2001, one day before the opening of a major donors conference for what was still Yugoslavia. The US government's threat to boycott the conference unless Milosevic was transferred to The Hague convinced the Djindjic Government to comply. Croatia began to cooperate seriously with the ICTY when the prospect of negotiations for accession to the European Union became more tangible. After years of resistance, Serbia and Montenegro recently handed over 16 accused persons as a first step towards Stabilization and Association negotiations with the European Union which could lead to full EU membership.

The ICTY experience shows that it is not so much international law as economic incentives that make states agree to work with the Tribunal. What is the explanation for this situation?

Although there have been changes of government, there have been no real changes of regime in the countries of the former Yugoslavia. Few of the governmental or extra-governmental structures and networks that waged the wars and produced war criminals have been dismantled, or even subjected to ritual "lustration". As a result, there is a deeply rooted resistance to recognizing the legitimacy of a foreign body like the ICTY and to delivering former comrades-in-arms to international justice. Furthermore, the same forces often control or influence the media, maintaining a negative public attitude towards the Tribunal, with the result that the political elite is less ready to stand by its international commitments.

However, since the beginning of 2005, the Serbian and Croatian Prime Ministers have begun to publicly endorse full cooperation with The Hague as being in the national interest not for any political or economical gains but in order to establish the rule of law. This is a welcome new development, building on efforts to create a framework for domestic war crimes trials, assisted over a period of years by the ICTY. A special war crimes chamber within the state Court of Bosnia and Herzegovina became operational in March 2005. Serbia and Croatia have also created institutions to try war crimes cases. This is part of the ICTY completion strategy, one aim of which is to transfer cases involving mid and low-level perpetrators to local jurisdictions. The Prosecutor has filed 12 referral motions involving 20 accused. To date, six of these motions have been heard and one was withdrawn. The Referral Bench granted five motions: four for transfer to Bosnia and Herzegovina's War Crimes Chamber and one for transfer to the Republic of Croatia. One motion has been denied. Four of the decisions to transfer cases have been appealed and the Appeals Chamber has confirmed one transfer.

Transferring cases is not just a technical operation whereby evidence is forwarded to local courts. It also requires the transfer of know-how and the adaptation of local legislation. The ICTY as well as NGOs and various international organizations have developed numerous training programs and seminars to ensure that judges, prosecutors and other court officials will be able to carry out trials in accordance with the best standards of due process. The domestic jurisdictions will not be left to their own devices. The Organisation for Security and Cooperation in Europe (OSCE) has agreed to monitor such trials, and the ICTY reserves the right to reassert its jurisdiction. The main concern is for the protection of witnesses. Although witness protection schemes have been put in place throughout the region, they have yet to prove their worth. It is much more difficult to design effective protection systems in the context of domestic jurisdictions than in the framework of an international tribunal. There are witnesses willing to testify in The Hague who refuse to appear before a court in Belgrade, Sarajevo or Zagreb.

In this way the ICTY has already made a contribution to the rule of law in the countries of the former Yugoslavia. Another important dimension is regional cooperation between prosecutors. At the initiative of the Croatian state Attorney, and with the support of the ICTY, a series of bilateral agreements were signed with neighboring states to allow the direct transmission of documents and evidence between prosecutors. This will not only help considerably in the upcoming war crimes trials but also in other cases, such as those related to organized crime.

It is fair to say then that significant progress has been made in strengthening local judiciaries over the past year. The political atmosphere is still not conducive to a dispassionate handling of war crimes trials however, and this has impacted negatively on the work of the judiciary. It is cause for concern that more than four years after discovery of the Batajnica mass graves containing nearly 1,000 bodies on a police ground near Belgrade, no indictment has been issued.

The assumption in war crimes cases is that justice will help the reconciliation process, and help to satisfy the victims. Since justice establishes facts, it also helps to ensure that the crimes are not forgotten. Balkan history shows that selective memory, without justice, perpetuates conflicts from generation to generation. A few months before his death, Simon Wiesenthal confided to the Belgian daily *Le Soir*: "...without memory, mankind is condemned to repeat the same mistakes and the same atrocities. (...) The hunt must go on. Criminals must never sleep quietly."

Among the 162 persons indicted by the ICTY for war crimes, crimes against humanity or genocide, only seven remain at large. This might be considered proof enough that the ICTY has been successful. But it is not. As long as the two main perpetrators, Radovan Karadzic, the former President of the Republic of Srpska, and Ratko Mladic, the former Commander of the Bosno-Serb Army, remain free, the many thousands of families who were their victims will feel that justice has not been done. Without the International Criminal Tribunal of course, Karadzic might well still be the President of the Republic of Srpska, and Slobodan Milosevic a force in Serbian politics. Ensuring that senior officials responsible for war crimes are removed from positions of power is another valuable service of international criminal justice that contributes to peace and reconciliation. But it is not enough. Trials must take place, crimes must be exposed and sentences passed. With establishment of the ICTY the international community created high expectations. It has an obligation to satisfy them fully.

Are there lessons the ICTY experience can teach to parts of the world outside the Balkans, or for the International Criminal Court? It is difficult to say. The way in which the ICTY proceedings developed was highly specific to the unique historical, social, political and economic circumstances of the former Yugoslavia, where there is also a strong international presence. These factors have produced a unique situation. There may, however, be some universal truths to be learned.

To begin with, it is always easier to put the enemy on trial. Governments are usually eager to try opponents. Serious obstacles begin to appear when it comes to perpetrators from one's own camp. This is not only true for domestic

trials. It applies equally to the level of cooperation provided with international courts. For instance, when the current ICTY Prosecutor, who was then also the Prosecutor of the International Criminal Tribunal for Rwanda, began to investigate the crimes committed by persons close to the ruling elite, the Rwandan government launched a major offensive to have her removed. They eventually succeeded. The experiences in the former Yugoslavia and Rwanda show clearly that the work of transitional justice takes place in heavily politicized environments. To maintain their integrity and credibility, prosecutors and judges must focus on the evidence and never bow to political pressure. This is not as obvious as it seems.

Secondly, international criminal justice is nigh to impossible without robust political backing. Security Council resolutions under Chapter VII were unable to guarantee the ICTY even minimum cooperation from the states of the former Yugoslavia. An international court needs the support of powerful governments ready to use both sticks and carrots to achieve the common aims.

Thirdly, there is a greater need for cross-fertilization between international and domestic jurisdictions. The ICTY addressed this issue on a pragmatic basis, out of necessity. Transferring smaller cases to unprepared judiciaries would have been inconceivable and contrary to the Court's own rules. The principle of complementarity enshrined in the Rome Statute should be an incentive for all member states of the International Criminal Court to establish adequate judicial mechanisms. Furthermore, the states Parties' obligation to ensure that procedures exist for cooperation with the ICC may help to promote the rule of law in these states.

Fourthly, we need to strike a balance in the division of labor between international and domestic judiciaries. While national courts may be reasonably well equipped to try direct perpetrators or lower-level commanders, the trial of high-level officials is a real challenge. This may be due to the lack of political will, or the intimidation of witnesses. Moreover trying former leaders may look like victors' justice. International courts such as the ICTY or the ICC help to overcome such difficulties.

Finally, while the aim of justice is above all to punish crime, it is equally important that justice be seen to be done. The achievements of the International Criminal Tribunal for the former Yugoslavia in this respect are not clear-cut. This is mainly due to the political and media context. The Outreach Program managed by the Tribunal has had some impact at the grass-roots level, but it has not changed the negative overall perception of the Tribunal in most communities of the former Yugoslavia. The governments and political parties are mainly to blame for this. ICTY bashing has been a cheap vote winner for years. NGOs have tried to help, but they must work

under extremely tough conditions. In a best case scenario, it will take at least a generation to repair the damage left by the wave of nationalism that overwhelmed this part of Europe in the 1990s. It means that the facts established by the ICTY must find their place in local education. This is something for the International Criminal Court to work on.





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## **6.3 Transitional Justice and International Accountability: The Role of the International Criminal Court**

### **Paul Seils**

The International Criminal Court has been in operation for just over two years. After establishing its basic infrastructure, staff and protocols, the Office of the Prosecutor (OTP) opened its first investigations into the situation in northern Uganda. Since then a further two investigations have been opened, namely in the Democratic Republic of Congo (DRC) and in Darfur, Sudan. The first two investigations were triggered as a result of referrals from the national governments and the Darfur investigation was triggered by the referral from the United Nations Security Council. Besides these three situations, there are currently seven situations in the generally confidential phase of preliminary analysis where the Office assesses matters of jurisdiction, admissibility and the interests of justice to decide whether to open an investigation. The situation of the Central African Republic is one of those under consideration as a result of the publicly known referral the Office received in December 2004.

### **6.3.1 Complementarity and the relationship with national jurisdictions**

Unlike the ICTY and ICTR, the ICC does not enjoy primacy of jurisdiction over national courts. Indeed, the principle of complementarity is one of the defining features of the Court and ensures that it is in fact a Court of last resort. The OTP can only open an investigation if (a) there are no proceedings that are taking place or have taken place at a national level or (b) if any relevant national proceedings cannot be considered genuine due to a lack of willingness or ability. In this sense the ICC presents a very different model from the Ad Hoc tribunals. It is a model that makes perfect sense for a permanent court whose fundamental aims are to end impunity for international crimes and ensure respect for international justice. The ICC Statute is designed to give full respect to the sovereign right of states to prosecute matters within the ICC's jurisdiction. More than that, the OTP has made it clear that, as a matter of policy, it believes that it should encourage all states to do all they can to deal with matters at the national level. It is clear that the most effective way of meeting the aims of the Statute is for national authorities to carry out effective investigations and prosecutions wherever possible.

This is the framework that circumscribes the nature of the ICC's relationship with national authorities. It raises many questions, only some of which can be reasonably addressed here. I will look first at the role of the OTP in encouraging national proceedings.

### 6.3.2 Encouraging states

There are essentially four ways in which the OTP can encourage national proceedings. Firstly, by consistently reaffirming and demonstrating that it takes seriously the principle of complementarity, it gives life to this essential feature of the Statute. Secondly, the Office can seek and share information with states. As a matter of general practice, the Office will normally seek further information from states where there may be a reasonable basis to believe that crimes within the jurisdiction of the Court have been committed. Such a practice by no means necessarily indicates that the Office considers an investigation probable, but it may help to focus states on the seriousness of allegations and the fact that the Court may have a role to play if it does not act. Thirdly, on a more general level the Office may be able to discuss broad approaches, best practices and lessons learned with relevant justice actors from states Parties, and actively help in developing networks to develop understanding of technical and policy issues in the investigation and prosecution of the kinds of crimes under the Court's jurisdiction. Fourthly, in some situations the Office may in fact assist in a practical way at a national level, but there are serious restrictions on the scope of such activities both on the basis of the Office's mandate and its resources. The Office does not have a clear mandate to assist in the building of national capacities and even if it had, the extent of its role would naturally be limited due to limited resources.

A matter related to the encouragement of states has been the largely unforeseen development of state "self-referrals". This is clearly a positive development in demonstrating the legitimacy and relevance of the Court. However it also raises some practical issues. If complementarity is to be effective, it is important that the Court is not used as an escape route by states to avoid confronting difficult problems. In order to avoid this, the Office will always carry out detailed examination of all relevant issues to ensure that the case would be admissible and that it would be in the interests of justice to open an investigation. A referral, it should be noted, does not guarantee that an investigation will be opened. It is a trigger for jurisdiction that means the issue will be actively considered by the Office.

### 6.3.3 Assessing national proceedings

It is sometimes overlooked that complementarity requires the application of a two-stage test. In the first place the question is whether national proceedings are taking place at all. If the answer to this is no, the case would be admissible and there is no need for any further assessment on admissibility issues. If there are national proceedings, we must assess whether they are genuine by considering the issues of willingness and ability.

The assessment of national proceedings is a complex one. It involves consideration of decisions not to investigate, investigations that have been carried out and prosecutions. The Office will not always be in a position to carry out direct monitoring activities. For complementarity to be an effective principle it is important that other agencies besides the OTP develop the technical skills and resource capacities to look into decisions made at national levels on these kinds of criminal investigations. In some circumstances the Office will engage directly with the appropriate officials to understand the nature of proceedings and why certain decisions were taken but it will rely heavily on national and international NGOs as well as official bodies including those within the UN family.

The Office has developed a number of factors that it considers important in assessing national proceedings, the vast majority of which are relatively obvious. These include, for example, delay in proceedings relative to other cases of similar complexity; the application of different rules or procedures from those that would normally apply; whether charging choices reflected the nature of the evidence obtained or that could be easily obtained; intimidation of witnesses and whether there is clear evidence of bias on the part of judges or prosecutors.

However, it has to be remembered that the ICC is not a human rights court in the style of the Inter-American or European Court, established to guarantee protection of rights, but a criminal court designed to investigate serious crimes. The main issue that faces the Office in these circumstances is not the general protection of rights but whether efforts to prosecute are genuine. It is possible that a national system, though somewhat inefficient or even corrupt, may nonetheless carry out genuine proceedings in respect of cases that might otherwise be dealt with by the ICC.

#### **6.3.4 Local impact of ICC proceedings**

It cannot be emphasized enough that genuine national proceedings are the goal of the Rome Statute. Experts generally agree that such proceedings represent the best option for a broad variety of reasons: genuine national proceedings will have the biggest impact on restoring confidence in the national institutions of justice and the rule of law; they will be more meaningful to local victims and witnesses who have suffered directly at the hands of perpetrators and help to restore dignity to victims; they are likely to be much more efficient and logistically feasible. By definition, ICC proceedings are a second best option to the ideal of genuine national proceedings. Strenuous efforts can be made by the ICC to ensure that the limitations of international justice compared to genuine national proceedings

can be mitigated but they will rarely be eliminated. It is therefore important to be realistic in terms of the expectation one has of the impact ICC proceedings can have nationally. The most direct and obvious impact will be in carrying out effective investigations into those suspected of bearing the greatest degree of responsibility, thus challenging impunity and building up the credibility of a deterrent threat. While by definition our actions will depend on a level of inability or unwillingness by the state, it does not necessarily follow that ICC action means there is no scope for increased confidence in national institutions. The level of effective cooperation with the Court may serve as an indication of the degree to which the state is inclined to contribute to ending impunity.

However, it is also clear that the Court can learn many lessons from the experiences of the Ad Hoc and mixed tribunals in terms of communications strategies, outreach programs and effective protection mechanisms. The Court has been in frequent touch with these bodies in order to develop adequate programs in these areas. One possibility that has been aired in public debates is the idea of some parts of proceedings of the Court taking place either in or near the country of the victims. This appears to be an idea that could be given serious consideration but would of course depend on a Court decision and not simply the OTP. In the meantime the OTP dedicates a considerable amount of time to explaining its mission and approaches in a variety of ways. One particular way that has proved successful in Ituri, DRC has been to engage in local radio programs, directly answering the questions of locals on issues of concern. It is intended to extend this initiative in relation to the investigations in Northern Uganda and Darfur.

The nature of the OTP's outreach and communications strategies will always be significantly predicated on the interests of witness security. In the case of the Northern Uganda investigation, a low profile was needed in the first months and indeed was requested by local groups. This helped to maintain a secure environment for victims and witnesses, give space for the evolution of other initiatives aimed at bringing an end to the conflict in the area, and develop a relationship with local leaders. Since the beginning of 2005 the OTP had made it clear that the low profile approach was no longer needed and like all other organs of the Court supported the idea of a proactive outreach.

A question related to local impact is the so-called impunity gap. The mandate and resource limitations that apply in respect of the Office assisting in complementarity circumstances *a fortiori* apply in relation to the impunity gap too. To the extent that national authorities seek to pursue lower level suspects for prosecution and seek guidance from the Office, such assistance could be offered in terms of a general sharing of information and experience. Under the provisions on cooperation in the Statute, the Court may provide information

to states in relation to information that it has obtained as a result of its own investigations. Also, the development of networks and opportunities to develop expertise is very much to be welcomed and the Office will play as active a role as it possibly can in such endeavors subject to the constraints of its mandate and resources.

### **6.3.5 The interests of justice: balancing prosecutions and security (among other things)**

In determining whether there is a reasonable basis to proceed with an investigation, the Prosecutor must be satisfied that there are no substantial reasons indicating it would not be in the interests of justice to do so. This concept of the interests of justice provokes considerable anxiety and doubt. On the one hand some people take the view that the Prosecutor has no right to consider the issue of ongoing peace negotiations while carrying out investigations or framing indictments. Others take the view that he is duty bound to give every possible opportunity for peace to prosper, even if it effectively means conceding impunity – and between these polarized views there are of course many shades of gray.

As a matter of fact, the Office has thus far tended to view the issue not so much as a competition between peace and justice but rather through the prism of the interests of victims as mentioned in Article 53 of the Statute. Where there appears to be a threat to victims and witnesses as a result of OTP activities, all reasonable steps will be taken to mitigate those risks, including lowering the profile of the investigation and possibly even suspending investigative activities until security improves. To the extent that the OTP may threaten the viability of any peace process, the Office will have to consider the facts and circumstances of each case. It is almost certainly imprudent to suggest binding principles where so many potentially determinative factors can vary significantly from situation to situation. What can be said is that the Office does not take the view that an investigation has to be carried out at all costs. The Office is required to strike the right balance between ensuring respect for the enforcement of international justice on the one hand and not creating circumstances which may lead to mass atrocities being committed all over again. Such a balance requires providing a credible threat to suspected criminals but also presenting a credible institution to the world that takes the rights and needs of victims and broader communities seriously. The creation of the Court is an act which itself indicates that as a matter of general principle the days of impunity are over. As a permanent Court there is the flexibility to ensure that circumstances are as propitious as possible for investigation if such an approach appears necessary. What should not be in doubt, however,

is that the states Parties have sent out a clear signal that a central aim of the Court is the enforcement of international justice and as a general principle, therefore, criminals should not expect to be able to barter impunity for peace.

### **6.3.6 Transitional justice and the ICC: merging principles for dealing with the past**

The OTP takes the view that the ICC is a key figure in the field of transitional justice, but it does not believe that the Court can or should seek to stand alone as the panacea for countries struggling with the trauma of past atrocities. In this sense it takes a two-level integrated approach. On the one hand with regard to justice, it considers that criminal justice is only a part of the solution and that other key issues such as reparations, institutional reform, truth seeking and traditional justice mechanisms must be encouraged as part of an integrated response to the challenge of finding a meaningful concept of justice that not only punishes, but serves to restore the injured dignity of victims and to restore confidence of communities in the ability of their state to defend and uphold the rule of law. On the other hand, the OTP recognizes that transitional justice however integrated can neither present itself as a complete solution to the complex and urgent problems that face the societies in which we most frequently work. The goals of justice have to be integrated in a comprehensive way with other pressing demands which may include humanitarian assistance, dialogue for peace, provision of security and broader development goals. The challenge for the ICC and other agencies is to find the most effective way of acting together in ways that not only respect each others' mandates but also enhance the prospects of mutual success.

Bearing this in mind, the Office has developed a number of initiatives in relation to specific investigations as well as at the general level. For example in the case of Northern Uganda, the Office spent several weeks in discussions with local community leaders on the relationship of the work of the Court to local peace and justice initiatives. It became clear that this process of dialogue was very instrumental in eradicating some fears but more importantly in developing ideas for how different efforts could complement rather than contradict each other. Similarly, fruitful discussions with different branches of the UN family are helping to increase understanding and creativity in terms of independence and interdependence.

The principles for dealing with the past have probably been well-established over the last couple of decades. These are by now part of mainstream thinking as can be seen, for example, in the Secretary-General's report on the Rule of Law and Transitional Justice where the ICC figures as a key element. The challenge now is not so much defining the principles but operationalizing

them. It is incumbent on all groups working in the field of transitional justice to think creatively and collectively about how we meet the challenge of working with others engaged in different fields but similarly seeking to bring an end to atrocities and conflict.





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## 7 Panel 5

*International Engagement and Emerging Principles:  
Integrating Approaches and Visions for the Future*

Panelists: M<sup>o</sup> Bleeker  
Yasmin Sooka  
Juan Méndez

Moderator: Jonathan Sisson

**Guiding Questions:**

Dealing with the past and transitional justice are understood not only as instruments to further democratic transition in post-conflict societies, but also as contributors to a larger process of societal transformation. In this regard, a number of broader issues addressing the question of roles and visions should be addressed. What can dealing with the past and transitional justice contribute to the transition from a culture of violence to a culture of peace? What are the main challenges for external actors with respect to dealing with the past in post-conflict societies? What are the ethical guidelines for dealing with the past and visions for the future in the field of transitional justice?

Aside from the broader questions of vision, specific issues with regard to the use of particular mechanisms such as truth commissions should also be raised. Are truth commissions an adequate instrument in dealing with the past? Should reconciliation be the goal of a process in dealing with the past? Would greater public participation in the design and implementation of truth commissions render more justice to survivors and victims families?



## 7.1 Challenges to the Implementation of Transitional Justice

### Mô Bleeker

Earlier in the conference, we listened to a presentation by Helen Mack about the difficulties of pursuing transitional justice in Guatemala. The 1996 peace agreements, magnificent in substance, were signed at a time of political and military stalemate in that country and in the context of the “pacification” of Central America. The situation can be characterized by the absence of local ownership and lack of internal leadership to defend the political aspect of the peace accords and accept responsibility for them. In the referendum of 1999, the vast majority of voters rejected the idea of including important principles of the peace agreements in the Constitution. Despite these signals, the international community continued to congratulate itself on the “peace process”, for which it had become the only guarantor. Even now it is reluctant to acknowledge its failure. Due to a lack of political will, the agreements have not been implemented as required. We have seen the consequences: institutionalization of impunity at all levels, increased violence, a lasting structural exclusion and a general lack of development. In short, even though the war has ended, violent conflict continues. From the point of view of transitional justice, Guatemala can be seen as a paradigm.

I shall confine my remarks to certain key aspects of strategies for dealing with the past and their implementation: local appropriation, new leadership, multiple mediations, external actors, the role of victims and certain aspects of reconciliation.

### 7.1.1 Local ownership, new leadership: the need for multiple mediation in the post-agreement period

Efforts to seek a peace agreement at any price and almost exclusively with the support of external actors are hardly likely to succeed in establishing sustainable transformation to a real peace. It is therefore indispensable to encourage the earliest possible emergence of a broad-based political coalition in favor of negotiations. There is also a need to organize formal spaces that will enable large sectors of society to discuss the political aspects of the peace agreements and to intervene. This internal appropriation process should already begin while the conflict is still raging.

Cease-fire agreements negotiated between armed groups are a small first step. Political agreements need to have broader based participation – from the private sector, religious institutions, trade unions, academic circles, human rights activists, youth, women, and various ethnic groups. Civil participation should also play a key role in the strategies and objectives of programs for

dealing with the past. Symbolically as well, the emergence of multiple actors representing a variety of interests and viewpoints itself indicates the demilitarization of culture and the emergence of a “plural nation”, with voices of dissent chipping away at the monopoly of authority by the supporters of violence.

Dictatorships, civil wars and genocide created conditions that were often extremely challenging for those who fought to protect human rights, to promote justice and peace – the many who accepted the role of “Mother Courage” and “Father Courage”. Repression, death, internment in camps or prisons, and torture have often been the fate of these worthy and courageous people. Leaders who believe in democracy, from the private sector as well as the political arena, have often seen their own group or party melt away or become polarized during the conflict. Members of the diaspora, whose relationship with the homeland and with the conflict is complex, are preparing to return; meanwhile demobilized, the armed actors are again taking their place in society in the framework of the demobilization process (which often pays little attention to the thorny issues involved in reintegration).

Indeed, once the first feelings of euphoria at the signing of the peace agreements have passed, one often sees a major leadership crisis. In many cases, the leaders are still traumatized, suffer from deep antagonism, and can be sometimes very authoritarian. It is difficult for the leadership of these groups to embrace a new political dynamic and new leaders have yet to emerge. And as soon as the agreements have been signed, the difficult job of implementation begins with the due efforts to ensure that there will be no repetition of the past wrongdoing. Everything becomes urgent: reconstruction, economic development, measures of transitional justice, reform of the structures which made the violations possible, eliminating the root causes of the conflict, and so on. It is often at this precise moment that lack of creative leadership, both at the level of government and in civil society, weakens the dynamic of conflict transformation, hindering the development and implementation of strategies for dealing with the past. By nature, transitional justice is a matter of contention. If properly negotiated, it can create a new dynamic for constructive dialogue. On the other hand, it can generate violent tensions if the local actors face a crisis of legitimacy, lack the technical instruments that would allow them to address such complex matters, and, if no space for formal dialogue exists following negotiations concerning the peace accords. In such cases, transitional justice is at the mercy of polarization and may even become a threat to the entire peace process.

It is at this delicate stage that what I call “multi-track” mediations become indispensable. This means, above all, supporting local government and civil

society actors in the difficult task of implementing the peace agreements at a time when the culture of confrontation is still active. Negotiating the application of strategies in these areas, particularly in the field of dealing with the past, is a complex task which, in addition to technical know-how, requires mastery of the processes of negotiation and mediation. At this stage everything still needs to be organized and many issues still need to be negotiated with multiple partners, usually at the level of track 1.5. The participation of civil society at this stage is an absolute necessity. Often, however, neither the agents of government nor civil society actors have any experience in this kind of dialogue. But after a peace agreement is signed the real work begins, the work of implementation.

Not enough attention is given to the fact that multiple and multi-track mediations are necessary to ensure that peace agreements will be owned by large sectors and will be implemented. It is indispensable to begin multiple mediations immediately after the signing of peace agreements, to ensure that there will be constructive dialogue and cooperation between different sectors and actors at each step required for implementation.

External actors can play a crucial role at this point, by strengthening national leadership, governmental and non-governmental, and preparing a new generation of leaders with greater gender balance. These leaders should be trained and given the technical support that will help them to master the various issues, particularly those for dealing with the past, as well as negotiating skills. Expert mediators and persons who can provide technical advice on dealing with the past should be invited to help the local actors, to enable them to agree on agendas, and on the concrete measures that need to be taken, including measures for verification and accountability.

External actors who have been closely involved in a conflict, and perhaps played an active military role, should question their own ability to function as facilitators in the post-conflict period, and ask themselves if they have the necessary credibility to take part in transforming the conflict. External actors who have been part of the conflict can hinder the emergence of new leaders, new political fora and new points of view, causing considerable harm. It may be important for them to step aside and open the way for new actors.

### **7.1.2 Facilitating the direct participation of victims**

The example of Guatemala teaches us that in the absence of a political will for conflict transformation, the burden of advancing the cause of justice, human rights and the peace process falls on the shoulders of the victims. Those who once needed only to worry about protecting themselves against death and

violations of their basic rights are today burdened with the struggle for justice and against impunity. Since the victims are expected to forgive their persecutors, the reconciliation process becomes an extra burden, particularly when based on a watered-down version of Christian principles. Moreover, when political will is lacking and the system resists efforts to dismantle the structures that led to the violence in the first place, the victims are made the scapegoat. Efforts are rarely made to involve victims in political decisions about transitional justice and, adding insult to injury, many actors do not hesitate to speak on their behalf. Thus, when transitional justice measures are planned, instead of being directly involved as should be the case, the victims often are not even consulted. Another challenge therefore is to facilitate the participation of victims in the development of strategies for dealing with the past. Here too we need to think in terms of technical support (knowing the ins and outs of transitional justice) and negotiating skills. Too little is done in this area. It makes no sense to insist on the victims' participation when we fail to ensure that they have the means to participate.

If it is true that the very essence of "dealing with the past" strategies requires reconciliation, non-repetition and rehabilitation for the society as a whole, then the full and comprehensive participation of the victims in the development and implementation of transitional justice measures can make it possible for these same victims to graduate from being just survivors to citizen survivors, and finally citizens who have been rehabilitated and restored to their full rights. Experience shows too that transitional justice measures are much easier to apply and more sustainable following negotiations of this type, with the full participation of victims' associations.

### **7.1.3 Transitional justice, a tool for reconciliation?**

Transitional justice as an integral part of conflict transformation could be a tool for shaping a new society. Transitional justice measures based on local participation and supported by multiple mediations can become a driving force for the promotion of peace, human rights and the rule of law. Transitional justice of this sort can also avoid the establishment of a "justice of the victors", a mockery of the word "justice" entirely lacking in visionary force and genuine restorative power.

Peacebuilding is intrinsically linked to the promotion of human rights, the rule of law and the idea of civil participation. Once "woven" together, these three strands create a stronger sense of security and help to rebuild confidence. When transitional justice is accepted as a way to achieve this new "woven" fabric, it brings truly dynamic support to the process of reconciliation. The result of this process should be a societal pact and a new national ethos, essential ingredients for a lasting peace.

But this leads us to the “how” of transitional justice rather than to the “what”. The lessons learned already show the way forward:

There is increasing consensus around a view which holds that transitional justice has four main pillars: establishing the facts, justice, reparations, and institutional reforms. Moreover demobilization, disarmament and reintegration, often referred to as the “DDR” aspects, also have their place in this framework. Full implementation of each of these factors is generally expected to lead to non-impunity and a guarantee of non-repetition, all of which should, in turn, produce the new dawn of reconciliation. But care must be taken at each step, with no efforts to cut corners. The focus must be on a society’s rehabilitation and not just on punitive justice. Half measures can turn the vision of transitional justice into a chimera and empty it of all meaning. Inversely a merely restorative vision devoid of punitive aspects could serve to continue the conflict, making use of transitional justice for other purposes. No support should be given to such designs.

As for fact-finding activities, these must make it possible establish the nature of the crimes committed and their extent, while exposing the system responsible for the violence and for exclusion, genocide and dictatorship. It should also help to identify areas that require structural modification. We owe it to the victims to recognize the nature of their sufferings, to unmask their persecutors and expose the rationale of the system that led to the crimes from which they suffered. They must be helped to overcome feelings of guilt for allowing themselves to be caught up in the machinery of victimization. This is important because it strengthens their resilience, and helps them to see themselves as full citizens in a new society.

Fact-finding must also help to separate those responsible for major crimes from armed actors without responsibility for such crimes. In this context, measures aimed at the reintegration and rehabilitation of former combatants are another important factor. The absence of support and of serious strategies can leave former combatants who have no responsibility for major crimes in a situation that is unbearable, eventually forcing them to throw their lot in once again with illegal groups, and to resort to further domestic or criminal violence.

We are also aware of the fact that a careful gender oriented policy is required to provide the victims with the special support they need in efforts to acquire a new resilience. Veterans returning to civilian life need similar support, and much remains to be done here. In dealing with veterans the focus still tends to be on justice rather than on rehabilitation or psycho-social assistance. Here too more needs to be done.

Criminal prosecutions and related procedures such as vetting and lustration are important for the consolidation of a major political transition. Such efforts must, above all, help to strengthen the local rule of law and local institutions, and to build mutual confidence between the citizen and the new regime. The efforts of international and special courts, which are also important, often receive no funding.

As for institutional reform, which is also crucial, this must be supported by unwavering political will to be effective, and must be carried out in strict accordance with international norms and standards. It must be approached in a way that avoids any suggestion of “witch hunts” or the desire for revenge and without undermining the ability of public institutions to function.

These preliminary measures require the actors to be capable of dialogue and negotiation, and able to rely on certain technical resources for a period of years. The process of transitional justice usually involves countries that are poor, with ruined economies. Difficult choices have to be made: whether to finance homes or roads, a local court or compensatory measures, etc. Despite this, the international community must focus its attention on the need for transitional justice, taking a view that is as holistic as possible. Everything should be undertaken to bring together the representatives of government and of civil society and to steer them towards a consensus on priorities that the international community will be able to support, politically and financially.

In conclusion, I would like to say a few words on the subject of reconciliation. It is a term that I avoid because it is used in such a variety of contexts, which leads to much confusion. In the West, the term has religious connotations and refers mainly to the intimate, private sphere. In some religions and cultures it is unknown. They have no use for reconciliation. Its use as a catch-all phrase is to be avoided. If we must use it, the precise meaning should be made clear each time. It would be a good idea to give to reconciliation a consistent meaning and a clearly defined underlying concept. What does it mean at the national level? A society that has rediscovered the ability to manage conflicts in a non-violent manner? A society that can live with a plurality of opinions, races, cultures and religions, and which sees this as the basis of its identity? A society whose structures allow for inclusive development, rather than the exclusion of some, and which has an ethos accepted by all? Is that what we mean when we talk about reconciliation?

If I am not mistaken, the signs used to write the word “wa” (“harmony”) in “wa-kai”, the Japanese word for “reconciliation”, correspond to the symbols for a mouth and an altar. Mouth for word and altar for a public place. It may be a folk etymology, but I like this association of ideas: words expressed in a public place. The locus is the community and the subject is the word spoken



before all, for all. This is similar to the Latin term *concilio* or council. Finally, efforts to deal with the past should lead to rehabilitation of the community and the renewal of its vocabulary, a metaphor for the rediscovery of identity and a state of sovereignty.

There are so many things we do not know – in the context of transitional justice, how can a society that has been traumatized by conflict truly heal itself? Transitional justice that does not go hand in hand with the political objective of conflict transformation – allowing the society to be both “council” (place of meeting, community, social fabric) and “counsel” (exchange of words and views) – risks losing its power to heal, becoming instead a source of new troubles, fostered by a culture of impunity, in a vicious circle.



## 7.2 Dealing with the Past and Transitional Justice: Building Peace through Accountability

Yasmin Sooka

### 7.2.1 Introduction

I wish to thank the organizers for inviting me to this conference as it represents the beginning of a dialogue on issues which I have been concerned about. Having been a Commissioner on two truth and reconciliation commissions in two post-conflict countries, South Africa and Sierra Leone, and having consulted at a number of others, I find this conference opportune.

In the short term, are we as practitioners making a difference through the work we do or are we short-changing victims? I vacillate on the answer depending on whether I am lamenting my own government's decision not to proceed to prosecutions expeditiously as they promised, or jubilating because they finally established a unit to deal with disappearances. Likewise, in the context of Sierra Leone, I experience a sense of accomplishment on the publication of a good report and deep disappointment at the weak white paper issued by government on the recommendations.

In the long term, does transitional justice contribute to building democracy and a culture of respect for human rights? Should we even use the term 'transitional justice' as this implies an end in itself?

Transition to what? When does a transition begin and when does it end? Can a commission operate in a country where the conflict is ongoing and there has not been a cessation of hostilities?

In examining the question of 'ownership', the issue of what I call the "space ship" approach must also be explored. What happens if all the political parties are not committed to a peacebuilding process and to the institution of a truth commission? In countries ravaged by conflict, in which donors' agendas prevail, is this ultimately in the long-term interest of the country? How does this issue impact on the truth commission and its ultimate goal of building credibility for its findings and recommendations? Will the report be accepted by all? Has it instilled a sense of ownership with the domestic government, sufficient to ensure that its recommendations are implemented? This is an important aspect if there is to be acceptance of the findings of the commission. Ownership of the process is linked to such acceptance, which in turn provides the impetus to implement the commission's recommendations.

A pertinent example is provided by the Democratic Republic of the Congo where a truth commission has been established against the backdrop of ongoing violent conflict and under pressure from peace brokers. The commission itself has members who are associated with warring parties and, as such, do

not qualify as being impartial and is hampered by the fact that the conflict does not permit it to engage in any meaningful activity. Under these circumstances, can such a commission function with credibility?

In attempting to grapple with these questions, I will formulate a few guiding principles based on my own personal experience.

### 7.2.2 Guiding principles

At the outset, we need to accept that we are dealing with deeply flawed processes and trade-offs. Given the particular circumstances which exist at the time of the negotiated settlement, it may represent the best possible deal for civil society. The point is that any process should be adapted to the local conditions and context. One size cannot fit all.

In this regard, we should be aware that:

- Transitional justice should incorporate a rights-based developmental approach which provides for:
  - Participation of all parties, particularly civil society
  - Accountability to civil society with an emphasis on the victims of violence, ensuring that both statutory and administrative measures are put in place to achieve the goals set
  - Non-discrimination – all of the parties are treated justly irrespective of the side they come from
  - Empowerment of local actors and civil society
  - Linkages to other democratic initiatives and institutions;
- Transitional justice must take place within the context of a shift to democracy, so as to avoid a recurrence of the causes which gave rise to the initial conflict;
- Transitional justice cannot and should not be considered an end in itself;
- Ownership of process – there should be buy in from all;
- Public participation.

### **Transitional justice in the context of a shift to democracy**

Transitional justice mechanisms are not established in a vacuum. They are established to deal with human rights abuses which have emanated from past conflicts. In many countries, while negotiated settlements may give rise to peace, the transition to democracy has the potential to be scuttled by diverse interest groups who remain a threat to peace. Most conflicts however are not only about victims and perpetrators; they include the beneficiaries, i.e. those who benefit from the unjust political and economic order prevailing before and during the conflict, as well as other actors.

Many of the transitional arrangements in Africa over the last decade have given rise to a truth recovery process either in the form of a truth commission or, in some instances, to a truth commission operating side by side with a criminal justice mechanism, taking the form of a special 'hybrid' court, which has both a domestic and an international character.

Transitional justice in the context of a democratic option cannot be addressed simply by talking about truth recovery mechanisms or criminal justice options. If the opportunity provided by the transition is not squandered the potential exists to begin the process of building the institutions of a democratic state based on the rule of law.

### **Exercise of caution in choosing options**

Over the past decade truth commissions have become the most common instrument chosen during the negotiated settlement to deal with issues of transitional justice. Yet, we should be careful to ensure that truth commissions do not become the new panacea to address all the ills of the past.

### **Ownership of the process**

Ownership of a transitional justice process is also a huge factor in countries which have been ravaged by conflicts. In a number of African countries, specific approaches have been accepted because the peace process was influenced by external actors who helped to bring about the cessation of hostilities and who therefore were able to influence the instruments and institutions which go into the peace agreement.

This can translate into a latent hostility by those in government who now have to implement the agreement. In these circumstances, the government may be indifferent to whether these institutions are established and properly funded. It may also result in the appointment of commissioners who have deference to the ruling party or faction and who are not committed to the work of the truth commission. This can have devastating consequences for such a commission.

Another phenomenon which is experienced mostly in Africa is what I term the “space ship” parachuting in to rescue the local community without understanding the context or the dynamics in which they are operating. Once the institution has come and gone, local actors are left to deal with the negative consequences left behind. This is not meant to denigrate or diminish the contribution of the international community, but should rather serve as a caution to ensure that national institutions and actors are integrated into any process.

### **Public participation**

Truth and reconciliation commissions which have been established through wide public participation processes have been effective vehicles for change. Civil society, if involved in the decision-making process from the outset, will have the opportunity to influence the law-making process, including the formulation of the commission’s mandate and the selection of its commissioners, and will be well positioned to hold the commission and government accountable.

Two examples of this are South Africa and Liberia. In South Africa, a powerful network of civil society organizations succeeded in removing ‘secrecy clauses’ that had been inserted by politicians from the major parties into the legislation for the commission. They influenced the public process by which commissioners were selected and monitored the work of the commission, thus holding the commission accountable. The ‘public’ nature of truth commission proceedings, a standard set by the work of the South African Commission, has become a benchmark for the work of all other commissions in Africa.

Liberia, in the past 12 months, has seen a strong group of civil society activists do the same thing with a similar impact. They have driven the lawmaking process and have conducted intense lobbying and advocacy activities, thus ensuring that the legislation would pass through the interim parliament. The Truth and Reconciliation Commission is the first democratic institution to be established in Liberia since the removal of Charles Taylor’s regime. Although Chairman Bryant appointed commissioners prior to the legislation being enacted, the efforts of civil society have succeeded in ensuring that all of these commissioners were compelled to undergo a similar vetting and public scrutiny process. In the run-up to the election, all of the political candidates for presidency publicly expressed their support for the truth commission, recognizing its importance for Liberia. This bodes well for ownership and accountability to the nation.

### 7.2.3 Circumstances in which a truth commission is the appropriate instrument to deal with transitional justice issues

In determining whether a truth commission is the appropriate structure to deal with transitional justice in any country, there are key issues which must be considered:

- Nature of the violence and human rights abuses to be investigated;
- Nature of the political transition;
- Extent of the dominance and power of perpetrators after the transition;
- Focus on justice, healing, and reconciliation;
- Public support for a truth commission;
- Contribution to building a culture of respect for human rights, democracy, and the rule of law;
- Potential for participation, accountability and empowerment.

#### Nature of the violence and human rights abuses to be investigated

In countries, in which there has been a history of human rights abuse, it is important to pay attention to the circumstances in which the abuse took place when developing the mandate of a truth commission. In the case of a repressive regime, when the perpetrators are mostly on one side, there is less likelihood of a contestation. In connection with a civil war, however, in which all sides share responsibility for the abuse committed, there is always the likelihood that a commission may be compromised by accusations that the crimes committed by the other side(s) have been neglected.

This was certainly true of both South Africa and Sierra Leone, where the side no longer in power and individual perpetrators expressed the view that the commission would be a witch hunt against them. In both instances, it was important for the respective commission to demonstrate publicly that it intended to deal with the violations committed on all sides.

This can be addressed, of course, by ensuring that the legal definitions of 'perpetrators' and 'victims' are politically neutral. While this can result in the identification of some persons as both perpetrator *and* victim, it should not be seen as a dilemma, as it is a question of upholding values rather than an adversarial approach which holds one party being right and the other in the wrong.

In articulating mainly a reconciliation agenda, a commission may become embroiled in focusing overly on this issue, while not exploring the morality of the one side's taking up of arms against the other. In the case of South Africa, while the legislation provided for the commission to examine and investigate violations carried out by both sides, the commission's interpretation of its mandate as being 'even handed' resulted in many observers and members of the liberation movements feeling that the commission had criminalized the resistance which they regarded as a 'just struggle' given the situation in South Africa. While the commission sought to draw a distinction between a just war and a just cause, this was not easily understood by ordinary people in South Africa.

A lesson perhaps for any commission is that it should announce, quite early on in its work, its intention to scrutinize the manner in which the conflict was conducted. This will ensure that there is never a potential for a culture of impunity, even if you were ostensibly on the side of those who had 'just cause'.

In Sierra Leone, the Civil Defense Forces (CDF) were seen in most quarters in the country as the legitimate force that had protected the larger community against the Revolutionary United Front (RUF) and Armed Forces Revolutionary Council (AFRC). This is the reason for the outrage expressed by many when Chief Hinga Norman, the erstwhile Minister of Defence, was indicted for his role in the conflict as the head of the CDF. While many people could identify with the indictment by the Special Court of members of the RUF and AFRC, the indictment of Hinga Norman was widely perceived as unjust.

### **Nature of political transition**

The manner in which a prolonged violent conflict is brought to an end has a huge impact on the choice of approach to be employed during a transition. A military victory by one side over the other will usually allow for a criminal justice mechanism. A negotiated peace agreement which initiates a transition to democracy on the basis of a voluntary transfer of power will result, in most instances, in a truth commission being established.

### **Extent of the dominance and power of perpetrators after a transition**

A third crucial factor to consider is the continuing power of perpetrators to influence the transition. In most countries where perpetrators have the potential to create fear and bring about further violence which may destabilize



the country, the negotiated settlement will usually result in some form of amnesty. Often the amnesties may have been negotiated or legalized before the old regime left office.

It is important to take into account how this factor will constrain the work of a truth commission. It certainly limits the scope of the investigations particularly in regard to the security institutions such as the military and intelligence structures.

South Africa instituted a conditional amnesty which helped to contain the role of the security forces. The legacy of this, however, is that the new government lacks the political will to begin prosecutions, which it pledged to do in respect of those who had not applied for amnesty. This is causing huge anger and bitterness in the country particularly among victims who articulate the view that the commission benefited perpetrators.

### **Focus on justice and healing**

In establishing a truth commission, although healing and reconciliation are important, justice for victims should be given priority by ensuring that it is part of its core mandate. Otherwise the success of the commission will be at risk. Justice should include truth recovery, recognition, reparations, as well as the restoration of civic trust and the building of social solidarity or cohesion.

### **Public support for a truth commission**

Unless there is widespread public support for a truth commission, which includes the broader public, political parties, the political elite, as well as civil society, it is unlikely that the commission will enjoy cooperation or achieve success. Public support is a crucial factor in establishing a truth commission and should not be underestimated.

## **7.2.4 Possible contributions of a truth commission during a period of transition**

Having considered the circumstances under which truth commissions are established, it is useful to frame the positive aspects that they may achieve if properly managed:

- Helping to build democracy;
- Acknowledgment ;
- Dealing with the denial of the past;

- Responding to the needs of victims;
- Reparations;
- Reconciliation;
- Building a common narrative of the country's past and thus ensuring a common set of premises from which to build for the future.

### **Helping to build democracy**

Transitions from oppressive undemocratic regimes to democratically elected governments, if properly managed and monitored, offer a window of opportunity to rebuild the institutional framework necessary to ensure the sustainability of democracy, build a human rights culture, and advance the rights of women, all of which are necessary for sustainable peace.

The processes adopted during the life of a truth commission are vital for the democratic future and should be accountable, transparent, accessible, and participatory. Given its potential to create a cadre of non-partisan individuals committed to human rights and the rule of law, a truth commission can empower nationals to assume roles in democracy-building institutions such as human rights commissions, electoral bodies, and gender commissions after its mandate has ended. (This list is not intended to be exhaustive.)

In this context, truth and reconciliation commissions are usually tasked with dealing with impunity, establishing accountability through truth-seeking, focusing on the rights of victims, the right to know, designing an appropriate reparation program, recommending institutional reform ultimately leading to reconciliation.

### **Acknowledgement and recognition**

Truth and reconciliation commissions offer the opportunity for victims to come forward, tell their stories, and have the wrongdoing done to them acknowledged by the wider community. The public acknowledgement by an official body contributes to their affirmation and healing. That victims could reclaim lost status through such a process was the opinion argued by Ishmael Mahomed, South Africa's first black Chief Justice of the Supreme Court, in the Azapo judgment:

"The Truth and Reconciliation Act seeks to address this massive problem by encouraging survivors and dependants of the tortured and the wounded, the maimed, and the dead to unburden their grief publicly, to receive the

collective recognition of a new nation that they were wronged, and, crucially, to help them to discover what in truth happened to their loved ones, where and under what circumstances it happened, and who was responsible".<sup>1</sup>

### **Dealing with the denial**

Truth commissions are a powerful tool in dealing with the lies and the myths that surround the conflict and violations committed. It is not that the truth of what happened is not known, but rather that those who benefit from the abuse and the privilege often refuse to acknowledge the truth. In South Africa, given the crucial role played by the media during the apartheid years, it is hardly likely that white South Africans did not know that atrocities were happening in the country. Ironically, during the hearings of the Commission, when the victims initially started testifying, many white South Africans claimed that the victims were exaggerating. When perpetrators began testifying about the gruesome crimes they had committed, white South Africans claimed either that they had not known of the atrocities committed or that the state had been involved in the commission of these crimes.

The South African truth commission was thus able to counter widespread disbelief and denial by white South Africa that the state had been involved in the commission of gross human rights violations. In doing so, it dealt conclusively with the denial with which most white South Africans had lived with almost all of their lives.

In Sierra Leone, many ordinary people did not understand the full complexity of what the chairperson of the commission called the "chameleonic war". A widely held belief in the country was that in the main the RUF was responsible for the conflict. The commission was able to establish that the January invasion of Freetown was in the main carried out by members of the AFRC, disaffected soldiers who had adopted characteristics of the rebel forces. Contrary to the belief that amputations had been the main violation carried out, the commission was able to establish that, in fact, rape and sexual violence were the most prevalent crimes. Rape had been the silent crime that most women and girls in Sierra Leone had suffered during the conflict.

The creation of a common narrative is crucial for a country to start rebuilding a new social solidarity. Michael Ignatieff puts it most eloquently: "The past is

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<sup>1</sup> Azanian Peoples Organization (Azapo) and Others versus the President of the Republic of South Africa and Others 1996 (8). In: Butterworth's Constitutional Law Reports/BCLR 1015 (CC). <http://www.constitutionalcourt.org.za/Archimages/2529.PDF>.

an argument and the function of truth commissions, like the function of honest historians, is simply to purify the argument, to narrow the range of permissible lies.”<sup>2</sup>

### **Responding to the needs of victims**

Truth commissions can play an important role in addressing the needs of victims, their families, and their communities. Many victims are shunned and suffer great stigma in their communities during the period of the conflict. The rest of the community is often afraid of being associated with the victim. Revealing the truth of their experiences assists the reintegration of victims into their communities and facilitates the opportunity to be restored to the status they held before the conflict.

The public affirmation and acknowledgement of wrongdoing done to the victim in the midst of the community is a powerful tool in effecting healing. Revealing the truth about the fate of loved ones, though painful, allows victim families to put their uncertainty to rest. Learning the fate of the disappeared brings closure. Public hearings and the publication of the truth are instruments which can contribute to the achievement of this goal.

### **Reparations**

The principles of reparation are well established in international law. The work of Professor Theo van Boven has been helpful to those of us who have had to work with this complex issue. Reparation programs in the context of a transition from an unjust regime to a legitimately elected government often pose a challenge to the newly elected government, which is almost always faced with conflicting demands, as the reconstruction and development needs of all citizens compete with the need for an appropriate reparations program for victims of human rights violations.

The guiding principles of a proper reparations program are meant to acknowledge the wrongdoing done to victims, to improve the quality of their lives, to afford recognition through affirmation and acknowledgment of the harm suffered, and to build civic trust and solidarity. Yet, reparation is often the point at which most countries and governments squander the opportunity to restore civic trust by not acknowledging victims through an appropriate reparations program.

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<sup>2</sup> Michael Ignatieff 1996: Overview: Articles of Faith. In: Index on Censorship 5,96: 113.

In a paper as yet unpublished at this time,<sup>3</sup> Pablo de Grieff makes a cogent observation when he explores the thesis that the responsibility of a state in designing a program of reparations in this context must satisfy conditions of justice. In addressing this question, he argues that the search for justice in a period of transition will involve efforts to punish perpetrators of the worst human rights abuses, to understand and to clarify the structures of the violence and the fate of victims, to reform institutions in order to neutralize the causes which might have contributed to the violence, and finally to repair victims.

Efforts to “repair victims” must therefore be seen as an essential element of a holistic transitional justice package. A powerful argument that he raises is that “a well designed reparations program contributes to justice precisely because reparations constitute a form of recognition – the materialization of the recognition that citizens owe to those whose fundamental rights have been violated.”<sup>4</sup>

Negative experiences where governments and truth commissions have failed on this issue underscore this important point. Truth commissions, which recognize and acknowledge that victims have been treated unjustly, have the most chance of success. Reparation programs which take this factor into account achieve the most social coherence.

Key questions that have not been dealt with are the obligations of illegitimate governments taken over by successor states, the dilemma that in many cases large cross-sections of citizens may constitute victims, and the issue of how to measure suffering where large communities of victims exist.

### **Reconciliation**

In dealing with this issue, there are a few observations that must be made:

- One cannot and should not legislate for reconciliation and especially not for forgiveness. It should be seen as part of a process;
- Reconciliation, like reparations, must be understood in the context of a holistic set of objectives. These include:
  - Justice for victims;
  - Accountability of perpetrators;

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<sup>3</sup> Pablo de Grieff (unpublished paper): Reparations Efforts in International Perspective: What Compensation Contributes to the achievement of Imperfect Justice. 34.

<sup>4</sup> Ibid. 35.

- Clarification of the truth relating to the causes of the violence and conflict;
- Establishment of democratic institutions, rebuilding of those destroyed through the conflict;
- Dealing conclusively with the factors which gave rise to the conflict;
- Elimination of the fear of living together;
- Rebuilding of trust in government and its institutions;
- Building social solidarity amongst citizens.

All of these objectives together constitute a holistic transitional package that contributes to rebuilding democracy.

### **Different levels of reconciliation**

There are different levels of reconciliation to which a commission can contribute. At the national level, the cessation of hostilities and the restoration of a peace, which allows citizens to live without fear that they will be the subject of attack or harm, is an important aspect of reconciliation. In countries, where living with violence on a daily basis is the norm, the cessation of hostilities and an accompanying peace process have a value in themselves which should not be underestimated.

At the community level, the restoration of one's status and the clarification of the truth relating to the conflict also foster reconciliation. The most significant intervention that can be made, however, is the creation of conditions that enable former enemies to live side by side in the certainty that one side will not be harmed by the other. While people living together do not have to like each other, mutual respect as the basis for future interaction builds social cohesion.

An observation on the work of the truth commission in Sierra Leone serves to illustrate this point. Laura Stovel, who spent six months in that country conducting research on reconciliation in 2003, writes: "In sum, the TRC report contributes to reconciliation in four ways. First, by creating an impartial and detailed historical record it humanizes the conflict, exposes and destroys myths and empowers the population. Second, it affirms values and standards of democracy and human rights. Third, it recognizes that crimes are enabled and interpreted within a social context and cannot be assessed outside that context. The report made recommendations to deal with social structures and

laws that enabled violence or hindered reintegration on just terms. Finally, the report made recommendations on reparations, future directions and legal changes that would better protect women and children from violence.”<sup>5</sup> While one may disagree with the point that “crimes cannot be interpreted outside the context of a particular country” given the universality of a human right discourse, the contribution is a valuable one to the debate.

In conclusion, we acknowledge that there is, of course, also a very critical view of the discourse on “reconciliation”. Without going into any detail, we quote Horacio Verbitsky, a Chilean journalist, who makes the following point regarding the process of reconciliation in his own country: “Reconciliation by whom? After someone takes away your daughter, tortures her, disappears her, and then denies having ever done it – would you ever want to ‘reconcile’ with those responsible? That word makes no sense here. The political discourse on reconciliation is immoral, because it denies the reality of what people experienced. It is not reasonable to expect people to reconcile after what happened here.”<sup>6</sup>

### 7.2.5 Contributions of truth commissions in dealing with issues of gender

There are a number of key issues which a truth commission can address in the area of gender and women’s empowerment:

- Disaggregating data relating to gender component;
- Drawing specific attention to crimes against women such as rape, sexual enslavement, and other gender-based crimes;
- Addressing the consequences of sexual crimes to assist in restoring status, re-integration in society, and material support of women victims who suffer ostracism and the stigma of having been associated with perpetrator groupings, especially if they have children as a result of their experiences;
- Empower women survivors through an affirmative participatory process to deal with the issues listed above;

<sup>5</sup> Laura Stovel 2003: When the Enemy Comes Home: Restoring Justice after Mass Atrocity. Paper prepared for the Restorative Justice Conference in Vancouver, June 1-4. <http://www.sfu.ca/cfrj/fulltext/stovel.pdf>.

<sup>6</sup> Horacio Verbitsky in an interview conducted by Priscilla Hayner, quoted in: Priscilla Hayner 2002: *Unspeakable Truths – Facing the Challenges of Truth Commissions*. New York and London: Routledge Press.

- Adding a gender component to any dispute resolution, peace negotiation, reconciliation, and democracy building project;
- Dealing with gender-based violence through law reform and the building of a human rights culture;
- Improving demobilization and reintegration programs through a gender focus;
- Ensuring a gender-specific component to a reparation and rehabilitation program;
- Addressing the role of peacekeepers.

Gender-based violence and crimes of sexual violence are a major focus of the recent conflicts in Africa. While gender-based crimes normally increase during periods of armed conflict, it is the low social status that women enjoy in general, even during peace time, that makes them especially vulnerable to sexual violence by almost all of the protagonists in conflict situations. Although women are perceived as playing a lesser role in armed conflicts, we should also recognize that there are many women who take up arms and engage in conflict in order to survive. Rape has been used as a tool of war indiscriminately by all sides in conflicts.

A truth commission, if it does its work properly, has a huge potential for promoting legal reform with respect to gender-based violence and the advancement of the rights of women during the transitional period. In formulating its recommendations, a truth commission can address a variety of legal issues in this regard, including laws to ensure that sexual violence is prosecuted, that the legal age of marriage for girls is in line with CEDAW standards, that women are treated equally under the law, and that cultural and traditional practices conform to a human rights culture.

### **Challenge of integrating women and girls in demobilization programs**

In most conflict countries women and girls experience discrimination in the way in which demobilization and reintegration programs are implemented. In addressing these issues, I would like to make the following recommendations:

1. Proper planning for demobilization, re-integration and rehabilitation;
2. Education to deal with the stigma attached to the victims of sexual violence;
3. Skills training appropriate to the girls;



4. Access to economic opportunities;
5. Integration of victims and perpetrators.

### **Role of peacekeepers in protecting women and girls**

A problem that was recently highlighted is the violation by peacekeepers and those in charge of displacement camps of young girls under their protection.<sup>7</sup> Although peacekeeping troops on duty in conflict countries remain a key challenge in dealing with the exploitation of women and girls, the rules applicable to troops stationed in Sierra Leone represent an advancement in the policy and procedures to prevent such exploitation. These policies and procedures need to be expanded upon and included in the rules for all peacekeeping missions. In addition, those in charge of displacement camps should be properly screened so as to ensure that any person who has been involved in the violation of the rights of women and girls should not be employed in key positions of power over those who are vulnerable.

Action should follow swiftly where violations have been uncovered and punishment should be speedy.

### **Crisis of legitimacy for truth commissions**

A major issue of concern for transitional justice practitioners must be the failure to have a commission's recommendations implemented.

What is the impact on the legitimacy of a truth commission, if its recommendations are not followed through, given that recommendations usually deal with institutional reform and reparation? Over the past five years, a number of truth commissions have had this experience. There has been a failure to implement the recommendations of the commissions in Guatemala, South Africa, and Ghana. Peru and East Timor report that they may face similar problems. In almost all of these countries, reparation programs have experienced difficulties.

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<sup>7</sup> A joint report by the UNHCR and Save the Children UK first publicized this abuse in 2002. See: UNHCR and Save the Children-UK 2002: Sexual Violence & Exploitation: The Experience of Refugee Children in Guinea, Liberia and Sierra Leone. Initial Findings and Recommendations from the Assessment Mission 22 October - 30 November 2001. [http://www.savethechildren.org.uk/scuk\\_cache/scuk/cache/cmsattach/1550\\_unhcr-scuk\\_wafrica\\_report.pdf](http://www.savethechildren.org.uk/scuk_cache/scuk/cache/cmsattach/1550_unhcr-scuk_wafrica_report.pdf).

The negative consequences attached to the failure to implement are significant particularly in terms of the intended impact of these truth commissions. These negative consequences include the following:

- A failure to address the underlying causes of the conflict by failing to address institutional reforms that are required;
- A failure to implement reparations is a further violation of victims' rights;
- A lack of recognition of victims that may cause further trauma and lead to a sense of re-victimization;
- A feeling of deep betrayal at the behaviour of the political elites who have benefited from the transition;
- The persistence of inequalities;
- The contribution to a new impunity.

Ultimately, the legitimacy of the whole process is called into question. It is certainly not good enough that the commission's work has gone well. If the final aspect of its work is not implemented, it leads to the perception that the process itself must be flawed. This was certainly the view of victims in both South Africa and Guatemala. In post-conflict countries, victims are often told by the successor government that they need to move on. As a consequence, they find themselves left out of the current political dispensation and are out of sync with the new political rhetoric. The problem, of course, for most victims is that they cannot move on, because they are often at the bottom of the pile in society. Their realities have not really changed. Sadly, this is often accompanied by a consolidation of the political elites across the political spectrum.

### **7.2.6 Conclusions**

In conclusion, transitional justice practitioners and the international community need to consider how we deal with the following issues:

- The deficit between norms, principles, and the reality on the ground;
- The disjuncture between conflict resolution, peacebuilding efforts, and transitional justice mechanisms. On the one hand, there is a need to deal with warlords and perpetrators out of a necessity to end the conflict. At the same time, it is expected that the international community will invest quite substantially in disarmament,

demobilization and reintegration processes in respect of ex-combatants. At the international level, however, there is not a similar commitment or investment in victims. It is seen rather as a task of national governments to address concerns related to victims, which, of course, often do not materialize.

Given the above, how can we improve the quality of justice for victims and how do we mainstream a rights-based approach into all these processes? In my view, we need to ensure the following:

- Inclusion of accountability mechanisms in peace agreements;
- Inclusion of references to justice for victims in peace agreements;
- Inclusion of civil society in the peace negotiations;
- Emphasis on gender inclusion and accountability for gender-based violations;
- Respect for the national context;
- Remember that one size does not fit all;
- That reconciliation is not at the expense of justice;
- Linking transitional justice to democracy.

The international community should ensure that donor assistance is used as leverage to hold new governments accountable. There is a need to ensure that they also use this leverage to ensure that the recommendations made by transitional bodies, such as truth commissions, are implemented given that they are usually involved in the oversight of the peace negotiations and the ensuing transition.

I will conclude by quoting a text by the Spanish poet J. Cabazeres, describing the challenge that we all must face in connection with reconciliation:

“Talk to us about reconciliation  
Only if you first experience the anger of our dying  
The anger of our dying

Talk to us of reconciliation  
If your living is not the cause  
Of our dying

Talk to us about reconciliation  
Only if your words are not the product of your devious scheme  
To silence our struggle for freedom

Talk to us about reconciliation  
Only if your intention is not to entrench yourself  
More on your throne

Talk to us about Reconciliation  
Only if you cease to appropriate all the symbols.”<sup>8</sup>

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<sup>8</sup> Cabazares J., „Discovering True Peace through sincere Reconciliation“ in *Intentional Conversation about Restorative Justice, Mediation and Practicing of Law*, Penelope Hurley and James Coben, *Journal of Public Law and Policy*, Hamline University School of Law, 2003.

## 8 Conclusions

### Thomas Greminger

It has been two intensive days of exchange and discussions. Before I move on to some reflections on the issues that we have been debating and possible followup steps, I would like to thank all those who have made this conference possible and, in my humble opinion, a success. My thanks go to all the panelists, the moderator, and in particular to our experts from Guatemala, Peru, East-Timor, South Africa and the former Yugoslavia. I would like to thank Sir Kieran Prendergast, David Bloomfield, and David Ashley, and of course the entire team from the International Center for Transitional Justice. I think you will all agree that this team, under the leadership of Juan Méndez, has made a very convincing case for making the ICTJ the leading center of expertise for transitional justice. Let me also thank swisspeace and Jonathan Sisson for his very valuable contribution. I am of course very grateful to MÔ Bleeker who designed and organized this conference, Sonia Rio who was in charge of the logistics, as well as to all my colleagues at the Ministry for supporting our joint endeavor. Last but not least, I would like to thank all of you for your active participation. I am sure that our exchanges were fruitful because we had such a good mix of civil society and government representatives, external and internal actors. This is the kind of dialogue that helps us to make progress.

Having arrived at the end of a very rich and for me very inspiring conference, I am not even going to try to summarize what has been said, as I am simply not in a position to do justice to the many important contributions. Instead let me just offer five remarks on points or issues that have impressed me personally:

1. It is fair to say that we have come a long way in recent years in developing the concepts of dealing with the past and transitional justice. We now have a good understanding of what is needed for effective transitional justice, as well as the linkages and the dynamics between judicial and non-judicial elements. I believe we have created a fairly well-integrated approach to transitional justice, at least in theory. At the same time we are still far from mainstreaming these concepts into the different frameworks of conflict resolution, peace-building, long-term development or human rights promotion. So in reality there is a gap between theory and practice, which may be even widening, and between the holistic approach in our mindsets, the implementation and strategies actually applied in the field.
2. As the head of the division at our Ministry, which runs conflict transformation programs at the same time as it deals with human rights policy, I was particularly interested in the dilemmas and

conflicts of interest that we are facing in transitional justice. David Bloomfield summarized yesterday's group discussion by saying that there is no contradiction between justice and peacebuilding, but there is a tension that is greater in the short term than in the long term. I must say I was also impressed by the International Criminal Court's sensitivity to these issues. It may be at the end of the day when the real dilemmas are fewer than I had thought. This is basically what Juan Méndez has been saying. There are of course some real dilemmas, he argues, but there are also many false ones, and there are good approaches to reduce the real dilemmas, by offering amnesty to rebellion, by separating perpetrators from communities they claim to represent.

3. My third point is linked to the previous one: many of you have been alluding to the emerging norm or the growing recognition of a *de iure* prohibition of amnesties, including *de facto* amnesties covering gross violations of human rights, be they crimes against humanity, genocide or war crimes. This is a very interesting development. We should examine how we can reinforce this tendency, solidify these emerging norms and (this has also been said) communicate to current and potential perpetrators that this is an issue that is not up for negotiation.
4. My fourth point is on the participation of victims and how transitional justice can improve their situation. Are we really listening to the victims? Do we as external actors know enough about what type of process could satisfy them and support their needs? We have heard that truth, prosecution, reparation and institutional reforms are not sufficient if there is no political will at the level of government and if the latter does not share the healing human feelings of compassion and remorse and accompanying these feelings with concrete actions that dignify victims and make them believe in the non-repetition of violations. The lesson to be learned is that victims should be fully associated with the design and implementation of transitional justice strategies.
5. Let us recognize that transitional justice should be just that: transitional. Yesterday we were reminded that we should be careful about what we term "transitional" in order to avoid giving alibis to states that are not keen on human rights protection. So it is absolutely crucial to create national rule of law systems that work effectively, and nationally owned human rights institutions and policies. As it has been pointed out, the international community is still struggling with the need to effectively extend and support sustainable institution/capacity building.

Allow me to conclude with a few thoughts on where to go from here. What are possible followup steps to this seminar? There are a number of ongoing processes that provide platforms for further developing the concept of transitional justice and mainstreaming it into the relevant fields. Let me now just mention four possible avenues.

1. The Secretary-General has to report to the Security Council on the rule of law and transitional justice and on what has been done to implement last year's report. A report is also due to be made to the General Assembly. Furthermore, the creation of a Peacebuilding Commission presents a unique opportunity for institutionalizing TJ concerns in the framework of UN activities. We hope to work together with like-minded states to see that transitional justice is integrated in the most pertinent *loci* of the UN System, perhaps in the Peacebuilding Commission or its executive organ, the Peace Support Unit.
2. It is important to see what the High Commissioner for Human Rights is going to suggest in the OHCHR's report in response to the Resolution on Transitional Justice and Human Rights. Maybe it will give us some insights about the way we should pursue the discussion on this issue, either in this commission or more probably in the future UN Human Rights Council.
3. We should also consider putting transitional justice and dealing with the past on the agenda of the OECD's Development Assistance Committee, producing guidelines for donors so that transitional justice can become an integral part of humanitarian and development aid.
4. We need to reflect on the question of another meeting of this type next year. Is a forum like this useful, since it is not tied to any need to develop a concrete process or product? Or would it be best to hold such discussions in the regions, responding to specific local and regional needs? This is something we need to think about. Your views will be very much appreciated so please, if you have any suggestions, do not hesitate to share them with us. I can promise you that we shall keep you informed of the next step.

Now I would like to thank you once again for your participation and interest. I wish you a safe journey home.





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## About the Contributors

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Isabel Amaral Guterres is a member of the Commission for Reception, Truth and Reconciliation in East Timor (CAVR). Prior to being appointed to the Commission, she worked with the Jesuit Refugee Service, providing support to people returning to East Timor after the events of 1999. Ms. Guterres graduated in nursing from the Catholic University in Australia and has practiced in Australia, as well as with Médecins Sans Frontières and World Vision in East Timor. She is a board member of the East Timor Red Cross (CVTL) and a member of the National Electoral Commission.

### **Mô Bleeker**

Mô Bleeker Massard is currently working in the Political Affairs Division IV (Peace and Human Security) of the Swiss Federal Department of Foreign Affairs where she is now in charge of the theme of dealing with the past and of the Mexico, Guatemala desk. She is a political anthropologist, expert in the field of peace promotion and dealing with the past. She has worked in development, humanitarian, intercultural and human rights issues since 1984. In 2001, she worked for the Center for Peacebuilding (KOFF) – swisspeace before going in 2003 to Guatemala to launch the Swiss governmental peace promotion program. End of 2004, she joined the Political Affairs Division IV (Peace and Human Security) of the Swiss Federal Department of Foreign Affairs. She is the author of numerous articles and a book entitled “Exils et Resistance du Peuple Salvadorien” (Harmattan 1995).

### **David Bloomfield**

David Bloomfield is currently the Director of the Berghof Research Center for Constructive Conflict Management in Berlin. He previously spent three years as the Director of the Democracy-Building and Conflict Management Program for the International Institute for Democracy and Electoral Assistance (IDEA) in Stockholm. David Bloomfield worked throughout the 1980s as the director of two reconciliation NGOs. After receiving his PhD in Conflict Resolution from the Department of Peace Studies at the University of Bradford, he held posts as Research Fellow at Harvard University’s Center for International Affairs, at the University of Ulster’s Centre for the Study of Conflict, and as lecturer in Peace Studies at Bradford University.

### **Pablo De Greiff**

Pablo De Greiff, a native of Colombia, is currently the Director of the Research Unit at the International Center for Transitional Justice. He obtained his BA from Yale University and his PhD in philosophy from Northwestern University. Most recently, he was associate professor in the Department of Philosophy at the State University of New York at Buffalo. He has written extensively on transitions to democracy, democratic theory, and the relationship between morality, politics, and law. From 2000 to 2001, he was the recipient of a fellowship from the National Endowment for the Humanities, and was a Laurance S. Rockefeller Fellow at the Center for Human Values at Princeton University. He is currently working on the completion of a book entitled "Redeeming the Claims of Justice in Transitions to Democracy".

### **Thomas Greminger**

Head of Political Affairs Division IV, Human Security (Peace, Human Rights, Humanitarian Policy) since August 2004, Ambassador Thomas Greminger joined the diplomatic service of the Swiss Federal Department of Foreign Affairs in 1990 after completing his studies in history, economics and political science at the Universities of Zurich (PhD) and Sorbonne, Paris. He was later promoted to head of the Development Policy and Research Division of the Swiss Agency for Development and Cooperation (SDC) and Secretary of the Federal Council's Consultative Commission for International Cooperation. From 1999 to 2001, he was chargé d'affaires of the Swiss Embassy in Maputo and SDC country-director in Mozambique. On his return to headquarters he became deputy-head of Political Affairs Division IV, Human Security, in charge of the Peace Policy and Human Security Section.

### **Priscilla Hayner**

Priscilla Hayner is currently acting as the Director of the International Policymakers Unit of the International Center for Transitional Justice (ICTJ). She is an expert on truth commissions and transitional justice initiatives around the world and has written widely on the subject of official truth-seeking in political transitions. She is the author of *Unspeakable Truths* (Routledge, 2001), which explores the work of more than 20 truth commissions worldwide. Prior to joining the ICTJ, she was a consultant to the Ford Foundation, the UN High Commissioner for Human Rights, and other organizations. She holds degrees from Earlham College and the School of International and Public Affairs at Columbia University.

**Nataša Kandić**

Nataša Kandić is the founder and president of the Humanitarian Law Center in Belgrade. She received her BA degree in sociology in 1972 from the Faculty of Philosophy at Belgrade University. She was dismissed from public office in 1990 following the publication in that year of the book "The Kosovo Knot: Untie or Cut?". After war broke out in Croatia, she and friends organized civil actions and campaigns against Serbia's warlike policy and later founded the Humanitarian Law Center, a non-governmental organization that documents war crimes and ethnically-motivated violence. Nataša Kandić has received numerous prestigious international and domestic awards which have earned her a reputation as defender of human rights.

**Jürg Lindenmann**

Jürg Lindenmann, Dr. iur, Attorney-at-law in Bern, is the Deputy Legal Advisor of the Swiss Federal Department of Foreign Affairs. Before 1999, he served as a legal officer and deputy head of section (Human Rights and Council of Europe) within the International Affairs Division of the Federal Office of Justice. He participated in the establishment of the International Criminal Court as a member and then as Head of the Swiss Delegation to the various preparatory bodies and to the Rome conference. He teaches international criminal law and international criminal jurisdictions at the University of Fribourg and the law of international organizations at the University of Bern.

**Helen Mack**

Helen Mack Chang received the Right Livelihood Award (Alternative Nobel Prize) in 1992 and also several human rights awards. Helen Mack is the founder and the president of Guatemala's Myrna Mack Foundation, which she formed in her quest for justice for the brutal murder by a military commando of her sister Myrna Mack, a social anthropologist who studied the problems of people displaced by the internal armed conflict. Helen Mack has been very engaged for the promotion of justice in Guatemala for the thousands of other citizens who lost their lives at the hands of the military. As a result of her determination she obtained the conviction of one of the soldiers accused of committing the crime and several years later, the conviction of one of the three officers accused of masterminding Myrna Mack's murder.

### **Alexander Mayer-Rieckh**

Alexander Mayer-Rieckh is a Senior Associate at the International Center for Transitional Justice and heads its office in Geneva. He was the director of the Human Rights Office of the UN Mission in Bosnia and Herzegovina and worked for the United Nations in Geneva, Rwanda, Eritrea, and East Timor. His publications include "Vetting, Institutional Reform and Transitional Justice: an Operational Framework" (forthcoming in 2006). Mr. Mayer-Rieckh obtained his master's degree in law from the University of Vienna, and his MDiv from Weston School of Theology in Cambridge, Massachusetts.

### **Juan Méndez**

In July 2004, Mr. Méndez was appointed the United Nations special adviser on the prevention of genocide. He acts also as the President of the International Center for Transitional Justice. He started to commit himself to the cause of human rights after his release as a political prisoner in Argentina by working with Human Rights Watch. After that, Mr. Méndez was the Executive Director of the Inter-American Institute of Human Rights in Costa Rica, and held a post as a professor of law and Director of the Center for Civil and Human Rights at the University of Notre Dame, Indiana. He later served as a member and President of the Inter-American Commission on Human Rights of the Organization of American States. He has taught International Human Rights Law at Georgetown Law School and at the Johns Hopkins School of Advanced International Studies, and regularly teaches the master's program in International Human Rights Law at Oxford University in the United Kingdom. He is the recipient of several human rights awards.

### **Toni Pfanner**

Toni Pfanner is currently Editor-in-Chief of the International Review of the Red Cross. Before joining the International Committee of the Red Cross (ICRC), he was assistant professor of private law at the Swiss Federal Institute of Technology in Zurich. After 1984, he was active as a delegate and head of delegation for the ICRC in Israel and the occupied territories, Iraq, Chad, South Africa, Afghanistan and in the regional delegation for South-East Asia in Jakarta. From 1993 to 1998, he was head of the legal division at ICRC's headquarters. Mr. Pfanner has taught in several universities and academies and has published numerous articles on international humanitarian law and humanitarian action. He holds a doctorate in economics (University of St. Gallen) and a master's degree in law (University of Bern).

**Jean-Daniel Ruch**

Born in Moutier, Switzerland, in 1963, Jean-Daniel Ruch acts as political adviser to Carla del Ponte, the Prosecutor of the International Criminal Tribunal for former Yugoslavia. Becoming a Swiss diplomat in 1992 he was in charge of the Mission in Belgrade from 2000 to 2003. Prior to that, he was the personal adviser to the Director of the Office for Democratic Institutions and Human Rights (ODIHR) of the OSCE.

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Paul Seils is a Senior Analyst in the Jurisdiction, Complementarity, and Cooperation Division of the Office of the Prosecutor of the International Criminal Court (ICC). Prior to his appointment to the ICC, this specialist in international humanitarian law was the Legal Director of the Center for Human Rights Legal Action (CALDH) in Guatemala City and more recently, a senior associate at the International Center for Transitional Justice in New York, an organization founded by Alex Boraine, who served on the South African Truth and Reconciliation Commission.

**Yasmin Sooka**

Yasmin Sooka is currently employed as the Executive Director of the Foundation for Human Rights in South Africa. After the end of her mandate as a member of the Truth and Reconciliation Commission in South Africa, first as the Deputy Chair to the Human Rights Violations Committee and in the latter period as its Chair, Yasmin Sooka was also appointed by the Office of the High Commissioner for Human Rights to be one of three international commissioners on the Truth and Reconciliation Commission for Sierra Leone. There she was responsible for policy and operational development as well as for planning and writing the final report.

**Jaime Urrutia Ceruti**

Jaime Urrutia Ceruti is Executive Secretary of the High-Level Multisectorial Commission for the Design and Monitoring of a Policy of Peace, Collective Reparations and National Reconciliation (CMAN) based in Lima, Peru. Jaime Urrutia Ceruti studied history at the Universities of San Cristóbal de Huamanga and the Sorbonne in Paris, and pursued his academic career by lecturing as a professor at the former institution. Later Mr. Urrutia Ceruti became a board member of several local NGOs. He was a member of the

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### **Paul Van Zyl**

Paul van Zyl is Program Director at the International Center for Transitional Justice (ICTJ) and teaches law at both the Columbia and New York University Law Schools. Prior to that, he was the Director of Columbia University Law School's Transitional Justice Program. Paul Van Zyl has acted as an adviser and consultant to human rights organizations, governments, international organizations, and foundations on transitional justice issues in many countries, including Colombia, Indonesia, East Timor, and Bosnia and Herzegovina. He later served as Executive Secretary of the Truth and Reconciliation Commission in South Africa. After that he worked as a researcher for the Goldstone Commission, as department head at the Center for the Study of Violence and Reconciliation in Johannesburg, and as an associate at Davis Polk & Wardwell in New York.

### **Urs Ziswiler**

Urs Ziswiler has been Head of the Political Affairs Directorate of the Federal Department of Foreign Affairs. Ambassador Ziswiler also held the post of vice-chairman of Presence Switzerland (PRS). He studied law at the Universities of Geneva and Zurich and obtained a post-graduate diploma on developing countries from the Swiss Federal Institute of Technology in Zurich. From 1995 to 1999, Mr. Ziswiler acted as Head of the Political Affairs Division for Human Rights and Humanitarian Policy as well as Coordinator for International Refugee Policy. In 1999 he was appointed Ambassador of Switzerland to Canada and The Bahamas and later served as Senior Diplomatic Advisor to Micheline Calmy-Rey, Federal Councillor and Head of the Federal Department of Foreign Affairs.

### **Adrien-Claude Zoller**

Adrien-Claude Zoller is President of Geneva for Human Rights, a Geneva-based NGO which provides training and monitors the proceedings of the UN Commission on Human Rights. He is a political scientist from the Graduate Institute of International Studies (HEI) in Geneva. After completing his studies, he created several international NGOs in Geneva, including the International Service for Human Rights (ISHR, 1984) and the World Organisation Against Torture (OMCT, 1985), serving at the former as its

Director from 1987 to 2003. In 1999 he launched an initiative to further the actual implementation of human rights. This became the Global Training Program (GTP) of which he has remained the Coordinator.

