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**Dealing  
with the Past**

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*Zeitschrift zur Aussenpolitik*  
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## Preface

*This issue of Politorbis is dedicated to François Bergier and all the righteous men and women around the world.*

It is a great pleasure for me to introduce this issue of Politorbis, devoted to the topic of dealing with the past.

Switzerland, with its strong commitment to the development of international justice, made a decisive contribution to the creation of the Rome Statute and to the establishment of the International Criminal Court (ICC). Furthermore, Switzerland is also aware of the additional concerted effort still needed in the struggle against impunity; its dedication to the work of dealing with the past, and to combating impunity, is based on this awareness.

Impunity is in fact very difficult to combat. Hard to grasp and restrain, as it is generally combined with other problems such as structural exclusion, unequal development, organised crime and corruption. As a result, instability and poor governance become the rule, violence spreads, preventing a functional democracy and hindering the establishment of the rule of law.

The fight against impunity has been the subject of many United Nations reports and resolutions, and thus it may be useful to recall some important milestones of its recent history. The first succinct preliminary report on "The Impunity of Perpetrators of Violations of Economic, Social and Cultural Rights" was presented in 1994 to the Sub-Commission on Human Rights. The Commission in turn decided to consider the matter in greater depth and to divide the study into two parts. Mr. Louis Joinet was asked to report on those aspects relating to violations of civil and political rights and Mr. El Hadji Guissé on matters pertaining to economic, social and cultural rights.

In June 1997, El Hadji Guissé published his "Final Report on the Question of the Impunity of Perpetrators of Human Rights Violations (economic, social and cultural)". Its preamble insisted on the global dimension of human rights by stating: "The concept of human rights is political and economic, embracing the security and protection

of the individual, and his material and moral well-being."<sup>1</sup> Guissé insisted on the interdependence of civil and political rights on the one hand, and on economic, social and cultural rights on the other, and emphasised the difficulties experienced by some states in "trying to reconcile the objectives of planned material development with the protection of human rights".

Some months later, in October 1997, Joinet presented his report on the "Question of the Impunity of Perpetrators of Human Rights Violations (civil and political)" in which he set out the "general economy of the aforesaid rights and its foundation with reference to the rights of victims regarded as being subject to the law: a) the victim's right to know; b) the victim's right to justice; c) the victim's right to compensation. For preventive purposes, these rights are supplemented by a series of measures intended to ensure that violations are not repeated." The rights are combined with the duties of States.<sup>2</sup>

On 18 February 2005, Mrs. Diana Ohrentlicher presented her independent expert's report updating the Set of Principles to Combat Impunity.<sup>3</sup> In her introduction, Ohrentlicher showed how the "principles" approved in 1997 had already considerably influenced strategies for combating impunity. She pointed out the need to adapt these principles, taking into account "recent developments in international law and practice, including

1 E/CN.4/Sub.2/1997/8, 27 June 1997: The Realisation of Economic, Social and Cultural rights, Final Report, Question of the Impunity of Perpetrators of Human Rights Violations, (economic, social and cultural), prepared by Mr. El Hadji Guissé, special rapporteur, pursuant to Sub-Committee Resolution 1996/24,

2 E/CN.4/Sub.2/1997/20/Rev.1. The Administration of Justice and the Human Rights of Detainees, Question of the impunity of perpetrators of human rights violations (civil and political), Final revised report prepared by Mr. L. Joinet, pursuant to Sub-Commission Decision 1996/119. The completed study comprises documents E/CN.4/Sub.2/1993/6, E/CN.4/Sub.2/1994/11 and Corr.1, E/CN.4/Sub.2/1995/18 and E/CN.4/Sub.2/1997/20.

3 E/CN.4/2005/102, 18 February 2005.

international jurisprudence and State practice, as well as other considerations specified in Resolution 2004/72".<sup>4</sup> Ohrentlicher also stressed that: "it may be useful to reiterate that these principles are not legal standards in the strict sense, but guiding principles".<sup>5</sup>

To this brief and very incomplete summary, let us add that the Secretary General of the United Nations published a report in 2004 on "The Rule of Law and Transnational Justice in Conflict and Post-conflict Societies".<sup>6</sup> It established the term transitional justice in this context and defined it as follows: "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."

If the Federal Department of Foreign Affairs, FDFA, has decided to give greater emphasis to the issue of combating impunity in the context of human security strategies, it is because real and significant difficulties persist for which neither the creation of the ICC nor international tribunals have provided a full and final solution.<sup>7</sup> FDFA developed its concept designating it as "Dealing with the Past", it is based on the "Principles established by Joinet/Ohrentlicher"<sup>8</sup>, it includes aspects relating to International Humanitarian Law and takes into account the main lessons learned of conflict transformation approaches.

Since 2004, practical initiatives in this field have been integrated into our programmes within the FDFA<sup>9</sup> in Latin America (Colombia, Guatemala), the Balkans, Caucasus and some countries in Africa and Asia. Parallel to this, the FDFA contributed to the development of norms and standards at multilateral level; for instance, resolutions have been introduced within the framework of the Council for Human Rights and consideration has

been given to addressing the fight against impunity in peace agreements, with the process that led to the publication of "Dealing with the Past in Peace Mediation", in cooperation with the Mediation Support Unit of the Department of Political Affairs in the United Nations.<sup>10</sup>

In addition, the link between prevention of genocide and mass atrocities and struggle against impunity became crucial. This has led the FDFA together with Argentina, Tanzania and other strategic partners, to the initiation of a series of regional forums on genocide prevention<sup>11</sup>.

This issue of *Politorbis* provides an opportunity for reviewing our thoughts and practice in this field. The first part of this issue reflects the present state of norms and practice in the fight against impunity. Despite the indisputable progress, it is clear that many gaps need to be filled, and significant issues still need to be tackled.

All too often, for example, holistic strategies that should be based on concerted and shared assessment are missing, links between the different areas and measures for dealing with the past are not established. At a time when the era of hybrid or special international tribunals is drawing to a close and the question of new local institutions or initiatives for combating impunity is inevitably being raised, the international community lacks flexibility and capacity to innovate when it comes to lending relevant support to some needed innovative initiatives such as the International Commission against Impunity in Guatemala (CICIG), for example.

The second part of this issue highlights some of the present practice in dealing with the past. It includes archives, forensic medicine, and the role of the business community. The gender issue is covered by a discussion on masculinity, and the chapter on victims sheds light on their perceptions about these efforts. For those who argue that dealing with the past may threaten to re-ignite conflicts, the article on transitional justice and conflict transformation provides interesting food for thought. The third and last part gives an account of experiments carried out as part of the FDFA's programmes, while the final chapter provides an

4 with reference to E/CN.4/Sub.2/1997/20/Rev.1, para. 49.

5 with reference to E/CN.4/Sub.2/1997/20/Rev.1, para. 49.

6 S/2004/616, 23 August 2004.

7 See speech by Mrs. Micheline Calmy Rey, Head of the Federal Department of Foreign Affairs, Switzerland.

8 <http://www.eda.admin.ch/eda/en/home/topics/peasec/peac/confre/depast/concep.html>.

9 Especially in the Political Division IV, human security

10 See page 171 to 177.

11 See *Politorbis* 47, 2009. <http://www.eda.admin.ch/etc/medi-alib/downloads/edazen/topics/peasec/peac.Par.0354.File.tmp/Politorbis%2047%20-%20Genocide%20Prevention.pdf>.



excellent critical analysis of the practices for dealing with the past realized by Switzerland.

Several central questions arise which we would like to address in the future, in particular the accountability of non-State parties and the issue of complementarity in all of its dimensions. These include complementarity with the institutions of international justice, including the ICC and also between measures for combating impunity. The question of double standards, and of the accountability of external parties needs also to be addressed in order to strengthen the credibility and legitimacy of the initiatives against impunity.

And finally, we believe that the dialogue on the struggle against impunity between El Hadji Guissé and Louis Joinet, taking into account the interdependence of civil and political rights and economic, social and cultural rights, should be reopened. This would enable us to deal with a number of gaps identified during this decade of practice,<sup>12</sup> and to explore in much greater depth the links between the prevention of mass atrocities and dealing with the past.

In conclusion, the central pivot of processes for dealing with the past is the notion of public trust, as both horizon and criterion of quality. The foundation for reconciliation, i.e. the “reconstitution of a community of citizens with equal rights, based on a new societal pact, anchored in the rule of law”, is based above all, on the security and engagement that these massive human rights violations should never be repeated. This is where Past, Present and Future thus come together.

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#### SPECIAL THANKS

Special thanks to Jonathan Sisson of KOFF swisspeace, with whom we developed our conceptual approach and the choice of content for this issue, all the authors who agreed to take part in this fascinating dialogue, Fanny Krug for taking care of the logistical coordination, Marlene Stefania for the pagination, and H. Brown, P.Knight, K. Hewlett, M.-L. Mettler, Maurice McKee, Paul Frank, BMP Translations, for the edition and translation.

Mô Bleeker

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<sup>12</sup> See also in this context: “Transitional justice and development”: [http://www.ssrc.org/workspace/images/crm/new\\_publication\\_3/%7B1ed88247-585f-de11-bd80-001cc477ec70%7D.pdf](http://www.ssrc.org/workspace/images/crm/new_publication_3/%7B1ed88247-585f-de11-bd80-001cc477ec70%7D.pdf), to which we contributed.



## A Conceptual Framework for Dealing with the Past

JONATHAN SISSON<sup>1</sup>

Dealing with a legacy of human rights violations is one of the most difficult challenges facing societies in transition from authoritarian regimes to more democratic forms of government. In order to re-establish fundamental trust and accountability in society, there is a need to acknowledge publicly the abuses that have taken place, to hold those responsible who have planned, ordered, and committed such violations, and to rehabilitate and compensate victims. This process of Dealing with the Past (DwP) is a necessary precondition for the establishment of the rule of law and the pursuit of reconciliation.<sup>2</sup>

Although there is no standard model for Dealing with the Past, in recent years a number of precedents have been established through the work of special rapporteurs and experts of the United Nations on the issues of reparations, impunity, and best practices in transitional justice.<sup>3</sup>

A significant step toward integrating experience in the field within the theoretical framework provided

by international standards has been made by the report of the UN Secretary General on the rule of law and transitional justice issued on 3 August 2004. In that document, the UN Secretary General argues that effective transitional justice strategies must be both comprehensive in scope and inclusive in character, engaging all relevant actors, both state agencies and non-governmental organizations, in the development of a “single nationally owned and led strategic plan.”<sup>4</sup> The report further emphasizes that the operational definition of transitional justice itself should be broadened to include “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>5</sup>

More recently, specific elements of these standards have been further elaborated. In December 2005, the UN General Assembly adopted Basic Principles and Guidelines on the reparation of victims of gross human rights violations.<sup>6</sup> Significantly, this document outlines the obligations of the State with respect to gross violations of international human rights and humanitarian law and defines the term “victim”. A year later, in December 2006, the General Assembly approved the Convention for the Protection of all Persons from Enforced Disappearance, which specifies the rights of parties with a legitimate interest, such as family members, to access information concerning the fate of victims of enforced disappearance and to receive compensation for material and moral damages

1 Jonathan Sisson is a senior advisor at the Centre for Peacebuilding (KOFF) in swisspeace where he is co-responsible for the programme on Dealing with the Past and reconciliation. In this capacity, he has written and edited a number of studies on holistic approaches to dealing with the legacy of violent conflict in the Balkans, including a comparative study on the impact of transitional justice mechanisms in Bosnia-Herzegovina and in Guatemala ten years after the peace agreements in those two countries. More recently, he has focused on the issue of missing persons in Kosovo and in the North Caucasus. Jonathan Sisson has served as the IFOR representative at the UN Human Rights Council in Geneva since 1996.

2 Dealing with the Past (DwP) is used as a technical term throughout this paper to connote a wide range of activities to address past human rights abuses of a serious nature and, in some cases, also root causes of conflict, as explained below. It is used in preference to the term “transitional justice”, because transitional justice is often too narrowly identified with juridical mechanisms and because DwP is a long-term process and not only limited to a transitional period.

3 See the reports submitted by Theo Van Boven (E/CN.4/Sub.2/1993/8; E/CN.4/Sub.2/1996/17; E/CN.4/1997/104) and Cherif Bassiouni (E/CN.4/2000/62) on reparations. Concerning best practices in transitional justice, see the analytical study on human rights and transitional justice (A/HRC/12/18 and A/HRC/12/18/Add.1), prepared by the OHCHR in 2009. With regard to the reports on impunity, see footnotes 8 and 9 below.

4 Report of the UN Secretary General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies (S/2004/616), p. 9. Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/395/29/PDF/N0439529.pdf?OpenElement>

5 Ibid. p. 4.

6 General Assembly. 2006. 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. A/RES/60/147. Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/496/42/PDF/N0549642.pdf?OpenElement>

where appropriate.<sup>7</sup> In addition, for the past several years the UN Human Rights Council has addressed the issue of the right to truth in a series of resolutions aimed at strengthening it as a principle of international law.<sup>8</sup>

### 1. The Principles against Impunity as a Framework for DwP

It is against this background of emerging norms and standards in addressing serious and systematic human rights abuse that a conceptual framework for Dealing with the Past can be formulated.

One of the most significant developments in this regard has been the progress made during the last decade toward establishing standards in the struggle against impunity. The principles against impunity were initially formulated by Louis Joinet in his final report on the administration of justice and the question of impunity to the UN Sub-Commission in 1997<sup>9</sup> and were later revised by Diane Orentlicher in 2005 at the behest of the Commission on Human Rights.<sup>10</sup> Known as the “Joinet/Orentlicher” principles, the importance of the principles against impunity lies not only in the formulation of the principles themselves, but also in the fact that they are based on the precepts of state responsibility and the inherent right of redress for individual victims of grave human rights violations. As such, the principles against impunity do not entail new international or domestic legal obligations, but identify mechanisms, modalities, and procedures for the implementation of existing legal obligations under international

humanitarian law and international human rights law.<sup>11</sup>

Taken from both a normative and a legal perspective, the principles against impunity provide a useful framework to conceptualize Dealing with the Past. The “Joinet/Orentlicher” principles identify four key areas in the struggle against impunity, which, in turn, provide a comprehensive scheme for Dealing with the Past:

#### 1.1. The Right to Know

- The right of victims and of society at large to know the truth
- The duty of the State to preserve memory

The Right to Know involves the right on the part of individual victims and their families to learn the truth about what happened to them or their loved ones, in particular with respect to enforced disappearance. It is based on the inalienable right on the part of society at large to know the truth about past events and the circumstances that led to the perpetration of massive or systematic human rights violations, in order to prevent their recurrence in the future. In addition, it involves an obligation on the part of the State to undertake measures, such as securing archives and other evidence, to preserve collective memory from extinction and so to guard against the development of revisionist arguments.

To ensure this right, the “Joinet/Orentlicher” principles propose the establishment, in principle, of extra-judicial commissions of inquiry (in practice, often called “truth” or “truth and reconciliation” commissions). The commissions themselves serve a twofold purpose: 1) to dismantle the administrative machinery that has led to abuses in the past, in order to ensure that they do not recur; and 2) to preserve evidence for the judiciary. The second measure often entails gathering, preserving, and ensuring the access to archives and information relating to serious human rights violations.

#### 1.2. The Right to Justice

- The right of victims to a fair remedy
- The duty of the State to investigate, prosecute, and duly punish

The Right to Justice implies that any victim can assert his or her rights and receive a fair and effective remedy, including the expectation that the person or persons responsible will be held

7 As of August 2010, some 84 countries have signed and 19 countries have ratified the Convention. The Convention enters into force upon ratification by 20 countries. For an overview of the signatories, see: [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-16&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-16&chapter=4&lang=en)  
For a copy of the General Assembly resolution, including a copy of the Convention, see: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/505/05/PDF/N0650505.pdf?OpenElement>

8 In 2006 and 2007, the Council welcomed two studies prepared by the OHCHR on the right to truth as a legal standard and instrument (E/CN.4/2006/91 and A/HRC/5/7, respectively). In 2009, a more specific investigation followed on the role of archives and witness protection in realizing the right to truth (A/HRC/12/19).

9 E/CN.4/Sub.2/1997/20/Rev.1. Available at: <http://193.194.138.190/Huridocda/Huridoca.nsf/0/a0a22578a28aacfc8025666a00372708?OpenDocument>

10 The revision (E/CN.4/2005/102/Add.1) focused on identifying best practices in combating impunity and did not significantly re-formulate the principles themselves. Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement>

11 See also the preamble of the Basic Principles and Guidelines on reparation cited above in this regard.

accountable by judicial means and that reparations will be forthcoming. The Right to Justice also entails obligations on the part of the State to investigate violations, to arrest and prosecute the perpetrators and, if their guilt is established, to punish them. Domestic courts have primary responsibility to exercise jurisdiction in this regard, but international or internationalized criminal tribunals may exercise concurrent jurisdiction, when necessary, in accordance with the terms of their statutes.

The Right to Justice imposes restrictions upon certain rules of law pertaining to prescription, amnesty, right to asylum, extradition, *non bis in idem*, due obedience, official immunity, and other measures, in so far as they may be abused to obstruct justice and benefit impunity.

### 1.3. The Right to Reparation

- The right of individual victims or their beneficiaries to reparation
- The duty of the State to provide satisfaction

The Right to Reparation entails measures for individual victims, including relatives or dependants, in the following areas:

- Restitution, i.e. seeking to restore the victim to his or her previous situation;
- Compensation, i.e. for physical or mental injury, for lost opportunities with respect to employment, education, and social benefits, for moral damage due to defamation, and for expenses related to legal aid and other expert assistance;
- Rehabilitation, i.e. medical care, including physiotherapy and psychological treatment.

The duty to provide satisfaction pertains to collective measures of reparation. These involve symbolic acts, such as an annual homage to the victims, the establishment of monuments and museums, or the recognition by the State of its responsibility in the form of a public apology, that discharge the duty of remembrance and help to restore victims' dignity. Additional measures in this regard foresee the inclusion of an accurate account of the violations that occurred in public educational materials at all levels.

### 1.4. The Guarantee of Non-Recurrence

- The right of victims and society at large to protection from further violations
- The duty of the State to ensure good governance and the rule of law

The Guarantee of Non-Recurrence focuses on the need to disband para-statal armed groups, to repeal emergency laws, and to remove senior officials from office who are implicated in serious human rights violations. It also foresees the reform of laws and state institutions in accordance with the norms of good governance and the rule of law. In particular, it mentions the reform of the security sector and of the judiciary as priorities. With regard to para-statal groups, it makes reference to the process of disarmament, demobilization, and reintegration of former combatants with special attention to be paid to the demobilization and social integration of former child soldiers. The vetting of public officials and employees should comply with the requirements of due process of law and the principle of non-discrimination. In addition, civil complaint procedures should be introduced.

## 2. Dealing with the Past from a Holistic Perspective: A Diagram

As a means of visualizing the framework for Dealing with the Past, swisspeace in collaboration with the DwP program desk in Political Division IV, Human Security of the Swiss Federal Department of Foreign Affairs, has designed a diagram that illustrates some of the main mechanisms and procedures associated with the four principles cited above from a holistic perspective.<sup>12</sup> In addition, the diagram also attempts to illustrate the transformative dimension of Dealing with the Past as part of a political and social process of democratization in post-conflict societies

Dealing with the Past is represented in the diagram by four concentric circles.

**The innermost circle** depicts the victim- and perpetrator-oriented perspective of DwP initiatives. As defined in the Basic Principles and Guidelines on reparation referred to above, victims are persons who individually or collectively suffered harm through acts or omissions that constitute gross violations of human rights.<sup>13</sup> While categories exist to define war crimes, crimes against humanity and genocide, there is no single normative definition of a perpetrator, as this qualification will often vary according to domestic legislation. Nevertheless, it can be said in general terms that DwP initiatives should be designed to address the needs of victims and the accountability of perpetrators.

<sup>12</sup> The diagram referred to has been included as an appendix to this document.

<sup>13</sup> General Assembly, *ibid.* para. 5.8.

**The central circle** represents the four principles of the conceptual framework and reflects the particular dynamics relating to victims and perpetrators mentioned above. Those DwP mechanisms and procedures that principally address the needs of victims are located in the upper part of the circle, while those focusing on the accountability of perpetrators are located in the lower part. Concrete activities are listed for each of the four areas, the idea being that, depending on the context and circumstances, any one of these activities in any of the four areas might be an entry point for Dealing with the Past. Moreover, it should be noted that there are linkages between the different activities in the different areas. For example, the preservation of archives is important for the realization of both the Right to Know and the Right to Justice. The same holds true for witness protection, which is necessary not only in connection with war crimes trials, but also in the search for missing persons. Ideally, a comprehensive and integrated approach to Dealing with the Past would build upon these and other linkages to create momentum and gradually widen the circle to include other DwP initiatives.

**The intermediary circle** represents the most immediate long-term goal of strengthening the rule of law by combating impunity. Significant progress made in any one or more of the four areas, such as the realization of a truth commission in connection with the Right to Know or the successful introduction of reforms to the security sector in connection with the Guarantee of Non-Recurrence, will not only provide satisfaction and ensure accountability, but it will serve to strengthen public confidence in State institutions. Obviously, DwP initiatives can only contribute in part to the larger task represented here, but the impact of these initiatives, which may involve implementation on an international, national, or local level (or a combination thereof), can be measured for both their immediate and long-term effects.

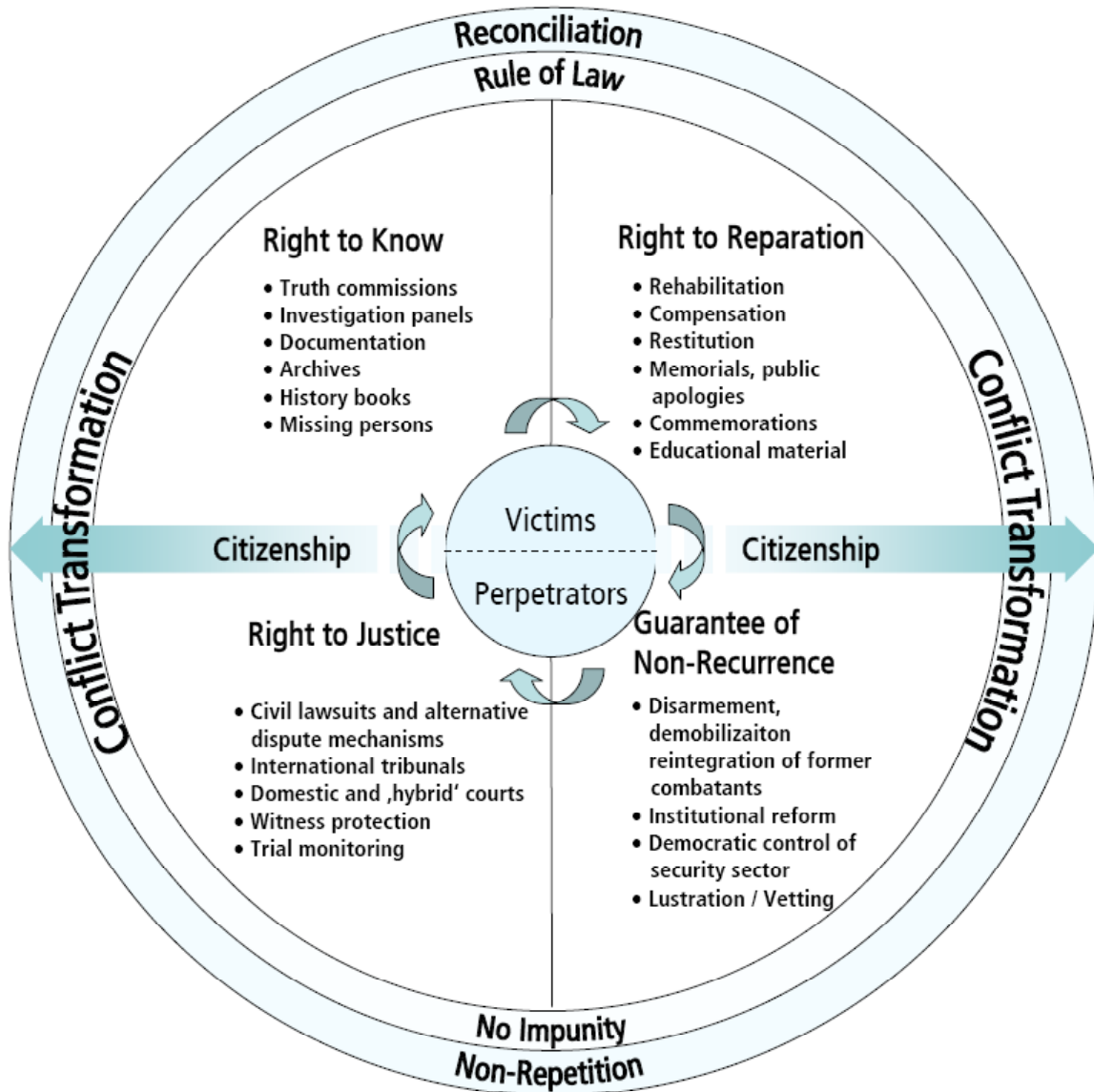
**The outermost circle** is defined by the parameters of reconciliation and non-repetition of the serious and systemic abuses of the past. This is again a long-term goal, for which a societal process of Dealing with the Past is a necessary pre-requisite. Impact measurement is more difficult here, but the key concept is conflict transformation. By strengthening the rule of law and contributing to the struggle against impunity, Dealing with the Past is creating conditions, in which other means become available to address social conflict. Even when the root causes of conflict continue to persist, the institutions and

mechanisms supported by DwP initiatives as well as the modalities employed and lessons learned will contribute to establish democratic norms of tolerance and power-sharing that reflect not only the social, economic, and ethnic diversity of a country, but also the need to involve women in the decision-making process.

The transformative dimension also finds expression in the transformation of social and political identities. If the victim or perpetrator identity was the predominant one at the beginning of a process of Dealing with the Past, it should change gradually as the process proceeds. The experience of being a victim or perpetrator belongs to one's personal biography, but it is no longer the dominant social or political identity. Instead, it is replaced by the new identity of being a citizen of society with the rights and duties of citizenship as part of the new social contract.

Finally, it should be added that the DwP diagram may also be used as an analytical tool to identify the activities of international, national, and local actors in the four principal areas. Depending on the context, an analysis of certain areas, such as the Right to Know or the Right to Justice, may reveal a diversity of actors on different levels, while other areas, for example the Right to Reparation, show hardly any activity at all. Using the diagram as a mapping tool is therefore not only useful for assessment purposes, but also as a strategic instrument to identify entry points and potential partners around specific DwP issues. Based on this analysis, a realistic comprehensive strategy for Dealing with the Past can be developed, reflecting the contingencies of political context, local culture, ownership, sequencing, and budgetary priorities.<sup>14</sup>

<sup>14</sup> An example of the use of this approach with respect to Dealing with the Past in Kosovo is given below in the article on the PD IV program on Dealing with the Past in the Balkans.



© DFAE/Swisspeace 2006, inspired by the Joinet/Orentlicher principles

When working with this diagram, note that:

- Focal groups, represented in the innermost circle, are individual victims and perpetrators.
- It offers a holistic approach, i.e. it addresses, from four complementary angles, different elements related to dealing with the past.
- It combines specific restorative and retributive measures.
- It simultaneously focuses on rights of individuals and on corresponding duties of the State.
- It combines individual rights and duties with collective ones.
- Its topics and mechanisms are inter-linked and inter-related.
- It is an operational working tool that can be used, for instance, for the mapping of on-going and/or new initiatives related to dealing with the past.

Finally, this conceptual framework for dealing with the past describes a long-term political and social process of democratization in post-conflict societies, focusing on the struggle against impunity and on strengthening the rule of law with the ultimate goal of fostering conflict transformation and reconciliation in society.





## A Normative Conception of Transitional Justice\*

PABLO DE GREIFF<sup>1</sup>

Transitional justice has become the focus of intense interest by academics and practitioners alike. One revealing indicator of the notion's currency and of a growing common sense about its general character is the emergence of official and quasi-official international documents on transitional justice. Perhaps the most important example of such a document is the former UN Secretary General's Report, "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies."<sup>2</sup> This report offers not only a definition of transitional

justice, but also a sophisticated understanding of the notion. It defines transitional justice as "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," enumerates the main components of a transitional justice policy mentioning explicitly criminal justice, truth-telling, reparations, and vetting, and, furthermore, stipulates that, far from being isolated pieces, these "mechanisms" should be thought of as parts of a whole: "Where transitional justice is required, strategies must be holistic, incorporating integrated attention to individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or an appropriately conceived combination thereof."<sup>3</sup>

\* This is a revised and shorter version of a paper entitled "Theorizing Transitional Justice" to be published in *Transitional Justice*, Melissa Williams, Rosemary Nagy, and Jon Elster, eds., *Nomos* vol. L, (NYU Press, forthcoming). The present version omits, among other things, references which appear in the original.

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2 S/2004/616, August 23, 2004. Other important international documents on transitional justice and related topics include: UN Commission on Human Rights, *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, E/CN.4/2005/102/Add.1, February 8, 2005 and the accompanying reports by Diane Orentlicher, *Independent Study on Best Practices, Including Recommendations, to Assist States in Strengthening Their Domestic Capacity to Combat All Aspects of Impunity*, E/CN.4/2004/88, February 27, 2004 and *Report of the Independent Expert to Update the Set of Principles to Combat Impunity*, E/CN.4/2005/102, February 18, 2005; UN General Assembly, *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*, A/RES/60/147, March 21, 2006, and the UN Office of the High Commissioner of Human Rights' entire series of "Rule of Law Tools for Post-Conflict States" on various transitional justice measures. The binding character of these documents is a separate question which I will not address here. It varies tremendously from case to case.

The fact that a common sense is developing around transitional justice reflects that the field is no longer in its infancy. Independent of when the practice started, some of the seminal documents specifically on the topic are now more than 20 years old; and yet, the field remains tremendously undertheorized. It is not just that the consensus around any given understanding of transitional justice and its components is far from complete; the consensus is, moreover, thin. This can hardly be explained by saying that no single conceptualization has succeeded in gathering sufficient acceptance to become a sort of "paradigm"; the fact is that there have been very few attempts to articulate a conception of transitional justice systematically.

My aim in this paper is to present a normative conception of transitional justice. This conception will help address two of the main challenges the field faces at this stage: first, since this is a field which has always advocated the application of a variety of measures, over time, it has come to be characterized by certain "centrifugal tendencies" at best, or by a lack of coherence, at worst, exemplified by those instances in which measures are traded off or conflict with one another. While articulating

3 All references in this paragraph come from UN Secretary General, "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies," pp. 4 and 9.

a normative theoretical conception is not the same as articulating a *theory*, the two exercises are related. One of the main purposes of articulating a normative theoretical conception is to clarify the relationship between its constituent elements. In the case of transitional justice, this exercise pays rather large dividends; I shall argue that it yields a justification for the claim that transitional justice is a “holistic” notion. Success here would have the important practical implication that it would help us see why the selective application of transitional justice measures is misguided, and why the frequently observed tendency to trade off one measure against others is inappropriate.

The second challenge is only suggested by the demand for the field to establish its effectiveness. The problem is actually complicated for reasons that go well beyond the difficulties of measuring the impact, especially in the long run, of complex interventions in the social world (difficulties that of course are not peculiar to transitional justice interventions but that affect *all* policy areas). Interventions that have been routinized, and that have legal backing, are prone to lose clarity about fundamentals, including what the point is of engaging in them in the first place. That the “law requires it” is often an excuse for *not* asking why something is required. So the challenge is far from being one about measurement primarily; the challenge the field faces is to articulate explicitly what its very point is. What is it, exactly, that we are trying to achieve in implementing transitional justice measures? It is only *after* defining these ends that the field can take up questions about whether particular applications of these measures are effective or not.

Normative theorizing can be of help here as well. The task of theory, according to my argument here, is not to develop formulae to which we can surrender the burden of exercising judgment; rather, theory can serve to clarify the nature and the full extent of our normative commitments. Fully articulating a conception of transitional justice can help us understand what we are committing ourselves to in adopting the notion. So, in addition to clarifying *what* we commit ourselves to in adopting the notion, theorizing helps us articulate *why* we are so committed. That understanding can make a crucial difference to *how* we act.

The paper proceeds in three sections. I will present two arguments for understanding transitional justice holistically. These two arguments are analytically distinct but substantively convergent. The argument in section I concentrates on the conditions of

the possibility of endowing weak and deficient measures (as compared to the tasks they face I think we must admit transitional justice interventions always are) with the *meaning* of justice measures. With this background, I then present in sections II and III a normative conception of transitional justice constructed around a set of ends which I argue the different transitional justice measures share. To say that the ultimate aim of transitional justice is the promotion of justice (for example, in the sense of contributing to “giving everyone his or her due” or to strengthening the link between effort and success) is too abstract to be of real help. In a reconstructive spirit, I will argue that attributing to transitional justice two mediate goals, namely, recognition and civic trust (Section II) and two final goals, reconciliation and democracy (Section III) helps to make sense of the practices we associate with transitional justice, both in the sense of clarifying the relationship between those practices and in the sense of clarifying the relationship between transitional justice and other concepts and practices, including reconciliation and democracy. One of the virtues of this normative conception is that rather than attributing to transitional justice the promotion of merely desirable goals, the two mediate and two final goals at issue can be understood as dimensions, or, as I will argue, as both preconditions and consequences, of the effort to give concrete expression *through law-based systems* to the necessarily more abstract notion of justice.<sup>4</sup>

#### I.

Given the emerging consensus in the field, I do not take my main task to be to offer a novel definition of transitional justice. It is now commonly understood that the term refers to the set of measures implemented in various countries to deal with the legacies of massive human rights abuses. These measures usually include criminal prosecutions, truth-telling, reparations, and different forms of institutional reform (foremost amongst them vetting, particularly of security forces, which may include the judiciary). Although this is not a closed list—for

<sup>4</sup> To illustrate how this exercise can positively affect discussions about impact measurement, consider the following. The ends that are attributed to particular policy interventions affect the way these measures are assessed. So, having an account of why it makes sense to attribute certain goals to particular measures is, in my opinion, a necessary step on the way to assessment. The normative model I offer here would lead to the articulation of indices of success around recognition (for which participation can be taken as a proxy), of trust (for which both surveys and patterns of use of formal procedures of conflict resolution can stand), of reconciliation (trust in institutions plus attitudinal shifts) and democratization (“formal” rule of law and political participation).

instance, memorialization is an important element of most transitions and a natural complement to truth-seeking--the point now is to show that these are not elements of a random list. Rather, they are parts of a whole.

The first argument in favor of thinking about transitional justice holistically has a pragmatic beginning and a conceptual end. Its point of departure is an effort to characterize the context in which transitional justice measures operate. The term "transitional justice" finds its natural place in what I have elsewhere characterized as "a very imperfect world." An imperfect world, *simpliciter*, is one in which there is no spontaneous generalized compliance with even basic norms. Well-established legal regimes are parts of such worlds, for while they are characterized by high levels of compliance, those levels never reach perfection, and, most importantly, this compliance is not spontaneous, as is shown, precisely, by the coercive nature of the legal regimes which impose both penalties and punishments for norm-breaking. In contrast to such a world, a *very* imperfect world is one characterized not just by the massive and systematic violation of norms, but also by the fact that there are huge and predictable costs associated with the very effort to enforce compliance. At the limit, in such a world, that effort puts at risk the very existence of the system trying to enforce its own norms. This, I think, is the primary domain of application of the term "transitional justice."

We should acknowledge from the outset the limited reach of each of the measures that are part of a transitional justice policy. In fact, there is no transitional country that can legitimately claim great successes in this field. That is, there is no country that has undergone a transition that has prosecuted each and every perpetrator of human rights violations (let alone has punished them in proportion to the gravity of the harms they caused); that has implemented a truth-seeking strategy that disclosed the fate of each and every victim or thoroughly identified the structures that made the violations possible; that has established a reparations program providing each and every victim with benefits proportional to the harm they suffered; or that, particularly in the short run, has reformed each and every institution that was implicated in the violations in question.

The weakness of each of these measures provides a powerful incentive to seek ways in which each can interact with the others in order to make up for their limitations. If one hews to the old understanding of justice in terms of giving to each his or her due, or of creating structures

that make it more likely that there will be a close relationship between effort and success in people's lives, the great challenge faced by transitional justice measures becomes clear. How is it possible to give people reasons to *endow* these admittedly imperfect measures with the meaning of *justice* initiatives? The challenge is particularly serious given that most of these measures do nothing for most people directly. Those that do, mainly reparations, typically fall far short of any notion of proportionality. In reality, what I, as a victim, see is that a handful of perpetrators (not necessarily those who abused me) get some form of punishment (surely not to the full extent they deserve and to the exclusion of complicit bystanders); that some report is compiled (which, even if it mentions my name, surely fails to do justice to the horrors I experienced or the overall ravages of massive violations); that I receive some money (what does money mean?) and services (most of which are of the basic sort which in other countries people receive simply in virtue of being citizens); and that some former official employees lose their jobs. Why should I regard such initiatives as *justice*-promoting? In summary, the challenge is to endow measures that could be seen as forms of scapegoating, mere words, "blood money," or inconsequential purges with the meaning that is required for them to be seen as instances of criminal justice, truth-telling, reparations, and institutional reform. Moreover, international experience suggests that if these measures are implemented haphazardly, piecemeal, and in isolation from one another, it is less likely that they will be interpreted as instances of justice, and more as instances of expediency at best.

Indeed, I think it is possible to go significantly further than the claim under consideration thus far. It is not just that individual transitional justice measures have a lesser likelihood of being understood as justice measures if they are implemented in isolation from one another; the measures seem to be much more tightly related to one another than even this suggests. I want to argue that the relationships between the various measures form a thick web. Starting with reparations, to illustrate the point, it is clear that reparations in the absence of truth-telling would give victims reason to interpret the benefits

as an effort to buy their acquiescence.<sup>5</sup> The point to notice, however, is that the relationship is bi-directional: just as reparations seem to call for truth-telling if the benefits are to be interpreted as a justice measure, truth-telling seems to call for reparations if words are to be seen, in the end, as more than inconsequential chatter. Similarly, beneficiaries of reparations programs are given stronger reasons to regard the sort of benefits usually conferred by these programs as reparations (as opposed to merely compensatory measures)<sup>6</sup> if they proceed in tandem with efforts to punish human rights violators. Conversely, since criminal prosecutions without reparations provide no direct benefit to victims other than a sense of vindication that otherwise does not change the circumstances of their lives, a policy based exclusively on prosecution is likely to be experienced by victims as an insufficient response to their own justice claims. Finally, vetting office-holders for past abuses is an important complement to prosecutions and reparations, for victims will have little reason to trust institutions that continue to be populated by rights abusers. But vetting without substantive measures of corrective justice will also ring hollow.

This pattern of bi-directional relations between reparations and the other transitional justice measures is replicated across the board. Criminal prosecutions, particularly considering their scarcity (even where there are some trials, the overwhelming majority of victims will not see *their* abusers prosecuted), can nevertheless be interpreted by victims as a justice measure, as something more than scapegoating, if they are accompanied by other truth-seeking initiatives. Truth-telling initiatives also need to be “saved” from being interpreted as a form of whitewash in which the truth emerges but no one pays any price. Similarly, it is easier for victims to see criminal trials as more than scapegoating if they

can regard them as one of several accountability measures that the new regime is implementing, measures that include the vetting of those responsible for human rights abuses. Again, what I want to emphasize here is that this relationship holds in the opposite direction as well; we give reasons to save vetting from the charge that it is nothing more than a slap on the wrist (considering the abuses for which those who are screened out of official position are allegedly responsible), that is, we give reasons to take dismissals as a justice measure if it is also accompanied by the creation of robust prosecutorial mechanisms. The web of interrelationships that binds the different transitional justice measures together is thick indeed.

Here my interest does not lie simply in pointing out the fact that forging links between the different transitional justice measures produces better results than having them operate in isolation from one another—although, of course, I think that policy-makers interested in “lessons learned” ought to heed this one. I am interested in accounting for that fact. The underlying reason, in my opinion, has to do with what is at stake during a transition. In stating it in this manner, I will approach what I take to be a second argument for thinking about transitional justice holistically, showing that, in the end, the two arguments converge and are distinguishable only at an analytic level. In the next section I will draw out this argument more precisely. For the time being, I wish to underscore that the various transitional justice measures are meant to show the currency of very basic norms. But because the norms are so basic, and because they were so massively and systematically violated, showing that they now hold sway requires a comprehensive effort. While restoring confidence in the force of more trivial norms might be easier, when norms that protect absolutely fundamental interests are broken, this generates not only havoc but also a range of reactive attitudes that can be overcome, if at all, only through coordinated interventions that could in turn ground the reasonable belief that the norms now play a meaningful role in guiding people’s behavior, particularly that of power-holders.

In summary, it is reasonable to expect that measures that are weak in relation to the immensity of the task that they face are more likely to be interpreted as *justice* initiatives if they help to ground a reasonable perception that their coordinated implementation is a multi-pronged effort to restore or establish anew the force of fundamental norms. It might overstate the case to say that this argument shows

5 Hebe Bonafini, leader of the Asociación Madres de la Plaza de Mayo in Argentina, long took the position that the only satisfactory response to their justice claims was the reappearance of their children, and that therefore accepting other measures, including reparations, constituted a sell out—a position that led to the breakdown of the Madres de la Plaza de Mayo into two different movements. The Moroccan experience with the Instance indépendante d’arbitrage referred to above illustrates how reparations measures de-linked from other justice initiatives can prove to be unsatisfactory even if one does not hold Bonafini’s hard-line position. See, e.g., Susan Slymovic, “No Buying Off the Past: Moroccan Indemnities and the Opposition,” *Middle East Report* 229 (2003): 34-37.

6 The difference between mere compensation and reparation is that reparations, in order to be understood as such, must be accompanied by some sort of acknowledgment of responsibility (which need not be an acknowledgment of culpability).

that isolated measures cannot be seen as justice initiatives and that they should not be tried, but the argument articulates a reason why there should be a *presumption* in favor of implementing them in relation to one another.

## II.

Each transitional justice measure can be said to pursue goals of its own and may serve more than one immediate aim at a time. In the following, I would like to move beyond immediate goals to a higher level of abstraction, and construct a conception that attributes to the various measures two mediate and two final goals. Before proceeding, however, three initial remarks are in order.

The first concerns the nature of the position I am taking. In attributing to the measures the goals that I do, I am not saying that these are necessarily goals that they have been said explicitly to pursue. The strategy is reconstructive rather than descriptive: the different transitional justice measures *arguably* have as their mediate and final goals the ones I will mention presently. The aim of the paper is to offer a conception of transitional justice as a theoretical construct. Like all theoretical constructs, this one aspires to account in a systematic fashion for a variety of phenomena whose interrelationship has caused puzzlement. In this case, the construct will help to account for the relationship between the different measures that are frequently said to be elements of transitional justice, and will do so in a way that shows they are part of a whole, and therefore ground a presumption against their piecemeal implementation. Further, the construct will also clarify the relationship between transitional justice, democracy, and reconciliation, which, in my view, is an abiding source of puzzlement and controversy.

Second, the conception on offer here is attractive not just because it provides us with a systematic account of complex phenomena by fixing on goals that these measures share. What is critical to notice is that these goals, as I will show, are not simply desirable aims but that they are themselves systematically related to each other, and, more importantly, to the concept of justice. The conception, in a nutshell, is the following:

Transitional justice refers to the set of measures that can be implemented to redress the legacies of massive human rights abuses, where “redressing the legacies” means, primarily, giving force to human rights

norms that were systematically violated. A non-exhaustive list of these measures includes criminal prosecutions, truth-telling, reparations, and institutional reform. Far from being elements of a random list, these measures are a part of transitional justice in virtue of sharing two mediate goals (providing recognition to victims and fostering civic trust) and two final goals (contributing to reconciliation and to democratization).

The third and final comment that needs to be made before proceeding is the following: the vocabulary of immediate, mediate, and final aims is not really adequate to the task I am proposing, particularly if these terms are primarily understood by their temporal connotations. I am using these terms to refer not to proximity or distance in time, but in “causal” chains. The immediate goal of a particular measure is one that in theory can be brought about by that intervention (regardless of how much time this might take); thus, for example, those who think of deterrence as the immediate goal of criminal prosecutions think that prosecutions *can* bring about this effect (even if not in a short time). Mediate and final, therefore, refer to degrees of separation from this position. The mediate aims of a measure are aims that it is reasonable to think the measure’s implementation may further, but whose accomplishment may also require a number of different measures. For example, reparations may contribute to making victims feel recognized but almost certainly cannot satisfy victims’ claims for recognition on their own. That will require the implementation of a variety of measures, including those in the typical transitional justice portfolio. “Final ends” in the way I am using the term here are not the ends “for sake of which everything else is done,” as Aristotle would have it in Book I of the *Nicomachean Ethics*, but ends whose attainment is causally even more distant, and therefore whose realization really depends upon the contribution of an even larger number of factors, whose role, relatively speaking, increases in importance.

Thus there are two axes along which I am classifying aims here: (1) the number of intervening factors, and (2) their relative importance in bringing about the desired results. While it is not unthinkable that transitional justice measures, if designed and implemented in what I have called an “externally coherent” fashion—that is, in a manner that attends to the many ways in which they interrelate both positively and negatively and tries to maximize the synergies—could make a contribution to the

trust that citizens have in their institutions, it is obvious that strengthening democracy will require the intervention of a larger number of factors. In this mixture, the significance of transitional justice measures may end up being quite low relative to, for example, broader constitutional reforms and economic restructuring programs.

Having made these remarks, we can now build the conception stepwise.<sup>7</sup>

### *Recognition*

First, it can be said that all transitional justice measures seek to provide recognition to victims. The sort of recognition at issue is actually a complex one. To begin with, it refers to something akin to granting victims moral standing as individual human beings. At the limit, and at its most basic, this requires acknowledging that they can be harmed by certain actions. Almost without fail, one of the first demands of victims is, precisely, to obtain recognition of the fact that they have been harmed, and intentionally so.

But this is only one dimension of the sort of recognition that transitional justice measures arguably provide to victims. It is not primarily the victims' great capacity to endure *suffering* that needs to be acknowledged. Ultimately, what is critical for a transition, and what transitional justice measures arguably aim to do, is to provide to victims a sense of recognition not only as victims but as (equal) rights-bearers, and ultimately as *citizens*.

This claim about the sort of recognition that transitional justice measures seek to provide to victims is neither descriptive nor predictive; whether transitional justice measures actually succeed in providing the relevant sort(s) of recognition is an empirical issue that depends upon many practical and contingent factors. But, in short, the argument is the following: from my standpoint, the various transitional justice measures can be interpreted as efforts to institutionalize the recognition of individuals as citizens with equal rights. Thus, criminal justice can be interpreted as an attempt to provide recognition to victims by denying the implicit claim of superiority made by the criminal's

behavior through a sentence that is meant to reaffirm the importance of norms that grant equal rights to all. Truth-telling provides recognition in ways that are still probably best articulated by the old difference proposed by Thomas Nagel between knowledge and acknowledgment, when he argued that although truth commissions rarely disclose facts that were previously unknown, they still make an indispensable contribution in officially acknowledging these facts. The acknowledgment is important, precisely, because it constitutes a form of recognizing the significance and value of persons as individuals, as citizens, and as victims. Reparations provide the material form of the recognition owed to fellow citizens whose fundamental rights have been violated. In light of the difficulties and deficiencies that normally accompany prosecutions, and of the potential charge that truth-telling is "cheap talk," reparations buttress efforts aimed at recognition by demonstrating a sufficiently serious commitment so as to invest resources, and, in well-crafted programs, by giving beneficiaries the sense that the state has taken their interests to heart. Finally, institutional reform, including vetting, is guided by the ideal of guaranteeing the conditions under which citizens can relate to one another and to the authorities as equals.

In summary, each transitional justice measure may be said to have an immediate aim or aims of its own. At a higher level of abstraction, however, all of them can be thought to pursue the goal of providing recognition to victims as individuals and as victims, but also, and most fundamentally, as bearers of rights. It is clear that this is a thoroughly normative-based conception of recognition, since recognizing victims as rights bearers involves recognizing the norms that establish a regime of citizenship. Indeed, transitional justice measures work--to the extent they do--only in virtue of their capacity for norm-affirmation.

### *Civic Trust*

The other aim that the various transitional justice measures seek to attain is the promotion of civic trust. Once again, this is not a description or a prediction. Whether the measures succeed in inducing this effect or not is an empirical question that cannot be settled in advance, and certainly there are many ways for these measures to "go wrong." But let me set that issue aside in order to concentrate on the theoretical claim. The first thing that needs to be done, of course, is to explain the sense of "trust" at issue here.

Let's start with a broad understanding of trust.

<sup>7</sup> In attributing these four ends to transitional justice measures, in thinking about these ends as parts of causal chains, and as is inevitable, in having to order the presentation of the goals in some way, I am not suggesting that there are necessary causal relations between the different aims. In particular, I do not want to suggest that, say, providing recognition sets off a causal chain that leads to democratization, as will become obvious later on.

Trust in general, as a disposition that mediates social interactions, “is an alternative to vigilance and reliance on the threat of sanctions, [and] trustworthiness... an alternative to constant watching to see what one can and cannot get away with, to recurrent recalculations of costs and benefits.”<sup>8</sup> Trust, then, at a general level, contrasts with the sort of constant monitoring and appeals to sanctions that speak of suspicion.

Still by way of indirection, it can be said that while trusting someone involves relying on that person to do or refrain from doing certain things, trust is not the same as mere predictability or empirical regularity. If predictability were the paradigm of trust we would see it exemplified in our relationship with reliable machines. But we do not usually think that the best illustration of trust is, say, towards one’s bike. Similarly, that reliability is not the same as trustworthiness can be seen in our reluctance to say that we trust someone about whose behaviour we feel a great deal of certainty but only because we both monitor and control it (e.g., through enforcing the terms of a contract), or because we take defensive or preemptive action. Trust, far from resembling a sort of “mechanical reliability,” involves an expectation of a shared *normative* commitment. I trust someone when I have reasons to expect a certain pattern of behavior from her, and those reasons include not just her consistent past behavior, but also, crucially, the expectation that among her reasons for action is the commitment to the norms and values we share. Trust develops out of a mutual sense of commitment to shared norms and values. This explains both the advantages of trust and the risks it always involves. In dispensing with the need to monitor and control, it facilitates cooperation immensely, and not only by lowering transaction costs; but as a wager about the other’s reasons for actions (no matter how “safe”), specifically, that at least in part for *normative reasons* those we trust will not take advantage of our vulnerabilities, we risk having our expectations defeated.

Now, the term “civic” in “civic trust” I understand basically as a limiting qualifier. The sense of trust at issue here is not the thick form of trust characteristic of relations between intimates, but rather “civic” trust, which I take to be the sort of disposition that can develop among citizens who are strangers to one another, and who are members of the same community only in the sense in which they are fellow members of the same political community.

True, since we have much less information about others’ reasons for actions in this case than in that of trust toward intimates, the dimension of a wager is more salient. However, the principles or norms that we assume we share with others and the domain of application of these norms are much more general. To illustrate, the loyalty that binds me to a common political project, and therefore to fellow citizens, is significantly thinner than the loyalty that binds me to intimates.

As compelling as this norm-based understanding of trust might be, however, it does raise a complication that needs to be addressed before we can proceed: it is not clear what, on this account, trust in institutions might mean. Strictly speaking, if trust is a relationship that cannot be reduced to mere empirical regularity, but one that involves an awareness of mutual normative reciprocity, this is possible only among individuals, and then there is no such thing as trust in institutions. Nevertheless, we trust institutions and the people who inhabit them. How so? Claus Offe offers the following explanation:

“Trusting institutions” means something entirely different from “trusting my neighbor”: it means *knowing* and recognizing as valid the values and the form of life incorporated in an institution and deriving from this recognition the assumption that this idea makes sufficient sense to a sufficient number of people to motivate their ongoing active support for the institution and the compliance with its rules. Successful institutions generate a negative feedback loop: they make sense to actors so that actors will support them and comply with what the institutionally defined order prescribes.<sup>9</sup>

By way of contrast, people mistrust institutions because they suspect (correctly) that the values embodied by those institutions do not make “sufficient sense to a sufficient number of people to motivate their ongoing active support for these institutions and the compliance with [their] rules.” Trusting an institution amounts to knowing that its constitutive rules, values, and norms are shared by its members or participants and are regarded by them as binding.

So, how do transitional justice measures promote this sense of civic trust? In a nutshell, the argument

8 Annette Baier, “Trust and Its Vulnerabilities,” in her *Moral Prejudices* (Cambridge, MA: Harvard University Press, 1994), 133.

9 Claus Offe, “How Can We Trust Our Fellow Citizens?” in *Democracy and Trust*, ed. Mark Warren (Cambridge: Cambridge University Press, 1999), 70-71.

is the following: prosecutions can be thought to promote civic trust by reaffirming the relevance of the norms that perpetrators violated, norms that turn natural persons into rights-bearers. Judicial institutions, particularly in contexts in which they have traditionally been essentially instruments of power, show their trustworthiness if they can establish that no one is above the law. Truth-telling can foster civic trust by responding to the anxieties of those whose confidence was shattered by experiences of violence and abuse, who are fearful that the past might repeat itself. Their specific fear might be that the political identity of (some) citizens has been shaped around values that made the abuses possible. An institutionalized effort to confront the past might be seen by those who were formerly on the receiving end of violence as a good faith effort to come clean, to understand long-term patterns of socialization, and, in this sense, to initiate a new political project around norms and values that this time are truly shared. Reparations can foster civic trust by demonstrating the seriousness with which institutions now take rights violations, a seriousness that is manifested, to put it bluntly, by the fact that “money talks.” Civic trust is bolstered when, even under conditions of scarcity and competition for resources, the state responds to the obligation to fund programs that benefit those who were formerly not only marginalized but abused. Finally, vetting can induce trust and not just by “re-peopling” institutions with new faces, but by thereby demonstrating a commitment to systemic norms governing employee hiring and retention, disciplinary oversight, prevention of cronyism, etc.

Now, recall that part of the aim of developing a theoretical construct is to draw systematic links between apparently discrete phenomena. The conception of transitional justice I am articulating is tightly woven; it seeks to explain the relationship between the different elements of transitional justice by providing an account of the goals that these elements can be thought to pursue. But before proceeding to the analysis of two further goals at the next level of abstraction, I want to make two remarks. First, there is a close relationship between the two goals that we have been examining, recognition and civic trust. To begin with, I have offered norm-based accounts of both recognition and of civic trust. Indeed, the same basic norms are relevant for both recognition and trust. One way of articulating the relationship between recognition and trust is to say that recognition involves the acknowledgment of standing, of status, on the basis of which individuals can develop a particular set of

attitudes in their mutual interactions and in their interactions with mediating institutions, namely, the attitudes characteristic of trust.

Second, and much more importantly, it is a virtue of this conception of transitional justice that it is organized not around just any goals, but around goals that are closely connected with justice. Both recognition and trust can be said to be preconditions as well as consequences of justice, at least of legally mediated efforts to achieve justice. Laws work on the basis of taking persons as legal subjects, that is, of recognizing the status of rights-bearers to individuals (and collectivities).<sup>10</sup> So, a precondition of legal action in pursuit of justice is the recognition of this status, which explains the importance of legal struggles for recognition, of “enfranchisement,” and the tragedy of the various forms of failure of this most basic type of recognition as legal subjects and as rights-bearers. But if it is right to say that recognition is a precondition of justice, it is not less so to say that recognition is a consequence of justice; over time, the operation of a legal system also facilitates the extension of recognition to those previously unrecognized.

Similarly, trust is both a condition and a consequence of justice. On the one hand, the operation of legal systems relies upon complex forms of trust. Criminal legal systems must rely upon the citizens’ willingness to report both crimes that they witness and crimes that they suffer. And this willingness to report, of course, rests upon their trust that the system will reliably produce the expected outcomes. This is actually a complex sort of trust: in police investigations, in the efficiency of the court systems, in the honesty of judges, in the independence of the judiciary (and therefore in the executive’s willingness to protect and promote that independence), in the at least minimal wisdom of the legislature, and in the strictness (but perhaps also the simultaneous humaneness) of the prison system, etc. Needless to say, each of these objects of trust could be further analyzed.

On the other hand, a legal system does not simply rely upon the preexisting trust of citizens in one another and in the system itself. Legal systems, when

<sup>10</sup> As Jürgen Habermas puts the point, “The legal medium as such presupposes rights that define the status of legal persons as bearers of rights.” *Between Facts and Norms*, trans. William Rehg (Cambridge, MA: MIT Press, 1996), 119. See also Habermas, “On Legitimation through Human Rights,” in *Global Justice and Transnational Politics*, ed. Ciaran Cronin and Pablo de Greiff (Cambridge, MA: MIT Press, 2002), 197-214.



they operate well, also catalyze trust in the system and between citizens; by stabilizing expectations, legal systems diminish the costs of trusting others, particularly strangers. By the same token, by accumulating a record of success in resolving conflicts between citizens, a legal system catalyzes trust in legal institutions, which will increasingly be appealed to for the resolution of differences.

In summary, a system of justice (a legal one, at least) is unimaginable without minimal levels of recognition and trust. Stable forms of recognition and trust, at least in a modern setting, are also unimaginable without the mediation of a legal system of justice. The two mediate aims pursued by transitional justice measures, then, are indeed closely related to justice, rather than just a pair of merely desirable ends.

### III.

Now, if providing recognition and fostering civic trust are, on this conception, two mediate aims of a comprehensive transitional justice policy, promoting reconciliation and democratization are two of its final aims. Once again, I will build this part of the conception step by step.

#### *Reconciliation*

It makes sense now to return to a characterization of the contexts in which transitional justice primarily operates. But whereas in the description of what I have called a “very imperfect world” I was focusing mainly on the risks or “costs” a legal regime has to endure in the very effort to enforce its own norms, here I will focus on the quality of social relations in such a world. In order to clarify the meaning of the polysemic term “reconciliation”—which we must do if we are going to clarify its relationship with transitional justice—it helps to have a picture of what an *unreconciled* society might be. Obviously, neither the presence of disagreement, even of deep and passionate disagreements, nor the presence of unredeemed justice claims can be taken as the defining marker of an unreconciled society; disagreement is part and parcel of life in complex societies and no society is completely free of justice claims yet to be redressed.

It turns out that a philosophical notion of resentment is useful for the characterization of an unreconciled society. On this account, developed by Margaret Walker, resentment is not merely another name for generalized anger or other negative affective reactions, but rather for a specific type of anger, one that attributes responsibility for the defeat, or the

threat of defeat, of *normative expectations*. Resentment, as Walker argues, “responds to perceived *threats to expectations based on norms* that are presumed shared in, or justly authoritative for, common life.”<sup>11</sup>

An “unreconciled” society, then, would be one in which resentment characterizes the relations between citizens and between citizens and their institutions. It is one in which people experience anger because their norm-based expectations have been threatened or defeated. Expectations concerning basic physical security, for instance, are neither whimsical nor do they reflect mere preferences. The idea that the state is the final guarantor of physical safety is part of the core of the notion of the modern state. Threatening or defeating those expectations not just usually, but *properly*, leads to feelings of resentment among victims and others. This anger is more than blind rage or deep frustration; it is ineluctably intertwined with a claim about the validity of the threatened or violated norm, a claim which in turn generates an attribution of responsibility for the threats or the violations, and therefore for the accountability of those who so acted.

There is a further aspect of this norm-based articulation of the notion of resentment that contributes to making it particularly useful for our purposes. It provides an illuminating account of a dimension of massive abuse that has to be kept firmly in mind when thinking about the prospects of reconciliation. Victims of torture—among other forms of abuse—report a sense of loneliness and isolation. Walker argues that resentment arises as a result of threats to, and violations of, not only norms, but also one’s standing to assert or insist upon the validity of those norms. To the extent that the norms in question are those that define social, moral, or interpersonal boundaries, massive abuse can lead to a form of “normative isolation,” of “demoralization,” that can be seen clearly when one considers that the “accusing anger” that resentment constitutes is one that invites others to come to one’s defense, an invitation that in these cases ordinarily goes unheeded. Hence the solitude of the abused, a solitude which in aggregate terms deepens, *ex post*, the marginalization of groups which *ex ante* were often already socially marginalized.

This seems to me to be a very good characterization of many transitional societies. But it is not merely a good description. It also connects easily with the

<sup>11</sup> See, Margaret Urban Walker, chap. 4, “Resentment and Assurance” and chap. 3, “Damages to Trust” in *Moral Repair* (Cambridge: Cambridge University Press, 2006). Here at 146.

normative conception I am articulating here, for another way of describing unreconciled societies is to say that they are characterized by massive and systematic failures of recognition, standing and consideration that would entitle them both to basic protections and to raise claims--and that these failures lead to a breakdown of social trust. By contrast, then, we can arrive at a conception of reconciliation:

Reconciliation, minimally, is the condition under which citizens can trust one another *as citizens* again (or anew). That means that they are sufficiently committed to the norms and values that motivate their ruling institutions, sufficiently confident that those who operate those institutions do so also on the basis of those norms and values, and sufficiently secure about their fellow citizens' commitment to abide by and uphold these basic norms and values.

Clearly, this understanding of reconciliation does not take it to be a substitute for justice. Quite the contrary: this account of reconciliation dovetails with the conception of transitional justice I am offering. To the extent that transitional justice measures seek to provide recognition and to foster civic trust in the ways sketched above, they can be seen to make a contribution to reconciliation, given that reconciliation can be understood in terms of the currency of norms on which both recognition and trust rest.

However, it must be kept in mind that reconciliation has an attitudinal dimension. If reconciliation is to mean anything at all it must refer to something individuals either experience or not. This means that the relationship between transitional justice and reconciliation is complex; there is a sort of unfillable gap between them: even if correctly and maximally implemented, the most that transitional justice measures can do is to give reasons to individuals to trust institutions. In other words, transitional justice measures, at their best, contribute to making institutions *trustworthy*. Whether they will in fact be trusted or not is a different issue. My sense is that the attitudinal change that is part of reconciliation also calls for initiatives that target a more personal and less institutional dimension of a transition than the measures we have been concerned with. Primary among these are official apologies which go beyond generic acknowledgments of responsibility.

Thus, to summarize, on the normative conception of transitional justice I am constructing here,

transitional justice has as one of its final ends contributing to reconciliation. Implementing these measures, however, does not guarantee that reconciliation will be achieved: reconciliation, on this conception, describes a state in which social relations are characterized by a civic and norm-based type of trust, and while transitional justice measures can contribute to making institutions trustworthy, actually trusting institutions is something that requires an attitudinal transformation that the implementation of transitional justice measures can only ground but not produce.

#### *Democracy*

As if it were not sufficiently controversial to argue that reconciliation is one of the final aims of transitional justice, I will now add to this by arguing that promoting or strengthening democracy is another final end of transitional justice. Because the claim is controversial it is important to reiterate the sense in which it is meant: to say that promoting democracy is one of the final goals of transitional justice does not mean that transitional justice measures can bring about democracy on their own. This claim is meant in the same sense in which I have spoken of the other goals of transitional justice. In each case, I have argued that the goal in question is one that from a reconstructive perspective helps to clarify the point of applying measures that in many ways are demonstrably weak. The way the attribution of these goals helps to clarify the point is not merely by linking those measures with the possibility of achieving aims we might think to be desirable (like "recognition," or "civic trust," or "reconciliation"), but by the further step of showing that these aims can be understood as dimensions, or, as argued above, as both preconditions and consequences, of the effort to give concrete expression through law-based systems to the necessarily more abstract notion of justice.

Although the present argument is, strictly speaking, a particular instance of a more general argument establishing the relationship(s) between democracy and justice, here I will have to remain close to the concerns of transitional justice, taking as my starting point the now commonplace claim of scholars and practitioners alike that the implementation of transitional justice measures, singly and collectively, strengthens the rule of law. In the manner of normative theorizing, the fundamental argument for attributing to transitional justice the strengthening of democracy as one of its final goals is one that unpacks the implications of transitional justice's commitment to the rule of law.

Promoting the rule of law is one of the aims frequently attributed to transitional justice measures. Virtually all truth commissions to date have used the concept both in an explanatory role (lack of respect for the principles of the rule of law is one of the factors leading to the rights violations under scrutiny) and as one of the objects of their work (their recommendations are intended to strengthen the rule of law). Scholars largely agree both about the centrality of the concept and about the usefulness of transitional justice measures in efforts to reestablish the rule of law.

The claim that transitional justice measures can contribute to the strengthening of the rule of law can be fleshed out in different ways, which include the following: criminal trials that offer sound procedural guarantees and that do not exempt from the reach of justice those who wield power demonstrate the generality of law; truth-telling exercises that contribute to understanding the many ways in which legal systems failed to protect the rights of citizens provide the basis on which, *a contrario*, legal systems can behave in the future; reparations programs that try to redress the violation of rights serve to exemplify, even if *ex post facto*, the commitment to the notion that legal norms matter; institutional reform measures, even those basic reforms consisting merely in the screening and dismissing of those who abused their positions, increase the integrity of rule of law systems, at least prospectively.

All of these seem plausible accounts to me. Whether they obtain in fact is an empirical question and therefore I will set it aside here in order to return to the main task of the paper, which involves, at least in part, clarifying the implications of undertaking certain normative commitments. When transitional justice promoters argue that transitional justice measures can make a contribution to the rule of law, they cannot have in mind merely a formalist conception of the latter, though the formal features of rule-of-law orders do matter. Requiring legislators to pass only general laws, insisting on their non-retroactive application, and on their public nature—to mention only some of the requirements usually associated with the rule of law—are significant achievements, particularly in contexts with histories of unrestrained power. In these and other ways, the formalist ideal of the rule of law provides some protection to individuals from the arbitrary exercise of power.

And yet a fully formalist understanding of the rule of law concept is not adequate to the task of

transitional justice, as shown by the fact that many of the countries where transitional justice measures have been implemented are countries in which the rule of law, understood formally, *was* satisfied. Indeed, the reports of the truth and reconciliation commissions of both Chile and South Africa, for example, are critical of the formalist understanding of the rule of law the commissions found to be widespread in each country. This reminds us that despite the analytical advantages that distinguishing the formal features of law may bring, those who are concerned with questions of justice and not only of institutional stability and order have reasons to adopt a thicker and more substantive conception of the rule of law than one that turns on impartiality and regularity. On the normative conception I am reconstructing here, transitional justice measures seek to make a contribution to justice in the world. The measures do so to a large extent in virtue of their ability to give force to certain basic norms. The point to notice now is that giving force to these norms is not a one-off affair, nor even a matter of making up for past breaches. Giving force to norms is a matter of showing their ongoing, continued relevance across time. This is one of the reasons why it makes sense to think that when transitional justice promoters say their measures promote the rule of law, they have in mind a conception of the rule of law that ultimately involves a commitment to a more substantive conception of justice, one that calls for political participation.

It helps to motivate the interest in clarifying the complex connection between transitional justice and democracy to examine why, for example, even a benign or “liberal” despot interested in redressing injustice is still a troublesome figure.<sup>12</sup> First, the benign despot’s commitment to accountability measures should raise questions in the mind of transitional justice defenders. The closer the mantle of responsibility approaches the despot, the more likely it is that, in the absence of constraints, he will derail the accountability measures. Second, a preventive rationale typically underlies the work of transitional justice. Of course, it is not that democracies have a spotless human rights record, but on the whole they fare better on the protection of basic human rights than their alternatives, including,

<sup>12</sup> Take, for example, the “liberal-minded despot” in Isaiah Berlin, “Two Concepts of Liberty,” in *Four Essays on Liberty* (Oxford: Oxford University Press, 1969), 129. Berlin’s despot is “unjust,... encourage[s] the wildest inequalities, care[s] little for order, or virtue, or knowledge” but leaves his subjects “a wide area of liberty... or at least curb[s] it less than other regimes.”

likely, our benign despot. While no type of regime offers ironclad guarantees for the protection of human rights, democracies have a better record protecting the rights of their citizens than other kinds of regimes. To the extent, then, that transitional justice promoters have an interest in prevention, the benign despot should give them some pause. Third, if transitional justice is going to mark a dividing line between an abusive past and a future rights-respecting regime, in addition to redress, there must be significant political transformation. Otherwise, the measures will be rendered ineffective, and there will be a great incentive to reapply them in the future to mark, precisely, this thick line. The despot's truth commission, for instance, will need to be followed, at some point, by another truth commission. Even under auspicious circumstances transitional justice measures may not achieve their most immediate ends. In the absence of political transformation it is not clear that even "successful" redress exhausts the justice agenda.

In the end, an understanding of how transitional justice measures achieve their aims should also motivate an interest in the connections between transitional justice and democracy. Here I would like to concentrate on just two mechanisms. First, the implementation of transitional justice measures plays a strong catalytic role in the process of civil-society organization. The possibility of securing a place for a truth commission or reparations program on the political agenda almost invariably leads to the formation of numerous and varied civil society organizations. Indeed, I would argue that this is one of the ways in which the implementation of transitional justice measures contributes to processes of democratization; but it is one of the characteristic marks of despotism and authoritarianism everywhere that they impede the free operation of civil society and the public sphere. Second, to reiterate one of my main points, transitional justice measures work, to the extent they do, in virtue of their capacity to affirm norms. In the domain of justice, however, as we know, it matters not just what *type* of norms we are expected to comply with but the ways in which those norms are "produced." Understanding that transitional justice measures work through these two mechanisms provides grounds for questioning whether redress in the absence of political transformation should be taken to exhaust the agenda of transitional justice promoters and, therefore, provides reasons why those advocates should be interested in the relationship between what they seek to accomplish and democratic political practices.

One fruitful line of inquiry starts, precisely, with the commitment to the rule of law--not a formalist conception but a more robust one that focuses on trying to secure due process guarantees in the production as well as in the application of the law. And this means that ultimately, contrary to what many defenders of the formalist conception hold, there is an internal relation between constitutional democracy and the rule of law. Citizens can enjoy as *rights*--and not merely as dispensations from those who hold power--the protections that are meant to be provided by the traditional liberal civil rights enshrined in laws which satisfy the formal conditions of the ideal of the rule of law only if, at the same time, they can enjoy rights to political participation. Otherwise, their enjoyment of the relevant guarantees depends upon the virtues of rulers and judges, and citizens will not enjoy these protections as *rights*. Conversely, citizens can exercise their rights to political participation fully and meaningfully only if their individual civil rights are guaranteed. In the absence of civil rights such as freedom of speech and even of privacy rights, which create space for the development of individual preferences, political participation turns citizens into instruments of those who hold political power.<sup>13</sup>

This, I think, is a sounder basis on which to think about the complicated relationship between transitional justice and democracy and helps systematize our reservations about letting redress in non-democratic contexts become a paradigm of transitional justice work. Saying that one of the aims of transitional justice is the promotion of the rule of law helps to make sense of the practice only if the "rule of law" is understood in a way that coheres with an understanding of its ultimate aim (promoting a just social order), as well as with the more particular aims in terms of which the latter is specified (including recognition, civic trust, and reconciliation).

Ultimately, there are good reasons to think that the commitment of transitional justice promoters to the idea of the rule of law is really a commitment to the *democratic* rule of law: democracy is both a condition and a consequence of legally institutionalized efforts to establish justice. Thus, if it is true that transitional

<sup>13</sup> The most convincing account of this relationship between democracy and the rule of law is offered by Jürgen Habermas in "On the Internal Relationship between the Rule of Law and Democracy," in *The Inclusion of the Other*, ed. Ciaran Cronin and Pablo de Greiff (Cambridge, MA: MIT Press, 1998), 253-264, and "On Legitimation through Human Rights," in *Global Justice and Transnational Politics*, ed. Pablo de Greiff and Ciaran Cronin (Cambridge, MA: MIT Press, 2002), 197-214.

justice measures contribute to the establishment of law-based systems of justice both through catalyzing civil society organization and through the affirmation of norms that include the norms of full citizenship, transitional justice promoters do well to remember that transitional justice redress does not, in itself, *bring about* democratic transitions. Regime change typically precedes the implementation of transitional justice measures. Further, the measures work fully only if there is at least some tolerance for certain types of social participation. If transitional justice measures are to succeed in providing recognition to victims and promoting civic trust, for instance, this calls for the establishment of participatory procedures. A minimum level of respect for democratic, participatory rights is a precondition of the successful implementation of these measures.

As justice measures, then, instruments of transitional justice should be understood as contributing to democratization. Democracy is valuable both inherently (as an expression of individual autonomy) and as a means for citizens to give concrete content to their understanding of justice by means of law. Of course, transitional justice cannot bring about democracy on its own, and its contribution, even under the best of circumstances, will be modest, and one of many, many factors on which the fate of democracy will turn.<sup>14</sup>

#### *Concluding remarks*

In this paper, I have presented a normative theoretical conception of transitional justice. The purpose of articulating such a conception is the one that normally underlies the construction of theoretical accounts, namely, to draw systematic links between diverse phenomena, and in this way to contribute to dispelling puzzlement. In this particular case, the “phenomena” that required linking, are, first, the elements that are commonly understood to be a part of a transitional justice

policy, and second, the concept of transitional justice and reconciliation on the one hand and democracy on the other. According to the conception I presented, in addition to their own immediate aims, a first exercise in abstraction allows one to argue that the elements of transitional justice share two “mediate” aims, namely, providing a complex type of recognition to victims, and promoting civic trust. Abstracting yet again allows one to argue that a comprehensive transitional justice policy also has two “final” aims, namely, promoting reconciliation and strengthening democracy. This theoretical construct, then, is supposed to ground the claim that transitional justice is a “holistic” concept.

The philosophical strategy that I have used is to make this construct “normative” not just in the ordinary sense which contrasts with “descriptive” (i.e., relating to how things *ought to be*), but in the more specific sense of norm-based; the task, then, is to draw links between norm-based accounts of recognition, civic trust, reconciliation, and democracy, something which I hope the chapter shows to be both feasible and productive.

<sup>14</sup> It would be good for human rights activists to relinquish their Cold War-rooted reservations about articulating more clearly the relationship between human rights and democracy. During the Cold War, human rights activists made the (correct) choice to concentrate on denouncing abuses rather than on promoting political change. To this positive reason a negative one was added, namely, antipathy to what was (again correctly) perceived to be a US-government agenda. Some of the relevant conditions that made these judgments correct have changed, however, and therefore now is a good time to assert the relevance of the links between human rights and democracy. An additional rationale for doing so, moreover, is to take back the democracy-promotion agenda from the grips of security concerns and return it to the arena of justice imperatives.



## The right to know: a key factor in combating impunity

MÔ BLEEKER<sup>1</sup>

The right to know is not a binding agreement imposing a formal duty on states. Nevertheless, UN and international recognition of the right to know (or right to truth), as well as the many initiatives in this field (more than forty truth commissions to date), have established the right to know as an emerging principle in customary international law.

Louis Joinet introduced the concept of the “right to know” in 1996: “This is not simply the right of any individual victim or closely related persons to know what happened, a right to the truth. The right to know is also a collective right, drawing upon history to prevent violations from recurring in the future. Its corollary is a “duty to remember”, which the State must assume, in order to guard against the perversions of history that go under the names of revisionism or negationism; the knowledge of the oppression it has lived through is part of a people’s national heritage and as such must be preserved. These, then, are the main objectives of the right to know as a collective right. Two series of measures are proposed for this purpose. The first is to establish, preferably as soon as possible, extrajudicial commissions of inquiry, on the grounds that, unless they are handing down summary justice, which has too often been the case in history, the courts cannot mete out swift punishment to torturers and their masters. The second is aimed at preserving archives relating to human rights violations. These have two main aims: first, to dismantle the machinery which has allowed criminal behaviour to become almost routine administrative practice, in order to ensure that such behaviour does not recur; second, to preserve evidence for the courts, but also to establish that what oppressors often denounced as lies as a means of discrediting human rights

advocates all too often fell short of the truth, and thus to rehabilitate those advocates”.<sup>2</sup>

This article focuses essentially on truth commissions and commissions of enquiry. The aspects relating to exhumations, missing persons, archives and historical commission are analyzed respectively in articles by Valerie Brasey, Jonathan Sisson and Trudy Peterson, and Marc Perrenoud. The first section examines current practices concerning the “right to know” or “right to truth” and the “duty to remember”. This is followed by an analysis of the lessons to be learned from the experience of more than forty truth commissions and other initiatives taken around the world. The article concludes by exploring the relationship between the right to know and the various pillars upholding the principles against impunity.

### 1 The right to know: an emerging practice in complex situations of transition

The right to know is gaining prominence in many different ways: truth commissions, fact-finding commissions, the protection of archives containing records of human rights violations, searches for missing persons (exhumations, investigations) and, not least, the writing of new history books.

#### 1.1 Truth commissions

Truth commissions are temporary bodies, generally set up as a result of a governmental or parliamentary decree, normally with a mandate to analyze and explain the nature and scope of violations committed during a given period, and to describe in detail the machinery that led to the commission of such terrible violations. This is the “fact-finding” aspect of an initiative of this kind.

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<sup>2</sup> Question of the impunity of perpetrators of human rights violations (civil and political). Revised final report prepared by Louis Joinet pursuant to Sub-Commission decision 1996/119 Principles. <http://www.unhcr.ch/Huridocda/Huridocda.nsf/0/3beb2ad845c6874c8025666a003d41e2?Opendocument>  
[http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/peasec/peac.Par.0255.File.tmp/DwP%20Rapport%20D.Orentlicher%20\(fr\).pdf](http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/peasec/peac.Par.0255.File.tmp/DwP%20Rapport%20D.Orentlicher%20(fr).pdf)

A further major objective may be to allow the victims to speak, to give them a voice. This is why truth commissions organize public hearings, unless it is imperative that the victims give their evidence to the commission members in private. This is the “social legitimization and social healing” aspect of their work.

The reports published by these commissions generally contain public policy recommendations of all kinds combining restorative and retributive aspects, depending on the situation, with a view to re-establishing the rule of law and introducing structural or institutional reforms to prevent the recurrence of human rights violations and conflict. This is the forward-looking, “preventive” aspect (i.e. prevention of recurrences), and the “societal reconciliation policy” aspect, of these commission’s activities.

The Truth Commission instituted in South Africa drew up a catalogue of different “truths”, all relevant within the framework of its activity: the factual and forensic truth, the subjective and narrative truth, the social and dialogical truth and the healing and restorative truth. This spectrum of different truths is useful in itself and enables us to clearly identify the purposes of the different dimensions in which these commissions are active. They have no judicial mandate and it is not their responsibility to establish proof of culpability, but to establish the facts with rigour.

One could say that the factual and forensic truth is concerned with the establishment of the facts in the strict sense of the term, providing a sound basis for future measures of restorative and retributive justice.

The subjective and narrative truth constitutes the memory of the events as experienced by the victims and witnesses. It has the intrinsic quality of testimony, of collective memory, of our history of humanity and inhumanity. Memories and perceptions differ, and sometimes contradict one another, but they exist in their own right and do not need to be reduced to facts. The memory of the survivors is woven from thousands of images and sensations which point us to this broken humanity. Memory also features acts of courage and resistance against barbarism; this is memory in its rehabilitative function. This healing and restorative truth, a social truth and melting pot of community identity, which, once the facts have been stated and described, tries to complete the work of rebuilding community,

faces the future knowing that you have to “live with it” but that tomorrow holds out the hope of “never again”.

When all these elements can be brought together, it becomes possible to follow the tortuous journey from victim to survivor and from survivor to (surviving) citizen. The transformation of the victim into a citizen is one of the great objectives of these “plural truth” institutions. But this is possible only if these truths then serve to bring about justice, to rehabilitate and compensate the victims and to put in place guarantees that violations will not recur.

### 1.2 Informal commissions

More than forty formal commissions have been set up since 1974, in a wide diversity of contexts and with greatly differing results.<sup>3</sup> There have also been a large number of informal commissions, for instance the Commission of Inquiry into the Matabeleland Disturbances, in 1983 in Zimbabwe, or the REMHI (Project for the Reconstruction of a Historical Memory in Guatemala / Proyecto de Recuperacion de la Memoria Historica), launched in 1995 by the Office of Human Rights of the Archbishop of Guatemala. Or more recently in 2004, the Greensboro Truth and Community Reconciliation Project, whose task was to “examine the context, causes, sequence and consequences and to make recommendations for community healing around the tragedy in Greensboro, N.C., on Nov. 3, 1979, which resulted in the deaths of five anti-Klan demonstrators”.<sup>4</sup> The members of these informal commissions are generally influential figures of widely recognized moral standing, as well as some of the victims. The proceedings are very similar (investigation, public hearings, recommendations), but there is no guarantee that their reports will be accepted by an official body, that their recommendations will be binding, or that there will be judicial consequences.

Principles against impunity emerge in the context of political and social rights. Other instruments emerge in the context of international humanitarian law. This is true of most fact-finding commissions and initiatives to trace missing persons.<sup>5</sup> The right to know, or the right to truth, is indeed a rapidly developing area of activity. Each year, the Human Rights Council and the General Assembly of the

<sup>3</sup> See list of truth commissions in annex.

<sup>4</sup> [http://www.greensborotrc.org/exec\\_summary.pdf](http://www.greensborotrc.org/exec_summary.pdf)

<sup>5</sup> First Protocol Additional to the Geneva Conventions, Article 32.



United Nations adopt further resolutions in this field.<sup>6</sup>

### 1.3 Fact-finding commissions

Fact-finding commissions are another type of body working in this field. They are generally set up by multilateral agencies or by states to establish the facts in cases of serious violations of international or international humanitarian law which took place over a limited time period. They also tend to be set up soon after the alleged violations have occurred, with widely differing mandates and under very different names. To name but a few: the United Nations Fact Finding Mission on the Gaza Conflict;<sup>7</sup> the Joint UN and Haitian Government Commission of Enquiry into the Incidents of 19 January at Les Cayes Prison;<sup>8</sup> the International Commission of Inquiry to investigate the facts and circumstances of the events of 28 September 2009 and related events in their immediate aftermath in Conakry, Republic of Guinea.<sup>9</sup>

Recently, UN Secretary-General Ban Ki-Moon decided to set up a panel of experts to advise him on accountability issues relating to alleged violations of international human rights and humanitarian law during the final stages of the conflict in Sri Lanka that ended last year.<sup>10</sup> The mandate of this panel is different again.<sup>11</sup>

#### 1.3.1 The International Humanitarian Fact-Finding Commission

This is another type of institution directly connected with the Geneva Conventions, with its headquarters in Switzerland.<sup>12</sup> It is a permanent body, available to the international community to investigate grave violations of international humanitarian law. Its legal foundation is set out in Article 90 of the First Protocol Additional to the Geneva Conventions of

1949. Based in Bern, the permanent Fact-Finding Commission consists of fifteen experts. The Federal Department of Foreign Affairs (FDFA) manages its secretariat. When parties to a conflict are accused of serious violations of international humanitarian law, the Commission's experts investigate them. They also perform valuable services relating to respect for international humanitarian law. Unlike a court, the Commission restricts itself to establishing the facts: it does not deliver a verdict. The Commission notifies the relevant parties and makes recommendations for improving compliance with international humanitarian law and its application. Investigation is subject to the consent of the parties.<sup>13</sup>

#### 1.4 Missing persons and the imprescriptible right to know

The Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (2005)<sup>14</sup> states that: "Irrespective of any legal proceedings, victims and their families have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victims fate." This extension of the content of the right to know and the recognition of its imprescriptibility has been reinforced by Article 24 of the International Convention for the Protection of All Persons from Enforced Disappearance, which sets forth the elements of the right to know in this context.<sup>15</sup>

In this perspective, Human Rights Council Resolution 12/12 of 12 October 2009 on the right to truth is interesting for more than one reason: links between judicial and extrajudicial initiatives are recognized as current practice and are even recommended.<sup>16</sup> The Report of the United Nations High Commissioner for Human Rights on the Right to the Truth,<sup>17</sup> dated 29 July 2010, also develops aspects relating to the protection of witnesses. The right to know is therefore taking many different forms. Similarly, the connection between the right to know and other elements of the

6 The most recent, on the application of forensic medicine in this field, is explicitly linked with the right to know: Human Rights Council, Tenth Session, Resolution 10/26 on forensic genetics and human rights.

7 <http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/a-hrc-12-48.pdf>

8 <http://www.un.org/french/newscentre/pdf/2010/25052010Fr.pdf>, page 6

9 <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Guinea%20S%202009%20693.pdf>

10 <http://www.reliefweb.int/rw/rwb.nsf/db900sid/EGUA-86NT6F?OpenDocument>

11 <http://www.un.org/apps/news/story.asp?NewsID=34102&Cr=sri+lanka&Cr1=>

12 This commission has never yet carried out an enquiry.

13 <http://www.eda.admin.ch/eda/en/home/topics/intla/humlaw/ihci.html>

14 [http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/peasec/peac.Par.0256.File.tmp/DwP%20Addendum%20Orentlicher%20\(en\).pdf](http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/peasec/peac.Par.0256.File.tmp/DwP%20Addendum%20Orentlicher%20(en).pdf)

15 <http://www2.ohchr.org/english/law/disappearance-convention.htm>

16 A/HRC/RES/12/12, 12 October 2009

17 [http://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.33\\_en.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.33_en.pdf)

principles against impunity is becoming increasingly tangible and normal practice.

### 1.5 The right to know and international justice

Where the relationship between this “extrajudicial” practice, the international courts and the International Criminal Court is concerned, we are also seeing changes. Whereas the first “new-generation” international tribunals tended to be opposed to the creation of truth commissions, or seemed to have serious problems in cooperating with them, the present approach is more pragmatic, regarding their extrajudicial efforts as complementary to the goals of international justice, in particular that of putting an end to impunity. It is now commonly required that the mandates of truth commissions should not include any responsibility concerning amnesties. In other words, to be seen as fully conforming with the norms and standards of international law, truth commissions may not decree a partial or complete amnesty, nor absolve individuals of responsibility for genocide, war crimes or crimes against humanity, including torture, enforced disappearance, extrajudicial execution, slavery, and rape, which are not permissible under international law.

### 1.6 The complementary nature of judicial and non-judicial mechanisms

The complementary nature of judicial and extrajudicial approaches is established once and for all by the UN Secretary-General’s report on transitional justice and the rule of law: “Transitional justice strategies must be comprehensive and inclusive in scope and gender-sensitive in character; they must engage all relevant actors, both state agencies and non-governmental organizations; a single nationally owned strategic plan should be drafted; including judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all), with individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof”.<sup>18</sup>

Finally, it is interesting to note that regional authorities are referring to the right to know in many cases, judgements or resolutions, for instance the Inter-American Commission on Human Rights and the African Commission on Human and Peoples Rights. The European Court of Human Rights and the ASEAN Intergovernmental Commission on Human Rights (AICHR / currently being set up) have not yet

adopted a final position or have not yet referred to the right to know in a systematic way.

## 2 Principles and lessons learned regarding the right to know

When interviewed in 2001,<sup>19</sup> Louis Joinet said of the function of truth commissions: “As their name indicates, these commissions are not so much intended to deliver justice as to establish truth by decoding “why” and “how” such things could have happened. Their goal, as I see it, is first of all to make a people aware of what was all too often a hidden reality they did not want to see (...). These commissions can facilitate the work of justice, but this is not their principal goal. The report they produce is more for the sake of memory than of justice.”

### 2.1 Truth commission or fact-finding commission?

A truth commission is generally set up against a background of prolonged conflict, during which massive violations have been committed. In recent years, what we might call the “tool-kit temptation” seems to have led the international community to establish truth commissions in each and every circumstance. This can sometimes create obstacles and even hinder the struggle against impunity: truth commissions are not a panacea and one size does not fit all.

For example, there have been cases in which very violent events have taken place over a week or a month and subsequently truth commissions have been set up with a mandate covering not only the events themselves but also decades of latent conflict. One is bound to ask whether it would not be more appropriate in such situations for a commission to concentrate exclusively on the actual events and produce a report in a limited timeframe, so as to define the problem and take rapid measures in relation to the events concerned.

If the commission arrives at the conclusion that a more robust process is required to tackle the structural causes, there is nothing to prevent it proposing that a truth commission be established with a broader mandate. The dialogue and participation leading to the drafting of the mandate and creation of a new commission (following a conclusive result from a fact-finding initiative) would give the commission crucial legitimacy.

<sup>18</sup> Report of the UN Secretary-General: “The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies” (S/2004/616).

<sup>19</sup> *Droits fondamentaux*, no. 1, July - December 2001.

## 2.2 Some absolutely essential criteria?

As already noted, the situations in which such commissions are established are generally situations of conflict. It is not unusual for the discussion regarding the establishment of a truth commission to become a battleground. If the dominant political forces are not in favour of combating impunity and achieving a political settlement of the conflict, commissions may be set up which, in their spirit and substance, contradict the very aims and principles of the struggle against impunity.

Indeed, there are many ways of preventing a truth commission from having any real impact: a commission's mandate may be impossible to fulfil or it may contain amnesty provisions that are not in conformity with international law; there may be no guarantee of the commission's independence from those in power; its composition may be problematic, with some of its members being parties to the conflict; its funding may not be guaranteed; or the government may decide not to respond to its report, or may even forbid its publication.

When setting up a truth commission, attention to detail is vitally important. There is no point in insisting on establishing a commission if certain conditions are not met. It is now generally agreed that the following elementary principles are essential:

- Autonomy. Without complete autonomy and independence in relation to the authorities or pressure groups, truth commissions will lack credibility and will not be able to perform their task.
- Composition. The members of truth commissions must be above reproach, with no criminal record. They must not be identified with either party to the conflict, and must have a reputation as honourable and incorruptible.
- Mandate. A commission's mandate must be clear, concise and achievable in a reasonable time.
- Amnesty. A truth commission should not have any judicial responsibility, in particular for granting an amnesty.
- Recommendations. The commission must be able to make recommendations which are made public and are binding on the authorities which gave it its mandate.
- Public response of mandating authority. The commission must be able to present its report officially to the state body which issued its mandate and obtain an official public response from this body.

- Publication of the report. The report must be made available as quickly as possible, and if necessary translated, so that the public generally, and in particular the groups most directly concerned, can read and understand it.
- Archives and access to information. There must be guaranteed access to archives, victims or any person or place the commission deems it useful to meet or visit. On the other hand, access to the commission's own archives must be regulated.
- Witness protection. There must be guaranteed protection for witnesses and people the commission meets with.
- Protection of the commission and its archives. There must also be guaranteed protection for commission members and the commission's archives.
- Funding. Funding of the commission must be provided by the mandating authority, so that the mandate can be carried through to completion.<sup>20</sup>

These minimum conditions are far from having been fulfilled in all circumstances. Decrees ordering the establishment of truth commissions have been issued and commissions created which will never operate effectively for lack of credibility or legitimacy. On other occasions, despite criticisms having been voiced concerning their mandate, composition or lack of autonomy, commissions have been set up which will never produce a final report.

There are of course always exceptions to the rules. For example, the Colombian Historical Memory Group (HMG), which does not have the status of a truth commission and whose mandate was extremely problematic,<sup>21</sup> has not only been able to create conditions in which the criteria set out above are in fact met, but has produced eight reports of excellent quality, and proposed public policy recommendations which have had positive effects.<sup>22</sup>

Where fact-finding questions or investigations are concerned, the tensions are of a different kind. But as we have seen in the case of the commission set up to investigate the conflict in Gaza,<sup>23</sup> or the independent

<sup>20</sup> See also: <http://www.truthcommission.org/>  
[http://www.beyondintractability.org/essay/truth\\_commissions/](http://www.beyondintractability.org/essay/truth_commissions/)

<sup>21</sup> "las razones para el surgimiento y la evolución de los grupos armados ilegales" (Ley 975/2005, Art. 51) / "The reasons for the emergence and the development of illegal armed groups" (Law 975/2005, Article 51).

<sup>22</sup> <http://memoriahistorica-cnrr.org.co/s-home/>

<sup>23</sup> <http://www2.ohchr.org/english/bodies/hrcouncil/specialesession/9/FactFindingMission.htm>

international mission on the conflict in Georgia,<sup>24</sup> to mention just two, we are bound to note that when the quality and independence criteria are met, these commissions enjoy incontrovertible legitimacy, regardless of politically motivated attacks made on them. One can quite legitimately claim, for instance, that the Goldstone Report completely transformed perceptions of the situation in Gaza.

### 2.3 “Truth”: pillar of the principles against impunity

“I want justice to be done, I want an explanation of what has happened”.<sup>25</sup> Victims sometimes express the feeling that “justice has been done”, when they have been able to speak, find out the circumstances that led to the death of a loved one, perhaps confront the perpetrator of a crime, or even read the report concerning them. Justice, as perceived by survivors, is a very complex world, not limited to the courts or punishment of the guilty. In this “feeling of justice”, truth plays a fundamental role. Truth commissions not only help to establish the facts and recognize and give a voice to victims, they also provide elements of understanding and information regarding the circumstances in which people have disappeared. In this sense, and more generally, they provide a space for rehabilitation which opens the way to efforts in the area of the “right to redress”. They are also very useful for the purposes of criminal investigations and of course provide crucial information for institutional reform processes.

When governments or state agencies support these commissions and welcome their reports, putting into effect some or all of their recommendations, the effects are many and immeasurable. Citizens confidence in the state authorities is reinforced; parties with an interest in maintaining an atmosphere of terror see their influence considerably reduced; the culture of impunity is shattered; and it is possible to begin to introduce measures to ensure accountability across the board. In this space for foundational and fertile dialogue between the “truth”, the struggle against impunity and the process of conflict transformation, there is a dynamic which it is good to fully appreciate. It is favourable to the emergence of a culture of accountability and the rule of law associated with what we can call a democratic society.

It is often stated that a truth commission cannot be set up until after a conflict, or even until a peace

agreement has been signed. This is plausible, in view of the risks that would need to be run. But a number of informal initiatives have played a crucial and fundamental role in conflict transformation, and subsequently in the struggle against impunity. Consider, for example, the REMHI in Guatemala: its effects are still felt and its recommendations largely inspired the report of the fact-finding commission, the CEH (the official truth commission), which was established on the basis of the Oslo Agreement of 23 June 1994, two years before the peace agreement, which was finally signed in 1996.

The Historical Memory Group (HMG), set up in 2008 in Colombia,<sup>26</sup> also began its work before the conflict was over. There were many who feared that the victims would not dare to testify, including members of the HMG. But in fact the opposite was the case: “telling the truth” was seen as an act of dignity, a refusal of the conflict and an appeal to the authorities to act responsibly. In the meta-dialogue that came about, the HMG asserted itself as a player of unquestionable moral authority, above the conflict, capable of acting as a mouthpiece for the victims and also of drawing up – in cooperation with both victims and state actors – public policy recommendations for combating impunity. This exemplary initiative helped to disseminate reliable and irrefutable information regarding the nature of the conflict in the country. In parallel – and here lies the ethical added value – the HMG also highlighted the best of what Colombian society has to offer today: public servants wanting to take their responsibilities seriously; victims fighting to prevent a repetition of the conflict by their words and testimony; officials of local, regional and national institutions determined to defend the rule of law and the equality of all citizens. Truth is here breeding a highly diversified and multi-track alliance of peace actors.

### 3 The right to know as a factor in combating impunity and consolidating peace

Where peace agreements are concerned, there is a growing tendency to include certain elements of

<sup>26</sup> The Historical Memory Group (HMG) is a research group that belongs to the National Commission on Reparation and Reconciliation of Colombia (abbreviated to CNRR in Spanish) whose objective is to draw up and release a narrative about the Colombian armed conflict in order to identify “the reasons for the upsurge and evolution of illegal armed groups” (Law 975 of 2005), as well as the different truths and memories of violence, with a differentiated approach and a preference for the suppressed or silenced voice of its victims. Moreover, the group formulates public policy proposals to facilitate the effective exercise of the rights to truth, justice, reparation and guarantees of non-repetition.

<sup>24</sup> <http://www.ceiig.ch/Report.html>

<sup>25</sup> Victim statement.

the principles against impunity, but unfortunately in a way that is still sporadic and without a holistic or consistent vision. No one is claiming that everything should be set out in great detail in peace agreements,<sup>27</sup> but it is important to understand that in the early stages following a conflict, arrangements (to combat impunity) need to be put in place and connections have to be made between the various adopted measures. On the ground, we are far from having mapped out all the opportunities for complementarity. Where the right to know is concerned, various processes could gain in relevance and impact if they were tackled in conjunction with the principles against impunity.

At this point, mention should perhaps be made of the decommissioning, demobilizing and reintegration process, or the processes concerned with security systems reform. Information should be gathered in a systematic and orderly way from the very first stages of demobilization with a view to establishing the facts, exercising justice, establishing compensation criteria and introducing institutional reforms. Ex-combatants have first-hand information on military operations, chains of command, massacres and the location of mass graves. Very often, in the busy activity of demobilization, this precious and crucial information is lost or, at least, not systematically recorded. There is a big gap to be filled here, a systematic approach to be adopted. Similarly, such information should provide guidance in the introduction of institutional reform, especially when security forces have been directly involved in committing serious violations.

### 3.1 The right to know... while waiting...

In some situations such as those in Nepal, Indonesia or Burundi, it seems to take ages before a decision is taken (if one is taken at all) to establish a truth commission or formally investigate the facts. What can be done in the interim? Wait, with the attendant risk of evidence being lost?

It may be very useful, as soon as possible and independently of ongoing discussions of initiatives for dealing with the past, to bring together information regarding human rights violations and construct a database using information already gathered by organizations in the country concerned

with the defence of human rights.<sup>28</sup> An initial sorting operation, involving the necessary checking of the mass of existing data, would be a quick and effective way of protecting information and preventing its loss. It is often the case that, in societies affected by serious human rights violations, there are as many sources of information concerning such violations as there are NGOs or state institutions. Moreover, when the documents that should serve as evidence are scrutinized, it emerges that some are not fit to be submitted to a court, nor to serve as the basis for a truth commission, because they are (sometimes) of such poor quality.

Patrick Ball, who founded the Human Rights Data Analysis Group (HRDAG),<sup>29</sup> has identified a number of factors which cause bias in databases on human rights violations.<sup>30</sup> The creation of a trustworthy database is crucial and requires in-depth technical knowledge. A real South-South network is beginning to emerge, encouraged by events such as the Documenting the Victims of Conflict seminar which Switzerland funded and co-organized in 2008.<sup>31</sup>

### Conclusions

Existing practices in the right-to-know arena are opening up vital prospects for combating impunity. However, it is important to remember that the situations in which these initiatives originate are situations of more or less profound and serious social break-down. Very often the conflict is ongoing and a truth commission has to establish the facts, record people's memories, identify the mechanisms of both institutional and ideological destruction, and at the same time propose a framework of reference/memory which can serve as the basis for building a new future. Such is the magnitude and difficulty of the task.

When the Armenians and Turks decided in September 2010 to put their signatures to an agreement "to implement a dialogue on the historical dimension with the aim of restoring confidence between two nations, including an impartial scientific examination of the historical records and

28 Some remarkable work of this kind has been done by the Research and Documentation Center in Sarajevo, as well as by the three centres mentioned in the article by Jonathan Sisson on the Balkans. <http://www.idc.org.ba/>

29 <http://www.hrdag.org/about/>

30 Under-registration: Selection bias, complexity in a human rights violation or event: Duplicate reporting, source versus judgement: Data coding and inter-rater reliability (IRR), data security.

31 <http://iwpr.net/report-news/documenting-victims-conflict>

27 See Part II: "Dealing with the past in peace mediation".

archives to define existing problems and formulate recommendations”,<sup>32</sup> they clearly demonstrated the value added by a process involving the right to know. It is no longer a question of being right regardless of others, or right in one’s own estimation, but of examining the historical past together and agreeing, for the good of present and future generations, on what really happened and the human, moral and historical responsibilities one intends to assume in the matter.

Very often, one of the essential consequences of these initiatives is to restore the human being to a central place in society, the human being as an absolute value, the human being in his or her intangible dignity. This is the dimension which will make it possible for an analysis of the past in this framework to contribute to a determination never to let human rights violations occur again. This is the forward-looking dimension of efforts to deal with the past.

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32 [http://www.armeniaforeignministry.com/pr\\_09/20090831\\_protocol.pdf](http://www.armeniaforeignministry.com/pr_09/20090831_protocol.pdf)

## Annexe

### TRUTH COMMISSIONS ESTABLISHED BETWEEN 1974 AND 2010

- Uganda: Commission of Inquiry into the Disappearances of People, 1974;
- Bolivia: National Commission of Investigation of Disappeared Citizens (Comisión Nacional de Investigación de Ciudadanos Desaparecidos), 1982;
- Argentina: National Commission on the Disappearance of Persons (Comisión Nacional sobre la Desaparición de Personas, CONADEP), 1983;
- Uruguay: Investigative Comisión on the Situation of Disappeared People and its Causes (Comisión Investigadora sobre Situación de Personas Desaparecidas y Hechos que la Motivaron), 1985;
- Uganda: Commission of Inquiry into Violations of Human Rights, 1986;
- Peru, Commission of Inquiry to Investigate the Massacre of Prisoners, 1986;
- Nepal: Commission of Inquiry to Locate the Persons Disappeared during the Panchayat Period, 1990;
- Chile: National Commission for Truth and Reconciliation (Comisión Nacional de Verdad y Reconciliación), 1990;
- Chad: Commission of Inquiry on the Crimes and Misappropriations Committed by the Ex-President, His Accomplices and/or Accessories (Commission d'enquête sur les crimes et détournements commis par l'ex-Président, ses co-auteurs et/ou complices), 1990;
- El Salvador: Comisión de la Verdad, 1992;
- Germany: Commission of Inquiry on Working through the History and Consequences of the SED Dictatorship in Germany (Enquete-Kommission "Aufarbeitung von Geschichte und Folgen des SED-Diktatur in Deutschland"), 1992;
- Ethiopia: The Special Prosecution Process by the Office of the Special Prosecutor, 1993;
- Germany: Commission of Inquiry on Overcoming the Consequences of the SED Dictatorship in the Process of German Unity (Enquete-Kommission "Überwindung der Folgen des SED-Diktatur im Prozess der deutschen Einheit"), 1995;
- Australia: The National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their families, 1995;
- Haiti: National Commission for Truth and Justice (CommissioNationale de Vérité et de Justice), 1995;
- Sri Lanka: three regional Commissions of Inquiry into the Involuntary Removal or Disappearance of Persons (Western, Southern and Sabaragamuwa Provinces; Central, North Western, North Central and Uva Provinces; Northern & Eastern Provinces), 1994;
- South Africa: Truth and Reconciliation Commission, 1995;
- Ecuador: Truth and Justice Commission (Comisión Verdad y Justicia), 1996;
- Guatemala: Commission for Historical Clarification (Comisión para el Esclarecimiento Histórico), 1997;
- Nigeria: Judicial Commission of Inquiry for the Investigation of Human Rights Violations, 1999;
- South Korea: Presidential Truth Commission on Suspicious Deaths, 2000;
- Ivory Coast: Mediation Committee for National Reconciliation, 2000;
- Sierra Leone: Truth and Reconciliation Commission, 2000; Uruguay: Peace Commission (Comisión para la Paz), 2000;
- Panama: Truth Commission (Comisión de la Verdad), 2001;
- Serbia and Montenegro: Truth and Reconciliation Commission for Serbia and Montenegro, 2002;
- Peru: Truth and Reconciliation Commission (Comisión de la Verdad y Reconciliación), 2001;
- Timor Leste: Commission for Reception, Truth and Reconciliation (Comissão de Acolhimento, Verdade e Reconciliação, CAVR), 2001;
- Grenada: Truth and Reconciliation Commission, 2001;
- Ghana: National Reconciliation Commission, 2002;

- Algeria: Ad hoc Commission (Commission ad hoc), 2003;
- Chile: National Commission on Political Imprisonment and Torture (Comisión Nacional sobre Prisión Política y Tortura), 2003;
- Paraguay: Truth and Justice Commission (Comisión de Verdad y Justicia), 2003;
- Morocco Equity and Reconciliation Commission (Instance Equité et Réconciliation), 2004;
- Democratic Republic of Congo (DRC): Truth and Reconciliation Commission (Commission vérité et réconciliation), 2004;
- Burundi National Truth and Reconciliation Commission (Commission Nationale pour la Vérité et Réconciliation), 2004 (not appointed);
- Indonesia: Truth and Reconciliation Commission (Komisi Kebenaran dan Rekonsiliasi, KKR), 2004 (not appointed);
- Republic of Korea: Truth and Reconciliation Commission, 2005;
- Liberia: Truth and Reconciliation Commission, 2005;
- Canada: Indian Residential Schools Truth and Reconciliation Commission, 2006;
- Ecuador: Truth Commission (Comisión de la Verdad), 2007;
- Solomon Islands: Truth and Reconciliation Commission, 2008;
- Kenya: Truth, Justice and Reconciliation Commission, 2008;
- Togo: Truth, Justice and Reconciliation Commission (Commission Vérité, Justice et Réconciliation), 2009;
- Honduras, Truth and Reconciliation Commission, 2010;
- Thailand, Independent Truth and Reconciliation Commission, 2010

The 2004 Truth and Reconciliation Commission of the Democratic Republic of Congo (DRC) and the 2008 Truth, Justice and Reconciliation Commission were created in countries where the ICC was conducting an investigation.



## Rule of Law and International and National Justice Mechanisms

PAUL SEILS<sup>1</sup>

This article considers international and national justice mechanisms in the context of the rule of law. It does not offer an exposition on the long list of various initiatives that have developed in the last twenty years but rather concentrates on conceptual and technical discussions about what international and national justice seeks to do and how it could do it better, particularly looking at the issues of complementarity, cooperation and technical assistance.

In August 2004 the UN Secretary General issued a report on the Rule of Law and Transitional Justice in Post Conflict Societies. He offered the following definition of the rule of law:

It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.<sup>2</sup>

It is a good definition and one which will be widely accepted as representing the dominant thought about the concept as it has developed in

recent decades.<sup>3</sup> Two things are notable about the approach taken. Firstly it embraces a “thick” or substantive definition. That is, it does not see the rule of law as a purely formal concept but as necessarily informed by values and principles and with international human rights law. The second thing to observe is the massive scope of the concept. The rule of law has profound practical implications in all sectors of the state – the executive, the legislative and the judicial. It affects all stages of the exercise of power – from legislative process, to review of executive power, to judicial independence.

This comment will consider national and international mechanisms of justice within the broad context of the rule of law. Without accountability, the rule of law is reduced to little more than hopeful or perhaps cynical rhetoric. While the focus here is on accountability, it is important also to bear in mind how national and international justice mechanisms must also respect the broader requirements of the rule of law – most notably in terms of the guarantees of the right to a fair trial. The modern international justice project has been ongoing since the creation of the International Criminal Tribunal for Former Yugoslavia. It’s second Prosecutor, Richard Goldstone, has often remarked that the guiding principle he followed was to ensure that the work of his Office was scrupulously fair and that there would be full respect for the rights of the defendants. It would, in essence, be regrettable to have little in the way of convictions, but much more regrettable and damaging to have the international community sponsor a body that was seen to be unfair.

In the space available it will not be possible to enter into detailed discussion about all of the international and national mechanisms that have played a part in trying to develop a respect

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<sup>2</sup> SG report to the Security Council, August 3, 2004, S/2004/616 at paragraph 6.

<sup>3</sup> See for example The Delhi Declaration of 1959 that joined the idea of the rule of law very firmly to the human rights movement. See also Lord Bingham’s endorsement of the definition offered by the SG in *The Rule of Law*, Allen Lane, 2010 at page 110

for the rule of law in recent decades. This review of the mechanisms itself will necessarily be of a snapshot nature, and in any event, a great deal is already known about most of them. Within the rubric of accountability the comment focuses on complementarity and cooperation in the future, and a consideration of the possible ways forward in making sure the relationship between national and international mechanisms is as fruitful as possible.

### 1. International Justice Mechanisms: the development of international tribunals, complementarity and the peace versus justice debate

For present purposes when speaking of justice mechanisms we refer to *enforcement* mechanisms, but one of course has to be aware that behind the courts and criminal investigations and prosecutions, the vast majority of the work done on the rule of law in justice sectors at both the national and international level is at the level of technical assistance and operational cooperation. It is not the aim here to address this massive field of UN, State and civil society activity, although as will be obvious by the end, the relationship between the enforcement mechanisms and assistance mechanisms is fundamental.

In the early years of the 1990s, the UN Security Council was consumed by the conflict in the Former Yugoslavia. When it set up the ICTY<sup>4</sup> the Tribunal represented the first ever internationally mandated civilian court to try war crimes, crimes against humanity and genocide. Its international predecessors at Nuremberg and Tokyo had of course been Military Tribunals. The ICTY was quickly followed by the creation of a similar body for Rwanda.<sup>5</sup> Both of these were fully international tribunals sitting in countries different from those of the alleged crimes. In November 1996 the Special Court for Sierra Leone was established with the support of the UN although not as a UN body. This represented a new venture into what are known as “hybrid tribunals” because the staff and judges of the Court were comprised of both nationals and internationals. Less than two years later the Rome Statute creating the International Criminal Court was signed by 120 States and quickly came into force with sixty ratifications by June 2002. In addition to these momentous events the Security Council has also supported the creation of a tribunal for Lebanon in connection with the alleged murder of Rafik

Hariri and the many other deaths that occurred in the aftermath of that attack. Additionally the Extraordinary Chambers in the Courts of Cambodia (ECCC) present another variation of a hybrid model.

The ten years from 1993 until 2002 represent a momentous shake up in the international community’s approach to accountability for serious atrocities. The reasons for the change have been well documented in the past and need only be sketched here. In essence the end of the Cold War created new possibilities for decisive Security Council action. Without those changes the ICTY would never have been possible. At the same time, the atrocities of the Yugoslav conflict, taking place in Europe in the full glare of detailed media coverage on a constant basis, made the prospect of ignoring the atrocities simply impossible. Furthermore, the development of civil society organisations in the decades since the Second World War rendered them more able and credible in charting the atrocities. Politics, media and civil society combined to help create the circumstances for the creation for the ICTY.

If the ICTY was a breakthrough moment, the creation of the ICC and its quick entry into force represents an amazing turnaround in fortunes for the concept of accountability. It is one thing for the UN Security Council to institute the occasional Ad Hoc body; it is quite another thing for States voluntarily to create a permanent body and voluntarily to create solemn obligations by which their nationals can be held criminally liable for war crimes, crimes against humanity or genocide.

#### *Complementarity*

Perhaps the defining characteristic of the ICC is that it is premised on a complementary model. What this means is that a case before the ICC will only be admissible in one of two circumstances: either the national state with jurisdiction has done nothing at all to investigate or prosecute the particular case or what it has done cannot be considered “genuine”. A *case* has been defined by the Court to consist of specific persons committing specific conduct in relation to specific incidents.<sup>6</sup> If a national case looks at different persons, conduct or incidents it will not render an ICC case inadmissible. To determine whether or not efforts have been genuine one must look at the concepts of willingness and ability. Both of these concepts are narrowly defined.

4 UN SC Resolution 827 (1993)

5 UN SC Resolution 995 (1994)

6 See for example the decision of the Appeals Chamber in the case of Bosco Ntaganda at the ICC.

National efforts may be deemed to lack genuineness if it appears the proceedings were in fact designed to shield the accused from responsibility rather than determine his guilt or innocence. This may include some forms of *de facto* or *de iure* amnesty proceedings. It may also cover the situation in which they are really sham proceedings.<sup>7</sup>

Secondly, an unreasonable delay in proceedings may indicate a lack of genuineness.<sup>8</sup> Precisely what constitutes an unreasonable delay will depend on the facts and circumstances of each case. Complexity and difficulty in investigation will be taken into account as well as relative resource capacity but there will have to be evidence of serious efforts to investigate serious matters.

Thirdly, if it appears that national authorities, in particular prosecutors or judges, lack sufficient independence or impartiality proceedings may likewise be considered not to be genuine.<sup>9</sup> This concept is somewhat linked to the first idea of sham proceedings. It is impossible to see how sham proceedings could make it to the trial stage without some degree of improper influence in the system. However it may often be difficult to prove that a decision was taken *for the purposes of shielding* the person from criminal responsibility. The test under this third heading is arguably less demanding. What has to be shown is that the proceedings were conducted in a manner inconsistent with intent to bring the person concerned to justice.

The final area to bear in mind when considering the power of the ICC to intervene is if there is a lack of ability at the national level. Again this is a narrower concept than one might imagine. The notion of inability requires a twofold test: firstly it must be established that the national judicial system has totally or substantially collapsed or is “unavailable”. Secondly, it must be shown that it is *due to those circumstances* that the state is unable to obtain the accused or otherwise conduct proceedings.<sup>10</sup>

Whereas the concepts of total or substantial collapse are relatively easy to understand, the notion of *unavailability* of the judicial system is somewhat curious. One might imagine that the Uganda referral is an example of unavailability. While the national system has by no means collapsed, it is “unavailable”

in the context of the conflict with the LRA. This is not an impossible construction in terms of the conditions that prevailed at the time of the referral although it is not the basis on which the Prosecutor decided to open the investigation. It was opened largely on the basis that cases of probable interest to the Prosecutor did not appear to have been investigated by the Ugandan authorities at that time.<sup>11</sup>

An important consequence to bear in mind about the relatively narrow concept of inability is that a system which has significant problems may not meet the definition of substantial collapse. It may be possible for a system facing serious difficulties to put together credible prosecutions of mass atrocities. This is important because it returns us to the idea of international cooperation and what kind of assistance should be afforded to such systems in terms of hybrid courts, specialised chambers, technically assisted prosecution units or specially trained police and investigators, even in the immediate term where the ICC might be considering an investigation. Targeted assistance to develop some kinds of vanguard capacity may render a system that has significant difficulties capable of holding genuine trials.

#### *The aims of criminal justice in post-conflict contexts*

The notion of complementarity at the heart of the ICC model came about for two different kinds of reasons. On the one hand States wanted to keep as much control over criminal investigations as possible. Many of the States involved rightly regard themselves as scrupulous observers of the rule of law and consider that their systems would not allow a national who had committed crimes within the jurisdiction of the court to remain untried. On the other hand there was recognition that international tribunals had certain significant limitations. These are generally characterised as remoteness from the people affected by the crimes, delays and difficulty in obtaining evidence arising from foreign investigators working in alien territory, and the costs related to international justice. The purported benefits of hybrid or internationalised models are

7 Rome Statute Article 17(2)(a)

8 Rome Statute Article 17(2)(b)

9 Rome Statute Article 17(2)(c)

10 Rome Statute Article 17(3)

11 The Prosecutor can open an investigation of a situation under Article 53(1) of the Rome Statute if he believes there is a reasonable basis to consider that crimes within the jurisdiction of the court were committed and that there is nothing precluding the admissibility of the probable cases he will investigate in terms of national proceedings. In the circumstances of a referral he need to seek prior authorization of the Pre-trial Chamber. It is a matter entirely for him. He is under no statutory obligation to specify the precise legal basis that led to the decision to open the investigation.

precisely that they overcome some of the challenges presented by remoteness and may provide a richer legacy in terms of both institutional capacity and broader civic confidence.

It is a pity that the issue is reduced to remoteness. It is more complex and goes to the heart of what we want to achieve through prosecutions of mass atrocities. It will be presumed obvious that the purpose is to punish the wrongdoer, vindicate the rights of the victim and (presumably) deter future crimes.

Some of these presumptions are correct, although the focus on deterrence needs a more sophisticated analysis. However, justice after huge atrocities is about something more fundamental than punishment. It is about reconstructing a sense of confidence among the citizens of a state that its institutions are willing and able to protect and defend fundamental values and freedoms.<sup>12</sup> The vice of remoteness is not purely geographical: trials taking place abroad say explicitly that there is no basis for trust in national institutions as far as justice for these crimes is concerned.

Now one has to be careful with this analysis. It does not seek to down play the importance of justice for the victims. This is of course essential. Also the importance of a concerted effort by the international community to formally punish and thereby confirm internationally held values should not be casually dismissed. These are hugely important considerations about the effectiveness of the pursuit of international justice. However, citizens have to live their lives long after the international courts have gone and they do so subject to the nature of the State where they reside. The optimum result for post-conflict justice is not only justice for victims but justice that re-establishes confidence among society as a whole in the efficacy of its institutions. The concept of complementarity is therefore important because even in those cases where the State may have limited capacity to do justice, complementarity affords the opportunity and recognises the importance of national efforts being made.

<sup>12</sup> I have set out these ideas, which are shared by many in the transitional justice field, in greater detail in several articles. See for example *La Restauracion de confianza civica mediante la justicia transicional* pp 21-43 in *Justicia Transicional en Iberoamerica*, Almqvist and Epsosito, (eds) Centro de Estudios Politicos y Constitucionales, Madrid 2009 (forthcoming in English by Routledge in 2011).

#### *Timing, sequencing and moving the debate forward*

In three of the five situations currently under investigation by the ICC, Uganda, the DRC and the Central African Republic all referred the matters to the court themselves. This would indicate that the virtues of national prosecutions are not appreciated or are more apparent than real in certain circumstances. There is not time to enter into the facts behind the referrals here but they do raise an important issue about timing, sequencing and capacity.

In 2004 the UN Secretary General noted that the issue was no longer whether justice should be done but rather when and how it should be done. He suggested the solution lay in creative approaches to sequencing different aspects of negotiations of peace processes and justice. This proposition has been subjected to scrutiny by Louise Arbour who has argued that the pursuit of peace and justice generally requires implementation on parallel tracks, not on sequential ones.<sup>13</sup> The Prosecutor of the ICC took the same position in a speech in Nuremberg in June 2007.<sup>14</sup>

There may be a way to bridge an apparent difference of views between the position of the Secretary General in 2004 and the other views mentioned. What is proposed below is an attempt to sketch out some ways in which efforts towards criminal justice can be incorporated meaningfully and contemporaneously into different processes so that criminal justice is not simply put off until a later date but is pursued through a number of mechanisms always with that goal in mind.

The sequencing argument has several justifications. One is that the search for justice will destabilise peace efforts. Another is that justice for these kinds of crimes will always be relatively slow. They are complex crimes. They involve difficult investigations. Those involved may still be powerful. Victims may be scattered around different regions or even internationally. They may be scared, poorly educated or illiterate. All of this means things take a

<sup>13</sup> The podcast of her lecture on Peace and Justice from 20 February 2010 can be found here: <http://www.law.yale.edu/news/9164.htm>

<sup>14</sup> See <http://www.peace-justice-conference.info/download/speech%20moreno.pdf>

long time. Attempts to do things quickly will often result in huge delays further down the line.<sup>15</sup>

If it is true that all international and national investigations of complex cases are likely to take time, one has to factor that into the calls for justice to be done. In short there has to be greater realism about what is and is not a reasonable delay when talking about these kinds of crimes. Further, there has to be recognition of the *quid pro quo* if one opts to seek justice internationally. In particular international tribunals are in general likely to prosecute a very small number of people and create no increased confidence in national judicial institutions. This is the natural consequence of being forced to use the option of last resort.

The debate about sequencing has to go into a more technical level than the rather polar discussions that seem to take place just now. It is not about peace versus justice and it is not necessarily about parallel versus sequential. People who want peace are not the enemies of justice, but they need to be persuaded rather than lectured that justice is not only feasible but can be done in a way that minimises threats to, and possibly enhances, the prospects of sustainable peace. Equally, justice proponents have to come up with ideas, better than those in the past, about how the two things are indeed compatible.

In some ways it may be necessary that justice proponents develop a more sophisticated approach to the concept of sequencing, besides a blunt insistence on parallelism, that does not see it as a short leap to impunity but rather as a constructive step to accountability.

There has been a fair amount of talk about how to operationalise sequencing over recent years. It has focused on ideas for evidence preservation, rapid reaction to protect crime scenes, recover documents and carry out forensic examinations. All of these are valuable ideas in themselves but their practical application is variable. More thought has to be put into making sure that those engaged in peace processes, including the issues of DDR, understand the opportunities for justice measures without seeing them as a threat to the process.

Two examples can be given. DDR processes are

<sup>15</sup> Consider for example the difficulties the Office of the Prosecutor of the ICC had in the Lubanga trial as a result of the way it dealt with so-called lead information obtained from the UN in the course of its investigations. See <http://www.icc-cpi.int/iccdocs/doc/doc511249.pdf>

delicate and important. They get fighters off the streets and increase the chance of peace, at least in the short term. Yet it is the demobilised personnel who will often hold key information into alleged crimes, if they have not been responsible themselves. Thus far almost no effort has been made to develop schemes that trade DDR benefits for some kind of information about crimes, weapons, structures or responsibilities.

It is not that one underestimates the difficulties of such processes but one laments the lack of serious attempts to incorporate relatively feasible measures when the opportunity has been there. One obvious measure may be more rigorous attempts to trace surrendered weapons through their serial numbers if they still exist. This would put arms traffickers on their guard for the future and have the potential to close some trafficking routes. The exchange of reintegration benefits among rank and file members for information on limited issues like this may at least sometimes be feasible. The bargaining position of people prepared to accept demobilisation packages is not the strongest. They have already come to a point where they are willing to consider financial incentives to hand in their weapons. Well thought out and implemented projects are capable of turning DDR processes into more valuable mapping and information gathering exercises that will reduce the likelihood of the same parties returning to violence and assist future rule of law and prosecution efforts. They need not give all information to the point of being a disincentive, but some information may be possible.

Similarly the issue of the relationship between truth commissions and prosecutions has to move into a new field now. There is not space to develop the argument fully but a truth commission in itself does not constitute justice.<sup>16</sup> This is the firm view, for example of the Inter American Court on Human Rights and appears to be the correct understanding of the Rome Statute.<sup>17</sup>

There is a way that truth commissions might meet the test of criminal investigations for ICC purposes but they have not been used in this way so far. For such a thing to happen, truth commissions would

<sup>16</sup> See Seils, *The Limits of Truth Commissions in the Search for Justice: An Analysis of the Truth Commissions of El Salvador and Guatemala and Their Effect in Achieving Post-Conflict Justice in Post-Conflict Justice*, 2002 Bassiouni, M. Cherif, ed. International and Comparative Criminal Law Series. Ardsley, N.Y.: Transnational Publishers.

<sup>17</sup> See Article 17(1) of the Rome Statute.

have to be able to lead *as a procedural inevitability* to the exercise of decision-making power by the criminal justice authorities at the national level. The ICC requires that national authorities exercise their criminal jurisdiction in relation to alleged offences. Ad hoc non-judicial investigations do not meet this test.

Attempts to characterise a truth commission as an investigation within the meaning of the Rome Statute are misguided – at least in the way truth commissions have operated to date. Truth commissions perform an important function in terms of certain features of the rule of law principles set out at the beginning, not least in terms of transparency. They do not however meet the relevant international human rights standards for the kinds of remedies victims require to be afforded in the face of serious violations of the right to life, and in the face of torture and other matters. Nor are they always likely to afford potential suspects with the appropriate due process guarantees.<sup>18</sup>

How should truth commissions change? Although they vary in mandate and procedure, the Uganda Human Rights Commission, the Kenyan Human Rights Commission and the Police Ombudsmen for Northern Ireland all have the power to pass on their investigations to the Director of Public Prosecutions. The DPP is then required to make a decision on whether or not to order a criminal investigation in relation to the matters presented. This represents a mandatory exercise of criminal jurisdiction, even if the decision is made not to investigate.

Some truth commissions have been used in a similar way but on a voluntary basis. The prosecutions of the Argentine military juntas in 1985-1987 relied almost entirely on the work of the National Commission on Disappeared Persons (Conadep), but this was a voluntary decision of the prosecutors and not a necessary consequence of the Conadep mandate. The Peruvian Truth and Reconciliation Commission established a team that was to present a series of paradigmatic cases to the national prosecutor. While this was a good idea in many ways, it was not supported by the national prosecutor who chose to pay very little attention to the work of the TRC.

If the mandate of a truth commission were designed so that its findings required consideration by the DPP or the equivalent, it may be argued that this

would go some way to closing the gap between non-judicial and judicial activities.

The biggest argument against such a step would be the threat to participation due to fear of prosecution, but this is a somewhat bogus objection. Truth commissions could still operate on the basis of confidentiality where needed. The report would function essentially as lead information for the DPP to consider. In addition, almost all of the information that comes in relation to atrocities for truth commissions, operating separately from prosecution initiatives, comes from victims rather than insiders of the institutions involved.

Truth commissions could also develop to play the role currently seen in mapping exercises carried out by the UN OHCHR in DRC and Nepal for example. Such mapping exercises are essential for an informed selection policy in prosecutions of mass atrocities. It helps to identify cases of particular gravity, potential patterns of atrocities and conduct, activities carried out by specific structures or groups. Some truth commissions have produced work on potential criminal cases but they have tended to be selective, looking at paradigmatic or illustrative cases and preferring to concentrate on broader phenomena.<sup>19</sup>

The kinds of exercises in mapping carried out by the OHCHR in DRC and Nepal are important and recent contributions in the field of transitional justice. Whether truth commissions should be extended to incorporate such activities or whether a parallel but contemporaneous effort is created would depend on an assessment of the facts and circumstances, including resources.

It seems arguable that efforts to map alleged criminality (as distinct from an effort to find the truth about violations and the circumstances that gave rise to them in a non-criminal context), allied to an express mandate requiring the exercise of prosecutorial decision-making on the information gathered, would meet the requirements of “proceedings” under the Rome Statute as genuine

<sup>18</sup> See for example UN GA resolution A/RES/60/147.

<sup>19</sup> Over forty truth commissions have taken place since the mid 1980s. They are of very different characters. Some, like CONADEP in Argentina, catalogued a huge array of violations and crimes and in the sense is a mapping exercise par excellence. Others, like the Historical Clarification Commission in Guatemala, go into considerable detail on allegations of massacres as well as presenting a number of illustrative cases. The point is not to say that no truth commissions have done this kind of work but to ensure that it becomes the norm and is done from the perspective or potential criminal investigations as the end result.

and necessary steps designed to enhance prosecution efforts. Of course, if prosecutors decided not to proceed, such a decision could be reviewed under the provisions set out above. In this way truth commissions need not be an alternative to criminal justice but a direct and positive contribution to it.

Why would these kinds of steps make a difference in the pursuit of justice? On the one hand they would help to change the mindset of those engaged in peace processes to see that the steps sought at a technical level to help justice are not necessarily an obstacle to peace. Indeed they would contribute not only to justice but the prospects of a more sustainable peace. It may mean that truth commissions would have to change their character somewhat to become a little more quasi judicial in some respects, but it would offer the possibility of more time to consolidate peace while at the same time gathering valuable evidence.

It should be emphasised that such an approach will not always be possible or desirable and it will of course depend on a balanced assessment of the facts and circumstances in each place. What seems clear however is that we have to start discussing more detailed ideas on a technical level to go beyond the present almost ideological impasse that seems to have developed in the current debate.

## 2. The Special Tribunal for Lebanon

The Special Tribunal for Lebanon is an international court and represents a radical shift by the Security Council in establishing a court in relation to particular events – the assassination of Hariri. Whether or not the Court will have success, some reservations may be expressed about the wisdom of establishing an international court in respect of such a limited set of circumstances. It seems difficult to imagine that the Security Council will not be called upon to consider similar circumstances several times in the future, and the failure to address the matter in a similar way will inevitably be taken as proof that other interests were at stake besides the pursuit of justice. It is not news that the Security Council is a political body and acts for political reasons but it would be extremely regrettable if the pursuit of justice became instrumentalised in legitimate political debates and decisions. It would in itself lead to a significant weakening in the perception of the creation of an international rule of law.

## 3. National Mechanisms: hybrid tribunals

Reference has already been made to a number of hybrid tribunals including those in Sierra Leone and Cambodia. Both of these have the classic elements of the hybrid model in that the staff is composed of a mix of nationals and internationals and that it takes place on the territory of the state where the alleged crimes took place.

The processes in both of these cases have been difficult, and it is too early to say if the alleged benefits of such a model have materialised in terms of a positive legacy in respect for the rule of law and technical ability on an institutional level. What has been clear is that they have provided invaluable lessons in respect of future efforts.

Some of the proposed benefits have been seen to give way in the face of reviewed circumstances. Charles Taylor is being tried by the Sierra Leone Special Court not in Freetown but in The Hague at the premises of the ICC. It was deemed to be too large a security risk to hold the trial in Sierra Leone. Such is the reality of the pursuit of justice, especially against powerful people and especially in poor countries.

One important question is whether hybrid courts have a future now that the ICC is in existence. In the first place, the ICC only deals with its States Parties unless the Security Council decides to refer a non-State Party, as it did in the case of Sudan. At least in principle the idea of hybrids remains possible for non-State Parties.

For States Parties of the ICC the situation is a little more complicated. According to one view, if a hybrid is needed it seems to amount to an admission of a significant degree of inability, the kind for which the ICC was designed to intervene. However, in the light of the ICC's view that the Central African Republic decision to refer the case to the Court was proof of an intent to see justice done, a decision by a State to welcome a hybrid tribunal would presumably be seen in the same light.

Hybrid courts are needed to fill gaps both in terms of political will and ability. There is nothing on the face of the statute that would preclude a hybrid court from being used to deal with post-conflict crimes. The issue is perhaps more political and practical. Would States be willing to pay for a hybrid court when they are already contributing to the ICC and would they not see it as undermining the efficacy of the ICC?

The honest answer to these questions is that we just do not know, but we should keep an open mind. Experience already shows that the ICC is only likely to achieve a limited amount even in a significant time. Hybrid courts may still offer a viable and valuable means of allowing justice to be done nationally, with the added benefits of developing national technical skills in proximity to the victims and with a potential consequence for confidence in the national institutions.

#### **4. National Mechanisms: What is required for national justice mechanisms to succeed; Peru and Fujimori; Guatemala and CICIG; future models**

Much of what has been written above extols the virtues of national prosecutions over international ones. Yet the simple truth remains that most states are either politically unwilling or practically unable to meet the challenges of justice. By far the greatest obstacle is political will. Whether or not there is a sufficient degree of political will to make investing in capacity a worthwhile venture is a complex assessment that requires a great deal of expertise both technically and politically.

The obstacles to national prosecutions, leaving aside political will, can be broadly divided into two categories – technical and infrastructural.

On the technical level investigators, prosecutors, defence lawyers and judges may not have the requisite skills needed to address certain kinds of crimes. It is a common tendency to dismiss this idea and suggest that there is nothing especially difficult about prosecuting mass crimes as compared for example to drug criminality or money laundering. In one sense this is true. Investigating massacres and torture is not as complex as some other types of investigations such as certain kinds of fraud or intellectual property crimes. It does however require particular skills. It is also the case, regrettably, that in many countries, police forces and prosecutors have a poor level of basic training in investigative techniques that on occasion requires some rather elementary investment.

The investigation of the crime base – the scene of the crime, its victims, eye witness and circumstantial witnesses – is generally viewed as the least skills-intensive kind of investigative work (leaving aside scientific expertise of a forensic nature). In most of the crimes being investigated post conflict or post repression, the chances are that the victims of such crimes will be marginalised or oppressed groups.

The relationships of state institutions with them will probably be chequered to say the least. In addition the population may be poor or illiterate.

The complexities that these circumstances bring to crime base investigation in national prosecutions are significant. Investigators have to understand that if they are to get to the truth they have to work to establish a relationship of confidence with those they are to interview. This has to be done without prejudicing the impartiality of the investigation. It is far from an easy balance to achieve. It requires sensitization, intelligence, almost certainly much longer investigations and quite possibly – in many cases at least – a willingness to enter into some kind of partnership or cooperation on certain aspects with local civil society organisations to help facilitate relationships with communities that have suffered alleged crimes.

Investment in such efforts requires political will and intelligence. There are relatively few examples of success in these regards. In addition to crime-based investigations, work has to be carried out to establish the linkage between occurrences and those responsible through the command chain in terms of planning, ordering or participating in the crimes. This requires skills in knowing the structures under investigation, how they were organised, where they operated, what kinds of communications systems were used, what weapons were used, what logistical capacity the groups had. Again it is not the most difficult intellectual matter in the world but it is not straightforward especially in post-conflict or post-repression societies. People are reluctant to start investigating these structures either through fear, through prejudice or through ignorance.

Infrastructural difficulties abound in the investigation of complex crimes under these circumstances. They range from a lack of vehicles for investigators get around, to a lack of computers, an ineffective information management system to store and analyse evidence, an almost total lack of forensic equipment to analyse samples, an absence of effective protection systems and insecure holding facilities for prisoners.<sup>20</sup>

Many of these issues can be addressed, but they require a detailed and accurate diagnosis of the real problems allied to a willingness of cooperation partners to provide the support needed.

<sup>20</sup> This was the author's experience in Guatemala while working with CICIG.



At the heart of many of the difficulties for national investigations is the issue of witness protection. In poor societies the cost and expertise needed to realise this can seem to be insurmountable obstacles. Some work has been carried out in recent times to review witness protection mechanisms, but much more can be done at a technical level, looking at detailed costing, staffing and reporting issues. No one can pretend that this is not a huge challenge, but focused efforts have not yet been made with sufficient regularity to make success at all likely.

The issue of secure prisons is also a massive problem. The corruption that is rife in many of the states where such investigations may be necessary makes the process of arrest and detention fraught with additional difficulties. In some situations it may be necessary to consider building entirely new high security prisons staffed with specially recruited and vetted agents.

Perhaps one of the most significant efforts in recent times has been the successful prosecution of former Peruvian President Alberto Fujimori for a variety of serious crimes including false imprisonment, killing and torture. In many ways this is an astonishing event that would have been unthinkable even ten years ago. It is a great credit to the relevant Peruvian institutions that the trial of a man who is still immensely popular among much of the population has been completed without any significant resort to violence. On the other hand some caveats are necessary.

It is not enough for criminal justice at the national level to be purely symbolic. Pursuing the former President of State can sometimes be considered sufficient to re-establish confidence among the population. It shows, does it not, that all are equal before the law. Well, yes and no. It certainly shows that former presidents can be brought down by justice, and fairly. But justice at the level of token or symbol is not socially convincing. It is not necessary for every individual to be prosecuted for confidence in the justice system to be restored. However, if there is a perception that prosecutions are politically motivated confidence will be adversely affected.

At a minimum, national prosecution efforts must be able to tackle those responsible for the patterns of abuse, and if institutions are involved, those responsible in the institutions must also face justice. If for example it is thought that the armed forces were closely associated with atrocities and that general conditions essentially remain unchanged,

the lack of an investigation and prosecution will certainly not help to restore confidence.

The possibilities of trials like Fujimori's depend on a number of factors, but principally on competent, incorruptible prosecutors and judges who function as such in a system that allows them to do so. One country that is very far from this situation is Guatemala.

*CICIG, a new attempt at international cooperation, prospects for replication*

The International Commission Against Impunity in Guatemala was established in an agreement between the UN and Guatemala.<sup>21</sup> It is known as CICIG in Spanish.<sup>22</sup> It has a complex mandate: its functions are to identify illegal security groups and clandestine security organisations in terms of structure, finance and operations; to collaborate with the state in dismantling such groups, including the investigation and prosecution of members of these groups; and to make recommendations on public policies to eradicate such groups, including the use of legal and institutional reform. CICIG is an autonomous organization created by the UN and Guatemala. Its UN partner is the Department for Political Affairs but it is not legally or structurally accountable to the UN although it depends on it politically and financially.

CICIG has attracted a lot of attention as a unique attempt to intervene in a failing state's judicial system. As an abstract idea it is certainly more imaginative than many earlier attempts. Inside Guatemala the institution enjoys enormous popularity especially among civil society. Although, taking into account the spiral in the murder rates over the last 12 years, the popularity may be borne as much from desperation as from expectation.

In practice CICIG's operations have concentrated very largely on the investigative and prosecutorial aspects of its mandate. Efforts at institutional reform and policy recommendations have met with some limited success, including the dismissal of many police agents suspected of corruption and forcing the resignation of the former Attorney General. But for the most part efforts in these areas can best be described as tactical rather than strategic. Many efforts aim to help advance the particular lines of

21 12 December 2006, See [http://cicig.org/uploads/documents/CICIG\\_AGREEMENT\\_EN.pdf](http://cicig.org/uploads/documents/CICIG_AGREEMENT_EN.pdf)

22 The author served as Chief of Analysis at CICIG from 2008-2009.

inquiry being developed. Under the circumstances this is entirely understandable but is inevitably a focus that is narrower than originally intended. In terms of the primary goal of identifying and dismantling illegal security groups, it is hoped to achieve this essentially through criminal prosecution.

The most significant case to date concerns corruption-related charges against former President Portillo. He is alleged to have been involved in corrupt acts through his association with an illegal security group known as the Cofradia. The group dates back to a powerful military faction that dominated the armed forces during significant parts of the conflict, possibly from the early 1980s and certainly in the mid 1980s. Through their dominance they also massively enriched themselves especially through corruption in contraband.<sup>23</sup> Whether Cofradia exists today in the form it did in the 1980s is unclear.

There have been other high profile cases but so far nothing in terms of the continued and well substantiated reports on the existence of government sponsored or constituted death squads. Operating in recent years, they have attacked and killed both human rights defenders as well as “social undesirables” linked with common crime, the drug trade and kidnapping. Progress in identifying and dismantling illegal groups has, at least in terms of public information, so far been slow.

In the middle of 2010 the head of CICIG resigned, citing continued failure by the government to take promised measures to help the work of CICIG. These included the improvement of security conditions in prisons and effective witness protection. In particular the appointment of a new Attorney General considered by CICIG to have links with organized crime was also cited.

CICIG was a long time in the making (some eight years of intermittent negotiations which began with the Portillo government ironically enough) and underwent various changes in the debates between different Guatemalan governments and the Department of Political Affairs at the UN. The initial proposal included the creation of a hybrid tribunal with international judges and prosecutors. Over time this proposal changed. It was found to

be unconstitutional to have international judges working with national judges and so the proposal was reduced solely to the creation of an international prosecuting force working either with, or parallel to, the national service.

While in many ways it was admirably innovative, the triple-focused mandate of CICIG might in retrospect have been more than it could reasonably manage within the terms of its resources and in the political context it faced. CICIG’s efforts at technical assistance have met with mixed success. The attempts to create a viable prosecution unit dealing with CICIG cases have been hampered due to a lack of suitable candidates. (Candidates are vetted by CICIG including by means of a polygraph test). Significant efforts have been focused on hiring young police recruits in the hope of training them professionally before they are contaminated by the generally corrupt practices in the police force. A relatively small number have been trained in this way. In addition a substantial number of policemen and prosecutors have been dismissed or forced to resign at the behest of CICIG.

There is much to commend many of the ideas behind the model developed by CICIG, but wise heads will counsel caution against premature talks of replication. Such efforts are not only costly but also require individuals to put themselves at considerable physical risk.

Among other things it is doubtful that such interventions are best partnered by the DPA. The DPA is an expert in political affairs, not criminal justice. It may play a very valuable role in developing an agreement for such an institution but its value diminishes when it comes to criminal justice operations and advice. If the UN is to partner such operations, its added value should be in helping to identify and assist in recruiting recognized experts with the appropriate profile and in advancing technical cooperation. If the DPA is to continue in this area it should do so in conjunction with OHCHR and UNODC.

Secondly, consideration should be given during the design process to the creation of identifiable benchmarks to measure the degree of government commitment. This is by no means an easy task and will require a deeper diagnostic effort at the outset to assess the particular problems likely to need addressing. We know for example that effective witness protection systems and secure holding facilities are essential. If they do not exist, and before

<sup>23</sup> See for example the famous case of Alfredo Moreno, a customs official tried on massive corruption charges that saw Cofradia related suspects resign senior military positions but not face trial in 1997.

entering into an agreement, there should be a clear plan of what is needed and what a government has to do by when to manifest a viable commitment. Sometimes things will be beyond the government's control. If too much is out of control the viability of the project will clearly be in doubt before it begins.

Thirdly, while Guatemala is such a severely problematic country it is difficult to guess how such a model would have fared elsewhere, and it is doubtful that such a model can prosper without at least some kind of presence in the judiciary as well as in the prosecuting authority. If, as in the case of Guatemala, there is a legal obstacle to having judges from abroad participate in national cases, at least minimal consideration should be given to some kind of internationalized mentoring system. It would allow national judges the chance to learn from experienced international judges. It may afford some degree of protection and where necessary would exercise a degree of pressure on judges minded to act corruptly.

The model has much to recommend it and above all offers an invaluable starting point to learn lessons to adapt it for maximum effectiveness in future opportunities.

### *Conclusions*

This article has considered international and national mechanisms designed to bring justice for mass atrocities in transitional contexts. It has done so in the context of trying to understand those efforts through the broader prism of rule of law. It has not attempted to chart and categorize all such efforts, which would have been a task far beyond the time and space available. It has tried rather to highlight four things:

First, that the rule of law is essentially a matter of citizens having confidence in the institutions of state, and especially the institutions of justice. The pursuit of justice in transitional contexts should be focused on helping to re-establish that confidence. Reliance on international justice mechanisms is a last resort because it admits that there is not a sufficient basis of confidence in national institutions to do the job. International efforts can have hugely important successes, not least in bringing some measure of justice to victims, confirming values of a universal nature and demonstrating an international commitment to enforce such values. But international mechanisms can do relatively little to restore national confidence, and in the longer

term it is that confidence which will ensure respect for rights and protection from future abuses.

Second, the notion of complementarity at the heart of the ICC system means that national authorities have the right and the duty to initiate the first attempts to investigate and prosecute. The ICC, far from doing away with the need for continued assistance to national authorities, positively encourages it. The limits of such assistance (for example in relation to the future use of hybrid courts) is not yet clear, but an open mind is needed to make sure that as much justice as possible is forthcoming for both the sake of the victims as well as for broader society.

Third, the relationship between the rule of law, justice mechanisms and peace processes has to move on from the sterile peace versus justice debate. There are many discussions on a technical level that can help move the debate in a useful way, including focussing on DDR mechanisms in peace processes, developing the ways in which truth commissions work and linking their mandates to prosecution decision making.

Finally, new and innovative attempts to provide technical assistance at the national level are welcome, such as in the case of CICIG in Guatemala. However, caution must be exercised in determining where and whether replication is a viable option. There must be realism about the nature of a government's commitment; there must be detailed and recorded diagnostic planning to ensure maximum efficiency; governments should be asked to endorse a set of identifiable benchmarks, even before the deployment of a similar mission, to demonstrate political will and viability. Individual institutions should not be burdened with well-intentioned but overly ambitious mandates. Creating the mirror of a justice ministry and Attorney General's office has many attractions. But it is likely that the net which it casts is too wide to penetrate the problems faced by the society in the midst of a profound rule of law crisis. Striking the balance is very difficult but erring on the side of a reduced mandate is probably prudent. Alternatively adequate resources must be provided to make sure that efforts are not too thinly spread. Finally such efforts need to include all stages of the judicial process, from investigation to judgement and to imprisonment. A lack of investment in any one of these is likely to render technical assistance of fleeting utility at best.

International and national justice mechanisms primarily seek to ensure accountability, without

which the notion of the rule of law becomes an empty shell, offering no real protection to the lives of citizens in countries throughout the world. It is only one part of the massive web of inter-related activities subject to the rule of law and needed to maintain the structures of State within the confines of its reach, but is it the part which puts the theory to test. Although they now form part of the landscape that was inconceivable twenty years ago, both national and international justice mechanisms still face far-reaching challenges. This is a profound advance. The present challenge is to deepen these commitments to the rule of law by ensuring that the principles of complementarity and the practices of cooperation render national efforts ever more effective.

## Reparations Programs: Patterns, Tendencies, and Challenges

PABLO DE GREIFF<sup>1</sup>

The topic of this paper is the massive reparations programs for gross human rights violations such as those established by countries as diverse as Argentina, Chile, Morocco, and South Africa. Reparations can also be mandated by courts following the adjudication of typically isolated cases of human rights violations. Proposals for the implementation of out-of-court, administrative, large scale programs have become a staple of most transitional situations – which does not mean that programs (let alone ambitious or effective ones) are implemented in the end.

The normative-legal basis for the establishment of these programs has been strengthened and clarified significantly in the last few years, so the right to reparations is no longer considered to be merely

“emergent.”<sup>2</sup> But in addition to legal obligations, governments have other grounds for establishing such programs, which I will examine below. Broadly speaking, they are now perceived to be a part of a comprehensive transitional justice policy.

In this paper I will not provide a detailed overview of past experiences with reparations programs, nor attempt to provide guidance for their design or implementation; this I have done elsewhere.<sup>3</sup> Rather, after a short summary of a few of the critical variables in the design of reparations programs (section I), I will concentrate on briefly

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<sup>2</sup> Thus, 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*, (A/RES/60/147, March 21, 2006) is said not to create new obligations but to encapsulate already existing ones. See also UN Commission on Human Rights, *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, E/CN.4/2005/102/Add.1, February 8, 2005 and the accompanying reports by Diane Orentlicher, *Independent Study on Best Practices, Including Recommendations, to Assist States in Strengthening Their Domestic Capacity to Combat All Aspects of Impunity*, E/CN.4/2004/88, February 27, 2004 and *Report of the Independent Expert to Update the Set of Principles to Combat Impunity*, E/CN.4/2005/102, February 18, 2005. The Inter American Court of Human Rights, since the Velásquez-Rodríguez case has forcefully affirmed this right. See Velásquez-Rodríguez Judgment, Inter-Am. C.H.R., Ser. C, No. 4 (1988). See also Arturo Carrillo, “Justice in Context: the relevance of Inter-American Human Rights Law and Practice to Repairing the Past,” in *The Handbook*, and Dinah Shelton, *Remedies in International Human Rights Law*, 2<sup>nd</sup> ed. (New York: Oxford University Press, 2006).

<sup>3</sup> Cf. Pablo de Greiff, “Addressing the Past: Reparations for Gross Human Rights Abuses,” in *Civil War and the Rule of Law: Security, Development, Human Rights*, Agnès Hurwits and Reyko Huang, eds. International Peace Academy (Boulder, CO: Lynne Rienner Publishers, 2007); “Justice and Reparations,” and “Repairing the Past: Compensation for Victims of Human Rights Violations,” in *The Handbook of Reparations*, Pablo de Greiff, ed. (Oxford: Oxford University Press, 2006); “The Trust Fund for Victims of the International Criminal Court: Between Possibilities and Constraints,” in *Out of the Ashes. Reparation for Victims of Gross and Systematic Human Rights Violations*, K. de Feyter, S. Parmentier, M. Bossuyt, P. Lemmens, eds. (Brussels: Intersentia, 2006); “Reparations Efforts in International Perspective; What Compensation Contributes to the achievement of Imperfect Justice,” in *Repairing the Irreparable: Reparations and Reconstruction in South Africa*, Charles Villa-Vicencio and Erik Doxtader, eds. (Cape Town: David Phillips, 2004).

listing some of the recent patterns, tendencies, and challenges in discussions about reparations (section II). I will examine, in particular (although, per force, not in detail) the expansion of the transitional justice agenda, as revealed in the fact that it is increasingly expected to be an effective way of addressing not only the legacies of authoritarianism but also of conflict, and to be effective as a development tool or as a way of redressing socio-economic imbalances.

### I. The basics of a reparations program<sup>4</sup>

The very broad understanding of the term «reparations» that underlies the five categories in the Basic Principles and Guidelines (restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition), an understanding that is closely tied to the more general category of “legal remedies”, is perfectly consistent with the recent trend to look for complementarity among justice measures. There are binding obligations to provide these five kinds of measures. However, the five categories go well beyond the mandate of any reparations program to date: no reparations program has been thought to be responsible for “distributing” the set of “benefits” grouped under the categories of satisfaction and, especially, of guarantees of non-repetition in the Basic Principles and Guidelines. Indeed, it can be argued that the five categories in the Basic Principles and Guidelines overlap with the sort of holistic transitional justice policy that the Secretary-General recommends in his report on the rule of law and transitional justice.<sup>5</sup>

In practice, those who are responsible for designing reparations programs are unlikely to be responsible for designing policies dealing, for example, with truth-telling or institutional reform. They concentrate on the design of programs that are organized mainly around the distinction between material and symbolic measures and their individual or collective distribution. Rather than understanding “reparation” in terms of the wide range of measures that can provide legal redress for violations, it is as if they understood it more narrowly, in terms of whatever set of measures can be implemented to provide benefits to victims directly. Implicit in this difference is a useful distinction between measures that may have *reparative effects*, and may be obligatory as well as important (such as the punishment of perpetrators or institutional reforms), but do not distribute

a direct benefit to the victims themselves, and those measures that do, “reparations” in the strict sense.

Even with the narrower understanding of the tasks involved in designing and implementing a reparations program, the challenges are significant. To begin with, we should recognize that the violations which reparations programs seek to redress, are normally, strictly speaking, irreparable. There is of course no way of returning victims or their families to the “*status quo ante*”, when the abuses involve the disappearance of a family member, torture, sexual abuse, years of illegal detention, etc. That there are victims who overcome such abuses is more a testimony to their own fortitude than to the effectiveness of any program. And yet, of course, this is no excuse for not trying to establish such programs. It is rather an invitation to conceptualize their aims more clearly, and to be mindful of the role that victims should play in that process.

Leaving aside the fact that reparations have a goal that cannot possibly be satisfied, I will concentrate on more modest (but still far-reaching) ambitions. In a paper in this same issue, I defend the view that the aims of reparations programs, as well as of other transitional justice measures, should be considered in terms of providing recognition to victims, not just in terms of their status as victims but primarily as *citizens*, and of making a contribution to fostering civic trust.<sup>6</sup> I will not rehearse that argument here, but merely add that reparations programs can accomplish these two goals, to the extent that they can, largely because of the norm-affirming capacity of transitional justice measures, especially when they coordinate with one another. In a nutshell, the argument is that both in terms of procedure and outcomes, reparations can signal that breaches to the norms establishing the basic rights of citizens are taken seriously, either again or anew, by the successor regime and other citizens, and sufficiently so to include the mobilization of resources in favor of those who had their rights violated. Since the basic norms of citizenship are part of the apparatus through which (a political conception of) justice is enshrined by means of law, in affirming those norms, reparations can serve the ultimate goal of transitional justice interventions, namely that of justice.

Now, turning over to questions of basic design, it makes sense to start by thinking about reparations programs in terms of a three-way relationship

4 This section tracks closely the work de Greiff did for OHCHR, *Rule of Law Tools for Post-Conflict States: Reparations Programmes*. HR/PUB/08/1 (Geneva: OHCHR, 2008).

5 See, e.g., S/2004/616, para. 26.

6 For reasons of space I will not deal here with the two other, “final” goals which I argue reparations measures also serve, namely those of reconciliation and democratization.

between three categories, namely victims, beneficiaries, and benefits. A reparations program, then, can be considered as a mechanism that seeks to guarantee that every victim will receive at least some sort of benefit from it, thereby becoming a beneficiary. How is this accomplished?

#### A. *Who is a victim?*

There is increasing consensus among human rights lawyers about the advisability of adopting a uniform definition of “victims”. The Basic Principles and Guidelines (paras. 8–9), for example, offer the following definition:

[...] victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term “victim” also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

A person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim.

It is foreseeable that this definition will be adopted by national reparations programs, as they pay increasing attention to international law commitments.<sup>7</sup>

#### B. *Who is a beneficiary?*

Even if a uniform and expansive definition of “victim” is adopted, this does not, on its own, settle a much more difficult question, one that all reparations programs face, namely how to select the human rights violations that will trigger access to benefits. For a reparations program to at least make sure that every victim is a beneficiary, it would have to extend benefits to the victims of *all* the violations that may have taken place during the conflict or repression. If it did that, the program would be *comprehensive*. No program has achieved total comprehensiveness.

For instance, no massive reparations program has extended benefits to the victims of very common human rights violations during authoritarianism, such as violation of the freedom of speech, of association or of political participation. There are other categories of violation that have only seldom been redressed through massive programs, some of them life-threatening, others not, but nevertheless quite serious, such as forced displacement.<sup>8</sup> Most programs have concentrated heavily on a few civil and political rights, those most closely related to violations of rights to very basic freedoms and to physical integrity, leaving the violations of other rights largely unrepaired, a trend that at least in discussions is being increasingly questioned as we will see in Section II.

Now, the fact that programs have concentrated on these types of violations is not entirely unjustified. When the resources available for reparations are scarce, choices have to be made and, arguably, it makes sense to concentrate on the most serious crimes. The alternative, namely drawing up an exhaustive list of rights whose violation leads to reparations benefits, could lead to an unacceptable dilution of benefits.

Having said this, however, no program has explained why certain violations trigger reparations benefits and not others. Not surprisingly and at least in part as a consequence of this omission, most programs have ignored types of violations that perhaps could and should have been included. These exclusions have disproportionately affected women and marginalized groups. So the mere requirement to articulate the principles or at least the grounds for selecting the violation of some rights and not

<sup>7</sup> See the reports by the truth commissions in South Africa, Peru and Morocco, which already include long discussions about the international legal obligations concerning reparations.

<sup>8</sup> The reparations program proposed by the Peruvian Truth and Reconciliation Commission recommended giving symbolic reparations as well as various services, including education and health, to the victims of forced displacement. Turkey has established an ambitious reparations plan that provides benefits to the victims of internal displacement. See *Overcoming a legacy of mistrust: towards reconciliation between the State and the displaced* (Istanbul, Turkish Economic and Social Studies Foundation, Norwegian Refugee Council and Internal Displacement Monitoring Centre, 2006).

others is likely to remedy at least the gratuitous exclusions.<sup>9</sup>

If distinct forms of violence were perpetrated against multiple groups, excluding some of the worst or some of the most prevalent forms of violence or some of the targeted groups automatically makes the reparation program less comprehensive and consequently less complete.<sup>10</sup> The problems generated by this are manifold. Firstly, there is a question of justice, of unequal treatment that could undermine the program's legitimacy. Secondly, such exclusions merely guarantee that the issue of reparation will remain on the political agenda, which may threaten the stability of the initiative as a whole.

Part of this challenge can be mitigated through creative design. Since one significant constraint is a program's cost, fashioning one that distributes a variety of benefits (not all of them material or at least monetary) helps increase its coverage, without necessarily increasing its cost to the same degree.

### C. Which kinds of benefits should reparations programs distribute?

The combination of different kinds of benefits is what the term *complexity* seeks to capture. A reparations program is more complex if it distributes benefits of more distinct types, and in more distinct ways, than its alternatives. The forms of reparations

spelled out by the Basic Principles and Guidelines (i.e., restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition) can, for purposes of simplicity in the design of more narrowly conceived reparations programs, be organized around two fundamental distinctions: between material and symbolic reparations, and between the individual and the collective distribution of either kind. Material and symbolic reparations can take different forms. Material reparations may assume the form of compensation, i.e., payments in cash or negotiable instruments, or of service packages, which may in turn include provisions for education, health, housing, etc. Symbolic reparations may include official apologies, the change of names of public spaces, the establishment of days of commemoration, the creation of museums and parks dedicated to the memory of victims, or rehabilitation measures such as restoring the good name of victims. These would fall in the category of *satisfaction*.

There are at least two fundamental reasons for crafting *complex* reparations programs. The first is that it will maximize resources. Programs that combine a variety of benefits ranging from the material to the symbolic, and each distributed both individually and collectively, may cover a larger portion of the universe of victims than programs that concentrate on the distribution of material benefits alone and therefore be more complete. Since victims of different categories of violations need not receive exactly the same kinds of benefits, having a broader variety of benefits means reaching more victims. Just as important, this broader variety of benefits allows for a better response to the different types of harm that a particular violation can generate, making it more likely that the harm caused can, to some degree, be redressed.

Reparations programs, then, can range from the very simple, i.e., merely handing out cash, to the highly complex, i.e., distributing not only money but also health care, educational and housing support, etc., in addition to both individual and collective symbolic measures. In general, since there are certain things that money cannot buy (and there are certain things for which there is no money), complexity brings with it the possibility of providing benefits to a larger number of victims — as well as to non-victims, particularly in the case of collective symbolic measures — and of targeting benefits flexibly so as to respond to a variety of victims needs. All other things being equal, “complexity” is a desirable characteristic in a reparations program.

9 See Ruth Rubio-Marín, “The gender of reparations in transitional democracies”, in *The Gender of Reparations*, Ruth Rubio-Marín, ed. (New York: Cambridge University Press, 2009). It also bears recalling that decisions about which types of violations will be redressed are usually taken before the reparations programs are set up, often when the mandate of a truth commissions is settled and in that context. No one will have in mind the consequences these decisions will have on subsequent reparations efforts. Some commissions have found themselves needing to interpret their mandates liberally, so as to include violations that, strictly speaking, were not covered but that could not reasonably be excluded, as was the case in Morocco and in Brazil.

10 “Completeness” refers to the ability of a program to reach every victim, i.e., turn every victim (of at least the types of violations that trigger access to the program) into a beneficiary. Whether this happens depends, to some extent, on the way in which the categories of violations that give rise to benefits are determined (see below). Because completeness can only be approached if the goal is articulated early on and steps meant to guarantee it are put in place from the very outset of the process — as well as throughout the duration of a reparations program — its challenges need to be dealt with before others are addressed. The completeness of a program depends, in part, on factors such as effective outreach, ample and flexible registration deadlines, easy access, effective information-gathering, realistic evidentiary thresholds, and involvement of NGOs including local groups, victims and human rights organizations.



*D. Defining the goals of reparations, and how this affects the levels of compensation*

One of the greatest challenges faced by reparations programs is where, exactly, to set the level of monetary compensation. Practice varies significantly from country to country. For instance, although the South African Truth and Reconciliation Commission had proposed giving victims a yearly grant of around \$2,700 for six years, the Government ended up making a one-off payment of less than \$4,000. The United States provided \$20,000 to the Japanese-Americans who were interned during the Second World War. Brazil gave a minimum of \$100,000 to the families of those who died in police custody. Argentina gave bonds with a face value of \$224,000 to the families of the disappeared. Chile offered them a monthly pension that distributed, originally, \$537 per month in preset percentages among the different members of the family.<sup>11</sup>

The rationale offered (if at all) for selecting a given figure also varies. The South African Truth and Reconciliation Commission had originally recommended using South Africa's mean household income for a family of five as the benchmark. The Government's selected figure of \$4,000 was never justified in independent terms and does not correspond to anything in particular. The same thing can be said about the United States Government's choice and Brazil's decision. After some discussions took place suggesting that the reparations plan in Argentina could use the existing schedule for compensating job-related accidents, President Menem dismissed this possibility, arguing that there was nothing accidental about what victims had borne. Instead he chose the salary of the highest paid government officials as the basic unit for calculating reparations benefits. Chile did not offer a particular justification for its own basic unit of \$537. It is clear that these choices depend on the political bargaining that takes place and are made with an eye to feasibility rather than to questions of principle. This — and not only the generally low levels of compensation offered by most programs — means that existing practice is of questionable value as a precedent. Indeed, requiring future programs to justify their decisions concerning compensation levels may in itself produce salutary results.

There is a significant difference in the compensation offered as a result of judicial resolution of individual, sporadic and isolated cases of violations, and that stemming from a massive reparations program

faced with a large number of potential beneficiaries. A judicial approach to the question of where to set levels of compensation, which simply expresses both articulate convictions as well as deep intuitions, appeals to the criterion of *restitutio in integrum*, of making victims whole, of compensating the victims in proportion to the harm they have suffered. For individual cases, this is an unimpeachable criterion, for it tries to neutralize the effects of the violation on the victim and to prevent the perpetrator from enjoying the spoils of wrongdoing.

Actual practice with massive reparations programs, however, suggests that satisfying this criterion is rarely even attempted. It would be too easy to draw the conclusion that reparations programs have historically been manifestly unfair. This would tar all reparations programs with the same brush, even those that have made an earnest effort to redress victims — despite awarding less compensation than the same victims would have received if they had won a suit in a court trying their cases in isolation.

Since the size of the monetary compensation is not merely a pragmatic question of affordability, but one of justice, it is important to clarify what justice requires. What does "adequate, effective and prompt reparation for harm suffered" mean?<sup>12</sup> There is a difference between awarding reparations within a basically operative legal system and 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 of compensating for 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 harm suffered by particular individuals. Whatever the criterion of justice, it is important to keep in mind the need to establish the preconditions

<sup>11</sup> See, e.g., the case studies in *The Handbook*.

<sup>12</sup> Basic Principles, para. 11.

for reconstructing the rule of law, an aim that has a public, collective dimension.<sup>13</sup>

By examining reparations programs in detail and the history of their design, enactment and implementation, it is possible to reconstruct an account of how they aimed at bringing some sort of justice. Arguably, these programs have pursued two goals that are intimately linked to justice: the first is to provide a measure of *recognition* to victims and thus to make a contribution to the full recovery of their dignity. 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 holders of rights which are equal to those of other citizens. The benefits become a form of symbolic or nominal compensation for the fact that rights that were supposed to protect the basic integrity, possibilities and interests of citizens were violated. It is the violation of equal rights that triggers the provision of compensatory measures. And it is precisely because the benefits are given in recognition of the (violated) rights of citizens that this general aim of recognition is related to justice. Justice in a State governed by the rule of law is a relationship among citizens, that is, among the holders of equal rights.

One important consequence is that the proper metric for assessing the size of the compensation owed in fairness to victims stems directly from the very violation of rights held in common by human beings and particularly by citizens, and not from each individual's particular position prior to the violation. In other words, the fundamental obligation of a massive reparations scheme is not so much to

return the individual to his or her *status quo ante*, but to recognize the seriousness of the violation of the equal rights of fellow citizens and to signal that the successor regime is committed to respecting those rights.

The other main justice-related goal that can be attributed to reparations programs is to make a (modest) contribution to fostering trust among persons and particularly between citizens and State institutions — trust that stems from commitment to the same general norms and values and can exist even among strangers. The point is that a well-crafted reparations program is one that provides an indication to victims and others that past abuses are taken seriously by the new Government and that it is determined to make a contribution to the quality of life of survivors. Implemented in isolation from other justice initiatives such as criminal prosecutions and, primarily truth-telling, reparations benefits might be counterproductive and be perceived more like a payment in exchange for the silence or acquiescence of victims and their families. On the other hand, if integrated into 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. To the extent that reparations programs may become part of a political agenda that enjoys broad and deep support, they might even have a positive impact not just on “vertical trust”, i.e., trust between citizens and the institutions of the State, but also on “horizontal trust”, i.e., trust among citizens.

This conception of justice in reparations does not lead to a formula for quantification, yet it provides some guidance. Whether a particular level of compensation is fair cannot be decided *a priori*. Ultimately, it depends, in part, on whether beneficiaries feel that *all things considered* the amounts received constitute sufficient recognition, in the sense specified above, and whether they, as

<sup>13</sup> Of course, where the proper quantum of monetary compensation should be set depends largely on the criteria of fairness and appropriateness, but these are not entirely isolated from judgments of feasibility. Judgments about the feasibility of paying certain costs are usually of the *ceteris paribus* type. It is clear that in a transition or a post-conflict situation it makes little sense for all other things to remain equal. Unless there is a budget surplus, it will be impossible to engage in aggressive reparations for victims without touching other State expenditures. To illustrate the point, while the government of South Africa refused to implement the Truth and Reconciliation Commission's recommendations on reparations, arguing that to do so would be too expensive, it was buying two submarines for its navy. See Brandon Hamber and Kamilla Rasmussen, “Financing a reparations scheme for victims of political violence,” in *From Rhetoric to Responsibility: Making Reparations to the Survivors of Past Political Violence in South Africa*, Brandon Hamber and Thokani Mofokeng, eds. (Johannesburg, Centre for the Study of Violence and Reconciliation, 2000), pp. 52-59. The Government of Peru, likewise, considered an expansion of its navy, while the comprehensive recommendations on reparations from the Truth and Reconciliation Commission remained largely unheeded.

well as others, take the benefits to provide a reason for renewed (or novel) civic trust.<sup>14</sup>

**F. Interpreting reparations benefits. Linking reparation and other justice measures**

The size of reparations alone does not determine their success. It is useful to examine the fate of some stand-alone reparations efforts, some of which have distributed large sums of money by way of direct material compensation to victims. Experience suggests it is important to draw significant links between the different elements of a comprehensive justice or redress policy. Reparations efforts that are not linked to other justice initiatives tend to be more controversial than their supporters expect.<sup>15</sup>

Reparations efforts should be designed in such a way as to be closely linked with other transitional justice or redress initiatives, for example criminal justice, truth-telling and institutional reform. There is conceptual backing for this as well. Programs that achieve these connections are said to be *externally coherent* or to have *external integrity*.<sup>16</sup> This requirement is important for both pragmatic and conceptual reasons. Such connections provide an incentive to interpret the reparations benefits in terms of justice, rather than as an exchange of money

and services for appeasement or acquiescence, and might contribute to improving the overall perception of the set of measures (despite their inevitable limitations).

**G. Linking reparations programs to civil litigation**

One more challenge facing those who design reparations programs is the link between the program and civil litigation. At a broad level, it must be acknowledged that the judicial resolution of individual reparations cases has often played a very important role in catalyzing the willingness of Governments to establish massive reparations programs.<sup>17</sup> Although their typically large awards contribute to setting expectations that normally cannot be satisfied by massive reparations programs, these awards can be used by victims and their representatives to put pressure on their Governments to establish sizable programs with high benefits.

Programs that stipulate that accepting their benefits forecloses other avenues of civil redress can be called *final*. The German programs, as well as the program established by the United States for the Japanese-Americans interned during the Second World War, are final in this sense: accepting benefits from these programs requires waiving the possibility of pursuing civil cases in courts of law. But not all programs are final in this respect. Those in Brazil and Chile do not require victims to surrender the possibility of pursuing reparations through the courts.

The Peruvian Truth and Reconciliation Commission formulated a sophisticated position in this respect: according to its recommendations, receiving benefits from the reparations plan would leave suits against the State without effect, but would not interrupt or impede penal cases against perpetrators. If those cases proceed and individuals receive civil reparations awards through judicial procedures, they are required to return whatever compensation benefits they had received through the reparations program to the State, so as to prevent anyone from receiving compensation twice for the same violation. This position tries to preserve the victims access to courts, while protecting the stability of the reparations program.<sup>18</sup>

14 There are aspects of the modalities of distribution, beyond the issue of the magnitude of the benefits, which can help achieving these two goals. Experience suggests that it is better to distribute compensation awards in the form of a pension rather than a lump sum; aside from the fact that pensions are less likely to be misspent and thus they may make a more sustainable contribution to the quality of life of victims, the point to stress here is that pensions do not invite the interpretation which lump sums frequently invite, namely, that the particular sum is the price that the government pays on the life of a victim. The very regularity of a pension may contribute to the experience of recognition of victims and to fostering trust in institutions from which they receive regular support. Whether a reparations program should also apportion the benefits it distributes by percentages to specific family members may also have an impact on how the program is perceived by beneficiaries. See Rule of Law Tools: Reparations Programmes. The general approach to the criterion of justice in reparations defended here has already been adopted — and adapted — in the reports of the Peruvian Truth and Reconciliation Commission, of the recent Commission on Illegal Detention and Torture in Chile and of the Truth and Reconciliation Commission for Sierra Leone. Parts of it are also incorporated in E/CN.4/2004/88.

15 Cf. the experiences in Brazil and in Morocco with the Independent Arbitration Commission, which operated from 1999 to 2001. See also Cano and Ferreira, "The reparations program in Brazil", in *The Handbook*...

16 See de Greiff, "Addressing the Past." Whereas external coherence or integrity refers to the relationship between reparations efforts and other justice measures, internal coherence or integrity refers to whether the various benefits distributed by a reparations program cohere and support one another.

17 Cases before the inter-American human rights system, for example, played that role in Argentina, and continue to exert this type of pressure in Peru and Guatemala.

18 See also the careful study of reparations in Peru in Magarrell and Guillerot, *op. cit.*, chap. 4.

It is difficult to decide, in the abstract, whether it is desirable, in general, for reparations programs to be final. On the one hand, finality means that courts are made inaccessible to victims. On the other, once a Government has made a good-faith effort to create an administrative system that facilitates access to benefits, allowing beneficiaries to initiate civil litigation against the State, poses not just the danger of obtaining double benefits for the same harm but, even worse, of jeopardizing the whole reparations program. While the first problem can be easily addressed by stipulating that no one can gain benefits twice for the same violation, the second is not so easy to avoid, for the benefits obtained through the courts can easily surpass the benefits offered by a massive program. This can lead to a significant shift in expectations, and to a generalized sense of disappointment with the program's benefits. Moreover, the shift may be motivated by cases that probably are unrepresentative of the whole universe of victims, making civil litigation prone to entrenching prevalent social biases. Wealthier, more educated, urban victims usually have a higher chance of successfully pursuing reparations litigation in civil courts than poorer, less educated, rural individuals, who may also happen to belong to marginalized ethnic, racial, or religious groups.

Contextual factors may play a significant role. In most post-conflict societies and societies in transition, particularly those where the legal system has been shattered, it is unlikely that courts will be flooded with civil claims. Furthermore, some jurisdictions have underdeveloped compensation laws or laws that set compensation at very low levels, diminishing the appeal of initiating judicial procedures that may have a negative impact on reparations programs. Nevertheless, those who are entrusted with the responsibility of designing massive programs should decide how the programs will relate to judicial proceedings. Given the significance of the possibility of accessing courts, all other things being equal, there should be a presumption in favor of leaving that right untouched or as uncurtailed as possible, with the proviso that no one should be entitled to receive benefits both through programs and through courts.<sup>19</sup>

<sup>19</sup> In Argentina, the victims of illegal detention were allowed to continue with legal proceedings already in progress and could then choose whichever set of benefits was larger. The programs were also made accessible to those who had judicial cases resolved, but with lower benefits than those provided by the programs, so that they received the difference.

#### *H. Making a reparations program gender-sensitive<sup>20</sup>*

Although several sections of this publication have already referred to the many ways in which decisions concerning reparations have an impact on women, the topic is so important, and reparations programs have neglected it so often, that it warrants a section of its own.

- Even before a reparations program is designed, gender-sensitive strategies must be set in place to gather gender-specific information that will be relevant for the program downstream and to secure the participation of women in debates about the design of the program.
- In the critical issue of the choice of the list of rights whose violation will trigger reparations benefits, once again the participation of women may help ensure that the sorts of violations of which women are predominantly victims are not left out. In general, requiring those responsible for designing reparations programs to articulate the principles or reasons underlying the selection of "repairable violations" may have a positive impact from the standpoint of gender by preventing gratuitous exclusions.
- More complex programs, i.e., programs that distribute a greater variety of distinct benefits, such as educational support, health services, truth-telling and other symbolic measures, in addition to material compensation, open possibilities for addressing the needs of female beneficiaries. Each type of benefit requires gender-sensitive design and implementation.
- Where the level of material compensation is set and how the compensation is distributed have a significant gender impact. All other things being equal, modes of distribution that ensure that women not only access, but also retain control over, the benefits are preferable.

#### *I. Financing reparations*

Low socio-economic development on the one hand, and a large universe of potential beneficiaries on the other, constrain a Government's ability to implement a reparations plan. In the Americas, for example, Guatemala, El Salvador and Haiti have not imple-

<sup>20</sup> "Gender sensitivity" need not mean greater sensitivity to the needs of women. However, the record of reparations programs is in general so dismal in this respect that this tool concentrates on this sense of the expression. See the case studies in *What Happened to the Women? Gender and Reparations for Human Rights Violations*, Ruth Rubio-Marín, ed. (New York, Social Science Research Council, 2006).

mented reparations plans, whereas Chile, Argentina and Brazil have.

However, the correlation between socio-economic development and reparations is more complex than this factual observation suggests. First, while minimum economic development seems to be a precondition for implementing reparations, countries in comparable economic situations often take quite different paths, as shown most clearly in Chile and Argentina. Second, and perhaps more importantly, in the countries mentioned earlier that have not implemented reparations plans, the *political* constraints were perhaps as significant as the economic ones. An analysis of failed efforts clearly shows that, normally, without strong and broad coalitions in favor of reparations, no plans, or at best very modest plans, are implemented even if the country can afford one or can afford a better one.<sup>21</sup>

Broadly speaking, there are two main models for financing reparations: creating special trust funds, or introducing a dedicated line in the yearly national budget. Countries that have experimented with the first model have, so far, fared significantly worse than countries that have used the second. This may have to do with political commitment. Nothing illustrates commitment more clearly than the willingness to create a dedicated budget line. The expectation underlying the creation of trust funds that it will be possible to find alternative sources of funding for reparations may demonstrate weak political commitment or actually weaken the resolve that exists — emphasizing yet again that, although socio-economic development is important, so are political factors.

Nonetheless, there is, in principle, no reason why creative funding efforts must all fail. Some possibilities are:

- Special taxes targeting those who may have benefited from the conflict or the violations, like those that were proposed (but never adopted) by the Truth and Reconciliation Commission in South Africa.
- Recovery of illegal assets. Especially where a State has accepted to provide reparations for victims of third parties, nothing should prevent the State from attempting to recover illegal assets from those parties. Peru devoted a portion of assets recovered from corruption to such ends and so did the Philippines with

monies recovered from the Marcos estate. Colombia is attempting to do so with assets held by paramilitaries. However, reparations programs should not be held hostage to, or made conditional upon, the recovery of such assets if the State bears clear responsibility for the violations.

- Debt swaps. It may be possible for Governments to negotiate agreements with international lenders so that the latter cancel a portion of the country's debt on condition that the same amount is spent on reparations and other support for victims. On a small scale, Peru was able to reach such agreements.

The fundamental point is that where reparation is a matter of *rights*, reparations programs require stable sources of funding, and nothing guarantees more stability in financing than a dedicated budget line.

## II. Recent patterns and trends

### 1. From authoritarian to conflict and postconflict settings

The application of transitional justice measures has migrated from the context in which they originally emerged, namely post-authoritarian settings, to post-conflict contexts, and indeed to contexts in which conflict is still ongoing such as Colombia. Whether this is a wise idea or not remains to be established. There are two factors which distinguish the authoritarian from the conflict-setting which ought to be kept in mind: first, the authoritarian settings were settings characterized by higher degrees of institutionalization than most of the contexts in which conflict has occurred in the recent past. Second, transitional justice measures were selected in the postauthoritarian settings to redress a particular kind of violations, namely those that stemmed from the abusive exercise of State power. In the postconflict setting the abuses stem much more from something akin to social collapse, or civil wars with many agents of violence, most of them non-state actors, and unconventional warriors and warfare.

It remains to be seen whether transitional justice measures can migrate from one context to another and still prove themselves effective (even if the conflict is actually over). In general, because most transitional justice measures aspire to making some attributions of responsibility (not in all cases coextensive with attributions of criminal responsibility), and to the extent that these are much more difficult to make in conflict and postconflict settings than in postauthoritarian settings, there are reasons to be

<sup>21</sup> See Alexander Segovia, "Financing Reparations Programs: reflections from international experience", in *The Handbook*.

cautious. Another factor that needs to be taken into account is that the implementation of transitional justice measures depends upon a minimum but still demanding threshold of institutional capacities and resources which are often lacking in countries ravaged by conflict. So, to illustrate, discussions about reparations in a country like the Democratic Republic of Congo, whose victims number in the millions, where various agents of violence participated in the violence, where state institutions are notoriously fragile, and where a substantial part of the national budget comes from international cooperation can reasonably be expected to take a course very different from that of similar discussions in the contexts in which reparations programs have typically functioned.<sup>22</sup>

Reparations in postconflict settings also have to face the challenge of being long perceived as competitors for scarce resources that could be used for security and reconstruction purposes. The number of postconflict countries that have implemented, often with international support, programs for the disarmament, demobilization, and reintegration of excombatants, *without* implementing a reparations program for the victims of the conflict, is large indeed.<sup>23</sup>

## 2. The Expansion of the transitional justice agenda

For a variety of reasons, which include perceptions of success, showcasing effects, and lack of clear alternatives, transitional justice measures have become the vehicles for addressing problems that were not part of the agenda that motivated the implementation of these measures in their original context. There are increasing calls for transitional justice measures to tackle the following issues:

### *-developmental and socioeconomic deficits.*

Over time, pressure on transitional justice measures to make themselves relevant for purposes of development has increased.<sup>24</sup> The sources of this tendency are diverse. The shift in transitional

justice work to contexts marked by poverty and underdevelopment is of course a primary impetus. The dismal socio-economic condition of most victims in states ravaged by violence provides strong motivation for them to seek measures that contribute to the improvement of their living conditions. Governments, in turn, feed into the tendency, not always with either clarity or good intentions, by attempting to pass existing developmental programs as reparations programs.<sup>25</sup> And finally, there is the fact that truth commissions, which by now invariably include analyses of some of the structural and institutional "root causes" of violence, always claimed that this was one of the functions they performed better than judicial procedures did.

There is no question that victims often experience violence in ways that negatively impacts their usually already dismal socio-economic opportunities. Nor that most countries in which conflict rages face severe developmental deficits. Caution needs to be exercised, however, concerning the expectations of transitional justice measures in this domain. Truth commissions can indeed provide insight into some of the contextual, institutional, and structural factors that led to abuses. This is important, among other reasons, to catalyze motivations for change,<sup>26</sup> and some of the means for change, since it is well known by now that one of the consequences of putting transitional justice measures on a public agenda is the formation of civil society organizations. But truth commissions are temporary bodies, and governments record of implementation of their recommendations is mixed at best. Institutional reforms of the sort that are usually a part of transitional justice policies are often, and for good reason, more narrowly focused on addressing the more immediate security sector gaps that enabled violations. And reparations programs, the subject both of our concern here and of the greatest expectations in the spheres of development and socio-economic issues, are far from ideal vehicles for redressing deep and entrenched economic imbalances: their budgets have traditionally been far too meager to make a difference of this sort (frequently dwarfed when they have coexisted, by the budgets of DDR programs or of even deficient

22 Experience thus far seems to warrant caution; it is difficult to think of postconflict settings that have implemented transitional justice measures as comprehensively as, say, Argentina or Chile. On the other hand, the history of the application of these measures in postconflict settings is not as long, so it may be that these countries will "catch up."

23 See, de Greiff, "DDR and Reparations. Establishing links between peace and justice instruments," in *Building a Future on Peace and Justice: Studies on Transitional Justice, Conflict Resolution and Development*, Kai Ambos, Judith Large, and Marieke Wierda, eds., (Berlin: Springer, 2008).

24 See *Transitional Justice and Development; Making Connections*, Pablo de Greiff and Roger Duthie, eds., (New York: Social Sciences Research Council, 2009).

25 For recent illustrations of this tendency, see, ICTJ, "The Rabat Report: the Concept and Challenges of Collective Reparations," p. 46. Document available at: <http://www.ictj.org/en/news/features/4095.html>

26 See, e.g., Rolando Ames and Félix Reátegui, "Toward Systemic Social Transformation: Truth Commissions and Development," in *Transitional Justice and Development*.

social services).<sup>27</sup> Furthermore, the focus of reparations programs is, correctly, on the effort to provide benefits to victims by virtue of the fact that their fundamental rights were violated, rather than the provision of basic goods that *all* citizens deserve insofar as they are citizens. In short, reparations programs have not been designed primarily as a developmental tool. Having said this, however, the arguments in section I of this paper concerning the importance of “external coherence” speak for the coordination of reparations plans with development efforts. Furthermore, by affirming the importance of certain basic norms, as other transitional justice measures, reparations can arguably make a positive (but modest and largely indirect) contribution to developmental aims; development, after all, is not a process of haphazard accumulation, but one in which choice is maximized in an orderly, equitable, and sustainable way, something which is not possible without respect for certain basic norms.<sup>28</sup>

#### *-Collective Reparations.*

The dynamics leading to an increased interest in collective reparations are similar to those underlying the interest in using reparations with developmental aims.<sup>29</sup> Some of the positive reasons include the argument that, when violence targeted people for reasons having to do with collective factors, such as gender, or more fittingly, particular identities or group membership, it is appropriate to redress these violations by means that recognize and highlight the factors that led to people being targeted in the first place.<sup>30</sup> An even simpler, and in many ways uncontroversial, use of material reparations is ensuring that benefits target communities which are geographically located in areas that were the subject of the equivalent of “guilt by association,” a form of collective punishment. Perhaps the clearest instance of such phenomenon is the set of communities in the vicinity of illegal detention centers established by

the government in Morocco that were deliberately isolated and bypassed by all government plans *for that very reason*. These communities, which were in no way culpable for the abuses that took place in the detention centers, were left with huge developmental deficits over time. The Moroccan truth commission (IER) recommended community reparations plans to redress the developmental deficits generated by this plainly discriminatory treatment.<sup>31</sup> Although, strictly speaking, these plans may go beyond the purview of legalistic conceptions of human rights violations, from the standpoint of justice there is nothing particularly problematic about them.

Much more problematic are instances in which governments, as mentioned before, and on the (often incorrect) assumption that the collective is cheaper than the individual, propose reparations plans that fail to deliver benefits to individuals directly despite the possibility of establishing individual violations of rights, and of distinguishing between victims of those violations and others. There are three reasons why such cases should give especial pause: first, it is often the case that victims of conflict are precisely those who have traditionally not been recognized as individual rights-holders, but as part of undifferentiated masses, the wholly “other.” Indeed, this often plays a role in identity-based forms of abuse, in which people are targeted by virtue of their membership in (usually ascribed, rather than chosen) groups.<sup>32</sup> So, precisely under these circumstances, it is important to recognize *not only* the identity-based factors leading to violations, but the fact that the members of those groups are *also* individual rights-bearers. Second, to the extent that collective reparations programs usually distribute goods that are “basic,” they can be rightly interpreted to distribute goods that people are entitled to, not as a form of redress for violations they have suffered but as part of what it means to be a member of a shared social and institutional project. And finally, as mentioned before, because these goods are not only basic but also “public”, i.e., non-excludable, they are usually shared by victims and non-victims alike, further diminishing their capacity to constitute themselves as markers of redress. When collective reparations programs force victims and perpetrators to collaborate with one another, as they often do, they impose a further burden on those victims that are not ready for this form of interaction.

27 See, e.g., de Greiff, “DDR and Reparations.”

28 See, e.g., de Greiff “Articulating the Links between Transitional Justice and Development: Justice and Social Integration,” in *Transitional Justice and Development*.

29 Discussions about collective reparations typically fails to establish some basic distinctions. Thus, there is nothing particularly problematic or controversial about using collective symbolic means such as apologies or memorials as means of reparations. More controversial is the distribution of material benefits to collectivities, rather than to individuals. This includes the distribution of “public goods,” goods whose use cannot be limited to particular individuals or groups. For a more extensive discussion cf. OHCHR, *Rule of Law Tools: Reparations Programmes*.

30 See, e.g., Ruth Rubio-Marín “Gender and Collective Reparations in the Aftermath of Conflict and Political Repression,” in *The Gender of Reparations*.

31 See the report at <http://www.ier.ma/?lang=en>.

32 On the relevance of transitional justice measures for dealing with identity-based conflicts, see the essays in *Identities in Transition*, Paige Arthur, ed., (New York: Cambridge University Press, 2010), a research project of the ICTJ.

Now, none of this speaks about the *impossibility* of designing collective reparations programs that meet these challenges, or about the absolute inappropriateness of such measures (as mentioned before). These considerations speak more against the tendency to substitute this kind of programs for programs that benefit individual victims of violations, in other words, about the advantages of thinking about ways in which collective reparations programs can, where possible and appropriate, *complement* individual programs.

*-Economic Crimes.*

Again, partly due to the characteristics of the new contexts in which transitional justice measures are being applied, namely contexts in which, for example, corruption is rampant and environmental crimes common, the measures are also supposed to redress these types of crimes. There is no question about the importance for transitional societies to control both (broad) categories of crimes. The question is more about the contribution that transitional justice measures can make to this end. Truth commissions seem to be broadening their mandate in that direction. This raises some specific challenges, important to keep in mind and to anticipate: the skills required to carry out investigations into human rights violations on the one hand, and economic crimes on the other, are quite different (not the least because the normative framework concerning the latter is much less developed, even at the international level, than that concerning the former). Second, the types of crimes are not only differently distributed in terms of participation (corruption, for instance, is arguably much more widespread than, say, disappearing people), and they occupy a different space in a given culture. Third (and perhaps consequently), there is the risk that mixing up the different categories of crimes may give the impression of a sort of “moral equivalence” amongst different types of crimes. Fourth (and perhaps ironically), political resistance on the part of stakeholders whose collaboration in the short run is required for a successful transition may increase with the expansion of the transitional agenda.

Once again, these are not necessarily insurmountable challenges, but ones that need to be kept presently in mind in order not to awaken unfulfillable expectations. Although no settled practice concerning the redress of “economic crimes” has emerged, what is certain is that issues about corporate responsibility, the recovery of illegal assets, and the prevention and redress of despoliation will

only increase in significance over time. Similarly, in contexts of conflict, displacement and its attendant problems, including land restitution, are increasingly salient issues. One can expect these to become ever more frequent parts of the agenda of reparations programs.



## The Role of Security Sector Reform in Dealing with the Past

TIM MURITHI<sup>1</sup>

### Introduction

A central function of the state is to provide security and ensure the liberty of its citizens. The security sector is composed of the state institutions and structures that are designed to achieve this liberty. In authoritarian and war-affected countries, security sector institutions are often misused to repress and oppress citizens and they are often implicated in the perpetration of atrocities and human rights abuses. Security sector reform is vital in the aftermath of authoritarian regimes and conflicts to ensure that the institutions are brought under the regulation of democratic institutions.

Dealing with the past includes establishing processes of justice, addressing the issue of reparations and implementing institutional reform. Given the fact that security sector reform necessarily deals with re-dressing the role of institutions in authoritarian or war-affected countries, it can contribute positively to dealing with the past. This chapter will assess how security institutions are the least likely to embrace reform due to the privileged position that they occupy in maintaining law and order within countries. This requires a concerted effort to promote SSR and innovative ways to ensure that the policies that are adopted to deal with the past are implemented. The proximity of civil society to the effects of past atrocities and injustices suggests that it should be more closely involved in mainstreaming strategies for dealing with the past into government-led security sector reform processes. In this regard,

the role of civil society in monitoring security sector reform has to be emphasised to ensure that it incorporates a strategy to deal with the past. This chapter concludes with some policy recommendations which emphasise the need to mainstream strategies to deal with the past in SSR programming.

### Contextualising Security Sector Reform

Security sector agencies are generally understood to include the military, police and law enforcement, intelligence agencies, border guards, the judicial system and penal institutions.<sup>2</sup> Security sector reform can be implemented at any point of time but it is a vital component of transformation for countries making the transition from authoritarian or war-affected societies to more democratic and plural dispensations. In this regard, SSR is often an aspect of an agreement which facilitates the cessation of hostilities and outlines a strategy for promoting peacebuilding.

Establishing the legitimate and effective governance of SSR processes requires engaging government, the security sector, and in the case of war-affected countries demobilised armed militias. Furthermore, security sector reform is operationalised by the utilisation of state resources to provide a framework that will ensure the security of its citizens. SSR necessarily has to focus on state institutions and policy formulation to outline a strategy for designing and implementing the desired transformation. SSR is therefore implicated in societies in transition from either authoritarian political systems or war-affected countries. In situations where security institutions were utilised to repress and oppress citizens then their reform becomes vital to dealing with the past.

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<sup>2</sup> Philipp Flury and Miroslav Hadžić (eds.), *Sourcebook on Security Sector Reform: Collection of Papers*, (Geneva/Belgrade: Geneva Centre for the Democratic Control of Armed Forces and Centre for Civil-Military Relations, 2004), p.7.

### Incorporating Strategies for Dealing with the Past into SSR

In 1997, the United Nations Commission on Human Rights (predecessor to the UN Human Rights Council) approved the Joint Principles on Combating Impunity which established the rights of victims and the obligations of states. The Joint Principles identify four key parallel processes that are necessary to mitigate against impunity, namely: i) the right to know; ii) the right to justice; iii) the right to reparation; and iv) the guarantee of non-recurrence. The processes are premised on confronting the atrocities of the past and undertaking certain judicial and quasi-judicial measures to safeguard against the potential recurrence of similar abuses in the future.

Some of the processes for dealing with the past fall under the rubric of the term “transitional justice”.<sup>3</sup> In particular, transitional justice seeks to advance processes and establish mechanisms and institutions to confront the past and to address the key issues that have sustained political repression or fuelled conflict.<sup>4</sup> Transitional justice “seeks to address challenges that confront societies as they move from an authoritarian state to a form of democracy”.<sup>5</sup> More often than not such societies are emerging from a past of brutality, exploitation and victimisation. In this context, transitional justice does not seek to replace criminal justice, rather it strives to promote “a deeper, richer and broader vision of justice which seeks to confront perpetrators, address the needs of victims, and start a process of reconciliation and transformation towards a more just and humane society”.<sup>6</sup>

The ultimate purpose of a process of transitional justice is to establish a quasi-judicial framework to undo the continuing effects of the past. It is also necessary not to lose sight of the fact that transitional justice is just that, a “transitional process” and it should not be viewed as a permanent solution to addressing the atrocities of the past. It

is rather a transient process that will have to give way to the rule of law and the restoration of a constitutional order that will manage and resolve the social, political and economic tensions within society. Bodies such as truth and reconciliation commissions and special courts are temporary and time-bound institutions and should not be considered as a permanent solution.

There are at least five components of a transitional justice process including:

- 1) ensuring accountability in the fair administration of justice and restoring the rule of law;
- 2) the use of non-judicial mechanisms to recover the truth, such as truth and reconciliation commissions;
- 3) reconciliation in which a commonly agreed memory of past atrocities is acknowledged by those who created and implemented the unjust system as a prerequisite to promoting forgiveness and healing;
- 4) the reform of institutions including the executive, judiciary and legislative branches of government as well as the security sector to ensure that a degree of trust is restored and bridges between members of society can be re-built;
- 5) the issuing of reparations to victims who had suffered human rights violations, as a way to remedy the harm suffered in the past.

Transitional justice and its relation to security sector reform is complicated by a number of dilemmas including how to balance the “competing legitimate interests in redressing the harms of victims and ensuring the democratic stability of the state”.<sup>7</sup> It requires the balancing of two imperatives – “on the one hand, there is the need to return to the rule of law and the prosecution of offenders, on the other, there is a need for rebuilding societies and embarking on the process of reconciliation”.<sup>8</sup> Ultimately, justice postponed is reconciliation deterred.

In transitional societies the security sector typically wields a disproportionate amount of force and coercive power through its monopoly over the instruments of violence. Therefore, advocating for the transitional justice and strategies for dealing with the past through security sector reform can be a precarious business. In some countries such as Guinea-Bissau, it has been very difficult to address security sector reform as a means to advance transitional justice and dealing with the

3 United Nations Security Council, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, Report of the Secretary-General, S/2004/616, 23 August 2004, p.3.

4 N. Kritz (ed), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, (Washington, D.C.: 1995; and A. J. McAdams, *Transitional Justice and the Rule of Law in Democracies*, (Notre Dame: Notre Dame University Press, 1997).

5 Alex Boraine, “Transitional Justice”, in Charles Villa-Vicencio and Erik Doxtader (eds), *Pieces of the Puzzle: Keywords on Reconciliation and Transitional Justice*, (Cape Town: Institute for Justice and Reconciliation, 2004), p.67.

6 Boraine, “Transitional Justice”, p.67.

7 Boraine, “Transitional Justice”, p.71.

8 Boraine, “Transitional Justice”, p.72.

past due to the reluctance of the military to subject their institutions to such processes. Consequently, peacebuilding in the Guinea-Bissau has not been premised on the twin track of transitional justice and security sector reform. Therefore an emerging challenge for mainstreaming approaches to deal with the past into security sector reform is how to sequence the pursuit of justice with the need to consolidate peace.

### The Execution of Justice

The execution of justice is often a challenge particularly in situations where the leaders of state forces or armed militia are concerned. However, this is a necessary part of ensuring that impunity is not encouraged. Following a decade-long war from 1991-2001 there was a need to address the violent crimes of the past in order for peace to be consolidated in the country. A Special Court for Sierra Leone was established to prosecute the leaders of security institutions who were deemed to be most responsible for atrocities during the war. The Court was particularly designed for leaders and security agents who were alleged to have directed and organised war crimes. Low-level soldiers and armed militia would not be subject to the jurisdiction of the Court. The Court indicted those who were at the head of state security or armed militia formations, including the former president of Liberia, Charles Taylor who was sent to The Hague to be tried by the Special Court for Sierra Leone in June 2006. The indictment against Foday Sankoh, who was the leader of the armed militia known as the Revolutionary United Front (RUF), was withdrawn in December 2003 following his death in July 2003. These individuals were charged with war crimes, crimes against humanity and other violations of humanitarian law; murder; rape; extermination; enslavement; looting and burning; sexual slavery; conscription of children into an armed force; forced marriage; and attacks on humanitarian workers. The Court made the provision that if the accused were found guilty, they would be sentenced to prison but not to death. Taylor's case is currently ongoing.

### Truth and Reconciliation Commissions

A specific approach to dealing with the past involves the use of truth and reconciliation commission's. These Commissions have been expected to deliver on "justice" variously assumed to mean reparations or the compensation for victims, resettlement, land re-allocation, psychological counselling, physical rehabilitation, the return of stolen wealth and

even recommendations for the prosecution of perpetrators.

### Sierra Leone's Truth and Reconciliation Commission

In Sierra Leone, since the Special Court only dealt with the leaders of armed movements and does not address the atrocities of lower ranking individuals or groups, it was necessary to find another mechanism to provide a framework for reconciliation.<sup>9</sup> Sierra Leone's Truth and Reconciliation Commission was created by the Lomé Peace Agreement and then established by an Act of the Sierra Leonean Parliament in February 2000. The mandate of the Commission was to create an impartial historical record of human rights abuses and violations of international humanitarian law related to the armed conflict in Sierra Leone. The Commission had an ambitious mandate of seeking to address impunity, responding to the needs of victims and promoting healing and reconciliation. The body also had a mandate of investigating, reporting the causes, nature and extent of human rights violations, and establishing whether these were a direct result of the deliberate planning, policy and authorisation of any government, group or individual. Based on the model of the South African Truth and Reconciliation Commission established in 1995, the Sierra Leone Commission completed its statement taking-phase in March 2003. An analysis of the statements indicated that they contained information on about 3,000 victims who had suffered more than 4,000 violations out of which 1,000 related to killings and 200 to rape.<sup>10</sup> The Commission faced a problem when it sought to hold public hearings on the detainees held in the custody of the Court. As a result these detainees did not go through the TRC process.

Tribunals and truth commissions can complement the process of SSR and reassure the society as a whole that the atrocities of the past will not be repeated. Ultimately, a citizenry that observes security sector agents and agencies not getting away with impunity is more likely to feel that the issues of the past have been effectively addressed.

<sup>9</sup> Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War*, (Cambridge: Polity, 2002).

<sup>10</sup> Sierra Leone Truth and Reconciliation Commission Report, October 2004.

### Democratic Control of the Security Sector

SSR that also addresses atrocities of the past has to ultimately lead to a political dispensation defined by the democratic control of the security sector. This is vital in order to ensure that any policy proposals are effectively implemented and that the process is ultimately accountable to the countries through their democratic representatives. The democratic control of the security sector is also the best way to guarantee the non-recurrence of the use of the security sector to commit future atrocities against the citizenry. Democratic oversight is crucial to ensuring that the reformed security institutions uphold human and gender rights as well as respect the rule of law. Furthermore, democratic institutions are the best place to ensure the implementation of recommendations to address grievances from the past and this requires the active participation of a cross-section of stakeholders in a given country. The democratization processes and the requirements of dealing with the past may require the establishment of new institutions, structures and chains of responsibility for the security sector.<sup>11</sup> The "civilianization" of these security sector institutions can also prevent the recurrence of past mistakes and contribute towards civil-military relations. Failure to successfully design and implement security sector reform through democratic oversight can impede and ultimately undermine strategies for dealing with the past.

### The Role of CSOs in Monitoring SSR Initiatives to Deal with the Past

Even though the existence and legitimacy of civil society remains contested in several countries it can play a proactive and supportive role when it comes to monitoring SSR initiatives to deal with the past. SSR priorities of the government, military, militia and other security actors may not always correspond with the priorities of citizens. The political elite of a given country inevitably determines what they are prepared to accept in terms of the establishment of SSR processes. However, the proximity of civil society to the effects of past atrocities and injustices suggests that it should be more actively engaged with SSR processes. Despite the fact that SSR planning tends to be a function that is monopolised exclusively by governments, CSOs can play

a complementary role in initiating, supporting, monitoring and evaluating SSR processes.<sup>12</sup>

At the stage where SSR programming is being designed CSOs can act as catalysts to encourage the mainstreaming of specific strategies for dealing with the past. Given the fact that citizens would have been affected by the atrocities committed by authoritarian governments or are victims of war situations, then there are bound to be expectations among citizens with regard to reforming structures that perpetuated past injustices. There is therefore a *prima facie* case for civil society to be involved in SSR programming and policy formulation processes. In particular, CSOs can ensure that when governments are defining the mandate and political parameters of SSR, they include measures that will acknowledge the role played by security institutions in undermining the rights of victims and ensure that future security actors are sensitised to the need to adopt a different posture for dealing with citizens within the framework of the rule of law and respect for human rights. For example, CSOs can support SSR processes by ensuring that the necessary provisions for gender-based violence (which in some instances may have been committed by security actors), particularly sexual crimes, are adequately considered in SSR processes.

CSOs and the wider citizenry can contribute to the debate on the mandates of security sector institutions to ensure they are clear and unambiguous. Civil society can play a role in ensuring that their fellow citizens and the wider society are educated in advance so that expectations on how SSR processes will impact upon dealing with the past are not raised unrealistically.

Specifically, CSOs can publicise SSR processes and the role that they can promote in promoting redress. CSOs can undertake outreach programmes, awareness campaigns and country-wide consultations. For example, the civil society SSR Working Group in Liberia is currently playing such a critical role.

In order to ensure the effective monitoring of the integration of redress issues into SSR processes, CSOs can convene regular exchanges with the national SSR institutions. They can also build capacity of governments and security agencies, if required, through

11 Andrew Goldsmith and Colleen Lewis, (eds.), *Civilian Oversight of Policing, Governance, Democracy and Human Rights*, (Portland: Hart Publishing, 2000).

12 Michael Pugh, "Civil Society and the Security Sector: "Security-Sector Reform is Too Serious a Business to be left to Soldiers", in Flury and Hadžić (eds), *Sourcebook on Security Sector Reform: Collection of Papers*, pp.209-215.

training officials as well as their own members and the wider community.

CSOs in partnership with governments can contribute towards the establishment of an independent monitoring mechanism by ensuring that any SSR provisions, recommendations and legislation relating to dealing with the past in the form of sanctions against security agents who may have been perpetrators and the disbursement of reparations are followed-up. In addition, CSOs can also play an evaluative role by regularly reviewing the recommendations that are proposed by the government and international partners to redress the past through SSR and by determining if new strategies need to be adopted.

The experiences from Sierra Leone, Liberia and South Africa have demonstrated that the independent evaluation and research provided by non-governmental organisations and research institutions can be invaluable to informing SSR processes. Furthermore, members of civil society have conducted citizen surveys to assess and record perspectives and to decide if the injustices that they experienced in the past are not recurring as a result of the SSR process that has been adopted.

### Policy Recommendations

This chapter has assessed the issue of the mainstreaming of strategies for dealing with the past into SSR programming. Specific policy recommendations include:

1. There is a need for explicit policy guidelines to mainstream strategies for dealing with the past into the design of security sector reform. In particular, the sequencing of security sector reform and other transitional justice processes have to be carefully managed and based on the context-specific requirements of a particular country.
2. SSR programming has to be context specific and an analysis of each situation should guide the choice of the range of institutions, including special tribunals and truth commissions, that are adopted to deal with the atrocities committed by security actors and institutions in the past.
3. In the design and legislation of the SSR processes to address the past, citizens and CSOs should be more actively encouraged to participate in policy deliberations.
4. It is necessary to mainstream “citizen-oriented” SSR programming as a means of addressing the injustices and atrocities committed in the past and to prevent them from occurring again in the new political dispensation.
5. Gender sensitive security sector reform should be prioritised to redress the effects of gender-based violence and to sensitise societies about the importance of upholding the rights of all citizens across the board.

### Conclusion

This chapter has discussed the importance of SSR programmes being sensitive to dealing with the past. Effective SSR in formerly authoritarian and war-affected countries is part and parcel of the efforts to deal with the past. Specifically, security actors who may have committed atrocities and grievances have to participate in processes that reveal the truth of what transpired and either participate in a process of seeking redemption or become subjected to prosecutorial justice. However, security sector agencies and actors often possess a monopoly over the instruments of violence and therefore in the absence of goodwill on their part implementing strategies for dealing with the past and promoting transitional justice can prove to be a precarious process. The exact sequence of whether to pursue security sector reform and then advance other transitional justice processes is a problem for most countries. Each context has to be addressed based on its own context, and an approach that seeks to advance a “one-size-fits-all” approach to security sector reform is bound to generate more problems than solutions. Finally, a progressive shift of emphasis is required towards the active participation of citizens in monitoring the incorporation of strategies for dealing with the past in security sector reform. Citizens are often the direct targets of previous oppressive and repressive regimes and therefore they need to become actively engaged in monitoring and raising awareness about the efficacy of security sector reform.



## Dealing with the Past in Peace Mediation<sup>1</sup>

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Dealing with the past is used as a technical term in this guidance note to connote a wide range of activities that address serious past human rights abuses and, in some cases, root causes of conflict. It is used in preference to the term “transitional justice”, because transitional justice is often too narrowly identified with judicial mechanisms and because dealing with the past is a long-term process not only limited to a transitional period.

### 1. Key Messages

1. Dealing with a legacy of gross human rights violations is one of the greatest challenges facing post-conflict societies. Experience suggests that there is a relationship between the ability to address this legacy in a comprehensive and inclusive manner, including initiatives to address root causes of conflict, and the potential to develop sustainable peace.
2. In order to re-establish fundamental trust and accountability in society, there is a need to acknowledge publicly the abuses that have taken place, to hold those responsible who have planned, ordered, and committed such violations, and to rehabilitate and compensate victims.
3. Developments in the field of international justice over the past two decades have changed the normative and legal framework conditions

under which peace agreements are brokered. Mechanisms for dealing with the past have become an integral part of such agreements.

4. Many factors will have an influence on how, when, and to what degree aspects of dealing with the past are introduced by mediators into peace negotiations. Some of these will be context-specific and concern the circumstances of transition, in particular the balance of power between the negotiating parties; others will depend on the role (proactive vs. passive), the mandate (strong vs. weak), and the objectives (long-term “positive” peace vs. short-term “negative” peace) of the mediator.
5. In general, mediators are well advised to take an incremental approach to human rights issues, concentrating on the immediate delivery of basic human rights. With respect to dealing with the past, this would mean an initial focus on humanitarian concerns, such as the demobilization and reintegration of combatants, the return and resettlement of refugees and IDPs, the release of political prisoners, and the location of missing persons.
6. With regard to the issue of amnesty, mediators have the duty to inform the negotiating parties about international legal norms which forbid blanket amnesties for war crimes, crimes against humanity, and genocide. Rather than focusing exclusively on criminal sanctions, however, mediators should point out that a range of non-criminal sanctions (e.g. vetting) and restorative measures (e.g. truth commissions) also exists to address accountability.
7. In light of the many real tensions and dilemmas associated with dealing with the past, mediators are encouraged to pursue a holistic approach when introducing the issue into peace negotiations. The main challenge for mediators is to develop pragmatic options that are both respectful of international norms and standards and responsive to the concerns of the relevant stakeholders, including victim communities. Compromises between what is desirable and what is feasible are inevitable.

<sup>1</sup> Dealing with the past is used as a technical term in this guidance note to connote a wide range of activities that address serious past human rights abuses and, in some cases, root causes of conflict. It is used in preference to the term “transitional justice”, because transitional justice is often too narrowly identified with judicial mechanisms and because dealing with the past is a long-term process not only limited to a transitional period.

8. If dealing with the past is introduced in a constructive and creative manner, it can enhance the legitimacy of the peace process, lend credibility to the stance of the negotiating parties, and provide incentives to avoid future human rights abuses. In any case, the perception that dealing with the past is only about sanctions should be avoided, as this may produce a backlash and transform concerned parties into spoilers.

## 2. Key Principles

### 2.1. A conceptual framework for dealing with the past

Although there is no standard model for dealing with the past, a number of precedents have been established through the work of special rapporteurs and experts of the United Nations on the issues of impunity, reparations, and best practices in transitional justice.<sup>2</sup> In the following, the so-called “Joinet/Orentlicher principles” identify four key areas in the struggle against impunity, which, provide a comprehensive scheme for dealing with the past.

#### a. The right to know:

*The knowledge of the truth and the duty to remember*

The right to know involves both an individual right on the part of victims and their families to learn the truth about what happened to them or their loved ones and a collective right on the part of society to know the truth about past events and circumstances which led to gross human rights violations in order to prevent their recurrence in the future. In addition, it involves an obligation on the part of the State to undertake measures to preserve collective memory from extinction and so to guard against the development of revisionist arguments.

The most frequently used instrument to ensure this right are extra-judicial commissions of inquiry, so-called truth commissions.

Their two-fold purpose is to investigate patterns of human rights abuse, identifying their root causes in political, social, and economic structures and ideologies, and to recommend measures to rehabilitate victims, to reform State institutions, and, when appropriate, to preserve evidence for the

judiciary. The latter often entails documentation and the preservation of archives relating to grave human rights violations.

#### b. The right to justice:

*The right to a fair remedy and the duty to investigate and to prosecute*

The right to justice implies that any victim can assert his or her rights and receive a fair and effective remedy, including the expectation that the person or persons responsible will be held accountable by judicial means and that reparations will be forthcoming. It also entails the obligation on the part of the State to investigate violations, to arrest and to prosecute the perpetrators and, if their guilt is established, to punish them.

#### c. The right to reparation:

*Individual and collective forms of reparation*

The right to reparation entails individual measures for victims, including their relatives or dependants, such as: restitution, i.e. seeking to restore the victim in his or her previous situation; compensation for physical or mental injury, including lost opportunities, physical damage, defamation, and legal aid costs; rehabilitation, i.e. medical care, including psychological and psychiatric treatment.

Collective measures of reparation involve symbolic acts such as the annual homage to the victims or public recognition by the State of its responsibility, which help to discharge the duty of remembrance and help restore victims dignity.

#### d. The guarantee of non-recurrence:

*Vetting/lustration, institutional reform, and other measures*

The guarantee of non-recurrence emphasizes the need to disband non-state armed groups (DDR), to reform security institutions, repeal emergency laws, and to remove officials from office who are implicated in serious human rights violations according to a fair and transparent procedure. It also foresees the reform of state institutions in accordance with the norms of good governance and the rule of law.

### 2.2. Other relevant international norms and standards

#### a. Treaty obligations

The main treaty obligations pertaining to the

<sup>2</sup> See the reports submitted by Theo Van Boven (E/CN.4/Sub.2/1993/8), Louis Joinet (E/CN.4/Sub.2/1997/20/Rev.1), Diane Orentlicher (E/CN.4/2005/102/Add.1), and Cherif Bassiouni (E/CN.4/2000/62).



criminal prosecution of genocide, war crimes, and crimes against humanity are as follows:<sup>3</sup>

- (i) The 1948 Genocide Convention: State parties are required to investigate and prosecute persons responsible for acts of genocide.
- (ii) The 1949 Geneva Conventions and the 1977 Additional Protocol 1: State parties are required to prosecute persons responsible for grave breaches or to extradite them to a state that will do so.
- (iii) The 1984 Convention against Torture: Alleged cases of torture must be investigated and, if the State party has established jurisdiction, it must either extradite the offender or submit the case to its own competent authorities for the purpose of prosecution.
- (iv) The 1984 Inter-American Convention on Torture and the 1987 Inter-American Convention on Forced Disappearance of Persons have similar provisions.
- (v) The 1968 Convention on Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity holds that the passage of time cannot bar prosecutions for genocide, war crimes, and crimes against humanity.
- (vi) Other major sources of treaty-based obligations affecting the scope of amnesty are found in general human rights treaties at the international and regional level, including the ICCPR, the American Convention on Human Rights, and the European Convention on Human Rights.

#### **b. UN Secretary General report on the rule of law and transitional justice**

The report of the UN Secretary General on the rule of law and transitional justice was a significant step forward in integrating experience in the field with the theoretical framework provided by international

standards.<sup>4</sup> In that document the Secretary General argues that:

- transitional justice strategies must be comprehensive and inclusive in scope and gender-sensitive in character;
- they must engage all relevant actors, both state agencies and non-governmental organizations;
- a single nationally owned strategic plan should be drafted;
- judicial and non-judicial mechanisms, with

differing levels of international involvement (or none at all), with individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof, should be included.

#### **2.3. International or “hybrid” tribunals and the International Criminal Court (ICC)**

Crimes against humanity are defined by the statutes establishing the international criminal tribunals for Rwanda and the former Yugoslavia, the Sierra Leone Special Criminal Court, and the Rome Statute of the International Criminal Court (ICC). They include crimes such as murder, extermination, enslavement, deportation, imprisonment, torture, and rape. These crimes are understood as acts committed on a widespread or systematic basis and directed against a civilian population. There is an emerging consensus that States are obligated to prosecute crimes against humanity. Moreover, there are assertions of universal jurisdiction in this regard, i.e. that the right exists to prosecute these crimes regardless of where they occurred.<sup>5</sup>

The ICC acts on the principle of complementarity and, as such, is a court of last resort, exercising its jurisdiction only when a State party is genuinely unable or unwilling to investigate and prosecute. The prosecutor’s office has expressed its intention to focus on those who bear principal responsibility for the gravest crimes, leaving the rest to national courts or other (unspecified) means. Amnesties or pardons in countries that are States parties to the Rome Statute covering crimes under the jurisdiction of the ICC may contravene legal obligations under that Statute.<sup>6</sup>

#### **2.4. Constraints pertaining to Amnesty**

With regard to the issue of amnesty, mediators are faced with a number of constraints as defined by international treaties, international human rights law, and customary international law. Outside of these constraints, limited amnesty is permissible under certain conditions.

##### **a. The obligation to prosecute**

The obligation to prosecute may result directly from international treaties, such as the Convention on the Prevention and Punishment of the Crime of

3 Christine Bell. *Negotiating Justice? Human Rights and Peace Agreements*. International Council on human Rights. 2006. p. 81-82.

4 Report of the UN Secretary General, “The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies” (S/2004/616).

5 Christine Bell. *Ob. Cit.* p. 82.

6 In accordance with the principle *ne bis in idem*, however, if a pardon were granted following proceedings and a conviction in a national court, the ICC would not try that person again unless the proceedings were aimed at shielding that person from criminal responsibility.

Genocide or the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. As for the Geneva Conventions, the obligation to prosecute is stated expressly with respect to crimes that constitute “grave breaches”, as specified in the Conventions. Further, international human rights law, such as the ICCPR, the ICESCR Optional Protocol,<sup>7</sup> or the American Convention on Human Rights, accord to victims of gross human rights violations the right to an effective remedy for the breaches they have suffered. Finally, customary international law with regard to crimes against humanity and war crimes or duties arising from the implementation of the Rome Statute may set forth an obligation for the State and the international community to prosecute perpetrators.

In light of the above, blanket amnesties to absolve individuals of responsibility for genocide, war crimes, and crimes against humanity, including torture, enforced disappearance, extra-judicial execution, slavery, and rape, are not permissible under international law. The United Nations will not acknowledge peace agreements containing such amnesties nor will such amnesties prevent subsequent prosecution by United Nations-created or -assisted tribunals.

#### **b. Permissible amnesties**

Apart from blanket amnesties, some form of limited amnesty for selected groups may be necessary for humanitarian reasons. Examples include combatants who should be demobilized and reintegrated into their communities; prisoners of war and civilian detainees who should be released from detention; and conscientious objectors and deserters who may have sought asylum abroad. Article 6(5) of the Additional Protocol II of the Geneva Conventions foresees such an amnesty at the end of hostilities, which is limited to those individuals who have not committed any crimes under international law.

Any decision to grant limited amnesty should respect the following conditions:

- amnesty should only be considered in circumstances in which such measures do not violate obligations arising under international law;
- amnesty policies should be linked to non-judicial mechanisms of accountability, for example truth

commissions or vetting, to discourage impunity and strengthen the rule of law;

- amnesty for less serious offenders and those lower down in the chain of command is more appropriate as a measure when criminal proceedings are foreseen for the most serious perpetrators and when combined with other non-judicial measures;
- amnesty policies should include provisions for the individual adjudication of claims, where appropriate.

### **3. Options for Mediators**

#### **3.1. Holistic approach and inter-linkages**

It is crucial for the parties to be informed about dealing with the past from a holistic perspective and to understand the linkages that may exist between particular measures. The conceptual framework for dealing with the past and the diagram in the Appendix provide guidelines in developing this approach.

#### *Opportunities*

- A holistic approach will provide mediators and parties at the table with more flexibility to adapt measures to the specific circumstances, priorities, and interests of the negotiating parties. This, in turn, will enable the concerned parties to focus on when and how specific issues should be pursued and in which combination.
- By drawing attention to possible linkages, the issue of accountability can be addressed from both a pragmatic and a principled perspective. This approach might foresee criminal prosecution for the most serious offenders, while introducing restorative measures for those further down in the chain of responsibility, including amnesty at the lowest level.
- Mediators can recommend a combination of mechanisms that join the normative commitment to accountability with the immediate goal of sustaining a cease-fire and the long-term goal of developing the constitutional commitments to the rule of law that are central to the peace agreement.
- From the perspective of self-interest, a holistic approach that includes both retributive and restorative measures can also enhance the legitimacy of the negotiating parties with their own constituencies.

#### *Challenges*

- The circumstances may sometimes not be favourable to a holistic approach. For example,

<sup>7</sup> The Optional Protocol to the ICESCR, adopted in December 2008 by the UN General Assembly, will not enter into force until it has been ratified by ten UN member states.

the ICC might intervene if the crimes committed are egregious, and if the State is not willing to prosecute. The focus on criminal sanctions could then dominate the agenda on dealing with the past to the exclusion of additional restorative measures. This is especially true given that those at the negotiating table are likely to be the very leaders and authorities most vulnerable to prosecution.

- Under international law, the State has the primary duty to protect human rights, whereas non-state actors are a more limited subject in this regard. It is therefore not always possible to address human rights violations committed by non-state actors in the same way as abuses attributable to the State.
- The social dynamics and symbolic value of retributive and restorative measures are quite different. The level of social acceptance of the different measures should be taken into consideration as well as their relative effectiveness as instruments and their potential impact on the conflict (“do no harm”).

### 3.2. Context-specific

No one size fits all. It is crucial that dealing with the past measures are informed by the context, the local culture and traditions, as well as the needs of concerned constituencies and the responses that society is developing.

#### *Opportunities*

- Mediators should be well informed about past human rights abuses in order to identify openings and frame measures for dealing with the past.
- Ideally, national consultations concerning the peace process would include specific consultations on dealing with the past with the purpose of identifying options and their consequences. These consultations could also include exchanges with foreign experts and exposure to other countries which have engaged in a similar process of dealing with the past.
- Mediators should be aware of the need to adapt mechanisms to local culture and traditions, paying particular attention to existing structures and local expertise.

#### *Challenges*

- As representatives of civil society are often not involved directly in negotiations, mediators will need to explore possibilities to gain access to their voices and concerns.

- The successful implementation of specific measures will depend on the institutional capacity within a given society and the degree of political will that exists among the parties. This will inform the options that mediators develop in the short-term and in the long-term for dealing with the past. Specific issues to be kept in mind concern the need to reform the security sector as well as judicial and educational institutions.

### 3.3. Timing and sequencing

The question is not whether dealing with the past should be pursued, but rather when, with which mechanisms, under which conditions, and at which time. Consequently, adequate agenda-setting with realistic priorities at the proper moment, including difficult issues such as accountability and impunity, is a sensitive task for any mediator.

#### *Opportunities*

- A relevant entry point for mediators is the linkage of dealing with the past with priority humanitarian concerns, on which some level of consensus between the negotiating parties can be expected. These concerns include the fate of missing persons, the demobilization and reintegration of combatants, the return and resettlement of refugees and internally displaced persons, and the release and rehabilitation of prisoners of war and political prisoners<sup>8</sup>.
- Social pressure in connection with humanitarian issues strengthens the case of the mediator in making the linkage with dealing with the past and adds to the legitimacy of the peace process.
- By developing a sequence of measures in connection with a short-, mid- and long-term strategy for dealing with the past, mediators can enhance the impact of the peace process in terms of conflict transformation.

#### *Challenges*

- Dealing with the past can be perceived as a threat if the debate on accountability focuses only on criminal sanctions. This would provide a platform for spoilers, particularly if the sanctions are disproportionate to one party or the other.
- The current normative framework excludes the choice between some accountability or none as an option. The pertinent question is rather how

<sup>8</sup> Example: an initial proposal might link the right to know with the right to reparation by introducing a commission of inquiry to investigate the effect of human rights violations on different sectors of society and thereby establish categories for reparations.

much accountability can be achieved when. This presents the mediator with the clear, if challenging, task of setting priorities regarding accountability and introducing linkages between retributive and restorative measures.

- Accountability mechanisms can result in de facto amnesty if they are implemented ineffectively. This might provide an incentive for certain parties not to take their commitments seriously.
- The introduction of specific topics too early in the negotiation process could prove to be counter-productive for the concerned parties. A focus on reparations, for example, could lead to a competition among victim communities and thus weaken the peace constituency.
- By tabling the question of dealing with the past, mediators should be aware of the danger that pertinent evidence pertaining to these issues might be destroyed by the negotiating parties.

### 3.4. Inclusion

The concerns addressed by dealing with the past are shared by a range of state and non-state actors. The inclusion of these actors and their viewpoints in the negotiation process will strengthen the legitimacy of the peace agreement and, in turn, enhance its implementation capabilities.

#### *Opportunities*

- As a general principle, mediators can underline the importance of the involvement of all relevant stakeholders during the peace negotiations in a formal or informal way. In particular, they should emphasize the necessity of the involvement of victims and of the organizations that advocate on their behalf.
- The introduction of human rights-based reform under the guarantee of non-recurrence provides mediators with a strong argument to involve civil society actors in the negotiations, both on grounds of principle (it is right to do so) and on pragmatic grounds (it will lead to better reform).
- Mediators may play a role in designing the processes through which relevant stakeholders can debate and outline the elements of a national strategy to deal with the past in the implementation phase.

#### *Challenges*

- The framework of the negotiations may place clear limitations on the involvement of civil society actors and other relevant stakeholders.
- The mediator may lack the leverage to argue for the inclusion of voices outside those belonging

to the negotiating parties. Nor is it necessarily within the mandate of the mediator to do so.

- Under certain circumstances, the inclusion of civil society and other stakeholders may be an impediment to progress due to a lack of consensus regarding dealing with the past.

### 3.5. Victim-sensitive approach

A victim-sensitive approach to dealing with the past will be determinant for the legitimacy and sustainability of the peace process. Victims have generally not had a platform in peace negotiations.

#### *Opportunities*

- When devising a negotiating strategy on dealing with the past, mediators should inform themselves about the concerns of victim communities. The negotiation strategy should prioritize the interests and needs of victims before those of perpetrators.
- Mediators should give special attention to the feasibility of truth-telling mechanisms and reparation programs, as victims are often regarded as their intended beneficiaries. Such initiatives raise expectations and, if successful, can play a crucial role in terms of the rehabilitation of victim communities and hence contribute to the long-term goal of reconciliation.
- Victim communities should be informed and consulted in connection with measures concerning the right to justice, especially if such measures include provisions of amnesty.

#### *Challenges*

- Mediators may only have limited contact with victim communities. Even then, the question of legitimacy may be raised, i.e. who has the right to represent victims?
- As different victims have different social bases, there will inevitably be some form of competition among victims for recognition and participation in the peace process.
- Although there are internationally recognized definitions of victims, in certain circumstances it may be difficult to distinguish between victims and perpetrators. Child soldiers are one example; refugees from among the combatant community are another. Mediators will have to adjust their strategy to take this grey zone into account.
- The reintegration of former combatants poses a particular challenge. Not only do they often reintegrate into communities that they have victimized, but they may also be the recipients of benefits that victim communities do not receive.

### 3.6. Gender

The gender dimension of dealing with the past is crucial at all levels. There has been a paradigm shift in international jurisdiction on the subject of sexual violence, in particular violence against women. The Rome Statute of the ICC recognizes rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity as crimes against humanity.

#### *Opportunities*

- In fulfilling obligations with respect to the right to know and the right to justice, the mediator should inform the negotiating parties of the obligation of the State to protect the dignity and privacy of victims and witnesses, in particular when the crimes involve sexual or gender violence.
- Particular attention should be given to the role of women in peace-building in accordance with UN resolution 1325.
- Specific measures dealing with children as victims or perpetrators should be linked, where appropriate, with international standards and corresponding national legislation concerning the rights of children.

#### *Challenges*

- A fundamental understanding of gender as a transversal issue may be lacking among the negotiating parties. In such a case, mediators will have to develop a gender analysis as part of the strategy for dealing with the past.
- The need to address the traumatic damage done to male and female identities (forced recruitment, sexual abuses suffered and committed) should be taken into consideration when developing proposals for reparation and reform programs. The psycho-social accompaniment of victim communities and former combatants requires a long-term commitment.

### 3.7. Ownership

Dealing with the past initiatives should be nationally led and owned. This fosters their legitimacy and sustainability. The imposition of external models must be avoided. Nevertheless, mediators can be supportive in providing access to experiences in other contexts, including exchanges about best practices and lessons learned.

#### *Opportunities*

- Mediators should encourage the negotiating parties to consider the impact of dealing with the

past measures on the national and local levels from the perspective of ownership.

- Local-level, bottom-up mechanisms can reflect a country's diverse make-up and experience of conflict and provide crucial precursors or extensions for wider-scale national initiatives.
- When introducing international human rights standards, mediators can identify shared values for divided societies.
- Restorative mechanisms for dealing with the past may offer important cross-community forums to initiate or further the process of reconciliation.

#### *Challenges*

- Introducing dealing with the past may call into question the ownership of the process because the issue of accountability is on the agenda, possibly against the will of the parties.
- Time constraints with respect to the negotiations may be in contradiction with the spirit of ownership, both in general and specifically with regard to dealing with the past.
- Without public awareness and educational initiatives and some form of public consultation, the public understanding and ownership of measures to deal with the past cannot be guaranteed.
- Under the pressure of the negotiation agenda, the local dimension of dealing with the past initiatives may be neglected to the detriment of the legitimacy, acceptance, and sustainability of the peace negotiations.

### 3.8. Oversight mechanisms

The creation of oversight mechanisms to monitor the implementation of peace agreements is a crucial element in any mediation process. Given the complexity of the matter, special attention needs to be paid to the implementation framework for dealing with the past.

#### *Opportunities*

- Mediators should ensure that the measures agreed upon are feasible, that the expected results are clearly identified, and that mechanisms are in place to respond in case agreements are violated or not implemented.
- Mediators might consider including the option of creating an independent body (a liaison office, for example) in the peace agreement. Its task would be to coordinate or monitor the implementation of a national strategy for dealing with the past.
- With respect to the financial implications of dealing with the past initiatives, mediators can

draw the attention of the negotiating parties and donor communities to the cost effectiveness of different retributive and restorative options.

#### *Challenges*

- There may be no role previewed for mediators during the implementation phase.
- Mediators should strike a balance between encouragement and caution regarding the implementation phase. Even in the best of cases, expectations regarding the effectiveness of dealing with the past measures may far exceed their capacity to deliver results.
- The financial implications of specific measures are difficult to calculate and therefore the question of the full extent of their implementation must remain open.

#### **4. Questions for Mediators**

##### **4.1. General questions**

- How will your mandate as a mediator and mediation style (proactive vs. passive) influence your approach to dealing with the past?
- In the mediation team, is there anyone responsible for accountability and impunity issues?
- How can you make sure that dealing with the past is integrated as a cross-cutting issue in the mediation process?
- Did you define any “red lines” when you as a mediator would have to withdraw from the negotiations?
- If the ICC were to intervene in connection with the issue of accountability, how would this affect the negotiation strategy for dealing with the past?

##### **4.2. Pre-negotiation phase**

Tasks for the mediator:

- to include dealing with the past on the agenda for negotiations;
- to explain the substance of a principled approach to dealing with the past;
- to inform the negotiating parties that this is the agenda item that will address a range of accountability issues all along the process;
- to ensure that the concerned parties understand the differences between restorative and retributive justice and with respect to the latter that prosecutorial discretion exists in certain circumstances even when amnesties are not permitted.

*Questions for the mediator:*

- What is the nature of the human rights violations to be addressed and their relationship to the conflict? Are they core issues? Symptoms? Root causes?
- Can mediation contribute to preventing human rights violations at this stage of the process?
- Is there any political will to address dealing with the past at this stage? On the part of which stakeholders and why?
- Is there any major opposition regarding dealing with the past that might threaten the peace process? On the part of which stakeholders and why?
- Who is accused of being responsible for the most severe violations? Which sanctions are foreseen for such cases according to international law?
- According to public opinion, what are the main priorities in the field of dealing with the past?
- Can you introduce this issue constructively with the concerned parties? What are the main obstacles and opportunities?
- What about victims? Are there ways to make the voices of the victims heard?
- Can/should parties be exposed to experiences of dealing with the past in other countries?
- Is there any specific issue that you could use as an entry point to launch the negotiations on dealing with the past?

##### **4.3. Negotiation phase**

Tasks for the mediator:

- to ensure that dealing with the past issues are addressed in a consistent and coherent way to the extent possible during the negotiation phase;
- to include - at a minimum - an agreement in principle on dealing with the past in the peace

agreement and to refer its implementation and details to an annex/commission/committee;

- to ensure that any mechanism created for dealing with the past has a clear mandate and provisions for implementation and monitoring and has procedures in place in case of non-compliance.

*Questions for the mediator:*

- What kind of dealing with the past provisions should the peace agreement include, general ones or very precise ones?
- Which issues should be mentioned in the peace agreement in light of the Joinet/Orentlicher principles? Are there any priorities?

- What could be the best combination and sequence of measures, given the context and the relations among the negotiating parties?
- What legal standards should be used? How will they apply to the different parties to the conflict?
- Is there any common incentive among the negotiating parties to address dealing with the past?
- Are there any specific issues of interest to the parties that could be put on the agenda?
- What are the potential consequences of any dealing with the past mechanisms on specific groups?
- How can mediators create conditions to ensure the fairness and effectiveness of dealing with the past measures?
- How would mediators deal with a situation in which parties express their intention to agree on an impermissible amnesty? What could be the consequences?

#### 4.4. Implementation phase<sup>9</sup>

Tasks for those persons or entities responsible for monitoring:

- to ensure that the previewed mechanisms are implemented in a transparent and accountable manner;
- to verify that sufficient financial resources are available for the measures foreseen;
- to ascertain whether the combination of short-, mid-, and long-term goals is realistic and reinforces the whole peace process.
- to facilitate a dialogue among relevant stakeholders, including state and non-state actors, regarding the decision-making and implementation of dealing with the past measures;
- to re-negotiate elements of the implementation, if necessary.

Questions for those persons or entities responsible for monitoring:

- Which monitoring tools are being used to assess the implementation of dealing with the past measures?
- Who is in charge of coordinating and monitoring dealing with the past measures? To whom are they accountable? The negotiating parties? The Parliament? The international community?
- Based on the results achieved so far, is there a need to reschedule the implementation?

<sup>9</sup> Although mediators are often not present at this stage, there is a growing consensus about the need for facilitation during the implementation process.

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## Pursuing Peace in an Era of International Justice

SARA DAREHSHORI<sup>1</sup>

Since the end of the cold war, the belief that those responsible for shocking human rights violations should be brought to justice has increasingly taken root in the international community. The establishment of ad hoc international tribunals to address atrocities in the former Yugoslavia and Rwanda marked a turning point from a time when the most victims could hope for in the aftermath of atrocities was a truth commission to document human rights violations. Abusive leaders regularly granted themselves amnesties or negotiated comfortable exile for themselves after being ousted from power, secure in the belief that they were immune from prosecution.

In the current environment, however, safety from prosecution is less assured for those responsible for international crimes. Abusive leaders, whose alleged offenses would have gone unaddressed a mere 20 years ago, now must consider the possibility that they may one day have to answer for their actions if not in their own country, then somewhere abroad. The adoption of the Rome Statute establishing the International Criminal Court (ICC) in 1998, and its speedy entry into force, signaled the most dramatic shift in the international community's commitment to battling impunity.

Elsewhere too there are signs that states are taking their obligation to prosecute international crimes more seriously. In the years since the ad hoc tribunals were established, Human Rights Watch has documented "a steady rise in the number of

cases prosecuted under universal jurisdiction laws in Western Europe."<sup>2</sup> Universal jurisdiction laws allow national courts to try persons suspected of serious international crimes such as genocide, crimes against humanity, war crimes, or torture, even if neither the suspect nor the victims are nationals of the country where the court is located and the crime took place outside of that country. In Latin America, national courts have taken up cases relating to human rights violations from the 1970s and 1980s.

The taboo against trying heads of state has also been broken. Two former heads of state—Slobodan Milosevic of Serbia and Charles Taylor of Liberia—have faced charges in international courts, and a third sitting president, Omar al-Bashir of Sudan, is wanted by the International Criminal Court for genocide, crimes against humanity and war crimes in relation to the events in Darfur. Hissene Habre, the former president of Chad, is also facing criminal charges and, at the request of the African Union, may be brought to trial in Senegal on the basis of universal jurisdiction.

Justice is an important end in and of itself. It can help to recognize victims suffering and restore their dignity and is an important tool for the re-establishment of the rule of law and prevention of further atrocities. The movement towards ending impunity is also in part a recognition of the high costs of ignoring crimes. There is ample experience to demonstrate that failing to address serious human rights crimes can lead to unforeseen negative results. Amnesties that grant immunity for war crimes, crimes against humanity, or genocide may effectively sanction the commission of grave crimes without providing the desired objective of peace. All too often a peace that is conditioned on impunity for serious crimes is not

1 Sara Darehshori researches and advocates on international justice issues relating to Darfur, Serbia, and the International Criminal Court (ICC). She also authored *Selling Justice Short: Why Accountability Matters for Peace*, a report that draws upon 20 years of Human Rights Watch research in a number of conflict situations and finds that instead of impeding negotiations or a transition to peace, accountability can yield short and long-term benefits. Prior to joining Human Rights Watch, Ms. Darehshori worked as a prosecutor in the first trial at the International Criminal Tribunal for Rwanda, *The Prosecutor v. Jean-Paul Akayesu*, and as a corporate litigator in New York. In addition, Ms. Darehshori has worked in South Africa and for the International Rescue Committee in Croatia, Sudan, and Sierra Leone. She is a graduate of Brown University and Columbia Law School.

2 See Human Rights Watch, *Universal Jurisdiction in Europe: The State of the Art*, vol. 18, no. 5(D), June 2006, <http://hrw.org/sites/default/files/reports/ij0606web.pdf>, pp.2-3. However, there has also been some backtracking with Belgium, Germany, and Spain seeking to place more restrictions on the use of universal jurisdiction.

sustainable.<sup>3</sup> Even worse, it can set a precedent of impunity for atrocities that encourages further abuses. Tolerance of impunity can in the longer term also contribute to renewed cycles of violence both by implicitly permitting unlawful acts and by creating an atmosphere of distrust and revenge that may be manipulated by leaders seeking to foment violence for their own political ends. Recognizing that amnesties for the most serious crimes are neither effective nor consistent with efforts to end impunity, the United Nations (UN) Secretary General issued guidelines prohibiting appointed envoys from associating themselves with agreements that provide amnesties for these crimes.

On the contrary, justice and peace are now widely viewed as complementary goals. The Rome Statute's preamble affirms that states parties are "determined to put an end to impunity for the perpetrators of these crimes and thus contribute to the prevention of such crimes." In his report on the rule of law in post-conflict societies, then-UN Secretary General Kofi Annan stated, "Justice, peace and democracy are not mutually exclusive objectives, but rather mutually reinforcing imperatives."<sup>4</sup> The European Union has stated it "remains convinced that peace and justice are not contradictory aims. On the contrary, in our view lasting peace cannot be achieved without a suitable response to calls for individuals to be held accountable for the most serious international crimes."<sup>5</sup> The African Union too has reiterated its "unflinching commitment to combating impunity" and has acknowledged the link between accountability and lasting peace.<sup>6</sup> The recognition that accountability is an important component of durable peace was reaffirmed during the peace and justice stocktaking session at the Review Conference for the ICC in Kampala in June

2010.<sup>7</sup> The acceptance of this premise is such that last September the Secretary General acknowledged that "the debate is no longer between peace and justice, but between peace and what kind of justice."

Despite this evolution in thinking about accountability, the new legal environment is not without its challenges. Even as they complement each other in the long term, in the short term tensions have arisen between the need to secure peace and efforts to ensure accountability for international crimes. Known or suspected rights abusers may inevitably have a role in peace negotiations and in peace-building contexts. In some cases, obtaining their consent to end a conflict may be difficult if they are facing criminal charges. Because the ICC can, and does, issue arrest warrants while conflicts are ongoing, it has already created considerable controversy over whether the prospect of prosecution stands in the way of peace. Negotiators and diplomats, under pressure to end a conflict, sometimes view the ICC as an insurmountable obstacle to their work. They fear that the prospect of arrest will cause abusive leaders to cling to power more tenaciously and thus prolong the conflict. The inability to promise an amnesty to an abusive leader gives negotiators and mediators one less tool in their kit of options available to end a conflict. The ICC's mandate to investigate and prosecute war crimes, crimes against humanity, and genocide in the course of conflicts means that this controversy is likely to arise more often in the future. The complications that can arise from inserting justice into peace negotiations and the understandable desire to end a conflict quickly have meant that even proponents of accountability argue that justice should be postponed in favor of peace. Already the call to suspend or "sequence" justice in exchange for a possible end to a conflict has arisen in conjunction with the court's work in a number of country situations.

There is no simple or formulaic answer for meeting these challenges. However, we are able to draw lessons from past experience about what has happened when tensions arise between these two important and complementary objectives. It is also worth examining what has happened in instances where thorny questions of justice have been postponed with the hope of securing peace.

3 For a more in-depth discussion of this issue, see Human Rights Watch, *Selling Justice Short: Why Accountability Matters for Peace*, July 7, 2009, <http://www.hrw.org/en/reports/2009/07/07/selling-justice-short-0>.

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7 International Criminal Court, Stocktaking of International Criminal Justice, Peace and Justice, Moderator's Summary, June 7, 2010, RC/ST/PJ/1 p. 5.

### A. The impact of international justice on peace negotiations

The creation of international justice mechanisms able to act before a conflict has ended is often accompanied by concerns about how they could impact efforts to consolidate peace. This is particularly true when the courts set their sights on top-level government officials. However, the possibility of criminal charges does not categorically mean the end of peace negotiations as people fear. The existence of indictments does not preclude negotiators from dealing with suspected war criminals if it is necessary to resolve a conflict. The prosecutor has discretion with respect to timing and whether or not the indictment is sealed or unsealed. Those decisions may factor in considerations about what is happening on the ground.<sup>8</sup> Moreover, for the ICC, the Rome Statute delegates the decision about whether an investigation or prosecution may conflict with international peace and security to an outside political actor. Article 16 provides that the United Nations Security Council, acting under Chapter VII of the UN Charter, may take action to defer an investigation or prosecution for a 12-month period. Because the Security Council has itself repeatedly emphasized that justice is linked to peace and because of the risks associated with political interference with the independence of the court, this article should be used sparingly.<sup>9</sup>

In situations where article 16 was not an option (such as the International Criminal Tribunal for the former Yugoslavia and the Special Court for Sierra Leone), experience has shown that suspected war criminals at peace negotiations don't always behave as expected. Efforts at justice, so often assumed to be antagonistic to peace negotiations, do not categorically have the predicted dampening or damaging effect on peace talks.

<sup>8</sup> For example, the ICC delayed the unsealing of Mathieu Ngudjolo's arrest warrant for crimes in the Democratic Republic of the Congo until after the signing of the Goma agreement after international participants in the negotiations expressed concern about how the news would impact parties to the agreement. See Laura Davis and Priscilla Hayner, International Center for Transitional Justice, "Difficult Peace, Limited Justice: Ten Years of Peacemaking in the DRC," March 2009, [http://www.ictj.org/static/Africa/DRC/IC-TJDavisHayner\\_DRC\\_DifficultPeace\\_pa2009.pdf](http://www.ictj.org/static/Africa/DRC/IC-TJDavisHayner_DRC_DifficultPeace_pa2009.pdf), p. 33.

<sup>9</sup> The Security Council's twelve-month deferrals under Article 16 should not be repeatedly renewed in order to create an indefinite deferral, as that would result in de facto immunity and undermine both international law and the purpose of the Rome Statute. See Human Rights Watch, *The Meaning of "the Interests of Justice" in Article 53 of the Rome Statute*, June 1, 2005, <http://www.hrw.org/node/83018>, fn. 31

For example, on May 27, 1999, the International Criminal Tribunal for the former Yugoslavia (ICTY) announced its most significant indictment: that of Yugoslav President Slobodan Milosevic and four other top officials for "murder, persecution, and deportation in Kosovo" from January 1 through May 1999.<sup>10</sup> The indictment was announced in the midst of the armed conflict between Serbia and NATO forces over Kosovo. The conventional wisdom at the time was that the indictment would make the situation in Kosovo worse and would likely undercut the prospect of any compromise by Milosevic. The Russian Foreign Ministry said the war crimes indictment "will add to the obstacles to a Yugoslav settlement" and "severely undermine" the authority of the negotiators. Russia's envoy to the Balkans, Viktor S. Chernomyrdin, denounced the warrant as a "political show" and "incomprehensible and unpleasant."<sup>11</sup>

Yet less than a week later, on June 3, negotiators announced that Milosevic had accepted the terms of an international peace plan for Kosovo.<sup>12</sup> Despite their strong opposition at the time, when asked about the indictment and its effect on the talks, the Russian and Finnish intermediaries later admitted that the indictment did not affect negotiations and was never on the agenda.<sup>13</sup> Because Milosevic did not travel much and felt secure at home, he did not fear ending up in The Hague.<sup>14</sup>

<sup>10</sup> "President Milosevic and Four Other Senior FRY Officials Indicted for Murder, Persecution and Deportation in Kosovo," ICTY press release, JL/PIU/403-E, May 27, 1999, <http://www.icty.org/sid/7765>.

<sup>11</sup> David Hoffman, "Russia Says Peace Talks Sideswiped," *Washington Post*, May 28, 1999, <http://www.washingtonpost.com/wp-srv/inatl/longterm/balkans/stories/diplomacy052899.htm>; "Despite Milosevic Indictment Peace Talks Continue," *U.N.Wire*, May 28, 1999, [http://www.unwire.org/unwire/19990528/2885\\_story.asp](http://www.unwire.org/unwire/19990528/2885_story.asp). See also Roger Cohen, "Crisis in the Balkans: The Indictment; Tribunal is Said to Cite Milosevic for War Crimes," *New York Times*, May 27, 1999, <http://www.nytimes.com/1999/05/27/world/crisis-balkans-indictment-tribunal-said-cite-milosevic-for-war-crimes.html>; Marcus Tanner, "War in the Balkans, Milosevic Charge Splits Allies," *Independent*, May 28, 1999, <http://www.independent.co.uk/news/war-in-the-balkans-milosevic-charge-splits-allies-1096257.html>.

<sup>12</sup> "Milosevic Accepts Peace Plan, Finnish envoy says," *CNN.com*, June 3, 1999, <http://www.cnn.com/WORLD/europe/9906/03/kosovo.peace.04/>.

<sup>13</sup> Herbert Okun, "The Role of International Criminal Justice in Peace Negotiations" (contribution to panel discussion "Future of International Criminal Justice - Evolving Accountability from Nuremburg to the International Criminal Court," October 30, 2006), *Penn State International Law Review*, vol. 25, 4 (2007), p. 788.

<sup>14</sup> *Ibid.*

More recently, the ICC prosecutor's request for an arrest warrant against Sudan's President al-Bashir in July 2008 similarly triggered a backlash by numerous actors, including the African Union (AU) and the Organization of the Islamic Conference, which asked the UN Security Council to defer the ICC's work in Darfur for 12 months out of concern about the possible impact of the ICC's work on "efforts aimed at promoting lasting peace."<sup>15</sup> Many were also understandably concerned about the potential impact on UNAMID, the AU/UN hybrid peacekeeping mission in Darfur. Shortly after the prosecutor's request for a warrant was made, one of Bashir's top advisors threatened various reprisals including expulsion of UNAMID, stating: "Send them out because the U.N. has declared us Public Enemy No. 1, why shouldn't we?"<sup>16</sup> Sudan experts Alex de Waal and Julie Flint publicly criticized the ICC prosecutor for pressing charges against high officials in the government of Sudan, stating, "Attempts to deploy UNAMID in Darfur are at a critical point. At this sensitive time, to lay charges against senior government officials, and to criminalise the entire government, will derail attempts to pull Sudan from the brink."<sup>17</sup> They argued that justice should wait until after those culpable are no longer in positions of authority.<sup>18</sup>

Following the issuance of arrest warrants, the Sudanese government expelled 13 international aid agencies, putting further at risk millions vulnerable to malnutrition and disease. However, the other anticipated devastating consequences flowing

from the warrant have not occurred.<sup>19</sup> Peace talks, which had not been robust before the prosecutor's announcement, continued after the prosecutor's announcement and after the arrest warrant had been issued. On November 12, 2008, al-Bashir announced an immediate unilateral ceasefire and the government of Sudan and the rebel movements pledged to work on a framework agreement for peace talks.<sup>20</sup> In February and May 2009, the government of Sudan and representatives of the Justice and Equality Movement (JEM) met in Qatar for peace talks and on February 23, 2010, agreed to a framework for peace discussions, which committed the two parties to an immediate ceasefire, the release of prisoners, and the negotiation of a final peace agreement.<sup>21</sup> Though there has been no progress towards implementation of a ceasefire protocol or a final agreement with JEM since negotiations were suspended for elections in April, talks have continued more successfully with a splinter rebel group, the Liberation and Justice Movement (LJM). In June, following negotiations in Doha, the LJM and the government of Sudan agreed to form committees to negotiate in a number of key areas, including justice and reconciliation. The lack of progress towards a comprehensive settlement of the conflict in Darfur is primarily due to divisions among regional actors, not to potential concerns about the ICC.<sup>22</sup>

15 Communique of the 142<sup>nd</sup> Meeting of the Peace and Security Council, PSC/MIN/Comm(CXLII), July 21, 2008, p. 3.

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18 Julie Flint and Alex de Waal, "Justice Off Course In Darfur," commentary, *Washington Post*, June 28, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/06/27/AR2008062702632.html>.

19 United Nations Security Council, "Report of the Secretary-General on the deployment of the African Union—United Nations Hybrid Operations in Darfur," April 14, 2009, [http://www.un.org/ga/search/view\\_doc.asp?symbol=S/2009/201](http://www.un.org/ga/search/view_doc.asp?symbol=S/2009/201). The seriousness of the expulsion of aid agencies – who employed 40 percent of humanitarian staff working in Darfur at the time and supplied food, water, and medical care to over a million people – should not be understated. Though emergency measures were undertaken to avert the worst consequences of the expulsion, including a "combination of enhanced government capacity, an increase in responsibility assumed by the remaining humanitarian actors, and new capacities on the ground," humanitarian aid has still not recovered nearly one year later to where it was before the expulsions. See United Nations Security Council, "Report of the Secretary-General on the deployment of the African Union—United Nations Hybrid Operations in Darfur," S/2009/297, June 9, 2009, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/363/65/PDF/N0936365.pdf?OpenElement>.

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21 United Nations Security Council, "Report of the Secretary-General on the United Nations Mission in Sudan," S/2010/168, April 5, 2010, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/299/70/PDF/N1029970.pdf?OpenElement>.

22 United Nations Security Council, "Report of the Secretary-General on the African Union—United Nations Hybrid Operation in Darfur," S/2010/382, July 14, 2010.

The warrants also did not slow the government of Sudan's cooperation with deployment of peacekeepers. Indeed, UNAMID deployment rose significantly following the prosecutor's announcement. Between July 31, 2008, and January 21, 2010, deployment of UNAMID's military, civilian, and police personnel rose from 12,341<sup>23</sup> to 24,223.<sup>24</sup> Over 3,000 UNAMID personnel were deployed in the first few months after the prosecutor's announcement.<sup>25</sup> Also in the months following the prosecutor's announcement, the government of Sudan agreed to provide blanket clearance for airlift operations and to remove other administrative hurdles to UNAMID.<sup>26</sup> The experiences in Kosovo and Sudan suggest at a minimum that indictments need not upend peace talks.

In other instances, justice may even have helpful side benefits. Arrest warrants sought as a means of bringing to justice leaders most responsible for serious international crimes have also at times had the side-effect of marginalizing those leaders in ways that may benefit peace processes. This was true with Liberian President Charles Taylor and Bosnian Serb leader Radovan Karadzic. The ICC warrants for LRA leaders may have also contributed to the group's at least temporary marginalization from its base of support in Sudan, pushing it towards more serious peace negotiations in Juba in 2006.

### 1. Charles Taylor

On June 4, 2003, the prosecutor of the Special Court for Sierra Leone "unsealed" an indictment against Charles Taylor as one of those "bearing the greatest responsibility" for war crimes, crimes against humanity, and other serious violations of international humanitarian law committed in Sierra

Leone. The unsealing of the indictment against Taylor caused a great deal of consternation at the United Nations Secretariat and elsewhere.<sup>27</sup> The cause of concern was triggered in part by the timing of the announcement, as it coincided with the opening day of Liberian peace talks convened in Accra, Ghana.<sup>28</sup> Peace, which had mostly been elusive in Liberia since 1989, was a priority, and many felt that the indictment would undermine chances at reaching a negotiated settlement.<sup>29</sup> The African presidents who were meeting in Accra to work on the peace process felt ambushed by the news and betrayed, as they had not been informed of the indictment earlier.<sup>30</sup> Ghanaian Foreign Minister Nana Akufo-Addo expressed his embarrassment and stated a belief held by many that the prosecutor's action "in unsealing the indictment at this particular moment has not been helpful to the peace process."<sup>31</sup>

In retrospect, however, it is clear that the unsealing of Taylor's indictment was a key factor in bringing

27 Jacqueline Geis and Alex Mundt, "When To Indict? The Impact of Timing of International Criminal Indictments on Peace Processes and Humanitarian Action," Brookings report for the World Humanitarian Studies Conference, February 2009, [http://www.brookings.edu/papers/2009/-/media/Files/rc/papers/2009/04\\_peace\\_and\\_justice\\_geis/04\\_peace\\_and\\_justice\\_geis.pdf](http://www.brookings.edu/papers/2009/-/media/Files/rc/papers/2009/04_peace_and_justice_geis/04_peace_and_justice_geis.pdf), pp. 3-4. See also "Liberia chaos as leader returns," *BBC News Online*, June 5, 2003, <http://news.bbc.co.uk/2/hi/africa/2964098.stm>; and Charles Cobb Jr. "Liberia: Diplomatic Dismay as Liberia Rebels Poise For Final Push and Foreigners Flee," *allAfrica.com*, June 10, 2003, <http://allafrica.com/stories/200306100002.html>.

28 See, for example, interview with Dapo Oyewole, Center for Democracy and Development, indicating that the timing of the unsealing of the indictment undermined some of the proceedings at the peace talks and that the humanitarian situation in Liberia needed to be addressed first. Jonathan Mann, "Insight," CNN TV, July 29, 2003, reproduced in writing by CNN Transcripts, [http://transcripts.cnn.com/TRANSCRIPTS/030729/i\\_ins.01.html](http://transcripts.cnn.com/TRANSCRIPTS/030729/i_ins.01.html).

29 "The executive secretary [of the Organization of West African States], Mohamed Ibn Chambas, said that announcing the charges against Charles Taylor as he was about to open the peace talks had "put a damper on the negotiations" where President Taylor was making helpful offers "opening up tremendous opportunities" to end the Liberian conflict." Virginie Ladisch, "Liberian President Indicted for War Crimes," Crimes of War Project news release, June 16, 2003, <http://www.crimesofwar.org/print/onnews/liberian-print.html>.

30 Felicity Barringer and Somini Sengupta, "War Crimes Indictment of Liberian President is Disclosed," *New York Times*, June 5, 2003; Lansana Gberie, Jarlawah Tonpoh, Efam Dovi, and Osei Boateng, "CHARLES TAYLOR: Why me?" *New African*, May 2006, reproduced at [http://findarticles.com/p/articles/mi\\_qa5391/is\\_200605/ai\\_n21391043/](http://findarticles.com/p/articles/mi_qa5391/is_200605/ai_n21391043/), p. 13.

31 Douglas Farah, "Tribunal Indicts Liberia's Leader," *Washington Post*, June 5, 2003, reproduced at [http://www.genocidewatch.org/images/Liberia5Jun03Tribunal\\_Indicts\\_Liberia\\_s\\_Leader.pdf](http://www.genocidewatch.org/images/Liberia5Jun03Tribunal_Indicts_Liberia_s_Leader.pdf)

23 United Nations Security Council, "Report of the Secretary-General on the deployment of the African Union—United Nations Hybrid Operations in Darfur," S/2008/558, August 18, 2008, [http://www.un.org/ga/search/view\\_doc.asp?symbol=S/2008/558](http://www.un.org/ga/search/view_doc.asp?symbol=S/2008/558).

24 United Nations Security Council, "Report of the Secretary-General on the deployment of the African Union—United Nations Hybrid Operations in Darfur," S/2010/50, January 29, 2010, [http://www.un.org/ga/search/view\\_doc.asp?symbol=S/2010/50](http://www.un.org/ga/search/view_doc.asp?symbol=S/2010/50).

25 On November 30, 2008, total UNAMID personnel numbered 15,444. United Nations Security Council, "Report of the Secretary-General on the deployment of the African Union—United Nations Hybrid Operations in Darfur," December 12, 2008, S/2008/781.

26 United Nations Security Council, "Report of the Secretary-General on the deployment of the African Union—United Nations Hybrid Operations in Darfur," S/2008/659, October 17, 2008, <http://daccessdds.un.org/doc/UNDOC/DEN/No8/553/95/PDF/No855395.pdf?OpenElement>.

peace to Liberia. The International Center for Transitional Justice's study of the 2003 peace negotiations concluded that the reason the 2003 agreement ultimately succeeded while over a dozen previous agreements had failed was because Taylor offered to vacate the presidency and not take part in transitional elections. That offer resulted directly from his indictment by the Special Court.<sup>32</sup> The report noted almost universal agreement among those present at the talks—even those who had been skeptical at the time—that the unsealing of the indictment had had a largely positive effect.<sup>33</sup> Furthermore, the expected retaliatory violence in Liberia resulting from the indictment never occurred. Although other important factors worked with the indictment to bring about peace in Liberia—including the impending rebel offensive threatening the capital, the involvement of the international community, and blocking by the peacekeeping force, the Economic Community of West African States Monitoring Group (ECOMOG) of arms delivery to Taylor—the Taylor case shows that an indictment may inadvertently strengthen peace processes and that the feared consequences resulting from indicting a sitting head of state do not always come to pass.

## 2. Radovan Karadzic

Similarly, the indictment of Radovan Karadzic facilitated peace talks to end the war in Bosnia and Herzegovina. Negotiations to end that conflict opened near Dayton, Ohio, in early November 1995, less than four months after the worst atrocity in Europe since the Second World War: the massacre of over 7,000 men and boys following the fall of the Bosnian Muslim enclave of Srebrenica on July 11, 1995. On July 24, 1995, less than two weeks after the fall of Srebrenica and in the midst of the conflict, the ICTY confirmed indictments against Bosnian Serb leaders Radovan Karadzic and Ratko Mladic. The charges included genocide, crimes against humanity, and war crimes for crimes alleged to have occurred between 1992 and 1995 in several locations across Bosnia, including Sarajevo. A second indictment against Karadzic and Mladic was confirmed on November 16, 1995, during the Dayton peace negotiations. It charged both men with genocide, crimes against humanity, and war crimes based on the mass execution of civilians after the fall of Srebrenica.

32 Priscilla Hayner, International Center for Transitional Justice, "Negotiating Peace in Liberia: Preserving the possibility for Justice," November 1, 2007, <http://www.ictj.org/static/Africa/Liberia/HaynerLiberia1207.eng.pdf>, p. 6.

33 Ibid., p. 9.

At the time negotiations in Dayton began, a number of politicians and political commentators suggested that the ICTY's work was getting in the way of peace.<sup>34</sup> Indeed, the former ICTY chief prosecutor Richard Goldstone said that after he indicted Karadzic and Mladic, the UN Secretary General was furious, castigating the prosecutor in a meeting shortly afterwards and asking why he had not been consulted.<sup>35</sup>

However, the indictment of Karadzic ultimately aided the Dayton peace accord. If Karadzic, the Bosnian Serbs political leader, had not been indicted, he would have likely attended the peace conference. Because those meetings began only two months after the massacre at Srebrenica, Bosnian Muslim and Croat leaders would not have entered the same room or sat at the same table with Karadzic.<sup>36</sup> A US State Department official said the tribunal "accidentally served a political purpose: it isolated Karadzic and left us with Sloba [Slobodan Milosevic]."<sup>37</sup> In his memoirs, the US negotiator Richard Holbrooke said he made it very clear to Milosevic that Mladic and Karadzic could not participate in a peace conference. When Milosevic said the attendance of the indicted men was necessary for peace, Holbrooke offered to arrest them personally if they set foot in the United States.<sup>38</sup> Thus the ICTY's indictments, far from being an obstacle to peace negotiations, helped move them forward.

## 3. The Lord's Resistance Army

In Uganda as well, community leaders and commentators feared that the involvement of the ICC would end all hope for peace talks with the Lord's Resistance Army, which had been terrorizing civilians in northern Uganda since 1986. Acholi leaders said that the issuing of "international arrest warrants would practically close once and for all the path to peaceful negotiation as a means to end this long war, crushing whatever little progress

34 Richard J. Goldstone, "Justice as a Tool for Peacemaking: Truth Commissions and International Tribunals," *NYU Journal of International Law and Politics*, vol. 28: 485 (1996), p. 488.

35 Okun, "The Role of International Criminal Justice in Peace Negotiations," *Penn State International Law Review*, p. 787.

36 Ibid., p. 788.

37 Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals*, (Princeton, NJ: Princeton University Press, 2000), p. 239 ("Stay the Hand of Vengeance").

38 Ibid., p. 233; Richard Holbrooke, "The Arrest of Sudan's Bashir Should Proceed," commentary, *Financial Times* (London), September 21, 2008, [http://www.ft.com/cms/s/0/57d9e354-87ee-11dd-b114-0000779fd18c.html?ncklick\\_check=1](http://www.ft.com/cms/s/0/57d9e354-87ee-11dd-b114-0000779fd18c.html?ncklick_check=1).



has been made during these years.”<sup>39</sup> The Roman Catholic Archbishop in northern Uganda saw the ICC’s decision to issue indictments against the LRA leadership as “the last nail in the coffin” for efforts to achieve dialogue.”<sup>40</sup>

Yet less than a year after the warrants were unsealed, in mid-2006, the LRA sat down at the negotiating table in Juba for the most serious peace talks they had had to date. Many believe that the ICC warrants were one of the factors that pushed the LRA to the table in part by isolating them from their base of support, the government of Sudan. Not long after the ICC referral was announced, Sudan agreed to a protocol allowing Ugandan armed forces to attack LRA camps in Southern Sudan. In October 2005 the government of Sudan signed a memorandum of understanding with the court agreeing to cooperate with the arrest warrants issued against LRA commanders. Because Sudan severed many of its ties with the LRA, it forced them into “survival mode,” at least temporarily.<sup>41</sup> A local leader noted that a number of LRA combatants defected following the change in attitude by the government of Sudan.<sup>42</sup>

The increased attention to the conflict resulting from the ICC’s involvement also galvanized international engagement in the peace processes for what has been described as “the biggest forgotten, neglected

humanitarian emergency in the world today.”<sup>43</sup> This support was crucial in moving the peace process forward. Agreements made as part of the peace process may yet help encourage national accountability efforts through the Uganda High Court Special Division agreed upon at Juba.

Firm conclusions about the impact of the ICC’s arrest warrants on peace prospects for northern Uganda are difficult to draw, not least because the conflict remains unresolved and civilians remain at risk. However, there are reasons to believe that the ICC’s involvement was not the reason why the final peace agreement was not signed. LRA leaders have never made clear their reasons for refusing to sign the final peace agreement; meanwhile, interim agreements which included justice provisions were successfully concluded over the course of two years of negotiations. The justice provisions called for national proceedings, which if seen as genuine by the ICC’s pre-trial chamber, would have rendered the pending ICC cases inadmissible. Thus the ICC had been taken out of the equation, though fear of national prosecutions may have remained an obstacle. Meanwhile, the resumption of LRA attacks on civilians and the failure of the LRA to implement commitments to assemble their forces in specified locations while the talks were ongoing reinforced concerns about the sincerity of the LRA’s commitment to conclude peace under any circumstances, despite the robustness of the negotiations.<sup>44</sup> In any event, ICC involvement did not preclude a dialogue with the LRA as many had feared; rather it may have been helpful in some unexpected ways.

39 “UGANDA: Amnesty and Peace groups urge ICC to probe government army too,” *IRINnews*, February 3, 2004, <http://www.globalsecurity.org/military/library/news/2004/02/mil-040203-irin03.htm>, quoting a statement issued by a chief negotiator of the Acholi Religious Leaders Peace Initiative.

40 “Justice for a Lawless World? Rights and reconciliation in a new era of international law,” *IRIN In-Depth*, July 2006, <http://www.irinnews.org/pdf/in-depth/RightsAndReconciliationPart1.pdf>, p. 72.

41 John Prendergast, “End This African Horror Story,” *Washington Post*, April 7, 2005, <http://www.washingtonpost.com/wp-dyn/articles/A32735-2005Apr6.html>.

42 Father Carlos Rodriguez, a Spanish missionary who was based in northern Uganda for many years, stated, Between April and September [2004] 500 or so combatants have come out of the bush with their guns including senior officers. So the ICC might not be so discouraging as we thought. Also those who have come out of the bush have told us that the Sudan Government has not been giving them anything since January this year. So the ICC may have had an influence on Sudan. The LRA will only reduce violence out of pressure and Sudan has changed its attitude because of the ICC. They are concerned about being prosecuted... Now that Sudan is not involved, it forces the LRA to talk about peace. Tim Allen, Crisis States Research Center, “War and Justice in Northern Uganda: An Assessment of the International Criminal Court’s Intervention,” February 2005, <http://www.crisisstates.com/download/others/AllenICCReport.pdf>, p. 58.

43 “War in northern Uganda world’s worst forgotten crisis: UN,” Agence France-Presse, November 11, 2003, quoting Jan Egeland, UN under-secretary-general for humanitarian affairs and emergency relief coordinator. See also Akhavan, “The Lord’s Resistance Army Case,” *American Journal of International Law*, p. 420.

44 See Elise Keppler, “Managing Peace and Justice in the Juba Process,” (forthcoming, manuscript on file with Human Rights Watch). At the same time, communication between LRA representatives in Juba and the LRA leadership appeared to be intermittent and suffered from a relative breakdown in the final months of the talks, raising questions as to the degree of involvement of the LRA leaders in negotiating the agreements, especially the February 2008 agreement on accountability. See International Crisis Group, “Northern Uganda: The Road to Peace, With or Without Kony,” Africa Report No. 146, December 2008, pp. 1-4; and Joe Wacha, “Kony Adds to Peace Process Turmoil,” Institute for War and Peace Reporting, July 3, 2008, <http://www.globalpolicy.org/component/content/article/207/39840.html>.

## B. The potential perils of postponing accountability

In an effort to circumvent the short-term tension that can arise between peace and justice, some argue that peace must be secured before any other process may be successfully undertaken.<sup>45</sup> As a Ugandan diplomat said "It is obvious that you cannot operate until the patient's condition is stabilized; the same goes for justice." The thought is that by postponing sticky questions of accountability, the tensions between peace and justice may be eased long enough to secure peace. This position is often put forward with the best intentions, though it is also an argument that can and has been subverted by those with other more self-serving interests, even outside the context of peace talks.

To a certain extent, sequencing in national courts is inevitable. Transitional justice processes are complex and may include truth-telling mechanisms, reparations, the vetting of "bad actors" from positions in government and the security forces, and other forms of traditional justice in addition to criminal measures. The details of transitional justice processes are unlikely to be included in a peace agreement. Peace agreements may sensibly leave questions of transitional justice subject to future negotiations, ideally after broad consultations with affected communities.

Criminal justice aspects of transitional justice processes present particular challenges. Countries emerging from conflict rarely have the domestic capacity or resources to initiate complicated judicial proceedings for international crimes. Even if there is political will to try these cases (which is often a serious problem if, as is often the case, the government has been implicated in abuses), legislation may need to be created and passed to establish a legal basis or a special mechanism to try these cases; staff need to be assigned and trained; witness protection and support measures considered; and evidence gathered. National courts may lack independence and the local community may not have confidence in their judiciary. Police and prison systems may also require serious institutional reform. For these kinds of complex cases, all of this takes time.

45 Refugee Law Project, "Peace First, Justice Later: Traditional Justice in Northern Uganda," Working Paper No. 17, July 2005, [http://www.refugeelawproject.org/working\\_papers/RLPWP17.pdf](http://www.refugeelawproject.org/working_papers/RLPWP17.pdf). Similar arguments were made during the peace and justice stocktaking session held during the Review Conference for the Rome Statute in Kampala on June 2, 2010.

If delayed long enough, other practical problems may arise that could render justice even more difficult to achieve. Memories fade over time, witnesses move or pass away, documentary or physical evidence can be lost, and suspects may no longer be available for prosecution. In Cambodia, for example, delaying justice for over three decades after the end of the Khmer Rouge regime meant that key figures including its leader Pol Pot, Ta Mok (Second Deputy Secretary of the Communist Party of Kampuchea/Secretary of the Southwest Zone), and Son Sen (deputy premier in charge of national defense), died without being tried by an independent court. The remaining defendants are aging and in deteriorating health. Though Cambodia enjoys relative peace and stability, the legacy of impunity has other less quantifiable effects. The prevalence of problems such as domestic violence, youth gangs and drug addiction has been partly attributed to social psychological traumata that earlier generations endured without remedy during the Khmer Rouge period. Because former Khmer Rouge cadres were integrated into civilian life without being held to account, many young people do not believe that mass killings took place. Impunity continues to mar the rule of law in Cambodia.<sup>46</sup> In other places that tried to bury their past, the culture of impunity has also left its mark. When asked about peace and justice issues, survivors in El Salvador, where crimes from its civil war remain unaddressed, responded, "What peace?" referring to El Salvador's extraordinarily high crime rate.<sup>47</sup>

The danger is that the strategy of "peace first, justice later" in practice means no justice. Once the imperative of resolving a conflict is over, the international community's attention may wander and there will be less pressure to establish credible institutions and mechanisms to deal with the past. Where political will may be waning, the lack of outside pressure can be fatal. In Afghanistan, Burundi and elsewhere the "peace first, justice later" strategy has yielded little on the justice front. This has been major source of frustration for victims. Nor does it build confidence in the post-conflict regimes. Ultimately, the failure to follow through on justice measures may undermine the hard-won peace.

The issue is further complicated by the establishment of the ICC. If the ICC has jurisdiction over cases

46 See Virorth Doung and Sophal Ear, "Transitional Justice Dilemma: The Case of Cambodia," *Peace & Conflict Review*, Volume 4, Issue 1, Fall 2009, p. 15.

47 Human Rights Watch interviews, San Salvador, November 14-15, 2009 (notes on file at Human Rights Watch).

in an ongoing conflict, “sequencing,” at least for those cases, may not be a legally viable option. A “de facto” attempt to postpone justice in favour of stability, such as by choosing not to execute an ICC arrest warrant or by invoking article 16, risks undermining the purpose of the court, which is to deter crimes, as well as its credibility.

## 1. Afghanistan

The UN’s strategy in Afghanistan was to wait until there was security before dealing with justice. After the fall of the Taliban in November 2001, the United Nations brought together leaders of Afghan ethnic groups in Germany to create a road map for representative government in Afghanistan.<sup>48</sup> The resulting Bonn Agreement called for creation of a *loya jirga* (grand council), which was convened in June 2002, to choose an interim government.<sup>49</sup> The agreement was silent on issues of accountability for war crimes.

Though the *loya jirga*’s selection process explicitly called for the exclusion of delegates who had engaged in human rights abuses, war crimes, looting of public property, or the drug trade, the Special Independent Commission for the Convening of the Loya Jirga did not monitor and enforce this prohibition.<sup>50</sup> The warlords cooperation was seen as crucial to the success of the *loya jirga*, so there was little willingness to confront the issue of their past records.<sup>51</sup>

When addressing the Security Council, the Special Representative of the Secretary-General, Lakhdar Brahimi, acknowledged the compromise, stating:

The processes being proposed are not perfect. The provisional institutions whose creation is suggested will not include everyone who should be there and it may include some whose credentials many in Afghanistan may have doubt about. PLEASE REMEMBER

48 The Taliban is a movement started by religious students (*talibs*) from the Pashtun areas of eastern and southern Afghanistan who were educated in traditional Islamic schools in Pakistan.

49 Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions (“Bonn Agreement”), December 5, 2001, <http://www.un.org/News/dh/latest/afghan/afghan-agree.htm>.

50 Procedures for the Elections of the Members of the Emergency Loya Jirga, UN Assistance Mission in Afghanistan, <http://www.globalpolicy.org/component/content/article/178/33093.html>, art. 14(4)

51 See Laura Secor, “The Pragmatist,” *The Atlantic*, July/August 2004, <http://www.theatlantic.com/doc/200407/secor>.

THAT WHAT IS HOPEFULLY TO BE ACHIEVED IS THE ELUSIVE PEACE the people of Afghanistan have been longing for so long. The provisional institutions being discussed, including the broad based interim administration, are the beginning, not the end of the road.<sup>52</sup> (Emphasis in original)

The EU special envoy to Afghanistan, Francesc Vendrell, described the sentiment at the time: “In early 2002, the Americans were relying on the warlords and commanders to pursue the War on Terror. There was a lot of emphasis on stability and therefore justice had to wait. These unsavoury characters were seen as providing stability.”<sup>53</sup>

Ironically, the decision to postpone addressing justice issues in the interest of peace and security had the opposite effect. In 2005-06, Human Rights Watch documented that many leaders implicated in egregious human rights abuses in the 1990s became Afghan ministry officials or presidential advisors, or controlled puppet subordinates who held official positions.<sup>54</sup> They include several of the worst perpetrators from Afghanistan’s recent past, such as Abdul Rabb al Rasul Sayyaf, Mohammed Fahim, Burhanuddin Rabbani, Gen. Abdul Rashid Dostum, and Karim Khalili, who despite having records of war crimes and serious abuses during Afghanistan’s civil war in the 1990s have been allowed to hold and exploit positions of power.<sup>55</sup> Mohammed Fahim, whose troops were implicated in abuses such as rape and summary executions in 1993, is now serving as first vice president of Afghanistan.

52 UN Security Council, Briefing by the Special Representative of the Secretary-General for Afghanistan, Lakhdar Brahimi, November 13, 2001, <http://www.un.org/News/dh/latest/afghan/brahimi-sc-briefing.htm>, para. 40.

53 Debbie Whitmont, “Winter in Afghanistan: Travels Through a Hibernating War,” *The Monthly* (Melbourne), March 2007, <http://www.themonthly.com.au/tm/node/478> (“Winter in Afghanistan”).

54 Ibid.

55 “Afghanistan: Bush, Karzai, Musharraf Must Act Now to Stop Militant Abuses,” Human Rights Watch news release, <http://www.hrw.org/en/news/2006/09/26/afghanistan-bush-karzai-musharraf-must-act-now-stop-militant-abuses>. See also Isabel Hilton, “Now We Pay the Warlords to Tyrannise the Afghan People,” *Guardian*, July 31, 2003, <http://www.guardian.co.uk/politics/2003/jul/31/afghanistan.world>; Ahmed Rashid, “Afghan Human Rights Abuses: A Chance for Change,” commentary, *Eurasianet*, August 4, 2005, <http://www.unhcr.org/refworld/docid/46f257f9c.html>; and Nick Meo, “Afghan Warlords Poised to Take Up Power,” *Independent*, October 14, 2004, <http://www.independent.co.uk/news/world/middle-east/afghan-warlords-poised-to-take-up-power-543691.html>.

Abusive actions by local strongmen and their forces have undermined the government's legitimacy and caused widespread fear and cynicism among Afghans.<sup>56</sup> As Afghan human rights activist Nader Nadery said, "The militia leaders became part of the structure and began using their powers again. They made institutions unprofessional, unqualified and corrupt. There's a culture of impunity. Everyone thinks they're immune from prosecution, so they do whatever they want."<sup>57</sup> Partly as a result, by 2006 the Taliban and other insurgent groups in Afghanistan had gained increased public support. A December 2008 International Crisis Group report on policing in Afghanistan concluded that the lack of rule of law lies at the heart of much popular disillusionment and that the weakness of law enforcement has contributed to the appeal of insurgents in Afghanistan.<sup>58</sup> The ongoing lawlessness helps the Taliban portray its rule in the 1990s as one of relative law and order.<sup>59</sup> The Taliban is able to use the presence of warlords in the government and the poor perceptions of police to discredit President Karzai's administration and its domestic backers.

Incorporating warlords into the government also minimizes the chances that Afghans will ever see accountability for the crimes they have suffered, despite the fact that large majorities favour prosecutions.<sup>60</sup> Although an "Action Plan" for peace and justice was adopted by the Afghan cabinet in December 2005 following public consultations, it is increasingly unlikely to be put into effect. The parliament enacted a general amnesty, which states that all those who were engaged in armed conflict before the formation of the Interim Administration

in Afghanistan in December 2001 (or current combatants who agree to reconcile with the government) "shall enjoy all their legal rights and shall not be prosecuted."<sup>61</sup> Though victims and their families are entitled to bring civil or criminal claims, doing so is dangerous and not likely to be a viable path to justice.<sup>62</sup> The amnesty law is further demonstration of the entrenchment of the culture of impunity in Afghanistan that resulted from choosing to hold off on addressing crimes from its past. It is also a clear illustration of the potential costs of putting off justice.

## 2. Burundi

In Burundi, explosions of inter-ethnic strife - and, more recently, intra-ethnic political conflict - have characterized the political landscape for nearly five decades. Massive human rights violations have occurred periodically since Burundi's independence in 1962. Impunity has long been recognized as a root cause of the violence and instability. Several UN reports after the 1993 massacres note that the culture of impunity has jeopardized peace and been used to spur further violence.<sup>63</sup> A 1996 Commission of Inquiry noted that "Impunity has, without any doubt, been an important contributing factor of the ongoing crisis."<sup>64</sup> It concluded that acts of genocide had been committed against the Tutsi and that

56 Human Rights Watch, *Afghanistan on the Eve of Parliamentary Elections*, September 2005, <http://www.hrw.org/en/reports/2005/09/15/afghanistan-eve-parliamentary-and-provincial-elections>, p. 9.

57 Whitmont, "Winter in Afghanistan." See also Ahmad Nader Nadery, "Peace or Justice? Transitional Justice in Afghanistan," *The International Journal of Transitional Justice*, Vol. 1, Issue 1, 2007, pp. 173-179, <http://ssrn.com/abstract=1405080>.

58 See International Crisis Group (ICG), "Policing in Afghanistan: Still Searching for a Strategy," December 18, 2008, [http://www.ciaonet.org/pbei/icg/0014389/f\\_0014389\\_11772.pdf](http://www.ciaonet.org/pbei/icg/0014389/f_0014389_11772.pdf) ("there is a general perception in Afghanistan that lawlessness is on the rise"), p. 1.

59 ICG, "Afghanistan: New U.S. Administration, New Directions," March 13, 2009, <http://www.unhcr.org/refworld/country,,ICG,,AFG,4562d8cf2,49ba4c53ed,0.html>, pp. 5-6.

60 Afghan Independent Human Rights Commission, "A Call for Justice: A Report on National Consultations on Transitional Justice in Afghanistan," January 2005. According to the survey (4,151 Afghan respondents), 94 percent found justice for past crimes to be either "very important" (75.9 percent) or "important" (18.5 percent). Almost half believed that war criminals should be brought to justice "now."

61 Resolution of National Assembly on National Reconciliation and General Amnesty to the President, No. 44, dated 16/02/1386, published in the official gazette no. 141712, dated 9/9/1387, art. 3(1).

62 See e.g. Human Rights Watch, *Afghanistan - The "Ten-Dollar Taliban" and Women's Rights*, July 13, 2010, <http://www.hrw.org/en/node/91463/section/6>, pp. 51-54.

63 UN Security Council, Report of the Security Council Mission to Burundi on 10 and 11 February 1995, S/1995/163, February 28, 1995, <http://www.unhcr.org/refworld/docid/4c4d45002.html>, para. 18; UN Security Council, Report of the Security Council Mission to Burundi, S/1994/1039, September 9, 1994, <http://daccess-ods.un.org/TMP/6340677.html>, para. 26 ("impunity from justice is one of the most serious problems Burundi is facing... The delay in efforts to bring to justice the perpetrators of the violence... are lowering the barriers to criminal conduct, including that of political extremists."); UN Security Council, "Letter dated 28 July 1995 from the Secretary-General addressed to the President of the Security Council" (enclosing the report of Dr. Pedro Nikken), S/1995/631, July 28, 1995, para. 2 ("the impunity which the perpetrators, instigators and abettors of these crimes have enjoyed... is, in turn, cited as the pretext or justification for obtaining justice through the vengeance and senseless violence organized by the militias.");

64 United Nations Security Council, "Letter dated 25 July 1996 from the Secretary-General addressed to the President of the Security Council" (enclosing the final report of the International Commission of Inquiry for Burundi), S/1996/682, August 22, 1996, <http://daccess-ods.un.org/TMP/2501921.html>, para. 490.

indiscriminate killing had occurred against Hutu.<sup>65</sup> However, the time was not deemed right for justice as the situation was still not secure. The Commission noted that

Impunity can only be suppressed through a fair and effective administration of justice. The Commission can find no way in which such an administration of justice can be established while the present situation of the country has not been brought under a minimum of control... No amount of reforms or resources can have any effect [on the Burundian justice system] as long as every citizen is convinced that his own ethnic group is under attack by people who have repeatedly shown that they do not hesitate to commit mass murder. It is clearly impossible for any system of justice to function under such conditions.<sup>66</sup>

Following this report, the Security Council did not take action to create a court (as it had done for the former Yugoslavia in 1993 and Rwanda in 1994), and those responsible remained in power, with devastating consequences. Donor nations also did nothing to insist that those responsible be brought to trial. Those most implicated in the killings continued to exercise power as they had before.

Negotiations to end the civil war began in Arusha in June 1998. Negotiators included provisions designed to end the pervasive impunity in the resulting 2000 Arusha Peace and Reconciliation Agreement for Burundi. The Agreement called for “enactment of legislation to counter genocide, war crimes, and other crimes against humanity, as well as human rights violations” and required the government of Burundi to request the UN Security Council to establish an international criminal tribunal to try and punish those responsible for war crimes, genocide, and other crimes against humanity.<sup>67</sup>

The Arusha Agreement did not end the civil war, as two remaining rebel groups held out and did not sign the agreement. In order to persuade the remaining rebel groups to lay down their arms and to convince political leaders outside the country to return to Burundi, the Arusha Agreement included a provision requiring the national assembly to pass “such legislation as is necessary for the granting of temporary immunity against prosecution for politically motivated crimes.” A 2003 ceasefire

agreement between the government and the strongest holdout rebel group, the National Council for the Defense of Democracy – Forces for the Defense of Democracy (Conseil national pour la défense de la démocratie – Forces pour la défense de la démocratie, CNDD-FDD), provided for even broader “provisional immunity” for all parties to the conflict that was not limited to politically motivated crimes.<sup>68</sup> According to the agreement, provisional immunity would last until a truth and reconciliation commission was in place and could establish responsibility for past crimes. Prosecutors in the military justice system later used the immunity provision to justify not prosecuting Tutsi soldiers.<sup>69</sup> A similar provision was included in an agreement with Palipehutu-FNL in 2006.<sup>70</sup> Over 3,000 political prisoners were released on the basis of provisional immunity in 2006 without mechanisms to determine who had actually been involved in serious crimes. The exclusion from the immunity provision of war crimes, crimes against humanity, and genocide, while important symbolically, had little practical effect as these charges were not used by prosecutors in Burundi. By leaving the international crimes to be dealt with by a UN mechanism, the parties were able to postpone dealing with justice issues.

After the CNDD-FDD entered government in 2004, former rebels were integrated into the reformed police and army with no vetting process. Tutsi soldiers and gendarmes were also integrated with no regard for their past abuses. Nor was there vetting of FNL (National Liberation Forces) rebels integrated into the security forces in April 2009. The likely presence within the forces of individuals who had committed war crimes contributes to ongoing mistrust, particularly between the population and the police, as police officers, among others, continue to commit abuses. Others implicated in serious abuses hold political office.

Though the then-President of Burundi submitted a request for the establishment of an international judicial commission of inquiry to the UN Secretary-General in 2002 as per the terms of the Arusha

<sup>65</sup> Ibid.

<sup>66</sup> Ibid., paras. 491-92.

<sup>67</sup> Arusha Peace and Reconciliation Agreement for Burundi, Arusha, Tanzania, August 28, 2000, paras. I.II.6. 9-11.

<sup>68</sup> The Pretoria Protocol on Outstanding Political Defense and Security Issues in Burundi, November 2, 2003, Pretoria Protocol on Outstanding Political Defense and Security Issues in Burundi, art. 2.

<sup>69</sup> Human Rights Watch, *World Report 2005* (New York: Human Rights Watch, 2005), Burundi chapter, <http://www.hrw.org/en/world-report-2005/burundi>.

<sup>70</sup> Comprehensive Cease-Fire Agreement Between the Government and the Palipehutu-FNL, Dar Es Salaam, Tanzania, September 7, 2006, <http://www.genevacall.org/Africa/Burundi/f-burundi/2001-2010/2006-07sep-ceasefire-burundi.pdf>

Agreement, an assessment mission to Burundi was not conducted until 2004. The delay at the Security Council was in keeping with its past practice of prioritizing peace and stability over justice. The decision to go ahead with the mission to assess transitional justice options in Burundi in 2004 was made a month after the facilitator of the peace process reported to the Security Council that “We can now say without fear of contradiction that the peace process has entered a decisive and irreversible stage.”<sup>71</sup> As the former human rights minister for Burundi Eugene Nindorera stated, “There is an analysis that says an inquiry might stir up political instability. Many leaders in the country have some alleged link to crimes of war, but these are the very people involved in negotiating peace... And for donor countries, the top priority is the ceasefire, not justice. They are after all politicians, not human rights activists.”<sup>72</sup>

In 2005, acting upon the report’s recommendations, the Security Council requested the Secretary-General to initiate negotiations with the Government and consultations within Burundi on the establishment of a Truth Commission and a Special Chamber within the court system of Burundi.<sup>73</sup> By then, support for such mechanisms among political leaders had diminished as they became aware that they themselves could be subject to prosecution. On May 5, 2007, the ruling CNDD-FDD party issued a statement indicating it favours reconciliation over prosecution for all crimes, in contravention of the international requirements that those accused of genocide, war crimes, and crimes against humanity be prosecuted. During the 2010 election campaign, President Nkurunziza made frequent promises that the government would soon put in place a Truth Commission – at one point, in April 2010, claiming unrealistically that such a commission would be in place “within months.”<sup>74</sup> However, at no point did he mention prosecutions within a Special Chamber.

71 See “Transitional Justice for Burundi: A Long and Winding Road,” Stef Vandeginste, presented at “Building a Future on Peace and Justice” workshop, Nuremberg, June 25-27, 2007, report at <http://www.peace-justice-conference.info/download/WS10-Vandeginste%20report.pdf>, p. 13, citing United Nations Security Council, Report of the meeting of 4 December 2003, S/PV.4876.

72 William Maclean, “Justice Remains a Dream in Blood-Soaked Burundi,” Reuters, May 2, 2003.

73 United Nations Security Council, Resolution 1606 (2005), S/RES/1606 (2005) <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/391/59/PDF/N0539159.pdf?OpenElement> (accessed August 18, 2010), para. 8.

74 “Le Burundi souhaite l’accompagnement du Burkina pour ses élections générales fin mai,” *Xinhuanet*, April 8, 2010.

The FNL, having transitioned from rebel group to opposition party, reiterated its demand first set forth at the 2006 peace talks that the proposed “Truth and Reconciliation Commission” be renamed the “Reconciliation and Pardon Commission,” and categorically opposed prosecutions.<sup>75</sup> Though smaller political parties have spoken out in favour of prosecutorial mechanisms, CNDD-FDD’s landslide victory in elections in 2010 renders slim the likelihood that serious measures to counter impunity will be undertaken in the next five years.

Given this political landscape, it is not surprising that virtually no progress has been made in establishing the accountability mechanisms that Burundi committed to in agreements with the United Nations. The UN has been unable to work out details of the proposed justice mechanisms with the government of Burundi, which is resistant to giving the prosecutor of the special court authority over which cases to bring to trial. Faced with gridlock, the UN and the government in Burundi agreed in early 2007 to conduct “national consultations” on transitional justice, seeking perspectives of Burundian citizens. Originally scheduled to begin in late 2007 but held up by both lack of political will and bureaucratic hiccups at the UN, the consultations – carried out by a “Tripartite Steering Committee” including representatives of the UN, the Burundian government, and civil society organizations – only kicked off in mid-2009. The committee’s report, submitted to president Nkurunziza in April 2010, had not been made public as of August.

The international community, perhaps suffering from donor fatigue after creation of the ad hoc tribunals for the former Yugoslavia and Rwanda, has failed to press sufficiently for the establishment of truth and justice mechanisms. The root causes of the violence remain unaddressed.

### 3. Democratic Republic of the Congo

In the Democratic Republic of the Congo (DRC), the emphasis has also been stability at the expense of accountability. As in Burundi, a pervasive culture of impunity has been one of the greatest obstacles to sustainable peace in the DRC. Although numerous peace agreements have taken care to use language explicitly excluding amnesties for war crimes, genocide and crimes against humanity, in an effort to comply with international law, limited efforts

75 “Les perspectives de la justice transitionnelle au Burundi vues par la ligue Iteka,” *Agence Burundaise de Presse*, January 22, 2010.

have been made to investigate or prosecute these crimes. Instead, in an effort to buy compliance with the transition process, the government gave posts of national or local responsibility, including in the army and police, to dozens of people suspected of committing international human rights violations.<sup>76</sup> The decision to put justice aside for peace was made most explicitly in the case of an ICC suspect in January 2009.

In August 2006, the ICC issued an arrest warrant against UPC leader Bosco Ntaganda for the war crime of enlisting and conscripting children under the age of 15 and using them in hostilities between 2002 and 2003 in Ituri.<sup>77</sup> The Congolese government, which requested the ICC to investigate crimes in Congo, and which to date has been cooperative with the court, in this case failed dramatically in its legal obligation to arrest Ntaganda. In a televised press conference on January 31, 2009, President Kabila invoked the peace versus justice dilemma, stating that he faced a difficult choice between justice and peace, stability, and security in eastern Congo. He said his choice was to prioritize peace. The Congolese justice minister said the “demands of peace override the traditional needs of justice.”<sup>78</sup> Dozens of local human rights organizations condemned the decision. Ntaganda has since served as a general in the army and played a role in joint military operations with the UN peacekeeping force in Congo, despite his status as a wanted man at the ICC and the peacekeepers mandate to support national and international justice efforts.<sup>79</sup>

The decision to integrate Ntaganda in the army rather than arrest him has contributed to further abuses and undermined the hoped-for deterrent effect of the ICC. Human Rights Watch has documented extensive crimes committed in DRC by forces under Ntaganda’s command since January 2009. Operation Kimia II, which began on March 2, 2009, was a joint military operation between UN peacekeeping forces and the Congolese army to disarm the Democratic Forces for the Liberation of Rwanda (FDLR), a Rwanda Hutu militia group. Hundreds of civilians have been raped or massacred by Congolese armed forces since the beginning of the operation.<sup>80</sup> Bosco Ntaganda was the de facto deputy commander of some of the forces linked to these crimes.<sup>81</sup>

Justice in the DRC is undoubtedly an extremely difficult issue. The lack of domestic capacity in a devastated country, a severe shortage of resources, lack of faith in the justice system, and no tradition of judicial independence are but a few of the obstacles to accountability. The fact that atrocities are ongoing makes it even more difficult to imagine addressing past crimes. Yet the failure to grapple in a serious, sustained way with these issues is costly as well. While prioritizing stability is understandable, doing so by flouting ICC obligations, one of the few credible options for justice in the DRC, is not. The repeated failure to follow up on accountability and address the root causes of the conflict exacerbates the existing problems.

## Conclusion

There are no easy solutions to these problems. Accountability in war-torn countries presents enormous challenges and the temptation to postpone dealing with those issues is understandable. But failing to signal the intent to implement accountability measures in a serious way and failure to follow through sends a dangerous message and may ultimately be counterproductive. Though in the short-term difficult choices will have to be

76 Human Rights Watch, *World Report 2005* (New York: Human Rights Watch, 2005), Democratic Republic of Congo chapter, <http://www.hrw.org/legacy/wr2k5/wr2005.pdf>.

77 *Prosecutor v. Ntaganda*, ICC, Case No. ICC-01/04-02/06, Decision to Unseal the Warrant of Arrest Against Bosco Ntaganda, August 22, 2006, <http://www2.icc-cpi.int/iccdocs/doc/doc305330.PDF>.

78 “Peace before justice, Congo minister tells ICC,” Agence-France Presse, February 12, 2009. Prior to the unsealing of his arrest warrant, Ntaganda had already been implicated in brutal human rights abuses, including leading military operations in which hundreds of civilians were slaughtered on an ethnic basis. Human Rights Watch, *Covered in Blood*, <http://www.hrw.org/sites/default/files/reports/DRC0703.pdf>, pp. 23-27; Human Rights Watch, *The Curse of Gold*, <http://www.hrw.org/en/node/11733/section/6>, or <http://www.hrw.org/en/node/11733/section/6>, or <http://www.anglogold-ashanti.com/NR/rdonlyres/CBB6C75C-EE9C-439E-962F-DD-B5C52FB968/0/HRWDRcreport.pdf>, pp. 23-34.

79 “Congo conflict: ‘The Terminator’ lives in luxury while UN peacekeepers look on,” *Guardian*, February 10, 2010, <http://www.guardian.co.uk/world/2010/feb/05/congo-child-soldiers-ntaganda-monuc>; “Congo ex-Rebel ‘working with UN,’” *BBC News Online*, April 29, 2009, <http://news.bbc.co.uk/2/hi/africa/8023978.stm>.

80 See e.g. Human Rights Watch, “*You Will Be Punished*: Attacks on Civilians in Eastern Congo,” December 2009; “DR Congo: Hold Army to Account for War Crimes,” Human Rights Watch news release, May 19, 2009, <http://www.hrw.org/en/news/2009/05/19/dr-congo-hold-army-account-war-crimes>.

81 Because of his status as an ICC fugitive, the Congolese government kept Ntaganda’s name out of the official organizational structure. Yet interviews with officers, documents, his frequent visits to troops on the frontline and his presence at the command center indicate his significant leadership role in Kimia II. Human Rights Watch, “*You Will Be Punished*,” pp. 43-44.

made, remaining committed to the new efforts to end impunity will help build a foundation that will benefit future generations. As former UN Secretary-General Kofi Annan said, "Impunity... can be an even more dangerous recipe for sliding back into conflict."<sup>82</sup>

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<sup>82</sup> United Nations Security Council, Report of the Secretary-General to the Security Council on the protection of civilians in armed conflicts, UN Doc. S/2004/431, May 28, 2004, <http://daccess-ods.un.org/TMP/6605174.html>, para. 55.



## Transitional Justice and Conflict Transformation in Conversation

UNDINE KAYSER-WHANDE AND  
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### Introduction

Is transitional justice something separate from broader efforts at making and sustaining peace? Is dealing with the past a specific part of comprehensive conflict transformation? Or is the focus on “looking back” and “atonement for past injustices” a distinct venture on its own that intersects with other efforts to transform societies after protracted violent conflict? What is the merit of these ways of looking at transitional justice and conflict transformation - as parts of one process or as distinct entities? Increasingly, we have been asked these questions at trainings, in advisory processes and at conferences.

Transitional justice and (civilian) conflict transformation have emerged concurrently in the past twenty-five years. They are by now seen as distinct fields. However, there is considerable overlap between them, especially with regard to ideas of building a future of sustainable peace. To some, transitional justice is a part of the broader field of conflict transformation, to others transforming the legacies of violent conflict is a key

challenge of dealing with the past. Both are deemed necessary ingredients for laying a foundation for sustainable peacebuilding and development. At the same time, the terminology used in both fields is far from congruent, which causes some confusion and incoherence. Also, the discourse in other countries, outside the dominant English-speaking world, such as in the French-, Portuguese- and Spanish-speaking countries, or in our native Germany, have set different emphases and brought their own historical, cultural, political and social dynamics to bear on their ideas and discourse on both, transitional justice and conflict transformation.

We realise that the two still emerging fields and their relationship, where they intersect, converge or diverge from one another, can be fruitful conversation. In this article, we explore some of the intersections between transitional justice (TJ) and conflict transformation (CT) that we have observed in recent years - both conceptually and practically. We are particularly interested in the resonance that emerges at three of these intersections - ideas of reconciliation, ways of understanding (and producing) identity, and the blindspot around economics that is gradually being illuminated at the moment in both fields, it seems. We have also introduced the idea of using societal dimensions as a lens through which to look at violent conflict and its legacies in order to broaden the conversation, in particular about TJ and its effects.

Both of us have had a foot in TJ and CT interventions over the past fifteen years, working in civil society organisations in South Africa during and after the times of the Truth and Reconciliation Commission and, later, for (German) state development agencies. Our reflections are also based on experiences of working in community mediation, conflict transformation and transitional justice training, research and advocacy in Timor Leste, Zimbabwe, Nepal, the Philippines and Sri Lanka, as well as on our continuous memory work in Germany and South Africa.

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Dr. Stephanie Schell-Faucon has lectured for many years in adult education at the University of Cologne and conducted her Ph.D. research on memory work and reconciliation in divided societies – focusing on South Africa. Next to her scientific work, she has always been involved in intercultural encounter and dealing with the past of Germany. From 2003 to 2007, she worked for the German development agency GTZ in Sri Lanka. Currently, she works as planning officer at GTZ headquarters to strengthen the contribution of development cooperation to peace and security. Together with Dr. Undine Kayser-Whande she has developed and conducted trainings on Transitional Justice for conflict transformation practitioners.

## 1. Who is in Conversation?

### The roots and development of transitional justice and conflict transformation

Four sets of actors wield defining powers in the discourse around the subjects of dealing with the past, transitional justice, and reconciliation:

- perhaps most prominent are human rights activists and scholars who work in the foreground of justice (punitive via prosecutions and restorative through reparations, etc.), and prevention through reform of abusive institutions and promotion of respect for the rule of law;
- political democratization-building advocates, who advise on the rebuilding of societies in the spirit of democratic citizenship as a critical connecting factor, a political culture of power sharing, and the legitimacy of political institutions;
- peacebuilding and conflict transformation activists and scholars, who focus on building new peaceful relationships, bridging divides, establishing trust and responsibility through acknowledgement and accountability; and
- religious actors, who have a stake in truth-telling, apology, forgiveness, repentance, healing, the rebirth of society and moral reflection.

Oduro (2007, 21) comments further that “depending which philosophical/ ideological platform one stands on, the meaning and priorities of TJ will differ” (2007, 21). If we take these four sets of actors - they each present us with their own different sets of logic, stakes in shaping the world, “field cultures”, and vested identities. Each define their roles and strategies in relation to their interventions. Whether a professional identity is framed as a human rights practitioner, advocate or activist, as a peacebuilder, mediator or conflict practitioner, as a custodian of religious and/or spiritual-moral values and practices, or as a political scientist and advocate of democratic (“good”) governance forms, we can look at these actors and their respective roles as moving on four different but intersecting realms of thought and practice. All actors have their distinct intentions and strategies, and all come to bear on both transitional justice and conflict transformation though from different angles. Much of this can be seen in the evolution of TJ and CT, in the emerging definitions and re-definitions of the fields over the past 20 or more years.

## Transitional justice

The Nuremberg trials (1945-49) are often cited as the „birth moment“ of transitional justice (though efforts to deal with the consequences of war and violence have been ongoing throughout human history). From Nuremberg further efforts sprung to devise principles of international law that would apply across nations in future (Ferencz 1999). As military dictatorships were crumbling in Greece and Latin American countries in the late 1970s and 1980s, the field of transitional justice emerged more visibly when legal and political-scientific research on transitions from authoritarian to democratic regimes came together. The question of combating impunity and amnesia in the aftermath of an atrocity in oppressive, dictatorial states was central. As new nation states were often unable to do so in light of the political realities of the day, the question also arose about the role and assistance of externals - dubbed „the international community“ - and the development of international legislation that would allow such interventions (see Orentlicher 2007: 11-13).

A legally-minded definition of transitional justice, i.e. viewing it as a “conception of justice associated with periods of political change characterized by legal responses to confront the wrongdoings of repressive predecessor regimes” (Teitel 2003, 69<sup>2</sup>), will on first sight present less common ground with conflict transformation than a broader definition that explicitly includes the non-judicial dimensions of dealing with the past. An example for such a broad definition that comes closer to matching the understandings of CT (and hence Roht-Arriaza deems it too broad for TJ) would be:

At its broadest [TJ] involves anything that a society devises to deal with a legacy of conflict and/or widespread human rights violations, from changes in criminal codes to those in high school textbooks, from creation of memorials, museums and days of mourning, to police and court reform, to tackling the distributional inequities that underlie conflict. (Roht-Arriaza/Mariezcurrena 2006, 2)

From the mid-1990s, TJ or „Justice in Transition“, as it was initially called, became an official term and concept as a variety of actors from different disciplines discussed the implications of peace agreements for the (legal) prosecution of gross human right violations. Common ground now exists in TJ definitions in that they all regard the engagement with human rights violations as central, assume that a wide ranging

<sup>2</sup> Authors emphasis

(often political) change and transformation process is taking place and mention (often rather vague) visions of a democratic, just and peaceful future.

Interventions like trials, truth commissions, reparations programmes and institutional reform are now seen as interdependent parts that can be drawn on to „tailor“ the right TJ „package“ for any situation, drawing from the range of measures now available and „tested“ (Boraine 2004; Roht-Arriaza/Mariezcurrena 2006). The implicit assumption seems to be that we have a „TJ tool box“ that can be brought to any situation once a peace agreement has been signed, and that will ensure a better process of peace building and democratic nation-building.

Since the later 1990s, an expansion and „norming“ of the Transitional Justice concept can be observed to now include non-judicial concepts as well as neo-traditional and other locally grown approaches to making amends after conflict. With increasing practical experience, in particular through the widely-publicised experience of the South African Truth and Reconciliation Commission (1996-1998/2003), a deepening appreciation for the multi-faceted nature of transitional justice processes has emerged. The South African experience has also led to the appearance of a vast literature on „reconciliation“ and to the unprecedented political currency of concepts such as forgiveness and apology (Barkan/Karn 2006). Other elements that received frequent mention from hereon were a „victim-focus“, the idea of „restoring dignity“ of victims, „giving voice“ to survivors and the benefits of „storytelling“.

Especially truth commissions that had hitherto been seen as a kind of „second best“ to prosecutions (Orentlicher 2007: 16) are now acknowledged for their impact at a range of levels of society. The positive picture from South Africa created high expectations, soon giving way to a more nuanced and sober assessment of possibilities and limitations (Hayner 2001), not least in South Africa itself (Henry 2000; Wilson 2001). Shared hope remains among all actors that TJ interventions can contribute to higher goals: strengthening the rule of law, reconciliation and conflict transformation. It is assumed that TJ interventions can prevent a culture of impunity and should assist in preventing violent conflict in the long-term (framed as the guarantee of non-recurrence in the Joint principles). One basic idea is that by confronting the negative and destructive events and experiences of the past, new/strengthened institutions can be built and constructive ways of dealing with conflict can be tested and, at best, internalised as a result of the same process. It is hoped actors can

use the TJ process to engage in non-violent forms of conflict resolution and to build „civic trust“ between citizens and their „new“ states.

### Conflict transformation

Lederach (2003, 2005) speaks of the conflict transformation field as an ongoing discussion and search for greater understanding and clarity in human relationships. (...) This includes both face-to-face interactions and the ways in which we structure our social, political, economic, and cultural relationships. In this sense, peace is a „process-structure“, a phenomenon that is simultaneously dynamic, adaptive, and changing. In essence, rather than seeing peace as a static „end-state“, conflict transformation views peace as a continuously evolving and developing quality of relationship. It is defined by intentional efforts to address the natural rise of human conflict through nonviolent approaches that address issues and increase understanding, equality, and respect in relationships.<sup>3</sup>

Conflict transformation has gone through its own evolutionary trajectory from **conflict resolution** (where the focus was on dialogue to end violence and resolve the immediate, often symptomatic, problems at hand) **via conflict management** (where the assumption was that conflict is part of life and that tensions cannot be resolved so that the focus should be on how they are approached and „managed“) **to conflict transformation** (based on the insight that there is a structural, „root-cause“ dimension to violent conflict that needs to be addressed and that requires efforts at deeper and longer-term transformation rather than just symptomatic resolution or conflict management). The idea of conflict transformation differs from the initial approaches of conflict resolution that emerged in the early post-Cold War era. From the late 1980s, violent conflict was increasingly visible as an intra-state phenomenon with ethno-political dimensions that resulted in severe damage to civilian populations. Efforts at conflict resolution focused mainly on the political sphere with emphasis on changing behaviour through shifting attitudes. Conflict resolution practitioners - i.e. mediators and facilitators in peace processes - realised, however, that if their focus ignored the structural inequalities and power imbalances present in many peace and dialogue processes (often in the name of impartiality), the solutions would often further disadvantage already marginalised parties (see Galtung 1996). This became particularly visible

3 Conflict Transformation, JP Lederach, 2003: <http://www.beyondintractability.org/essay/transformation/> accessed 24 August 2010

in contexts characterised by large-scale poverty and a high degree of income asymmetry and would lay the grounds for future violence because the focus remained on surface symptoms. If key underlying grievances are not addressed over a period of time, violence would recur in almost predictable cycles (see also Parlevliet's iceberg of causes and symptoms of human rights violations, 2009). The emphasis on the structural domain that emerged in CT was expressed by practitioners in the claim to facilitate "peace with justice" (and hence at times be decidedly partial).

Lederach frames this as a question: "How do we address conflict in ways that reduce violence and increase justice in human relationships? To reduce violence we must address both the obvious issues and content of any given dispute and also their underlying patterns and causes. To increase justice we must ensure that people have access to political procedures and voice in the decisions that affect their lives" (2003).

Hence, the terminology of conflict transformation, as it became established in the later 1990s, added the longer-term focus on deep-rooted causes of conflict in the structural domain. Miall offers a definition: "CT seeks to enable a comprehensive process of engaging in and transforming relationships, interests, discourse and also structures as well as the methods of operations of social and political institutions that support the continuation of violent conflict" (2004). These changes may need to address long-held beliefs and deep-rooted mistrust of the (ethnic, racial, national) "Other" as well as societal structures and cultural practices. In practice, the emphasis of civil society interventions in CT is often on working with grassroots and middle level leadership.

Conflict transformation understands social conflict as evolving from, and producing changes in, the personal, relational, structural and cultural dimensions of human experience. It seeks to promote constructive processes within each of these dimensions, Lederach defines these as the four "Change Goals in Conflict Transformation":

- Personal: Minimize destructive effects of social conflict and maximize the potential for personal growth at physical, emotional and spiritual levels.
- Relational: Minimize poorly functioning communication and maximize understanding.
- Structural: Understand and address root causes of violent conflict; promote nonviolent mechanisms; minimize violence; foster

structures that meet basic human needs and maximize public participation.

- Cultural: Identify and understand the cultural patterns that contribute to the rise of violent expressions of conflict; identify cultural resources for constructively handling conflict.

Based on the observation that conflicts often develop a kind of "organic" dynamic where irregular and non-linear phases of stagnation, fluctuation and rapid change alternate (see Dudouet 2007), some practitioners and scholars in conflict transformation have been concerned with developing new theoretical bases (see Lederach 2005 and various Berghof-Publications: Bloomfield et al. 2006, Wils et al. 2006, Körppen et al. 2008). To capture the phenomenon they draw, among other things, on systemic approaches that take a more cyclic or spiral model as a starting point for observing and intervening in situations of violent conflict. Looking at "conflict systems" as moving dynamic entities with self-generating and self-regulating powers, this view assumes that conflicts are non-linear in their evolution with multiple, sudden, simultaneous and over-layered movements, and they do not follow the commonly used escalation and de-escalation models. Interesting for the conversation with TJ is the recent realisation by systemic CT approaches that there is no simple equation that "more pro-peace engagement is more likely to lead to a successful peace process". The question at stake is not always to be immediately present with the maximum of tools, interventions and resources. As Norbert Ropers summarises, systemic thinking especially helps to understand different forms of resistance to change in a society. As long as the different forms resistances are meaningful and viable for some, especially politically, economically and/or socially powerful people, "it is important to focus first on the drivers within the system which might have quite rational reasons to prevent the intended social change from happening" (2008, 35).

## 2. Why enter into Conversation?

Both emerging fields share the same vision of sustainable just peace and societal reconciliation based on a process of social and political change. Both are concerned with the relational aspects that further/hinder social and political transformation, an aspect that is often in the foreground of CT.

Parlevliet (2002, 2010) in her holistic exploration of human rights and conflict transformation proposed that human rights actors (who at this point also dominate in shaping the TJ field) focus first on rules as well as on structures and the reform of

institutions, and then consider other social issues that are considered “softer”. Meanwhile, conflict transformation actors emphasise processes and relationships, the transformation of behaviour and attitudes, and then think through how structural change and new norms can evolve further from here. Clearly, there is an overlap where particularly process-oriented TJ actors and more structure-focused CT actors find more in common than becomes visible in the attempt to render the two approaches distinct here. There is a set of actors who traverse the two fields - such as ourselves - and seek out, highlight and develop further the interconnections.

Colvin (2008) goes so far as to ask why TJ and development (counting conflict transformation as one intervention set within the broader development paradigm) have been narrated as “separate” in the first place. He points out that TJ and its modalities take place within the broader framework of development and social change as “doable”, and, in a sense, “engineerable” ventures that states, agencies and organisations can take on, plan, implement, measure and complete using “tools” and “timeframes”. However, practitioners in both fields (and in the broader field of development) know from practice how fraught with contradictions, paradox, pain, disorder and open-endedness social transformation processes turn out to be in local realities. We also have learned how such processes are never fully “completed”, that change is not linear but cyclic and enters new phases. The perspective of impact at times needs to span several generations. Increasing conflict (rather than avoidance or a surface desire for harmony) may become a necessary part for deeper structural transformation to become possible (Parlevliet 2010). But at what cost is this the case if the increase in conflict turns out to be violent? For example, Western powers were accused in former Yugoslavia of prolonging the violence when taking a strong human rights stance at a time when this may have prevented opportunities to prioritise ending violence.

Power asymmetries tend to reproduce themselves in social change, despite the best of intentions. Transforming entrenched structures and modalities of power requires information, advocacy and political leverage as well as conversation and dialogue strategies with those wielding power, old and new. Power asymmetries also reproduce between “outsiders” (“internationals”) and “insiders” (“locals”). Cynics might say that local elites serve as access and information channels for international interests and strategies, while using internationals to serve specific local (and

at times personal) interests. Internationals may bring political leverage through funding, technical expertise, institutional backing and some distance in observing context-specific dynamics. By sending international experts and advisors into CT and TJ situations, an intercultural dimension is created and global-local relations become the focus of discussion in TJ (Orentlicher 2007). While development work – recognising its close nexus to conflict transformation – has evolved its own culture of self-reflection and -critique (Nuscheler 2004) with “do no harm” and approaches of conflict sensitivity, the same questions of a potentially negative impact is yet outstanding in TJ interventions, even though there is awareness of the sensitive nature of the field. In light of the above considerations, there is already a movement between the two fields that leads them towards one another: TJ seems to be expanding beyond an understanding of a mechanistic set of tools and narrow state-focused set of primarily political and legal interventions with a sub-reference to “reconciliation measures” and symbolic gestures enabling the envisioned social change (without specifying how). Questions of how to deal with the “soft” issues of identity, “voice” and the psycho-emotional phenomena after experiencing violence are beginning to be considered in TJ (Arthur 2009, Kayser-Whande/Schell-Faucon 2009, Servaes/Birtsch 2008). At the same time, CT has become more structure- and justice-oriented and gives more thought to how transformative efforts can be solidified and consolidated while “good process”<sup>4</sup> is kept as a principle. CT had for example difficulties in settings like Sri Lanka where the human rights dimension was undervalued in international interventions for a number of years, as dialogue-orientation was prioritised for the sake of possible negotiations. This had the negative consequence in that both sides had the time to re-arm on a broad scale. It also compromised the credibility of the peace building community, not only in the eyes of human rights activists.

### 3. What is brought into conversation

#### Connecting point: reconciliation

The initially quite polarised debate of peace versus justice and human rights versus conflict management (Parlevliet 2002) has since evolved into a discussion on synergy and complementarity and how to make this into a concrete field practice (Parlevliet 2010) while retaining the unique angle

<sup>4</sup> By this we mean that CT retains its emphasis on process and relationships as entry points for intervention, as well as an orientation to what already is in the situation above universal norms and standards.

that each perspective contributes. Most experts agree that peace and justice are irrevocably interconnected and mutually reinforcing (Hazan 2007; Okello 2007; De Greiff 2007; Mani 2007; Hughes/Shabas/Thakur 2006), one of the key connections being the idea of political and social “reconciliation”.

Reconciliation is one key conceptual and practical intersection between TJ and CT. The perspective that places “reconciliation” at the centre of transitional justice is concerned with a broader process aimed at individual and social transformation. In some cases, the term may be avoided for its religious connotations<sup>5</sup>, but both fields are concerned with how people live together after violent conflict, how they deal with the consequences of harm and violations, how they make amends, deal with the human need for acknowledgement, how to restore a sense of justice, concretely repair and better lives and build new (or renew depending on the circumstances) moral and interpersonal foundations.

It strikes us, however, that there is a tendency to broaden the terms and concepts - reconciliation and TJ - so far that they include everything to do with justice, retrospection, democratisation, conflict transformation and peacebuilding in the attempt to gather all the complexity and be holistic. But that also means that, in the end, the discussion at times becomes diluted and distinctness is sacrificed in favour of inclusiveness. There is a yearning for a single decisive definition of both reconciliation and TJ on the one hand and their relation to broader conflict transformation on the other hand. Yet authors always arrive at the same state of inability in agreeing to one. Hence, “reconciliation” in particular stays an amorphous and malleable concept, a dynamic and moving idea that can take on a large variety of forms. Roht-Arriaza and Mariezcurrena (2006, 12) emphasise that “the individual, community and policy aspects of such (reconciliation) processes are still not well understood.”

Our experiences with grassroots work in the context

<sup>5</sup> For a critical reflection on the term reconciliation and its problematic notions see also Kayser 2001, Schell-Faucon 2004, The Israeli psychologist Dan Bar-On is of the opinion that reconciliation is problematic in conflict contexts where there was never an “original” harmonious state in the past (2000, 27). He concludes for his work: “The terms reconciliation and forgiveness have been charged over generations with deeply-religious constructions of meaning that pleads for differences and social exclusion rather than for the bridging of differences and social inclusion. Hence, such concepts are to be avoided in intercultural peacebuilding activities” (2001, 231).

of the macro discourse of reconciliation in South Africa have shown that it is important to differentiate carefully between realistic short and medium-term goals for encounter, dialogue and community work and the long-term aims for envisaging the society as a whole (Kayser-Whande/ Schell-Faucon 2009; Kayser 2005; Schell-Faucon 2004). We suggest that those who intervene in TJ/CT contexts observe with caution:

- who speaks in favour of reconciliation, why and with what power or leverage of argument?

Often reconciliation is seen as a need of the perpetrators and bystanders/ beneficiaries, as an attempt to forget. Meanwhile, the new state and new political elites may have similar interests in „active“ forgetting. It is important to ask what power the advocates of reconciliation have in their society and what claim they themselves can lay to the memories of suffering.

- who rejects reconciliation, why and with what power or leverage of argument?

In South Africa, it has been highly problematic that some perpetrators continue to pursue their usual (and often well-paid) careers while many survivors continue to live in great poverty, pain and deprivation and even meet their torturers in the street on occasion. But not only survivors reject the term reconciliation. The rejection of reconciliation (and especially of the TRC process) from the side of the conservative white population has resulted in renewed hurt and humiliation of black survivors.

### Questions of identity: victims, perpetrators and the grey zones

Another point of conversation that seems of importance concerns the question of identities. While TJ interventions and processes are by nature concerned with identifying and trying “perpetrators” and rehabilitating and restoring “victims”, CT is particularly careful about these different labels. Identities in a conflict scenario are a matter of shifting ground. As the clouds of violent conflict lift, a new landscape becomes visible, with a complex reality of perceived and self-ascribed identities. There are already polarised conceptions of Self and Other, and vulnerable senses of self may change every day as the transitional context shifts rapidly.

In her observations and work in rural villages in Peru, Theidon (2006) traces how ideas of justice and morality in the past and in the present, as well as the emotions attached to those conceptions, change over time. She describes how possibilities for the

re-integration of former enemies in communities were linked to the sense of being secure, a sense of being in power and control, that allows the affected collective to be more liberal with policing the boundaries of who is enemy and who is not. Thus, it was possible to integrate former perpetrators using a mixture of restorative principles and the demand for (and strict monitoring of) the moral commitment of the perpetrators upon their return to life in society. Theidon speaks of a “grey zone of jurisprudence that left space for porous categories, for conversion, moral and otherwise” (ibid., 451). She cautions though that local efforts to “stay the hand of vengeance do not imply forgiveness per se” (ibid., 453) but rather point to more long-range perspectives on justice in the context of intimate co-existence of victims and perpetrators.

In such contexts national and international agents (especially state bureaucrats) often quickly divide the world into “victims” and “perpetrators” in a process that has a dramatic impact on people’s lives during transition, and that has afterwards proven rather static (and filled with stigma) when it comes to transforming the negative qualities and consequences associated with such labels. This process of division often takes place without knowing the terrain well and guided by simplistic premises: all who fought and committed violations become “perpetrators” and all who experienced violence and violation become “victims”. Those that disappear from sight are the many “ordinary” people in between who moved in what Primo Levi (1990 [1986]) has described as the “grey zone”. The grey zone houses all who stood by, who witnessed, who did not prevent harm, who feared to risk and who cannot be blamed for that choice, who voted and cheered, who participated through varying degrees of complicity and collaboration, by profiting or not rejecting benefit built on the suffering of another, those who gave their silences and “looked away”, “didn’t know” and did nothing when in their name everything was done.

In light of such a complex scenario, we need to ask how far descriptions of identity that seek to define right from wrong, and hence divide society into those that wronged and those that were wronged, can do justice to the messy conflicts and cycles of violence and counter-violence that characterise today’s scenarios. Specifically, we need to identify:

- where the lines between victims and perpetrator are not always clear;
- where today’s perpetrators may have multiple claims to past victimhood;

- where structural violence led to loss of dignity and de-humanisation over decades; and
- where cultural violence has been deeply embedded and its consequences are not always immediately evident and visible.

We need to look much more closely at the ways in which experiences of the past shape people’s senses of self in the present. We need to ask how memories correspond with possibilities and efforts to remake a broken sense of selfhood: How can survivors muster the hope to envisage a future in which their experiences have meaning, a future that gives a sense of purpose and that is often, nonetheless, rooted in the past? While these thoughts – deriving initially from memory and critical trauma work – have gained growing importance in conflict transformation literature (e.g. Lederach 1997; Volkan 2004, 2006, Enns 2007), in TJ literature and debates such questions are often still seen as the “realm of psychology”. Yet the dynamic interrelations between politics, memory, narrative, between ascribed identities and actual, shifting senses of self are at the core of how TJ processes unfold (see also Lindorfer 2008). It is a highly charged landscape.

In this sense, Enns also cautions that today’s concern for the suffering of the victim tends to deny both the power and responsibility of the victim and hence turns victims into “objects” of politics. Based on thoughts of the African post-colonial researcher Mahmood Mamdani who warns that we are locked into a world in which identities are only generated in binary pairs, Enns emphasizes the “need to break out of the world view of the victim and the perpetrator, for an attachment to victimhood is an attachment to the very divisions instigated and perpetuated by those in need of stabilizing their rule” (2006, 33). She argues that we need to create political communities that resist this sort of simplistic politicisation of identities. Rather than rushing to define and then assist “victims” we need to assume the agency (and hence ownership) of local actors to restore their lives and participate in the revival of the polity, in face of the harm done and its consequences.

There is another focus, which we find needs more attention in TJ and where the conversation with conflict transformation as well as social anthropology will be fruitful. This relates to the presumed need to „change the identities of perpetrators“ so that they do not continue to commit further violence. This language betrays an assumption that such change is possible and can be brought about quickly, whether or not the actors concerned wish and chose to do so. There is little consideration of how years as a

combatant or soldier are woven into the essence and fabric of someone's being, and what it means to face a transition where all of a sudden one is reconfigured as „perpetrator“ and „violent“ whereas before one might have defined oneself as a freedom fighter in a „just war“. Suddenly, one is not a protector or hero anymore but re-narrated and perceived as a „danger“. „Yesterday the communities considered me a hero, but today I am seen as a perpetrator“, was one of the frequently heard statements from militarised youths who had been part of communal self-defence and self-protection units in South Africa between 1990 and 1994. They had since fallen through the cracks of the already limited and flawed demilitarisation processes that were taking place, and many remained psychologically affected and destitute or had turned to crime. (see Schell-Faucon 2001, 2004). In addition, there is a host of measures already in place to respond to that danger - to demobilise, demilitarise, re-train, re-educate and re-integrate in exchange for renouncing the role of the combatant/fighter/rebel/guerilla member. Yet there is no new sense of self ready to be comfortably inhabited. Rather, the work of changing focus and building a new life is slow, painful and laborious. People always reason for themselves that how what they did made sense at the time, even if it was violent. When the outer frame shifts and there is a new frame that says: „What I did was wrong. I am a perpetrator, this is a shock, a loss of a world view and often followed by anger and despair. Such a fundamental loss of sense and having a defined place in the world also needs to be mourned - as we already learned from Mitscherlich/Mitscherlich (1967) when they reflected on the effects in German society as one of perpetrators. A myriad of questions ensues for practitioners seeking meaningful intervention in TJ/CT:

- Who defines old and new identities? Who is labelled victim/perpetrator? Who rejects the label? Who accepts it or readily adopts it?
- Who benefits from such labels (amnesty, reparations)? Who does not?
- How does meaning given to the terms - victim, survivor, perpetrator - change over time and in light of political developments?

### **A common blind spot: economics**

While we have developed some socio-economic consciousness in recent years of the need to look at structural violence, this „eye“ for what kinds of economic transformation are needed could be enhanced to the benefit of both conflict transformation and transitional justice interventions. Addressing the economic needs of the population

in conflict and post-conflict contexts often remains a blind spot in both fields. In South Africa, while the TRC reparations had an – albeit very limited – economic impact for survivors of gross human rights violations at a very late stage, the economic inequity suffered by the black population at large was not addressed. A systemic look at South Africa shows that, in face of this absence of structural change, new black elites have been produced who benefit from the structures of the old system while the majority of citizens remains excluded from economic growth and possibilities. There is growing consensus that in developing countries emerging from violent conflict, sustainable and just peace must be consolidated on the basis of social and economic development, meeting the needs of the whole population. In various conflict settings – be it Nepal, Timor Leste, Rwanda, Uganda or Guatemala – this is particularly urgent in order to overcome the structural violence of extreme poverty and social inequity. People's basic human needs and rights have been disregarded over decades. States have to be built anew using local resources and value systems that may yet clash with international human rights norms and democratic standards. International business and security interest play into development interventions, particularly in countries with a strong natural resource base of interest to multinational companies. There is no equivalent of a „Marshall plan“ in sight for these developing contexts, nor do they have a skills infrastructure that a country like Germany or also the eastern European countries could build on after 1945 and 1990 - despite the destruction/deterioration of infrastructure. Discrimination, socio-economic exclusion and political marginalization have impeded and distorted the post-colonial countries social, economic, cultural and political development and represent a source and root cause of conflict and instability. While efforts have been made to ensure conflict sensitivity and peacebuilding in the field of sustainable economic development (see Banfield et al. 2006; Grossmann et al. 2009), the questions of how to deal with structural injustices and crimes of the past and how to ensure the social and economic rights of people in the future, have often been neglected. Likewise, transitional justice interventions often overlook socio-economic dimension of justice. For instance, the TRC report in Liberia was the first to incorporate a chapter on socio-economic crimes and their impact on the war. The role of private sector actors in violent conflict remains underlit (see also Nordstrom 2004). As a consequence, many actors in TJ, CT and development are equating human rights violations only with gross violations of civil and political rights. But for the majority of victims in



developing countries, the acknowledgement of gross violations of their economic, social, and cultural rights (and rehabilitation) is just as – if not even more – important. The expectations of measures that acknowledge and address poverty are extremely high among victims of structural injustices (Carranza 2009, Miller 2008, Arbour 2006). More and more the need for social repair, reparations and restoration is emphasised in the context of dealing with the past, not only the imperative of retribution. This has led to a more differentiated view of the socio-economic or distributive kinds of “justice” that are at stake (Mani 2002).

**4. How to develop the conversation further?**

**Suggesting a “societal dimensions” framework for engaging TJ and CT**

Interventions carried out in the name of social transformation – be they by religious actors, peace builders, human right activists or development agents – need to done keeping in view a broad range of dimensions of society. Our way of looking at the different contributions TJ and CT can make in both backward and forward-looking engagements with past (and increasingly also present) violent conflict and atrocity is guided by observing transformation processes taking place (or not) in different dimensions of society. We have found this best captured by the German theologian and anti-apartheid activist Kneifel (1999) in his work on reconciliation. Inspired by his thinking, we suggest a closer look at each of the following dimensions during social change processes:

- the legal-judicial
- the political,
- the economic,
- the socio-cultural,
- the religio-spiritual and
- the psychological.

We have used the table below as a tool to think through which (state and civil) interventions have taken place addressing particular challenges in a particular dimension. Then we ask further: what effects have these interventions had (or not) in some of the other dimensions? Are there blind spots? It is critical that the table be used as a flexible and open-ended tool to observe and discuss from different standpoints how one process impacts on different sectors and realms of society, rather than to take it as an analytical tool that seeks to draw a complete and exact picture or tries to fix interventions to a particular dimension exclusively. In the case of Germany, that has had more than sixty years of dealing with the effects of the Third Reich and the Shoah, as well as

twenty years of dealing with the legacies of the GDR, this might take the following shape:

Di-mensions	Legal-judicial	Political	Economic	Socio-cultural	Religio-spiritual	Psycho-logical
<b>Germany post-49</b>	Nuremberg 1945-48, Waldheim 1950 (GDR), Auschwitz 1963-65 (FRG) ...	Vetting: Denazification New Constitution(s) FRG and GDR ....	Marshall Plan Individual Reparation Programme ...	Denazification Memorial Sites: GDR 1949-58 FRG 1965 onwards ...	?	?
<b>Germany post-89</b>	Honecker Process 1992 Polit-Office Process 1995 ‚Wall Protection‘ Process up to 2004...	Re-unification 2 commissions of inquiry 1992-94 1995-98 (not well-known even in Germany for it was little mediatised) Stasi-Archives	Treuhand restitution and compensation processes 1990, Solidarity Tax levied on West Germans 1991 ....	Memorial Sites on Stasi/ GDR oppression 1991 onwards Commission of Historians for revision of contested sites (Buchenwald 1992) ...	Church-led Monday demonstrations in the lead-up to the ‘peaceful revolution’ ...	Some debate on effects of discovering in Stasi files that close friends of family had betrayed one

This way of looking at the different interventions reveals that today some of these interventions might be called TJ measures. Some would fall under CT. Others would perhaps just be deemed purely developmental or economic such as the Marshall plan, which however, had a profound effect on possibilities in the political domain. The effects of vetting, in the name of denazification, were later reversed when compromised senior civil servants were re-employed in the new German states. It seems therefore important to pay attention to a time axis as well. Some of the effects and impacts of economic, political or socio-cultural interventions and measures might not have been immediate, but they laid the foundation for later developments in other dimensions. The fact, for instance, that the religio-spiritual and the psychological domains remain empty boxes here post-45 does not mean that the psychological effects of the Third Reich were not present over time in Germany.<sup>6</sup> However, they were little debated in the public realm until the late 1970s, with Mitscherlich/ Mitscherlich (1967) speaking about the German inability to mourn. It is only from the 1980s onwards when, suddenly, among the third generation born after 1945, there was conversation,

<sup>6</sup> The use of this reflection tool in trainings has shown that individual movements and small scale interventions can, of course, be found in each context for each dimension. At a recent conference participants reminded us for instance that the Protestant Church of Germany made in 1945 the famous “Stuttgart Declaration of guilt”. While this declaration was rather general and prompted by pressure of a foreign delegation from the Protestant Church, this is much more than the Catholic Church did at the same time. Post-89 there have been some offers in the psychological dimensions for victims of torture but again nothing on a larger scale and without entering the public realm.

local research and public debate about the individual, familial and societal pathologies that emanated from the children and grandchildren of Nazi soldiers and the large base of supporters, bystanders and collaborators of the Hitler regime.

Additionally, we need to have a careful look at what level of society various interventions impact over time. While public access to the Stasi archives was an initiative in the political realm and still continues to allow for a broader macro discourse on the past, it definitely also had great impact on the psychological dimension of the individual. The local research for traces of the Third Reich ("digging from below") that started in many communities in the late 80's until today first worked mainly at micro level, to later impact on the macro level and vice versa. For instance, the impact of this later research was seen in form of public exhibitions, such as the hotly contested portrayal of the role of ordinary soldiers in executions, demonstrated in the so-called "Wehrmacht exhibition" in the late 1990s. This caused demonstrations, public outrage and even defacement of the exhibit, nearly 60 years after the time.

The above societal dimensions have a dynamic relationship with each other and together form a moving living social whole. TJ has developed a number of tools and approaches that can especially address the political and legal-judicial dimensions (most prominently, state measures such as tribunals, truth commissions, institutional reform processes including vetting of implicated state personnel, reparations policies). CT - while decidedly political in its roundtable and multi-stakeholder processes - places more emphasis on the socio-cultural, religio-spiritual and psychological dimensions (i.e. dialogue facilitation between adversaries and interest groups, the use of cultural resources inherent in the situation, memory, storytelling and healing as well as personal change and trauma work). There is some convergence, as broader definitions of TJ increasingly include dialogue, memory and trauma work among the non-judicial interventions of TJ (Kayser-Whande/Schell-Faucon 2009). Both fields might claim that the revision of school history curricula and thinking about history-related human rights education of young people is part of their interventions.

The conversation between the two fields seeks to explore further how they build on such complementarities and seek synergies between different state and civil society actors and their varying levels of leverage and impact. For instance, in the context of the South African TRC, a range of efforts existed that brought

citizens into new kinds of conversation in the name of the "new nation" and its rainbow/reconciliation paradigm. The widely mediated macro discourse on the injustices of apartheid that the TRC was able to facilitate was accompanied by a number of (conflict transformation) efforts on micro and meso level. These initiatives often sought to deepen the impact of the TRC, but also expanded it by offering alternative spaces to address "silenced" stories and experiences of various survivor groups and citizens (see Henry 2000, Kayser 2001, 2000a and 2000b, Colvin 2000, Schell-Faucon 2001, 2004). This opened up a more pluralistic memory space than the TRC was able to offer. It also gave room for emotions that were not welcome in the broader reconciliation narrative of the new South Africa - the angry, unforgiving voices that spoke of continuities of pain, hatred, bitterness and lives unchanged. These black apartheid survivor voices that pointed out early on the lack of deeper structural transformation in the economic sphere have since become much more vocal in the debates prevalent in South Africa, i.e. via the interventions of the Khulumani Survivor Support Group that has taken multinational companies that supported apartheid to court in a US-based lawsuit.

Against this background both, transitional justice and conflict transformation, can benefit from an approach that seeks to holistically envelop all the above dimensions when observing processes and designing interventions. While neither TJ nor CT have the tools, approaches and the resources to address all dimensions at once, a stronger linkage and more coordination and collaboration with development actors are needed and recommended - as recent TJ research also emphasises (see especially De Greiff/Duthie 2009).

All actors in their respective fields, including sectoral development approaches, need to be aware of the blind spots and the imbalances that might be created when engaging the past in some dimensions more than in others. A strong emphasis on a few selected dimensions (i.e. the political and judicial-legal in Rwanda or the religious-spiritual/psychological and economic dimensions in Mozambique) will sooner or later lead to demands in other - sidelined

or overlooked – dimensions.<sup>7</sup> Such an imbalance may also strongly question the meaning and value of earlier processes in other dimensions such as the re-reading of the TRC process in light of social economic injustices ten years later. As the German example shows quite well the search for unaddressed dimensions and needs of people might continue over several generations. There were several “generations” of trials of Nazi crimes - initially these were initiated by externals and only later did internal efforts at prosecution follow. There were several phases of reparations, some very late like the awards for forced labourers. Germany took at least three generations to consciously approach and engage with the personal and psychological dimension.

In conclusion, we suggest that an important way how TJ and CT should be brought into further conversation is by careful observation of the interplay between these dimensions. We also need to trace how the developments around dealing with the past play out at different levels of society - top, middle, grassroots - over time. The following questions we have found useful for practitioners reflections:

Which other interventions and processes have emerged parallel to the TJ efforts - both from the state, from civil society and by private (sector) actors? How did they complement, contradict or otherwise influence one another?

- Which developments that initially seemed to have nothing to do with specific TJ interventions and processes did nonetheless have a profound impact on the possibilities of dealing with the past in this country/setting (prominent biographies, films, etc.)?
- What effects did the interventions have on power structures and how power is distributed and acted out in the political but also in the other dimensions?
- What dimensions appeared that we maybe did not even think about or look at before (i.e. secondary trauma of next generations, etc.)?
- How has maybe the dominant perspective on TJ processes changed in the country itself,

while the external debates or international discourse still recite a different evaluation?

- How are TJ and CT interventions - once over - narrated and re-narrated and also evaluated and re-evaluated in light of changing social contexts and political events over time - by the population, by practitioners and by researchers?

Lederach's (1997, 29) states that “the emotive, perceptual, social-psychological and spiritual dimensions” are “core not peripheral concerns” when facing contemporary conflict. This we find particularly crucial for transitional justice and conflict transformation. In much of current TJ and CT literature, however, these dimensions do not feature in such a central role. They remain occasional excursions into the personal and complex, maybe “too complex” to be heeded as starting points for further exploration and action.

There is yet still little understanding of the realm of cultural violence (Galtung 1996), how exactly it works and how it may be undone and “healed”, and how to set free once more the powers of imagination that spark human beings into developing themselves. To us it seems that especially disciplines more concerned with the realm of the individual or interpersonal such as critical trauma psychology<sup>8</sup>, social anthropology, educational and religious science/theology can enable insights that are relevant to the international debates on how collective political and social change processes work. Yet they seem to remain of limited impact in the dominant TJ debates.<sup>9</sup> An example might be the important but little-mentioned relevance of mourning processes for the transformation of identities, as well as for careful forms of encounter and dialogue across the divisions of the past. Volkan (2006b, 130) cautions us to “have a look at the complicated psychology that exists between large groups” [and] [...] not to make the concepts of “apology” or “forgiveness” magical tools in international relationships without first considering the slow and complicated mourning processes associated with them.” If mourning takes time and resources, we have to ask ourselves what this means for the pace at which TJ processes are

<sup>7</sup> Interestingly, Mozambique is often not even mentioned when we speak of TJ processes, though the psychological dimension was at centre focus (local rituals were and are being used to deal with the past - to facilitate the re-integration of child soldiers and ex-combatants, and to counter the “return” of memories of violence, even years later and economic development was crucial. The political dimension seems to have been sidelined. Igreja (2007) describes, however, how recent accusations by Renamo of a history writing that favours Frelimo's version of the story has led some to call for a Mozambiquan truth commission.

<sup>8</sup> As opposed to mainstream trauma psychology that is very present in mainstream TJ discourse, but usually limited to the terminology of PTSD and “trauma counselling”.

<sup>9</sup> See for instance Gobodo-Madikizela 2003 on South Africa; on the Balkans and beyond Vamik Volkan 1997, 2006a/b; for Germany and Israel/Palestine Dan Bar-On 1999, 2000, 2001, 2004; on Burundi/Rwanda Lindorfer 2008.

nowadays supposed to take place and achieve a large number of results at once?<sup>10</sup>

In light of the South African experience, Hugo van der Merwe puts a cautionary note on such multiple and high expectations:

The notion of justice is extremely powerful and inspiring, capturing the notion of putting things right, of restoring balance. Too often, though, it is also illusory and elusive, especially for victims of mass atrocities. (...) It may also seem impossibly remote in a world robbed of meaning by overwhelming violence. Essentially, our work in this field is to hold out the possibility of restoring this meaning and to give a sense of hope for rebuilding human relationships based on some semblance of justice.

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<sup>10</sup> It is important to note that we do not look for a direct transfer of insights on individual psychosocial processes into the realm of the collective. In fact, this is one of the dangers, as visible in the case of the South African TRC, when the metaphor of the body politic of the "wounded nation in need of healing" was used to conflate individual and collective needs and served to silence the voices of those harmed if they were not forgiving in the name of such symbolic national "healing" processes. What we are looking for, rather, are the implications of such insights for broader political and social processes affected by TJ.

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## Reflections on the role of the victim during transitional justice processes in Latin America

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In Latin America, the institutions and conceptual categories of transitional justice have become a part of the public debate. This is not only the case in countries that suffered from internal armed conflicts, such as El Salvador, Guatemala, and Peru, or dictatorships, such as Chile, Argentina, and Uruguay, but also in countries like Colombia in which the armed conflict is ongoing and the existence of a true transition is placed in question in various social sectors and by human rights organizations.

Beyond the discussions on whether a case reflects a real, partial, limited or incomplete transition, it

is clear that during a transitional justice period the role of the judicial system is vital in at least two ways that are closely intertwined: ending impunity and guaranteeing the rights of the victims. Both elements are crucial in order to ensure a firm transition and enable the new regime to avoid a repetition of the actions of the past. In view of the importance of these transitional justice processes, and given that some time has passed since these were initiated – in some cases several years, and in others several decades – the time has come to ask whether the states, and specifically their judicial systems, have been complying with international standards in dealing with the past.

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In order to address this question, the Due Process of Law Foundation (DPLF) carried out a study to evaluate compliance with international standards on justice and victims rights in seven countries in Latin America: Argentina, Chile, Colombia, El Salvador, Guatemala, Peru and Uruguay.<sup>2</sup> This study set out to evaluate the transitional justice process from the perspective of the victims – not from an essentially subjective point of view focusing on polling victims about their level of satisfaction with sentencing in human rights cases of the past, but rather from a more objective point of view that considers the state's compliance with its international obligations, and in particular with the internationally protected victims right to justice. The study therefore focused strongly on the real ability and readiness of judicial authorities to incorporate the perspective and rights of the victims into the prosecution of persons responsible for past grave human rights violations. This article summarizes the study's findings.

The DPLF decided on this focus because it perceived that, in Latin America, judicial authorities tend to almost exclusively incorporate the perspective of the defendant into investigations and judicial procedures, in addition to their

<sup>2</sup> Las víctimas y la justicia transicional: ¿Están cumpliendo los Estados latinoamericanos con los estándares internacionales? (Victims and transitional justice: are states of Latin America complying with international standards?) Due Process of Law Foundation, Washington DC, April 2010.

own. Although it should be noted that the rights of the defendant are essential to the rule of law (investigations would not be legitimate without respect of due process guarantees and the right of defense of those accused), in a transitional justice framework it is also essential for the rights of the victims to be duly considered and afforded the same level of importance. Evaluating the incorporation and respect of these rights in judicial procedures is a first step towards identifying deficiencies and strengthening victims rights in the courts of law.

Furthermore, the study set out to compare progress in the prosecution of past human rights violations in the countries under examination with the goal of comparing and disseminating positive and successful actions. Another objective was to underscore the challenges, difficulties and obstacles that judicial systems have faced in conducting investigations and trials of persons accused of grave human rights violations, and in guaranteeing the rights of victims to justice, truth and reparation. Based on the successes and unattained goals of the judicial transition processes examined in this study, recommendations on how to best comply with international standards were also made.

### **Characterization of violence and definition of victims**

The study identified two types of countries among those examined, based on the different situations in which human rights violations were committed, and from which the movement towards democracy was made or attempted. The first type concerns countries that have suffered from state terrorism (Argentina, Chile and Uruguay), while the second type concerns countries that have been described as having suffered from internal armed conflict (El Salvador, Guatemala, Colombia and Peru). This does not mean that the crimes committed by state agents in countries in which armed confrontation has been considered a source and characteristic of violence have not been, or could not be, considered state terrorism. The difference we noted is that in the countries of the Southern Cone the widespread and grave human rights violations have been explained solely within the context of criminal state action, while in the Andean and Central American countries (although there are differences between these that will be addressed later) the occurrence of violence can also be explained within the context of crimes committed by illegal armed groups who challenge(d) state power, or have a pro-system character, such as in the case of the paramilitaries in Colombia.

At one end we have Argentina, Chile, and Uruguay, which have characterized the real violence as a product of military governments and dictatorships. Then we have the cases of El Salvador and Guatemala, where it is asserted that the violence originated both from the state and from subversive organizations, but where in reality the majority of the violations (95% and 93% respectively) have been attributed to state agents. Next we have the case of Peru, which inverts the proportion and attributes the majority of violations to armed organizations on the fringes of the law (53.4%), but without excluding state violations from judicial investigations. Finally, at the other end we find Colombia, where according to the Justice and Peace Law, violations committed by illegal armed groups<sup>3</sup> (paramilitaries and guerillas) should be investigated, but not the violations attributed to the state, which should be investigated under ordinary justice.

The different characterizations of violence have an important consequence in terms of defining those who are considered to be victims. In countries where the violations are identified as state terrorism, victims are identified as those persons who have suffered from crimes of the state, while in those countries in which it is understood that abuses resulted from armed conflict, both those who suffered from state violence as well as the people who suffered at the hands of subversives are regarded as victims. Two points should be noted here. In Peru, although the Truth and Reconciliation Commission (CVR) Report did not distinguish between types of victims, the Reparations Council<sup>4</sup> did not consider members of subversive organizations to be victims for the purpose of inclusion in the Unified Register of Victims (and therefore entitled to receive compensation). And in Colombia, the Justice and Peace Law does not consider those whose rights have been violated by the armed and security forces to be victims.

### **Grave violations of human rights**

Grave human rights violations were committed in all the countries included in the study. Usually one

<sup>3</sup> In reality, the majority of demobilized persons have been paramilitaries.

<sup>4</sup> Law 28592 of 28 July 2005, through which the Integral Program for Reparations (PIR) was created, envisioned the organization and operation of a Reparations Council, which was conceived as a body attached to the Presidential Council of Ministries, with the mandate to create the Unified Registry of Victims, an instrument which would be utilized in the implementation of the Integral Plan for Reparations. The Reparations Council was created in October 2006.



type of violation was committed in a predominant manner or with greater intensity than the other types. In Argentina, for example, the main violation concerned the forced disappearance of persons (8,960 disappearances, according to the National Commission on the Disappearance of Persons, CONADEP), and the kidnapping of babies was an illegal practice that was characteristic of the years of violence in this country. In Uruguay, imprisonment for political reasons was predominant (5,925 cases, according to the University of the Republic), to the point that this country took first place in Latin America in terms of the number of political detentions relative to its population.<sup>5</sup> In Chile, torture reached such a magnitude that a special body (the Valech Commission<sup>6</sup>) was set up specifically to document this type of grave attack against personal integrity, which was committed against 27,255 victims, according to the Commission's report.

In El Salvador and Guatemala, extrajudicial executions and forced disappearance characterized the era of armed conflict. In El Salvador, 54.4% (7,388) of the violations documented by the Truth Commission were homicides, and 14% (1,057) were forced disappearances. In Guatemala, the Historical Clarification Commission estimated that during the 36 years of armed conflict, 160,000 extrajudicial executions were committed and 40,000 forced disappearances occurred. The Report of the Historical Memory Recovery Project (REMHI)<sup>7</sup> noted that the actual number of executions could exceed 200,000, while the number of forced disappearances could exceed 50,000.

In Peru, the predominant violations by state agents were extrajudicial executions and forced disappearances, while the violations committed by armed groups mainly took the form of assassinations and torture,<sup>8</sup> whereas in Colombia the absence of a truth commission or a report on the acts of violence made it difficult to determine uniform facts. However, certain features of the Colombian conflict can be identified that reflect the magnitude of violence attributable to armed groups. The armed

confrontation has produced "the most grave and dramatic humanitarian tragedy in the hemisphere",<sup>9</sup> which resulted in approximately 3.5 million internally displaced persons and the dispossession of 5.5 million hectares of land.<sup>10</sup> According to information provided by these authors, Colombia is the country with the greatest number of victims of kidnapping and antipersonnel mines in the world. The violence in Colombia is also characterized by the "selective elimination of human rights defenders, administrators of justice, union and social leaders, journalists, and candidates in popular elections".<sup>11</sup> Between 1995 and 2004, more than 1,000 massacres were perpetrated in this country, involving around 6,600 victims, most of whom belonged to indigenous and afro-descendant communities.<sup>12</sup>

### **The role of the Inter-American System in protecting victims of human rights violations**

The various institutions of the Inter-American System have continually recognized the responsibility of military regimes and dictatorial or authoritarian regimes for the violation of rights protected by the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights. Although we can distinguish different levels of impacts and effects in the countries examined in the study, the Inter-American System has contributed to the termination of old regimes and the advancement of democracy.<sup>13</sup>

As Valeria Burbuto notes in her chapter on Argentina, the 1979 *in loco* visit by the Inter-American Commission on Human Rights (IACHR) to Argentina was a "fundamental milestone", from which point onwards the media began to report on human rights violations. The IACHR became a forum "for pressuring the Argentine military government to stop committing crimes", and a vehicle for maintaining the hope that justice would be done, to the extent that for many victims this

5 Prats in *Las víctimas y la justicia transicional*, supra.

6 In view of the demands of victims, this Commission was reopened in February 2010 to receive testimony over six months, and afterwards it will have a period of six additional months in which to evaluate them.

7 While the Historical Clarification Commission was created by the Oslo Accords of 1994 that sought to bring an end to the nation's civil war spanning three decades, the Report of the Historical Memory Recovery Project was a project carried out by the Human Rights Office of the Archbishop of Guatemala.

8 Rivera in *Las víctimas y la justicia transicional*, supra.

9 Guzmán, Sánchez, and Uprimny in *Las víctimas y la justicia transicional*, supra.

10 Garay, 2009: 160, in Guzmán, Sánchez, and Uprimny in *Las víctimas y la justicia transicional*, supra.

11 Guzmán, Sánchez, and Uprimny in *Las víctimas y la justicia transicional*, supra.

12 García, 2009: 36, cited in Guzmán, Sánchez, and Uprimny in *Las víctimas y la justicia transicional*, supra.

13 Regarding the impact of the Inter-American System on the movement towards democracy, see also *Victims Unsilenced: The Inter-American Human Rights System and Transitional Justice in Latin America: The Cases of Argentina, Guatemala, El Salvador, and Peru*. Due Process of Law Foundation, 2007. Available at: <http://www.dplf.org/uploads/1190403828.pdf>.

Commission was the first authority that “heard them without doubting their stories”.<sup>14</sup>

### **The role of the judicial systems in the protection of victims**

We can point to two tendencies regarding the judicial institutions and structures for investigating past human rights violations. One approach is to create and put into practice special judicial structures designed particularly to complete the work of investigating human rights violations committed during the previous regime, while the other approach is to investigate violations and conduct criminal proceedings via the judicial institutions that existed during the civil war or dictatorship.

A brief review of the processes of judicialization (criminal prosecution) that have taken place in different countries, both with and without specialized structures, enabled us to come to certain conclusions regarding the use of the instrument of specialized justice and its implementation in different political contexts. Among the countries examined in the report, only Peru, Colombia and Guatemala stand out for having set up specialized units or systems within the normal judicial system that conduct investigations of human rights violations committed during their respective armed conflicts.

However, the practices examined here show that specialized justice has not always been a determining factor in advancing the prosecution of violations. The cases of Argentina and Chile, for example, where the judicial systems have not been adapted to judge such violations, demonstrate that a significant number of cases can be investigated and processed by the institutions of the previous regime. It has often been stated that beyond institutional designs the key appears to lie more in political will and the existence of a favorable political context to eliminate impunity.

### **Obstacles to justice within the judicial systems**

Among all legal obstacles, there is one that has been constant and present in all the countries covered by

this study, except Colombia:<sup>15</sup> amnesty laws. In the Southern Cone as well as in Peru and the Central American countries, these types of laws have been passed under a variety of titles: “amnesty law” in Peru, “amnesty law decree” in Chile, “Full Stop and Due Obedience Law” in Argentina, “statute of limitations for state claims” in Uruguay, “General Amnesty Law for the Consolidation of Peace” in El Salvador, “Law of National Reconciliation” in Guatemala.<sup>16</sup>

The obstacle posed by amnesty laws has been confronted in all the countries examined in the study in the form of strong, persistent measures and political and legal strategies in which the perseverance and determination of the victims and/or their representatives, the Inter-American System and local courts have all been crucial in eliminating the effects of these laws in general, or at least for limiting their application in specific cases. Unfortunately, once this barrier has been overcome, the path to justice does not necessarily immediately follow.

It is important to note that amnesty laws have not been the only obstacles to securing victims right to justice. The analyses of the countries examined in the study reveal the existence of other forms of legal obstacles, as well as obstacles of an institutional, political, cultural or other nature, which hamper the right of victims to justice. Some of these obstacles are related to the lack of political will of governments and administrators of justice, while others are attributable to the lack of independence of investigators and judges; the slow nature of procedures; the lack of special investigative strategies for human rights trials; the judicial culture, which frequently places procedural forms and rituals above the goals of judicial processes to

15 In Colombia, some have considered the Justice and Peace Law to be a law of impunity. However, both the Colombian Constitutional Court and the Inter-American Court of Human Rights have held the contrary view (Guzmán, Sánchez, and Uprimny, *infra*). The Inter-American Court had the opportunity to analyze this law in the case of the massacre of La Rochela and it found that the law was not in and of itself in violation of the American Convention. However, it recommended, *inter alia*, that the Colombian state should allow for the participation of victims in specific cases in all phases of the processes of justice and peace, and that it should interpret the principles of favorability, proportionality, and *res judicata* in conformity with the jurisprudence of this high tribunal.

16 This is not the same as an amnesty law, but its application by Guatemalan tribunals has had a similar effect. See Mónica Leonardo’s article, *infra*, and the sentences of the Inter-American Court in the cases of Myrna Mack Chang, Tiu Tojín, and massacre of Dos Erres, all against Guatemala.

14 Barbuto in *Las víctimas y la justicia transicional*, *supra*.

discover the truth and assign responsibility; the persistence of actors and sectors of the political and military powers interested in maintaining impunity and obstructing investigations; the lack of protection for judicial administrators, victims, and witnesses; and the economic and geographic barriers, as well as hurdles to legal defense encountered by victims.

### **The role of the victim in the pursuit of justice**

The persistence and perseverance of victims have been essential factors in the achievement of goals and progress in every transitional justice process. The role of victims has been important in various ways: keeping the need to prosecute unlawful actions of the past on the public agenda; driving investigations and processes so that victims can give testimony in court, provide evidence or demand diligent evidentiary investigations; and putting forward strong and convincing arguments of fact and law so that judicial officers can accept and apply them to resolve cases.

Several of the authors who collaborated in the study underscored the role of victims and human rights organizations in judicial processes and in the resulting progress. Carlos Rivera (author of the chapter on Peru) reminds us that Peruvian human rights organizations have had the need for the prosecution of the gravest crimes committed by and during successive governments on their agenda since the 1980s. In this regard, NGOs proposed the creation of a sub-system for the prosecution of human rights violations. Regarding the role of victims in Peruvian judicial processes, Rivera affirms that, given the complexity of the crimes, it is "highly probable that the investigations would not have advanced significantly were it not for the impetus of the victims and their lawyers. Considering that these or their families frequently serve as witnesses in the investigated events, their testimonies are vital in shedding light on cases". But the contribution concerns not only testimonies, but also the persistence of the involvement of victims over time. On this point, he notes: "One must highlight the role of living memory, the source of information and the direct testimony that the victims and their families provide".<sup>17</sup>

In her chapter on Argentina, Valeria Barbuto points out that the judgment of those responsible for crimes has been made possible thanks to the demands and persistent actions of human rights organizations, many of which are victims organizations.

In Argentina, nearly all the criminal charges originated with a complaint by a victim or organization, not by the state itself. These players have been active providers of evidence concerning what occurred, since the perpetrators offered very little information. Barbuto also notes: "They were determined actors in the construction of legal arguments that achieved judicial recognition of the right of victims to truth, justice, reparation and memory". During the more than twenty-five years of democracy, "human rights organizations have brought forward clear strategies to confront the successive policies of impunity. The principle that guided these actions has been that of obtaining justice in terms of punishment for those responsible, as a manner of making amends for victims and their families, but also with an institutional sense for all of society."<sup>18</sup>

The same also applies to Chile. Mayra Feddersen tells us that judicial progress in Chile is attributable to "the incessant work of human rights organizations and of victims families, through a team of lawyers who over the course of thirty years have been dedicated to proving, denouncing, and prosecuting those responsible for these terrible events".<sup>19</sup> And with respect to Uruguay, Martin Prats maintains that although "there remain pending issues and matters without resolution, it can be considered that victim participation has been fundamental in these advances", and that "the actions of victims were central to keeping this issue alive in public opinion and in the attention of the political system during these twenty-five years; it is due to their initiative that judicial cases were reactivated, through novel legal strategies".<sup>20</sup>

With regard to the role of victims in El Salvador, it should be noted that the two recent rulings by the Constitutional Chamber of the Supreme Court<sup>21</sup> which allowed forced disappearances to be investigated "would not have been possible without the insistence and courage of victims", and that "their authentic and constant fight has begun to raise awareness and provoke change".<sup>22</sup> In Guatemala, "the participation of victims in criminal

18 Barbuto in *Las víctimas y la justicia transicional*, supra.

19 Feddersen in *Las víctimas y la justicia transicional*, supra.

20 Prats in *Las víctimas y la justicia transicional*, supra.

21 The first was pronounced in June 2009 and related to the disappearance of Sofia Garcia Cruz on 4 July 1981 when she was 10 years old. The second decision was made in December 2009 concerning the case of Maria de los Angeles Ortega, who disappeared on 4 November 1983.

22 Cuéllar in *Las víctimas y la justicia transicional*, supra.

17 Rivera in *Las víctimas y la justicia transicional*, supra.

proceedings concerning violations of human rights during the armed confrontation made the difference in their result. This is due to their persistence and the tenacity that they gained as the processes advance". In El Salvador, the interpretations of facts, legal principles and evidence are the outcome of factual, legal and evidentiary discussion that the victims put forth.<sup>23</sup>

Regarding the role of human rights organizations in Colombia, the study indicated that the "inclusion of victims rights in negotiation policies was able to become a reality thanks to the achievements of Colombian human rights organizations in "translating" in a creative manner international standards into the Colombian debate, which has not only decisively strengthened their political and legal claims against impunity but has also considerably influenced public opinion regarding this matter". Before the process that led to the adoption of the Justice and Peace Law, the Colombian public debate did not really include victims rights.<sup>24</sup>

#### Participation of victims in the judicial processes

The national investigations included in the comparative study refer both to theoretical and practical aspects of the participation of victims in judicial processes, i.e. both constitutional and/or legal regulation, and the level of effective compliance with these regulations.

In almost all the countries examined in the study, the participation of victims in judicial processes is guaranteed by law (though not always to an equal extent). In Chile and Guatemala, for example, regulatory limits apply to the participation of victims in judicial processes. In Chile, victim participation "is very limited by procedural rules that govern processes related to the dictatorship".<sup>25</sup> In Guatemala, victim participation is legally and constitutionally established, but with certain limitations. Participation is manifested in procedural figures such as the querellante adhesivo (ancillary complainant), complainant, petitioner and plaintiff. The limitations arise from the unequal regulation of the rights and abilities of the ancillary complainant with respect to the accused. For example, to be able to participate in the public hearing at the trial stage, the victim must request prior written authorization, while the accused can automatically participate.

23 Leonardo in *Las víctimas y la justicia transicional*, supra.

24 Sánchez, Guzmán and Uprimny in *Las víctimas y la justicia transicional*, supra.

25 Feddersen in *Las víctimas y la justicia transicional*, supra.

The ancillary complainant is excluded from participation at the sentencing stage, and regarding the conditional liberty or termination of punishment of the convicted.

Moving on to the practical aspect and the effective participation of victims in judicial processes, different situations become apparent. 1) In some countries (Colombia and El Salvador) there is a notable discrepancy between what is established in law and how it is applied. 2) In other countries (Argentina, Peru, Uruguay), reality coincides with or comes quite close to legal provisions. 3) In Chile, despite limitations in the law, in practice greater participation has been permitted because lawyers utilize the existing system (with all its limitations) in such a manner that their attitude and insistence enable them to overcome legal shortcomings and achieve concrete results in legal processes.

The group of countries in which there is the greatest discrepancy between theory and practice<sup>26</sup> includes Colombia and El Salvador. In Colombia, the discrepancy is such that victim participation is fairly limited, despite considerable normative progress that is the product of key legal and jurisprudential developments. Guzmán, Sánchez, and Uprimny (the authors of the chapter on Colombia) note that there has been significant progress at the legal level, but there are still serious difficulties in practice, which not only affect the participation of victims in judicial processes, but also simultaneously interfere with the process of litigating human rights violations as a whole. These difficulties coincide with some of the obstacles to judicialization cited above, including economic and geographic barriers, misinformation regarding judicial proceedings, lack of awareness of rights and the complexity of the justice and peace processes, lack of psychosocial attention, lack of legal representation, and victims uncertainties regarding the possibility of obtaining a fair result under the Justice and Peace Law, which many see as an instrument that "contributes to impunity

26 The discrepancies, which are sometimes enormous, between legal provisions and their practical application, are a generalized characteristic in Colombia, and have been identified and cited by the Inter-American Commission on Human Rights, as well as by various rapporteurs and independent experts of the United Nations who visited the country this past year. To mention just one example, Gay McDougall, the United Nations independent expert for minorities, noted in February 2010 that the Colombian legal framework is "impressive and praiseworthy", while its application is "unfortunately inadequate, limited, and sporadic".

and strengthens victimizers to the detriment of victims".<sup>27</sup>

El Salvador is another country in which participation of the victim is provided for by law, but where in practice it "is limited to only obtaining information of advancements, since almost all of the attention is centered on protecting those allegedly responsible, to the point that facts are not investigated and cases founder".<sup>28</sup>

The group of countries in which victim participation in judicial processes is adequately regulated (although potentially with certain deficiencies) includes Argentina, Peru and Uruguay. In Argentina, the participation of victims became a reality in the procedural figure of the complainant, as stipulated in the Criminal Code. This legal enshrinement has formally given victims, their spouses (and even their partners) and the ancestors and descendants of disappeared persons the necessary legal standing to participate in criminal cases directly or through their legal representatives. Here, even human rights organizations "have been recognized as interested parties and with standing to bring complaints as long as their statutes include the goal of achieving justice". This power has been fully exercised in practice, in a manner in which the majority of processes rely on "a particular claimant that initiates the accusation, presents evidence, participates in investigations and, during the trial phase, makes accusations, in representation of victims".<sup>29</sup>

Peru is another country with adequate legislation governing the participation of victims in judicial processes, which specifically establishes this right in the preliminary investigation phase, during pre-trial proceedings and at the actual trial. The complaint and testimony are the two primary forms of participation, which have great relevance for litigation in that "the facts are set out and initial theories are raised regarding those responsible for the crimes". At the trial, victim participation is embodied in the procedural concept of "civil party", which grants victims broad margins of intervention and allows them to collaborate in the establishment of facts and regarding the involvement of those responsible, as well as authorizing civil reparation.<sup>30</sup>

In Peru, victim participation in judicial processes brings "quite positive results", as is indicated by the numerous litigated cases as a consequence of complaints by victims and/or their families. Without these complaints, the processes would be different or simply would not exist at all. Examples of the relevance of the complaints and/or testimonies of the victims include cases of sexual violations in the regions where military bases existed during the armed conflict. The absence of victims testimonies explains why these crimes had remained invisible during the years of the conflict and there were no available statistics.<sup>31</sup>

Finally, in Uruguay victims have a broad capacity, as established in the Code of Procedure and in Law 18.026 of 2006, to participate in the judicial process and drive it forward beyond the level of complaint. From that moment onwards they can provide evidence as well as put forward arguments of fact and law. Victims can participate through their legal representatives, who can accompany them if they are summoned to testify. Since the adoption of Law 18.026, in cases of genocide, crimes against humanity and war, the claimant, victim, or their family can access all phases, propose evidence that they have at their disposal, and participate in all judicial actions. The courts are also obliged to notify them about all rulings.<sup>32</sup>

Based on the above comments we can conclude that, no matter how well-formulated legal provisions may be, the constant impetus of victims is required for them to be effective. It is only if victims rights are taken seriously and they persist in demanding their comprehensive fulfillment that legal provisions can become truly effective. The situation in Chile, for example, demonstrates that where legal provisions are inadequate, the impetus and perseverance of victims can nonetheless achieve significant results, despite such shortcomings. As Carlos Rivera notes in his chapter on Peru: "Beyond the wide or narrow margins of intervention in a criminal case, the will of families in demanding justice continues to determine the existence of unresolved paths and the very concrete work to achieve this justice."<sup>33</sup>

### **The role of investigations and criminal proceedings in discovering the truth and obtaining reparation**

It may be stated that judicial processes are ideal and beneficial instruments for discovering the truth

27 Sánchez, Guzmán and Uprimny in *Las víctimas y la justicia transicional*, supra.

28 Cuéllar in *Las víctimas y la justicia transicional*, supra.

29 Barbuto in *Las víctimas y la justicia transicional*, supra.

30 Rivera in *Las víctimas y la justicia transicional*, supra.

31 Ibid.

32 Prats in *Las víctimas y la justicia transicional*, supra.

33 Rivera in *Las víctimas y la justicia transicional*, supra.

about acts of violence. However, national studies generally reveal that, although criminal trials have contributed to the reconstruction of the truth, this process has a complementary character to previously established facts. This means that trials assume a role that is above all symbolic, with positive and repairing effects. What is legally decided by the courts corresponds to victims knowledge or to discoveries by truth commissions and other such bodies.

Although this is the case in the majority of countries, some have specific characteristics that are worthy of note. For example Argentina, where for a long period of time the trials concerning human rights violations focused solely on the search for truth. Another example is Peru, where greater importance was attached to the impact of the truth obtained from a judicial trial in comparison with other countries.

Argentina is perhaps the case that best reflects the aptitude of the judicial system for establishing the truth. Here, the obstacle posed by the "Full Stop and Due Obedience Laws" for trying and sanctioning those responsible for grave violations of human rights was transformed by victims and their representatives into an opportunity to demand that judicial processes must be carried out with the aim of clarifying the facts and determining the truth of what occurred in each specific case heard by the judges. Thus between 1999 and 2003, judicial processes recognized the right to truth for victims, their families, and society in general. This judicial recognition of the right to truth relied on the impetus of the Inter-American System. Beginning with an amicable settlement agreement signed in 1999 between the government of Argentina and the petitioners in a case before the Inter-American Commission,<sup>34</sup> national judges protected families right to the truth and to mourning in the framework of judicial processes.<sup>35</sup>

In Peru, the actions of the justice system have indeed helped to discover the truth about events. These thus perform an irreplaceable role. In many cases the preliminary and judicial investigations have signified an important contribution to clarifying the facts, taking into account that they have gone beyond the discoveries of the Truth and Reconciliation Commission and have enabled the identities of the perpetrators to be established.

In Chile, judicial processes have contributed to the reconstruction of historical truth. This has been the product of the combined efforts of various actors, which have permitted the reconstruction of the history of violations, the methods of repression, and the agents involved. Mayra Feddersen notes that this required "systematic work over 27 years to reconstruct in great part the history that branded the period between 1973 and 1990", and that this process had been possible largely thanks to attorneys and the families of victims, who "since the early days had utilized the courts of justice as a tool to learn more about the situation of their loved ones".<sup>36</sup> Although the participation of many authors still needs to be determined, there currently is clarity regarding the facts and circumstances, and this is mainly due to judicial processes.

In Uruguay, the contributions to truth in specific cases have been modest and the achievements of judicial processes in this respect are also more symbolic and emblematic, "since little is known about the true fate of the majority of the disappeared, about where to find their remains, or about who were directly responsible"<sup>37</sup>. The historical truth in Uruguay has been constructed on the basis of different sources, such as civil society reports, victims families, university studies, contributions from political sectors, investigations by the press, and even reports by the armed forces. As already noted, the contributions of judicial cases have been modest. Despite their limitations, criminal investigations "are a necessary source for those who are trying to discover" the truth.<sup>38</sup>

Given that a truth commission has not been established in Colombia, in theory judicial processes there would be the appropriate settings for establishing the truth. However, according to Guzmán, Sánchez, and Uprimny, "The possibilities of [the judicial processes] contributing to the truth are seriously limited by the practical conditions in applying the law [of justice and peace], the [few] incentives that exist for truth-telling, and the investigative capacity of the Prosecutor,"<sup>39</sup> all of which generate the risk of privileging the voice of victimizers and weakening the potential of the peace and justice process for securing knowledge of the truth. Moreover, due to the nature of the Justice

34 The case referred to is that of Carmen Aguiar de Lapacó, Case 12,059, Report no. 21/00 of 29 February 2000.

35 Barbuto in *Las víctimas y la justicia transicional*, supra.

36 Feddersen in *Las víctimas y la justicia transicional*, supra.

37 Prats in *Las víctimas y la justicia transicional*, supra.

38 Ibid.

39 Sánchez, Guzmán and Uprimny in *Las víctimas y la justicia transicional*, supra.

and Peace Law, which provides benefits to those who submit to it, the account of the truth depends on who renders the version, which means that these truths could be partial or incomplete.

Two aspects may be cited regarding the use of judicial processes for obtaining reparation: the concrete measures ordered by judges in the region, and the significance of judicial instruments in terms of reparation. Regarding the former, the measures ruled by judges are intended as compensation (Guatemala, Peru, Argentina, Chile, Uruguay). The influence of Inter-American jurisprudence has not reached the point at which it enables judges in the countries examined in the study to order measures other than economic compensation, not even when this has been expressly solicited, such as in Peru. In Guatemala, the National Compensation Program recommended by the Historical Clarification Commission has still not managed to design policies of comprehensive reparation. Furthermore, reparation as the result of judicial processes is scarce. However, the exhumations ordered in the courtroom have had a reparation effect in Guatemala insofar as these actions have helped victims find out about the fate of their loved ones. According to Benjamín Cuéllar (author of the chapter on El Salvador), although victims in this country have the right to comprehensive reparation which should have been ordered in a judgment, "this judgment never arrived".<sup>40</sup>

In Uruguay, Law 18.026 of 2006 states that victims of crimes within the jurisdiction of the International Criminal Court are to receive comprehensive reparation through measures of restitution or rehabilitation which go beyond economic compensation. Although this provision has still not been applied by the judges, some progress has been made through its implementation. On 19 October 2009, Law 18.596 was adopted which has a greater reach in that in Article 3 it recognizes the right to comprehensive reparation for victims of state terrorism during the period from 27 June 1973 to 28 February 1985. In addition, the Ministry for Education and Culture is establishing a special commission charged with processing petitions submitted under this Law.

Regarding the second aspect, i.e. the significance of judicial processes as a means of obtaining reparation, criminal proceedings have become instruments for recognizing and dignifying victims in almost all

countries. The findings of the authors of the national studies are clear. Carlos Rivera illustrates the significance of a legal action in Peru in the following terms: "The existence of a preliminary investigation, and even more so the criminal process for human rights violations, is very significant, because it allows victims, who usually passed through unperceived or were simply ignored by the justice system due to their social or economic condition, to be able to not only move and create a reaction from one of the most rigid state machineries, but also to obtain concrete results: causing the investigation or prosecution of persons who in other circumstances occupied positions of power".

Similarly, Martín Prats notes that for victims in Uruguay "the possibility of presenting claims, of accessing tribunals, and of confronting the accused in court has signified small "moral vengeance". He adds: "To see the victimizers, formerly omnipotent and unpunished, seated in the dock of the accused, enter the court in handcuffs, or confined in detention centers, demonstrates how the judicial processes can become settings for repairing and dignifying victims".

## Conclusions

One conclusion that can be drawn from the study is that the results that have been achieved through investigations and criminal proceedings are very precarious and are still a long way from meeting international standards. If we compare the number of sentences pronounced in Argentina and Chile, i.e. those countries with the highest number of convictions for crimes of the past (68 and 59 respectively), with the number of victims from these countries years of dictatorship (30,000 and 31,425 respectively), it is clear that the results are inadequate and that the great majority of victims have not received an acceptable judicial response to their violated rights. In the case of Guatemala, there are only three rulings that sustained the conviction of ten individuals in an armed conflict that left at least 160,000 dead and 40,000 disappeared. In Peru, nine individuals have been convicted in cases related to a conflict that left approximately 69,000 victims. The results are even more shocking in El Salvador or Colombia, where there are no convictions at all in cases related to the extensive and brutal armed conflicts.<sup>41</sup>

<sup>40</sup> Cuéllar in *Las víctimas y la justicia transicional*, supra.

<sup>41</sup> More information can be found in the national chapters of the publication referred in footnote 2.

Another important conclusion is that, although the state, according to international obligations, has a duty to satisfy the victims right to justice through the investigation, prosecution and punishment of grave human rights violations, in the vast majority of cases compliance does not occur as the result of action by the state. In most cases, compliance has been repeatedly demanded of the state by the victims, making them the essential motor of the trials and of any results that may be achieved. As Carlos Rivera notes in connection with Peru: "The legitimacy that the victims have today was not given by the State, but is a recognition earned and owned by the victims themselves".

As already noted, criminal proceedings concerning past human rights violations face obstacles of a normative, political, institutional, cultural, economic and ideological nature. This leads to a third conclusion, namely that the victims have undoubtedly been the motor that has kept the judicial processes going and thanks to their persistent efforts at least some of these obstacles have been confronted and to some extent overcome. However, it should also be noted that other national and international actors have played important roles in confronting and overcoming obstacles to criminal prosecutions in the long term. In some countries (e.g. Peru), the role of international actors such as the Inter-American System of Human Rights<sup>42</sup> has had a greater impact in specific criminal cases than in any other country. In fact, findings obtained in Peru by the Inter-American Court on Human Rights have directly influenced the course of specific judicial procedures. Some cases have been reopened and laws and judicial decisions have been discarded on the basis of other decisions by this international authority. At the same time, in countries like Argentina, Chile, and Colombia, advances in judicial procedures have been led mainly by national judicial institutions, such as the constitutional court, the supreme court, and individual judges or prosecutors.

With respect to national actors, it is important to note the significant role played by human rights and civil society organizations, which have designed legal

and political strategies to confront obstacles in the courts, respond to the public discourse and question state policies. Strategies against amnesty laws (which included national challenges and, when these failed, international challenges) aimed at repealing, annulling or deeming them inapplicable (depending on the country) are a prime example. Another example concerns campaigns denouncing laws and legal reforms that were intended to disadvantage victims, such as the Victims Law in Colombia or Peru's law granting public funds to cover legal defense costs for military personnel on trial for past human rights violations, without making such funds available for the victims. Measures favorable to the prosecution of human rights cases, such as the creation of special courts to prosecute human rights violations in Peru and Chile, have been actively promoted and supported by the organizations that represent victims in both countries.

By questioning the political and judicial decisions of investigators and judges that have favored impunity through the inappropriate use of criminal law instruments such as statute of limitations or *res iudicata*, the untiring efforts of the victims and the organizations representing them have in some cases made it possible for these decisions to be overruled. This has led to the continuation, reopening or initiation of investigations, even in the most complicated of contexts such as the dictatorships of the Southern Cone, the Fujimori dictatorship in Peru, and the authoritarian regimes following the civil wars in Central America, and even against the most powerful figures (former presidents, or former high-ranking military officials). National organizations have also been persistent, even in the most difficult circumstances, in insisting on prosecuting criminal acts by filing charges, submitting evidence, giving testimony, providing documents, putting forward factual and legal arguments, and by constantly urging judicial authorities to achieve the best possible result in the given context. Where, for example, amnesty laws prohibited sanctions, demands focused on the right to truth, as was argued and accomplished in Argentina.

Another example of the key influence human rights organizations have had at the national level is the role they played in promoting education campaigns aimed at breaching a rigid judicial mindframe and making judicial authorities more flexible and receptive to taking international law and jurisprudence into account in their judgments. Thanks to these efforts, in many Latin American countries the judicial stage is now no longer

<sup>42</sup> The role of the Inter-American System has been promoted by the victims and the organizations that support them, who have intensely used the mechanisms of the Inter-American System of Human Rights since the first atrocities took place in the 1980s in the Peruvian armed conflict. For further information please refer to: *Victims Unsilenced: the Inter-American Human Rights System and Transitional Justice in Latin America*. Due Process of Law Foundation, Washington DC, 2007, available at <http://www.dplf.org/uploads/1190403828.pdf>.



exclusively for judicial officials and defense lawyers, and the victims perspective has become ever more essential and legitimate. Even though victims rights are still far from being satisfied, fewer people now question the notion that victims have rights that should be exercised in criminal proceedings.

Even though victim participation in criminal proceedings is, generally speaking, legally guaranteed (though at varying levels depending on complexity and/or normative evolution in each country), the main challenge lies in its actual realization. Once again, the consistent and creative demands of the victims have meant that, even in adverse circumstances and faced with differing norms and laws, it has been possible to modify judicial practices to allow victims and their representatives to intervene and defend their rights in each of the different stages of the investigation and criminal proceedings.

With respect to criminal proceedings as a means to reparation, the study addressed two aspects: concrete economic measures ordered by national judges, and criminal proceedings as a reparation measure per se. Unfortunately, the Inter-American System has had little success in convincing national judges to order measures other than monetary compensation. In most of the countries in the study, criminal investigation and trials have become a way to recognize and afford dignity to the victims. Criminal prosecutions are a valid way to uncover past truths. On the other hand, the study revealed that, in general, although criminal proceedings have contributed towards reconstruction of the truth, they have basically confirmed or complemented already known facts. They therefore play a significant symbolic role, with positive and reparational effects in that a personal truth finally becomes a historic, official one.

The existence of a criminal investigation followed by a judicial decision confirming deeds long alleged by an individual who has been historically ignored by the judicial system, is extremely important. The fact that these long-ignored individuals were finally able to make judicial authorities (as traditionally impenetrable institutions) move against and actually pin responsibility for atrocities on previously powerful and untouchable representatives of the state, is a very significant development in both historical and emotional terms. The judicial process thus extends beyond the punitive function of providing justice to giving the victim a new position in society with social and historic recognition.

Although it is true that the numbers (e.g. relating to convictions) still fall short, the transitional justice processes in Latin America should also be looked at from a different perspective, one that focuses on and recognizes the legitimacy and dignity earned by the victims through these processes. And legitimacy and dignity cannot be measured in numbers. Although far from complying with the spirit of the internationally recognized right to justice, this long road has served to reveal the facts about the practices of terror used during armed conflicts, military dictatorships and authoritarian regimes. The victims have, in their own right, gained legitimacy in the process of unveiling and denouncing these atrocities.

In spite of differing legal provisions, a lack of political will on the part of governments and judicial authorities, and in many cases the entrenched opposition of actors benefiting from impunity, the force that has brought about advances on the road to justice has been the consistent, dedicated and determined efforts of the victims who have not rested in denouncing, documenting, and insisting on finding those responsible, and in the creativity, imagination and judicial rigor of the organizations and individuals that have accompanied them. Criminal proceedings have not only played their natural role of sanctioning and giving facts historical recognition, but have also given the victims (who are usually forgotten and ignored by official institutions) the opportunity to denounce face to face and on equal terms the people previously more powerful than themselves who were responsible for violating their rights.



## Archives against Amnesia

TRUDY HUSKAMP PETERSON<sup>1</sup>

“He fainted on top of the display case,” the archivist said. The Russian state archives put the Molotov-Ribbentrop pact on view in the early 1990s. An elderly man came to the exhibit, looked at the document, announced, “I heard about this, but I never believed it,” and fainted, shattering the top of the exhibit case and scattering glass shards on the document.

“I can’t get anything out of it,” said the specialist. He had just used all available 21<sup>st</sup> century wizardry to try to read the words of a heavily inked-out set of minutes of a meeting of the Panzos municipal council in Guatemala, held the day after a clash between the villagers and the Army left at least 35 dead. First someone crossed out the words, then (apparently using the same pen that was used to write the minutes) drew loops upon loops over the words, obscuring them completely.

Clearly the treaty and the minutes are documents that stun and documents that are considered dangerous by someone. Archives usually are not that frightening, but many archives hold significant information for dealing with the past and for protecting human rights.

The state is often seen as the ultimate protector and violator of human rights and the state archives as a key source for information about the actions of the

state. In a globalizing world, however, many other archival sources are available to help the researcher who wishes to investigate human rights issues. This essay describes the scope of archival sources that are relevant to human rights investigations that deal with the past, then turns to a discussion of the use of archives in post-conflict settings, and finally considers the protection and development of archives as an essential part of preventing social amnesia.

### I. Scope of archival sources

Any investigation using archives begins with a survey of materials.<sup>2</sup> When embarking on a survey and subsequent research in archives, the researcher needs to understand two basic principles of archives, the physical types of materials found in archives, and the legal status of the materials. Armed with that background information, the researcher can identify and use the records of governments, intergovernmental bodies and private sector institutions as well as the papers of individuals.

Archivists organize and describe their holdings in accordance with the principles of provenance and original order. *Provenance* is the relationship between the materials and the organization or individual that made, received, maintained and used them in the conduct of organizational or personal activity. The principle of provenance, which is accepted by archivists around the world, requires the archives to keep the documentary materials of one provenance separate from those of any other provenance. For example, archives do not mix records of one labor union with the records of another or the personal papers of a labor leader with the records of the labor union; rather, the archives will have one body of material

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2 If the survey results show that no materials exist that are relevant to the investigation or the materials that do exist are incomplete or inaccurate, then the researcher must begin the process of creating documentation, using such techniques as oral interviews, data collection and statistical profiling, or forensic examination. Many, if not most, investigations will use existing archives and then create additional source materials.

described as the records of union A, a second body of material described as those of union B, and a third body of material described as the personal papers of the union leader. The second principle, *original order*, holds that records from a single entity (in other words, one provenance) should retain the arrangement established by the creating entity; this preserves the existing relationships among the records and allows later researchers to use any search tools created by the originating institution. Institutional records often come to the archives with an internal arrangement (for example, chronological, alphabetical, numerical) that the archivists preserve. Personal papers, on the other hand, may have little organization, and archivists often create order in them. Taken together, provenance and original order preserve essential evidence about the context in which the records were created and used and the records systems that produced them, thereby protecting their utility for legal processes.

Archives hold a wide variety of physical types of material, any of which may include important information for human rights research: paper and the counterpart electronic desktop documents; statistical, scientific and managerial databases on paper and in electronic systems; maps on paper, aerial photography, and digital cartography; drawings, including sketches and measured architectural and engineering drawings and computer-assisted designs; posters and background drawings; still photographs (analog and digital); sound recordings on a variety of media; videotape and digital video and motion picture footage. While archives normally do not hold natural objects and artifacts, some archives will have a few items that are included with paper files such as exhibits submitted to court that were then transferred with court records or pieces of insignia found among police and military records. Personal papers may include a variety of small objects.

Both institutions and persons have legal title to, and therefore control access to, their records and papers. If the records remain within the dominion of the institution that created them (such as the records of a government body that are now in the government archives), access to the records is controlled by the laws, regulations or policies established by the institution. If the records are transferred to another entity, such as the records of a civil society organization's being transferred to university archives, the dominion changes and legal title passes through the execution of an instrument of transfer, usually a deed of gift or an exchange

of letters, which should specify the conditions of access to the materials. Transfer of title to personal papers is usually conveyed through a deed of gift, an exchange of letters or a will; these instruments should also specify access conditions. Archives usually give researchers access to the legal transfer documents.

### Research in records of governments

The first research question is which agencies of the government create records that are important to the matter under investigation. While the records of the military, the police, courts, and prosecutors are obvious choices in human rights investigations, depending on the issue researchers may also need, for example, the records of the land registration office, the cemetery administration, the health ministry, or the registrar of births, deaths, and marriages. Records of previous special investigations, such as those of truth commissions, may also provide important information.

A second question is what level of government is most likely to have relevant evidence: municipal, district, provincial, or national. The next question is where these records are located: in the originating office, transferred to the office's archives (either at the local or national level), or transferred to regional or national archives. For example, police records from a district may be transferred to the central police archives in the capitol city (as in Guatemala) or to the district archives (as in Brazil). Military institutions in many countries maintain their own archives separate from the central state archives; in some countries there are separate archives for the police and other security services, for the foreign ministry, for the parliament or for the head of government. The central state archives will know which government agencies are authorized to keep their own archives, as well as which records are to be transferred to the central archives or to regional archives.

Another question is when the records were supposed to have been transferred from the active office to the archives. Archives try to establish a schedule for transfer, for example, when the records are 20 years old, or five years after the case or investigation is closed. Researchers can ask to see any schedule for transfer of records; if the records are overdue for transfer, it may be possible to pressure the archives and the agency to execute the transfer. Because the archives are set up to handle research (at least for internal purposes if not for the general public),

it is usually easier for the researcher to work in the archives than in the creating office.

For government records, freedom of information acts help researchers, but they are often a blunt instrument: the request may not relate to an easily identifiable body of records, the records may be completely disorganized, the queues of requests may be long, and the will to comply with the requirements of the law may be weak. Archives access policies may be more flexible than FOIA regulations, but archives normally cannot unilaterally declassify items with national security markings and cannot override access constraints in donors deeds of gift. If the records are closed to the general public but can be made available to the specific researcher, public archives normally can accommodate the researcher in an area separated from other researchers.

Records of a government other than the one in the country where the investigation is centered may be extremely helpful. For example, satellite photography taken by U.S. equipment was used in the trials of the International Criminal Tribunal for Yugoslavia to show mass graves, and copies of U.S. diplomatic correspondence were used in the Fujimori trial in Chile.<sup>3</sup>

Government archives are rapidly putting descriptions of their holdings and images of some of their materials on the Internet. Researchers should understand that it is highly unlikely that all descriptions and all holdings are available electronically. In response to an email or postal inquiry, the archives may provide copies of additional search tools and copies of specific documents, but personal visits are usually required for extensive research in the records.

### Research in records of international and intergovernmental bodies

The second half of the twentieth century saw the emergence of a forest of international and intergovernmental bodies, most of which are concerned in some way with human rights issues. From the U.N. special rapporteurs to the

international criminal tribunals, from the World Trade Organization to the World Bank and to the United Nations High Commissioner for Refugees, these bodies have archives of potential interest to human rights researchers. Nearly all of them have archivists and finding aids to help researchers understand the nature of the records they hold.<sup>4</sup> The trend is to make these archives available for research after 20 years, but exceptions can and are made for investigations in legal matters.

### Research in records of non-government entities

Businesses, labor organizations, churches, political parties, educational institutions, media, and civil society non-governmental organizations all create and maintain records that concern human rights. For example, the records of multinational businesses contain information on the deadly explosion at the Union Carbide India Limited plant in Bhopal, India in 1984; the disastrous explosion and leak from the British Petroleum oil rig in the Gulf of Mexico in 2010; and the data of cigarette companies indicating cancer is caused by smoking. Records of labor organizations document not only their struggle with employers, but may contain documentation of working conditions, unfair labor practices, or corruption within the organization itself. Church records in several countries have been used in recent investigations into sexual abuses by the clergy; in Canada, church records are used by researchers looking into practices in boarding schools for Native Americans run by churches in the nineteenth and twentieth centuries.<sup>5</sup> The public broadcasts and publications of media organizations may provide useful information, such as the broadcasts of Radio Television Libre des Mille Collines in Rwanda in the period before the 1994 genocide; background footage and reporters notes may be even more useful, but access to these is often difficult because of journalism ethics against revealing sources. Civil society organizations are diverse; records of the human rights organizations of course contain relevant

3 "Spy Photos Indicate Mass Grave at Serb-Held Town, US Says," *New York Times*, August 10, 1995; <http://www.nytimes.com/1995/08/10/world/spy-photos-indicate-mass-grave-at-serb-held-town-us-says.html?scp=2&sq=August+10%2C+1995&st=nyt>; "Archives Expert Testifies in Fujimori Trial," National Security Archive Update, September 8, 2008, <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB256/index.htm>; "Fujimori found guilty of war crimes," <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB274/index.htm>.

4 For a list of organizations and their access policies, see Trudy Huskamp Peterson, "Access to Archives of Intergovernmental Organizations," [http://www.wilsoncenter.org/index.cfm?topic\\_id=1409&fuseaction=topics.item&news\\_id=104527](http://www.wilsoncenter.org/index.cfm?topic_id=1409&fuseaction=topics.item&news_id=104527); for a list of archives of international bodies that are members of the International Council on Archives see <http://new.ica.org/?lid=2806&group1=26>.

5 See, for example, "The Forgotten Children," *The United Church Observer*, 2010-07 [http://www.ucobserver.org/faith/2010/07/forgotten\\_children/](http://www.ucobserver.org/faith/2010/07/forgotten_children/).

information but so do records of the Boy Scouts<sup>6</sup> and fraternal organizations, to name just two.

Researchers seeking to use the records of non-government entities need to determine whether the organization maintains its own archives or whether it transfers its records to another archive or historical society. In either case, the researcher should ask whether the records have been described, whether search tools are available and what access is permitted. Private sector institutions such as businesses and churches generally tightly control access, but some research may be possible. If the organization has its own records but does not have formal archives, the researcher could encourage the owner to transfer its records to an appropriate archive.

### Research in personal papers

Personal papers are as varied as the persons who create them. They are primarily papers and photographs; increasingly they include digital documents and digital photography. Just as the first step in identifying relevant records is to determine what organization at what level is likely to be creating or receiving the records, the first step in identifying relevant personal papers is to develop a profile of persons important to the research (for example, military officers, former corporate leaders, prosecutors, journalists) and then to develop a list of individuals fitting the profile.

Then the researcher must determine where the personal papers are located: with the person, with an heir or friend or promised or delivered to an archive. A special question with personal papers is whether the person actually has title to the materials he or she holds; for example, a former military officer may have a document from the army that he simply took home. While this may not be a great problem for a researcher, it can be a problem for an archivist who has to determine who controls access to the item. Personal papers in a repository may have a finding aid, but papers still in the possession of the person or an heir are unlikely to have one, and the researcher granted permission to use the materials simply must dig through them. In this case, too, if the papers are important the researcher might encourage the owner to locate archives that would be willing to accept and preserve the papers.

<sup>6</sup> See "Boy Scouts shield abuser files used to vet volunteers," *Dallas Morning News*, 2010-09-12, <http://www.dallasnews.com/sharedcontent/dws/dn/latestnews/stories/091210dnmetscoutfiles.2b77dd7.html>.

## II. Use of archives in post-conflict settings

The United Nations High Commission on Human Rights principles against impunity, prepared by French jurist Louis Joinet and amended by Diane Orentlicher, emphasize that a person has a right to know what happened, a right to the truth, and that society as a whole has both a right to know and a responsibility to remember:

The right to know is also a collective right, drawing upon history to prevent violations from recurring in the future. Its corollary is a "duty to remember," which the State must assume, in order to guard against the perversions of history that go under the names of revisionism or negationism; the knowledge of the oppression it has lived through is part of a people's national heritage and as such much be preserved.<sup>7</sup>

As part of the measures a State must take to protect the right to know, Joinet declared that the State "must ensure the preservation of, and access to, archives concerning violations of human rights and humanitarian law."<sup>8</sup>

Swisspeace created a very helpful paradigm of categories for asserting rights and dealing with the past in post-conflict situations: the demand to hold perpetrators accountable for past violations of human rights; the reform of the governmental system to prevent a future recurrence of past repressive practices; truth-seeking and the right to know what really happened, both in personal terms (such as learning the fate of a loved one) and in terms of how the society came to be what it was; and the right to reparation, to restitution of property and to moral and material compensation for losses suffered during the period of oppression.

States use a variety of approaches to meet these four demands for reckoning with past injustices. These include prosecutions (domestic, international, or hybrid), institutional reforms including vetting programs, truth-seeking activities such as truth commissions and exhumation projects, and

<sup>7</sup> "The Administration of Justice and the Human Rights of Detainees: Question of the impunity of perpetrators of human rights violations (civil and political). Revised final report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119," United Nations Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/1997/20/Rev.1, 1997-10-02; updated by Diane Orentlicher, E/CN.4/2005/102, 18 February 2005, and E/CN.4/2005/102/Add.1, 8 February 2005.

<sup>8</sup> *Ibid.*, Principle 5.

reparations and restitution initiatives, including public memorial activities. Every one of these accountability mechanisms relies on records.

### **Prosecution and the right to justice**

The world of the justice system is choked with paper, electronic records, and audiovisual evidence. Investigators search out and identify key archival resources; prosecutors select those they will use to bring indictments and prosecutions; defense counsel search for documents to support their position. These resources can be assembled from all the sources and all the physical types discussed above.

The right to justice also encompasses the monitoring of judicial systems. Here the records of the court itself are key, as investigators seek to develop a pattern of rulings and decisions. Some monitoring investigations will look at police records to see patterns in handling complaints; for example, did all complaints of sexual assault receive no or only cursory investigation.

### **Institutional reform and the promotion of non-recurrence**

Institutional reform through vetting relies heavily on records; personnel records in the first instance, but also records of participation in groups, records of voting, and records of participation in key events. For example, the International Military Tribunal after World War II used footage from Leni Riefenstahl's film "Triumph of the Will" on the 1934 Nazi party congress in Nuremberg that showed Minister of the Economy Hjalmar Schacht with a Party emblem in his buttonhole, "thereby contradicting his assertion that he was a pure economist and never a Nazi."<sup>9</sup>

Institutional reform also includes rebuilding governmental structures, importantly including the national archives system discussed in Part III below.

### **Truth seeking and the right to know**

Archives are central to this post-conflict process. From seeking a personal file, such as one kept on the person by secret police or the person's own personnel file at his place of employment, the person has a stake in the preservation of the record. Families, too, seek records that will explain the fate of loved ones, while community leaders seek

records of decision-making at higher governmental levels or in corporate bodies to understand what happened to their community. Broader truth-seeking inquiries, including truth commissions, use records extensively—if they can gain access to them.

### **Right to reparation**

Restitution of property (real estate or personal property), compensation for losses, and rehabilitation are reparations to individuals or their heirs or, in a few cases, to defined groups such as a village or a tribe. The societal forms of reparations such as building a school or erecting a monument often can be made without recourse to records, but records are crucial to reparations to individuals. Identity, citizenship, marital status, ownership of land, ownership of business ventures, ownership of movable goods, ownership of intellectual property: all of these are documented in archives and all support claims for restoration, restitution, and compensation. Most of these ownership and identity statuses can be traced in state archives or in church archives; records of commercial transactions preserved in notarial or business archives are useful in documenting the transfer of property. Insurance records, for example, have been used to document property previously owned (for example, art objects seized by the Nazis from Jewish owners), while the United Nations High Commissioner for Refugees holds the records of the compensation claims filed by Asians forced to leave Uganda by Idi Amin.

The use of archives for these post-conflict processes is, of course, limited by incomplete records, destroyed records, and inaccurate records. All archival items must be subjected to the test of authenticity (they were created or sent by the person who seems to have created or sent them at the time shown), integrity (they are complete and unadulterated) and reliability (the information contained in them can be trusted as a full and accurate account of the transaction, action, or fact). But archives provide an unparalleled foundation for dealing with the past in a post-conflict world, where the disease of amnesia is all too easy to contract.

### **III. The archival deficit and the right to know**

Archivists have two great influences on research work: deciding what to save (appraisal and acquisition) and telling the researcher what the materials contain (description). Unless the materials exist and the researcher knows they exist, research cannot be undertaken.

<sup>9</sup> Sandra Schulberg, "Filmmakers for the prosecution: The making of *The Nazi Plan* and *Nuremberg: Its Lesson for Today*," in *Nuremberg and The Hague: Jurisdiction and archives*, "Nationaal Archief of the Netherlands Magazine, Special, November 2009, p. 9.

While each nation has its own archival tradition, the archival profession is increasingly adopting international standards of practice. During the past 20 years, the International Council on Archives has adopted an International Standard for Archival Description (General)<sup>10</sup> and several subsidiary standards for informing researchers about the materials that archives hold and a voluntary Code of Ethics<sup>11</sup> that includes guidelines on best practice when working with researchers.

As wide-spread as these standard practices may be, in too many countries there is an archival deficit, that is, a difference between the promise of a functional national archives system and the reality of a limited, cramped, under-resourced archival institution. All countries have national archives; it is one of the basic offices of functioning governments. But not all countries support their archives; some countries, in fact, actively limit the national archives ability to fully document the workings of the government, let alone the activities of non-governmental institutions and individuals important to the heritage of the country.

What causes an “archival deficit”? Several things. First is the attitude of those in power. Ignorance of the importance of the records is one problem; a lack of interest in the past actions of the ministry or the business or institution is another; either may be coupled with a dangerous desire to make sure that past actions stay in the past. The pre-1997 records of the National Police in Guatemala, for example, were not destroyed (although the police said they were), but neither were they maintained in any order that would permit their use. As far as the police were concerned, the records were theirs—not those of the citizens of Guatemala—and they could control the knowledge of past activities.

Other factors are structural. A system in which many ministries are authorized to keep their own archives reduces the central state archives to keeping those records that the state considers relatively non-sensitive; this, in turn, allows the powerful ministries to control access to the records as they see fit. The archives law may not permit the archives to inspect the records in the custody of originating offices, which means that ministries can be scrupulous or careless with their records with no outside accountability. Similarly, an archival system that

does not permit the state archives to hold security classified records means that key bodies of material are simply not declassified and therefore not turned over to the archives where they would be made available for research use. The state archives may not be authorized or encouraged to hold the records of non-governmental institutions or the papers of private citizens, leaving it to non-governmental archives, without access to state funds, to close the gap.

Still other factors are psychological. Archivists may be cowed by powerful superiors who want to see access suppressed and preservation reduced. Government archivists appointed for political reliability rather than professional capacity may approach access issues with a strong desire to protect the status quo rather than balancing the need for confidentiality against the right of citizens to know.

And, of course, budgets are a factor. The archives staff may be far too few for the job. The archives building may be old, insecure, and completely full. Archivists may not have the equipment to carry out their work—for example, an archive without a computer when the institution is actively creating important records in its digital system. Archivists may not have the money to participate in international meetings where they can receive training in international standards. The educational opportunities for archivists within the country may be inadequate or non-existent but the funds are not available, either to bring in archival educators from abroad or to send staff for training outside the country.

Making up this deficit is not easy. The start is to conceive the archives within a country as a system and determine where the emphasis needs to be placed.<sup>12</sup>

If the first need is to strengthen the state archives, is the law governing archives adequate?<sup>13</sup> Does it cover all records of all ministries (not just those of ministries that are not powerful), the parliament,

10 The standard is available in many languages at [http://www.ica.org/sites/default/files/isad\\_g\\_2e.pdf](http://www.ica.org/sites/default/files/isad_g_2e.pdf).

11 The code of ethics is available in many languages at <http://new.ica.org/?lid=5555&bid=225>.

12 The International Council of Archives Pacific Regional Branch has developed a “Recordkeeping for Good Governance Toolkit” that provides a useful questionnaire for self-analysis by national archive. On line in English only at <http://new.ica.org/?lid=4521&bid=139>.

13 The International Council on Archives has useful guidance on the elements of an archives law, “Principles for Archives and Records Legislation,” 2004, International Council on Archives, <http://www.ica.org/sites/default/files/Study%2019%20CLM.pdf>.



the head of state, and the courts? Does it provide for the transfer of all records to the state archives or, if not, does it give the archives the authority to set standards and inspect other government archives? Does it permit the state archives to hold private sector materials? Is there an access law and does it provide tools for the right to know, whether the records are in the hands of a ministry or the archives? Some jurisdictions, such as the Federal District of Mexico, have found that the very existence of an access law strengthens the state archives because it encourages institutions to organize their records in order to respond to requests and it also encourages ministries to turn over older records to the state archives, allowing the ministry to divert time-consuming access requests.

Businesses, particularly global corporations, have records that directly pertain to human rights—for example, information on additives in food, the chemicals used in pharmaceuticals and cosmetics, safety in manufacturing plants, discharge of effluents into air and water—and the archives of these institutions must be seen as part of the national archival system that require oversight if not state regulation. While some important information about corporate activity can be obtained by government inspection or by requiring reports from businesses, this information will be partial and will not fully reflect the decision-making processes within the business leadership. Only by preserving the records of the business itself will sufficient information be available for researchers to understand the choices the business made. Access to these records will be limited, but in order for access to be provided in the instance of a lawsuit, the records must be maintained, and human rights proponents must urge the preservation of business archives.<sup>14</sup>

The records of religious institutions are another crucial part of the national archival system. In some countries, religious institutions are part of the state system and fall within the general guidance of state archives. But in other countries, religious leaders operate without state sanction, and in all religious systems there are sensitive records of internal activities. While state relationships with religious institutions can be even more contentious than the relationships between businesses and states, the signal importance of the records of religious institutions means that their archives must

be considered within the context of the national archival system. At minimum, religious bodies must be encouraged to keep archives in accordance with professional standards; an institution such as the national archives should be designated to maintain a directory of institutions holding religious records. Like the business records, access to these records will be limited but the need for their preservation is fundamental.

Records of civil society institutions and personal papers of individuals provide another significant source for human rights information. If state archives are not authorized or not encouraged to seek donations of these materials or if the civil society institutions and individuals do not trust the state archives, then other archival institutions must be established and supported to be the repository for these important materials. These alternate archives must be able to take both materials that can be made public and those that must be restricted for a period of time in order to protect the persons mentioned in them.

Preservation of the archives, whether of state or private origin, depends on proper housing and adequate security. Water, fire, wind, faulty construction, lack of maintenance and natural enemies such as termites all play a daily role in the destruction of archives.<sup>15</sup> Particularly when handling electronic and audiovisual materials, dust is a great problem; for all archives in damp climates, mold is a persistent problem; termites and other pulp-loving vermin damage records across the world. Open doors and windows, no alarms, disinterested guards, and lax procedures are all security risks. While some of the problem is money, other parts of the problem are management issues of assuring alert, repetitive surveillance and proper cleaning.

The rapid trend toward digitizing older records also raises preservation concerns. In country after country, governments are digitizing older records, for example, records of land title. The question is what happens to the paper originals once the digitization is complete. In countries where the only legally sufficient document is an original, the digitized copy can only be considered a reference copy and the original will have to be produced in case of dispute. Unfortunately, digitization projects often do not consider the preservation of the items

14 For a good discussion of the access problems from the point of view of business archivists, see the papers by Becky Haglund Tousey and Elizabeth Adkins and Yuko Matsuzaki at <http://www2.archivists.org/proceedings/access-to-archives>.

15 Just in the past year and a half, archives have been damaged or destroyed by a hurricane in Haiti, an earthquake in New Zealand, a sinkhole collapse in Germany, and a fire in Kyrgyzstan.

after digitization, leaving bundles of loosely tied records, with their original bindings possibly cut away to facilitate copying, sitting on shelves. Without appropriate care for the original records, the ability to produce the originals when needed is endangered.

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The role of archives is central to the exercise and protection of human rights. Archivists are duty-bearers for human rights; that is, it is the duty of the archivist to select, protect and make available the records of institutions, with the clear understanding that some of these records are crucial evidence for the protection of the rights of individuals. Archives, properly supported and managed, can be a bulwark against societal amnesia.

## Business in Armed Conflict Zones: How to Avoid Complicity and Comply with International Standards

SALIL TRIPATHI<sup>1</sup>

Frans van Anraat is a Dutch businessman who was conducting business with Iraq in the 1980s. There was no law barring business transactions with Iraq in the 1980s, and he had not broken any Dutch export laws. He sold chemical components in Iraq, which were then used to make chemical weapons in the attacks on the Kurds in 1988, especially in Halabja, and against the Iranian town of Sardasht in 1987 and 1988. As is now widely-known, the Iraqi Government of Saddam Hussein had used poison gases against Iranians during the Iran-Iraq War of 1980-1988, and during "Operation Anfal" in Iraqi Kurdistan in 1988. Tens of thousands of civilians in Kurdistan died or were maimed in that operation.

Van Anraat said his business dealings in Iraq were regular and within the law, and that he was not selling chemical weapons to the Saddam regime. But an investigation by U.S. customs authorities showed that van Anraat had been involved in four shipments to Iraq of thiodiglycol, an industrial chemical which can be used to make mustard gas. It also has civilian uses.

The Dutch Government initiated prosecution against van Anraat, saying he was aware of the real purpose for the chemicals. The prosecution said van Anraat was "suspected of delivering thousands of tons of raw materials for chemical weapons to the former regime in Baghdad between 1984 and 1988".

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In December 2005, a court in the Netherlands found van Anraat guilty of complicity in war crimes. According to the judge, van Anraat's deliveries facilitated the attacks and constituted a war crime for which the court imposed the maximum sentence of 15 years imprisonment. The judge stated: "He cannot counter with the argument that this would have happened even without his contribution." The court stated that the attacks against the Kurds had been carried out with the intent to destroy, in whole or in part, the Kurdish population in Iraq, thus qualifying them as acts of genocide. Van Anraat however, was acquitted of the charge of genocide, as it could not be proven that he was aware of the regime's genocidal intent.

Van Anraat appealed against the judgment, saying that the court could not find him guilty beyond a reasonable doubt, and it was unlikely that the judges could have known who was selling which chemicals to Iraq at that time. In May 2007, a Dutch Appeals Court in the Hague increased van Anraat's sentence to 17 years, asserting that he had repeatedly sold chemicals with the knowledge that they were being turned into mustard gas. The Court of Appeals also upheld the initial decision to acquit him of complicity in genocide.<sup>2</sup>

In recent years, the web of liabilities for businesses operating in zones of conflict has been expanding, and businesses can no longer assume that their activities in these zones will not be scrutinized. International policymakers are paying close attention to the issue. Prosecutors are investigating the connections between those persons assisting perpetrators of grave abuses, even if they are not aware of them, and Civil society organisations are campaigning against the links of commodities, finance, and commerce to conflict. While full-scale prosecutions such as the one against van Anraat are relatively rare, investigations and proceedings initiated by complainants under tort law have added to the pressure on businesses to act responsibly. Responsible companies have begun taking steps to protect themselves against

<sup>2</sup> LJN: BA4676, Gerechtshof 's-Gravenhage, 2200050906 - 2

the risk of being found complicit, and international understanding about the notion of complicity has grown.

Businesses have operated in zones of conflict since time immemorial. Armies need money to buy weapons and ammunition; soldiers need food; civilians still need supplies to continue their daily lives; and businesses have to function. Some businesses have played a direct role in conflict by providing the means with which wars are fought. Others have provided infrastructure support – intentionally or not – that has facilitated the continuation of conflicts. Some have supported their national governments while others have aided armed groups – sometimes by choice, sometimes under duress.

There are other indirect ways in which business has contributed to conflict, including paying taxes, royalties, sharing profits with joint venture partners, and otherwise aided and abetted governments or armed opposition groups. Although the chain linking business with conflict varies in length, the number of businesses which are, or appear to be, unaware of it is surprising. The links can expose businesses to the risk of being deemed complicit in grave human rights abuses, including war crimes, crimes against humanity, and genocide. Those crimes are extreme manifestations of the horrors of war, but businesses should be aware that the risks exist. Businesses have paid relatively little attention to these problems, partly because prosecutors have not focused on the role of business in conflict until recently, and partly because there is a high threshold of evidence required to prosecute a criminal case of complicity. It means that prosecutors have opted for cases that are more straightforward. It makes more sense to charge a general whose troops committed mass atrocities under his command, than to charge a financier who may have provided funds to buy particular weapons. Money is fungible, and the onus is on the prosecutor to prove that the financier knew the intent of the army when he arranged for the funds to be transferred. This means businesses, which are often one step removed from those who have carried out illegal acts, have felt they can rest comfortably. It is changing.

Many businesses have maintained that in zones of conflict they have no choice but to comply with requests and orders, even if they are illegal. Nuremberg Trials showed however that such a defence is not tenable. Companies also seek comfort from the fact that under the law, while a

company is “a person,” it is not “a natural person”, and as such, a company is not covered under the jurisdiction of the Rome Statute of the International Criminal Court. However, a handful of executives and businesspeople have been accused, and some convicted,<sup>3</sup> of inciting genocide. Businesses operating in conflict zones that have not considered the potential consequences of their role, even if unintended or inadvertent, in an environment where genocide may be imminent and have not considered possible preventive measures in this respect, are running the risk of being held liable.

Genocide<sup>4</sup> is a grave crime with a precise legal definition and meaning, and it takes lawyers, jurists, and scholars to interpret its application in a specific context. It is reasonable to assume that, with the exception of private military or security companies, few businesses are likely to be *directly* charged with involvement in committing genocide, crimes

3 The landmark cases in this regard are the ones at the International Crimes Tribunal for Rwanda, involving Radio Télévision Libre des Mille Collines. The station broadcast from July 8, 1993 to July 31, 1994, and its role in the Rwandan Genocide is widely cited as an example of what inciting and vindictive speech can do when it is unregulated and unrestricted, operating in an environment which has no effective alternatives. The ICTR took up the case in October 2000. In August 2003, prosecutors sought life sentences against Ferdinand Nahimana, a director of the radio station, and Jean Bosco Barayagwiza, associated with the station. They were found guilty in December 2003, and they appealed. In November 2007, the appellate court reduced their sentences to 30 and 32 years respectively. In 2009, Valerie Berneriki, a broadcaster, was found guilty of incitement to genocide by a *gacaca* court (traditional community justice courts of Rwanda, revived in 2001), and sentenced to life imprisonment. Felicien Kabuga, president of the radio station, remains a fugitive.

4 Articles II and III of the Genocide Convention of 1948 define genocide as “any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, such as: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.” The punishable acts are: (a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; and (e) Complicity in genocide

against humanity<sup>5</sup> or war crimes.<sup>6</sup> However *indirect* involvement is a different matter. In that context, businessmen can be, and have been, implicated and prosecuted for complicity in grave abuses.

Most businesses justifiably argue that they do not intend to take part in such crimes. A vast majority of businesses have no criminal intent. Most businesses view themselves as making a positive contribution to society – many perform services essential for civilian life to continue during an armed conflict. There are several positive examples of the role businesses have played in zones of conflict. Some businesses have been driven by humanitarian convictions and attempted to help broker peace. Some business leaders in Sri Lanka have helped bring communities together, and taken active steps to recruit people who have given up arms.<sup>7</sup> Similarly, businesses in Zimbabwe, South Africa, and Angola have played a role in helping the warring parties come together for negotiations. In a few cases, as in Northern Ireland, trade unions<sup>8</sup> have played a constructive role in helping to eliminate sectarianism. Employees themselves, as in Rwanda<sup>9</sup> and the Niger Delta<sup>10</sup>, have taken exceptional measures to assist victims during an armed conflict.

Many of these actions are unusually noteworthy. But they are not necessarily drawn from a notion or conception of legal responsibility. These are moral,

value-based responses. Such values and social norms, including social expectations of business, do contribute towards making laws. Responsible businesses have relied on codes of conduct that apply under specific circumstances, sometimes with government and civil society participation. These codes are useful, but they cannot substitute for compliance with existing laws, because such codes of conduct are not necessarily legally enforceable.

To ensure that businesses do not contribute to genocide and that they aid in the peace process, it is necessary to determine clear rules for what they should not do, what they must do, and what they can do. Encouragingly, commendable work has been undertaken in all three areas to which we shall now turn.

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Political scientists have explained violent conflict, between and within nations, in terms of ethnicity, history, memory, culture, or sociology. The work of Paul Collier and Anke Hoeffler<sup>11</sup> at the World Bank, and then at Oxford, has shown that it is wrong to neglect greed as an important aspect in sustaining wars<sup>12</sup>. Subsequent research<sup>13</sup> has shown that both greed and grievance play a role in armed conflict.

As the International Committee of the Red Cross (ICRC) has pointed out,<sup>14</sup> businesses get protection from, and have obligations under, international humanitarian law (IHL). IHL is non-derogable and applies to state and non-state actors in times of conflict under all circumstances. Businesses have always operated in situations of armed conflict, but not always and not necessarily, out of choice. Once a business is operating in a conflict zone, it is not easy for that business to leave due to the important consideration of safety and security for its employees. As the ICRC has observed:

5 The International Military Court at Nuremberg after World War II defined crimes against humanity under Article 6[c] as "Murder, extermination, enslavement, deportation, and other inhumane acts committed against civilian populations, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated."

6 Article 147 of the Fourth Geneva Convention defines war crimes as: "Wilful killing, torture or inhuman treatment, including... wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile power, or wilfully depriving a protected person of the rights of fair and regular trial, ...taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."

7 See *Local Business, Local Peace: The Peacebuilding Potential of the Domestic Private Sector*. International Alert, London, 2007. See [http://www.international-alert.org/peace\\_and\\_economy/peace\\_and\\_economy\\_projects.php?t=3](http://www.international-alert.org/peace_and_economy/peace_and_economy_projects.php?t=3)

8 [http://www.gppac.net/documents/pbp/9/3\\_n\\_ire.htm](http://www.gppac.net/documents/pbp/9/3_n_ire.htm)

9 For example, the exemplary conduct of Paul Rusesabagina, manager of Hotel Mille Collines, later documented in the film, *Hotel Rwanda*.

10 In particular, the assistance provided to refugees from sectarian violence by some oil companies during the Warri crisis of 2004-05.

11 Paul Collier and Anke Hoeffler. "The Economic Causes of Civil Wars." *Oxford Economic Papers*. vol 50 iss 4, (1998), pp 563-573. And "Greed and grievance in civil war" *Oxford Economic Papers*, vol 56 iss 4, (2004), pp 563-595.

12 For a good examination of greed "sustaining" conflict, see Ian Bannon and Paul Collier, eds. *Natural resources and violent conflict: options and actions*. World Bank, 2003.

13 *The Political Economy of Armed Conflict: Beyond Greed and Grievance*. Karen Ballentine and Jake Sherman (eds.) Lynne Rienner Publishers, 2003.

14 Business and international humanitarian law: An introduction to the rights and obligations of business enterprises under international humanitarian law ICRC, Geneva, November 2006. See <http://www.icrc.org/Web/eng/siteeng0.nsf/html/business-ihl-150806>.

*“Business enterprises are reluctant to abandon their personnel, their operations and their capital investments when an armed conflict breaks out around them. A withdrawal of business enterprises from conflict zones may also be undesirable: countries struggling to overcome the torments of armed conflict usually need economic development and private investment. The rules of international humanitarian law that protect civilians and civilian property prohibit attacks against business enterprises personnel – as long as they are not taking a direct part in hostilities – and against business enterprises facilities.”*

However, under conditions of genocide or crimes against humanity, businesses always have the option to leave.

Companies in the extracting sector have faced accusations about their conduct in conflict zones. Their response has frequently referred to the need to operate wherever resources are available and to make long term investments irrespective of temporary crises. That is true at one level, but their presence can contribute to violent conflict. When they operate in remote regions on the periphery of state authority, their presence may exacerbate tensions, including the legitimisation of forces undermining the state. They must ensure that their presence mitigates tensions rather than contributing to them.

The end of the Cold War brought new markets and opportunities. Businesses began investing in countries in which they previously had not. Higher commodity prices meant that businesses invested in areas where raw materials were found, irrespective of political stability. And it led to companies investing in a country even if a conflict were raging. Based on expediency, dealings were conducted with armed opposition groups in areas where state authority was weak. Although these decisions are often driven by the dictates of the market, local managers are not trained to consider the consequences of agreements with armed opposition groups which may lack legal authority in the area under their control. If communities object to the investment, state forces step in under the doctrine of eminent domain. They may use force, with tragic results.

To protect their assets and personnel, companies have been known to make agreements with security forces – or, in some cases, armed groups – to ensure that their operations are not disturbed. Some companies have also entered into financial arrangements with state or non-state actors, often

contributing royalties to the parties engaged in conflict. All of these activities significantly increase the risks for companies operating in such zones, risks not only for their reputation but also for their assets and employees. There is also the risk of being sued, as an enterprise or individual staff member, and prosecuted in international crimes tribunals or at the International Criminal Court.

In addition to avoiding risks, compliance with the law and meeting obligations are also of great importance. Elaborating on business obligations, the ICRC has added:

*“Business enterprises carrying out activities that are closely linked to an armed conflict are required to respect relevant aspects of international humanitarian law. Furthermore, they may be in a position to play an important role in promoting respect for international humanitarian law among political and military authorities or other business enterprises within their sphere of influence. An understanding of international humanitarian law is thus an important ingredient in the ability of a business enterprise to live up to its obligations under the law and to any commitments it may have under the various codes of conduct or voluntary initiatives to which it may have subscribed. An appreciation of the implications of business operations in the dynamics of conflict is also key in identifying potentially significant risks<sup>15</sup> of criminal and civil liability for complicity in violations of international humanitarian law.”*

A company is a legal entity set up to organise economic activities in an efficient way. It is an “organ of society”, as the Universal Declaration of Human Rights characterises non-state actors. But it is an organ of society for a specific purpose – economic activity – and not a more general purpose, or with unlimited obligations. A company is also a social organisation. Companies are made up of people, and they organise people’s lives under rules which must be consistent with human rights law. Laws usually do not bar economic activity in zones of conflict (unless sanctions have been applied). Some companies will therefore continue to operate in zones of conflict. They take risks because their primary aim is to make a profit for their shareholders. This is not to suggest that the profit motive is detrimental. But it is important to remember that companies are not expected to be driven by other considerations.

<sup>15</sup> The way international laws and norms have progressed, it appears that the notions of due diligence and avoidance of risk are converging, and such a norm could emerge as a legal obligation over time.

Companies are not *good* or *bad*; the specific conduct of companies can be *good* or *bad*.

Many large companies make major investments only after undertaking detailed studies of the country's political and legal infrastructure. They have analyzed the risks of expropriation, repatriation, and taxation. They know if they are investing in a country in conflict; they have enough information and analysis to ascertain whether crimes against humanity, war crimes, or genocide are being, or have been, committed. However they are not clear about the extent of their role in supporting it, and what they should do to prevent it.

Companies today operate in an environment of greater public scrutiny, stricter laws, better enforcement, and a more egalitarian architecture of international law than had prevailed during the colonial era. Recognizing that companies operating internationally are not adequately regulated, either by home or host states, and that there is no all-encompassing treaty or law to regulate their conduct, Non-Government Organizations (NGOs) began researching corporate conduct in the mid-1990s in order to lobby for binding accountability mechanisms. Among them, Global Witness, founded in 1993, focused on the links between natural resources and armed conflict, and through a series of investigations drew international attention to conflict commodities, focusing on timber, diamonds, oil, and other minerals. Human Rights Watch produced an important report on the Niger Delta in 1997, highlighting ways in which companies were involved with human rights violations in the region. Amnesty International published Human Rights Principles for Companies in 1998. Partnership Africa Canada reported in 1999 on links between rebel forces and the diamond trade in the Angolan and Sierra Leonean conflicts.

These reports have resulted in sustained international campaigns against many companies and industries, and adverse commentary from international experts,

including the expert panels<sup>16</sup> of the United Nations. In some cases, such as diamonds from Angola and Sierra Leone, the U.N. Security Council has imposed sanctions against specific commodities to prevent the flow of funds to armed opposition groups engaged in violent conflict and committing widespread human rights abuses.

One important outcome of the campaign and focus on the conflicts in Sierra Leone, Liberia, and Angola,<sup>17</sup> with the ensuing sanctions, was the creation of the Kimberley Process Certification Scheme<sup>18</sup> that was set up to ensure that companies do not procure diamonds from armed groups waging a war against legitimate governments. Unilateral sanctions have been imposed on other commodities, such as gemstones from Burma, because of that government's human rights record.

As early as 2000, the UN Global Compact initiated a policy dialogue for companies operating in zones of conflict. It has since revived the project and issued a new set of guidelines. In 2000, the International Business Leaders Forum and International Alert published *The Business of Peace*, and in 2002 the UN published<sup>19</sup> guidelines for companies operating in conflict zones. International Alert also published *Conflict Sensitive Business Practice: Guidance for the Extractive Sector*<sup>20</sup>. In the past year, the Organisation of Economic Cooperation and Development has launched an initiative to ensure mining

16 In its October 2002 report (S/2002/1146), the *United Nations Expert Panel on Illegal Exploitation of Natural Resources and other Forms of Wealth in the Democratic Republic of Congo (DRC)* said that 85 companies had not observed the OECD Guidelines for Multinational Enterprises and challenged the governments adhering to the Guidelines to use them to promote responsible behaviour among companies active in the DRC. In October 2003, the Panel reported on its efforts to verify, reinforce and update its earlier findings. This report describes the conclusions drawn by the Panel from its dialogue with many of the companies accused of not observing the Guidelines in its 2002 report.

17 On 1 December 2000, the United Nations General Assembly unanimously adopted a resolution on the role of diamonds in fuelling conflict, breaking the link between the illicit transaction of rough diamonds and armed conflict, as a contribution to prevention and settlement of conflicts (A/RES/55/56). In taking up this agenda item, the General Assembly recognized that conflict diamonds are a crucial factor in prolonging brutal wars in parts of Africa, and underscored that legitimate diamonds contribute to prosperity and development elsewhere on the continent.

18 [www.kimberleyprocess.com](http://www.kimberleyprocess.com)

19 Business Guide to Conflict Impact Assessment and Risk Management. Global Compact, June 2002. [http://www.unglobalcompact.org/docs/issues\\_doc/7.2.3/BusinessGuide.pdf](http://www.unglobalcompact.org/docs/issues_doc/7.2.3/BusinessGuide.pdf).

20 Full text available: [http://www.international.alert.org/peace\\_and\\_economy/peace\\_and\\_economy\\_projects.php?t=1](http://www.international.alert.org/peace_and_economy/peace_and_economy_projects.php?t=1)

sub-contractors compliance with the OECD's guidelines for multinational enterprises. The UN experts panel for the Democratic Republic of Congo has used this as a benchmark to judge corporate conduct.

Meanwhile, at the United Nations, attempts were made in the former Sub-Commission for the Protection and Promotion of Human Rights to draft norms for transnational corporations and other business enterprises. The UN Secretary General subsequently appointed John Ruggie as his special representative for business and human rights. Professor Ruggie, who had been an assistant secretary-general at the UN, is an internationally-respected authority on international relations at Harvard University. He has developed a framework which clarifies the role and responsibility of business and the state. Ruggie has explained it as follows:

*"The framework comprises three core principles: the State duty to **protect** against human rights abuses by third parties, including business; the corporate responsibility to **respect** human rights; and the need for more effective access to **remedies**. The three principles form a complementary whole in that each supports the others in achieving sustainable progress."*

Elaborating on the *corporate responsibility to respect*, Professor Ruggie has suggested that businesses should develop due diligence processes, which he has defined as

*"a comprehensive, proactive attempt to uncover human rights risks, actual or potential, over the entire life cycle of a project or business activity, with the aim of avoiding and mitigating those risks"*.

While this international architecture is being developed, victims are making ingenuous use of laws to seek redress. Victims of human rights abuses initiated legal proceedings in the United States against companies under the Alien Tort Claims Act<sup>21</sup> of 1789. This Act allows foreigners to sue in US courts for damages for violations of the customary "laws of nations" such as the prohibition of slavery, genocide, torture, crimes against humanity and for war crimes. While none of the almost 50 cases filed against companies has been successful, a few involving the oil companies Unocal and Shell have

been settled out of court without the admittance of wrongdoing. However, these were cases under civil law, and not criminal law, meaning that they did not deal with genocide, crimes against humanity, or war crimes in the criminal sense. Nevertheless, such lawsuits are forcing companies to rethink their policies, and a growing number now say that they would prefer clear and transparent rules that are applied universally. They have begun developing voluntary codes of conduct in anticipation of future legislation.

To critics, the main problem with codes of conduct is their voluntary nature. "Codes of conduct work only for the well-intentioned" is a remark made frequently by civil society activists, businesses and academics in the sphere of corporate social responsibility. Frequently, there are no mechanisms to verify or monitor the conduct, and as the language in many codes is unclear, external parties find it hard to establish accountability or assess performance.

If banning business activity in conflict zones could have solved the problem of complicity in conflict, well-meaning governments would have attempted it more frequently. But such blanket bans do not work. Whenever comprehensive bans of this nature are imposed, predatory companies have stepped in. They have continued to trade and invest, and sometimes worsened the environment. Predators are drawn by the potential to make extraordinary profits because sanctions create scarcity. As Collier and Hoeffler have noted, sometimes civil wars are prolonged if armed groups have access to "lootable" resources. The example of Nigerian oil theft – also known as bunkering – has shown that even apparently "unlootable" commodities such as oil are being stolen openly by armed groups and sometimes even with the collusion of official entities. As a result, revenues and weapons continue their flow to these armed groups.

Responsible businesses are not predators. They maintain that they are good corporate citizens, investing over the long term, and it is not their intention to profit from conflict. Yet they become the target of public attention during conflict and have been accused of benefiting from abuses that occur during conflict. Companies sued under the ATCA are often leading brand-names<sup>22</sup>. But that does not detract from the gravity of abuses, and litigation

<sup>21</sup> The Alien Tort Statute (28 USC § 1350; ATS, a section of the U.S. Code that reads: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

<sup>22</sup> It is true that some law firms and some legal activists look for specific companies as targets, the victims who are plaintiffs are not necessarily guided by such motives; the abuses they have suffered are real.



under ATCA does not necessarily provide effective remedy to the victims. The process is dependent on the admittance of a case by judges in a particular area and on the question of applying international law to determine a tortuous act involving a party that, in another area of jurisdiction, might be considered only indirectly responsible. As noted earlier, no case implicating a company for genocide has been filed under ATCA.

Companies are reluctant to get drawn into discussions about genocide for several reasons. Firstly, many companies disagree, conceptually and philosophically, with the idea that their activities might harm civilians in an armed conflict. They find the idea of their being implicated in such a crime to be offensive. This is partly because companies have not clearly thought through the consequences and implications of all their actions in a zone of conflict, and they often lack the willingness or ability to explore these consequences, including the unintentional ones. A company that builds a highway and permits communities and the government to use it may not realize that an armed group or government forces can use the same highway to move forces rapidly. When a leading human rights organization pointed out to a major oil company that the company was supplying aviation fuel to the air force in a particular African country, and that the air force was bombing civilians, the company's immediate response was that its action should not be viewed in isolation. It was also providing aviation fuel to an international relief agency that was distributing food. Its understanding was that, although adverse things can occur, they were not responsible for them and in addition they were providing needed aid. To the company, both transactions were legitimate. The companies that built the railroads that took inmates to concentration camps during World War II, or the companies that supplied the Zyklon-B gas used in those camps, may also have initially seen their transactions as entirely innocent. Their failure to understand the legal and moral implications contributed to the Holocaust. The notion of *known or should have known* becomes important in this context, as does the notion of *aiding and abetting*.

The companies operating in a zone of conflict must realise, above all, that they are often only a few steps away from committing grave abuses. When security forces relocate a large number of people against their will so that a company can drill for oil, the company may believe it is only fulfilling an exploration contract as it in no way ordered, authorised, or

forced the relocation. But its planned activities and relationships may have contributed to the crime. Likewise, companies that have hired labourers from sub-contractors or government agencies to build pipelines in Burma have claimed that they were unaware that the labourers were working against their will.

Secondly, companies believe that the definitions of genocide, war crimes, and crimes against humanity are so precise, so arcane, and so legalistic, with such onerous evidentiary standards, and the criminal threshold for prosecution and liability is so high, that they are unlikely to be charged for their actions. While that may be the case, it indicates a tactical response, rather than strategic thinking.

Thirdly, companies think they are protected from risks because they are not "natural persons" and the Rome Statute applies to natural persons. While companies cannot be prosecuted, company officials can. Before the Rome Statute took effect during the Nuremberg Trials, individual businessmen had been prosecuted and held accountable.

During World War II, German businesses colluded with, and profited from, the Nazi regime. Several businessmen were arrested, prosecuted, and found guilty for their conduct during the war. During the Nuremberg Trials<sup>23</sup>, the Military Tribunal prosecuted two bankers, Karl Rasche and Emil Puhl, for their role in the crimes perpetrated by the Nazi regime. Rasche was the Chairman of Dresdner Bank, which served as the bank for the Third Reich. He was convicted of looting and of being a member of the Schutzstaffel (SS). He was acquitted, however, of charges that he had played a role in providing loans for the construction of Auschwitz. The Tribunal noted that, as a board member of the bank, Rasche was intimately involved in loaning substantial sums of money to various SS enterprises, which employed large numbers of inmates from the concentration camps, and also to enterprises and agencies of the Reich that were engaged in so-called resettlement programs. It concluded that Rasche had actual knowledge of the purposes for which loans were sought. But it also concluded that his granting of

<sup>23</sup> For further details, see the work of Anita Ramasastry at findlaw.com. <http://writ.news.findlaw.com/ramasastry/20020703.html>

loans was not a violation of international law.<sup>24</sup> The Tribunal made the distinction between providing capital and actively participating in Nazi looting efforts.

Emil Puhl's case was different. He was deputy to the president of the German Reichsbank. Puhl's job included arranging for gold, jewellery, and foreign currency from victims of the Nazis to be deposited at the Reichsbank. He also arranged for gold teeth and dental crowns from concentration camp victims to be recast into gold ingots. Puhl was prosecuted and convicted, and sentenced to five years imprisonment for his "role in arranging for the receipt, classification, deposit, conversion and disposal of properties taken by the SS from victims killed in the concentration camps."<sup>25</sup>

Besides the Nuremberg verdicts, there are other cases, which provide some guidance. The International Crimes Tribunal for the Former Yugoslavia (ICTY) has had two important rulings

clarifying complicity - the *Tadic*<sup>26</sup> and *Furundzija*<sup>27</sup> cases. The International Crimes Tribunal for Rwanda (ICTR) has a similar standard-setting ruling in the *Akayesu*<sup>28</sup> case. It has charged another businessman in the *Kabuga*<sup>29</sup> case, in which the Tribunal is seeking to prosecute a businessman who is allegedly complicit in abuses. The case of *Frans van Anraat*,<sup>30</sup> described earlier, falls in a similar category. While a lower court found another Dutch businessman, *Guus van Kouwenhoven*,<sup>31</sup> guilty of trading arms for timber in Liberia, a higher court acquitted him.

To provide some clarity on these issues, the Norwegian think tank FAFO worked with the International Peace Academy (now Institute) in

24 The Tribunal held: "The real question is, is it a crime to make a loan, knowing or having good reason to believe that the borrower will use the funds in financing enterprises which are employed in using labor in violation of either national or international law? Does [Rasche] stand in any different position than one who sells supplies or raw materials to a builder building a house, knowing that the structure will be used for an unlawful purpose? A bank sells money or credit in the same manner as the merchandiser of any other commodity. It does not become a partner in the enterprise, and the interest charged is merely the gross profit, which the bank realizes from the transaction, out of which it must deduct its business costs, and from which it hopes to realize a net profit. Loans or sale of commodities to be used in an unlawful enterprise may well be condemned from a moral standpoint and reflect no credit on the part of the lender or seller in either case, but the transaction can hardly be said to be a crime. Our duty is to try and punish those guilty of violating international law, and we are not prepared to state that such loans constitute a violation of that law, nor has our attention been drawn to any ruling to the contrary."

25 Unlike Rasche, the tribunal noted: "[Puhl's] part in this transaction was not that of mere messenger or businessman. He went beyond the ordinary range of his duties to give directions that the matter be handled secretly by the appropriate departments of the bank."

26 Dusko Tadic was arrested in 1994 in Germany on suspicion of having committed offences at the Omarska camp in the former Yugoslavia in June 1992, including torture and aiding and abetting genocide. In that case, the ICTY elaborated on what constitutes complicity: "First, there is a requirement of intent, which involves awareness of the act of participation coupled with a conscious decision to participate by *planning, instigating, ordering, committing, or otherwise aiding and abetting* in the commission of a crime. Second, the prosecution must prove that the participation in the conduct of the accused contributed to the commission of the illegal act." Additionally the contribution, or assistance, needs "to have a substantial effect on the commission of the crime." Everyone who is part of the "conspiracy" is responsible for the crimes committed, even if the individual only assisted by providing logistical support. Even if the contribution is slight, criminal law holds participants in such a project with common design to be complicit.

27 Anton Furundzija was the local commander of the Croatian Defence Council Military Police unit known as the "Jokers". He was charged with two counts of violations of the customs of war, arising out of interrogations of a Bosnian Muslim woman and a Bosnian Croat man, in which Furundzija questioned the pair while another police officer threatened sexual violence against the woman, beat them, and raped the woman in the presence of the man and others. Advancing the concept of "mere presence," the ICTY held: "It may be inferred that an approving spectator who is held in such respect by the other perpetrators that his presence encourages them in their conduct, may be guilty of complicity in a crime against humanity. [P]resence, when combined with authority, can constitute assistance in the form of moral support, that is, the *actus reus* of the offence. The supporter must be of a certain status for this to be sufficient for criminal responsibility."

28 Jean-Paul Akayesu was the *bourgmestre*, or mayor, of the Commune where atrocities, including rape and sexual violence, occurred during the Rwanda conflict. The Tribunal considered his position of sufficient authority to conclude that he was criminally liable for aiding and abetting. The *Akayesu* ruling extended the principle for non-state actors, and provided three important building blocks in clarifying complicity.

29 Felicien Kabuga is a Rwandan businessman currently in hiding against whom the ICTR issued a warrant of arrest in 1999 on eleven counts, including genocide, conspiracy to commit genocide, and complicity in genocide.

30 <http://www.redflags.info/index.php?topic=meanstokill>

31 <http://www.redflags.info/index.php?topic=sanctions>

New York to develop a clearer understanding of companies and their liabilities under criminal law. It was followed by a multi-country study<sup>32</sup> which examined different criminal jurisdictions in different parts of the world, and concluded that domestic law has jurisdiction and prosecutions are possible. One consequence of that project was the *Red Flags*<sup>33</sup> initiative, which specifies in clear terms what companies must not do. They are drawn from cases that have been filed and include nine specific activities:

- Expelling people from their communities
- Forcing people to work
- Handling questionable assets
- Making illicit payments
- Violating sanctions
- Engaging abusive security forces
- Trading goods in violation of international sanctions
- Providing the means to kill
- Allowing use of company assets for abuses
- Financing international crimes

These *Red Flags* state the legal liability risks to which companies are exposed. But companies are looking for guidance about what they can do if they are operating in a conflict zone. Relying on corporate social responsibility initiatives or codes of conduct may be a helpful first step, but it is not sufficient. How can companies operate in zones of conflict, and what must they do to help build peace and to avoid circumstances in which they might become complicit?

A core part of due diligence must mean developing an understanding of complicity. It means understanding *proximity* – to the violator, the violation, and the victim. The closer the proximity, the higher the complicity risks. *Aiding and abetting*, and *knowing* (or *should have known*) are other important concepts. In this context, it is important to note the work of the International Commission of Jurists whose multi-year study has enhanced our understanding of the notion of complicity.<sup>34</sup>

PROXIMITY <sup>35</sup>		
VIOLATION	VIOLATOR	VICTIM
AID/ABET <sup>36</sup>		
KNOWLEDGE <sup>37</sup>		
DURATION <sup>38</sup>		
BENEFIT <sup>39</sup>		
INTENT <sup>40</sup>		

For a company wishing to act responsibly in a zone of conflict, its responsibilities would therefore include:

- Complying with international humanitarian law
- Identifying early trends and possible sources of violence
- Sharing information with other companies, government officials, trade unions and civil society
- Operating in a way that does not discriminate between classes of people
- Ensuring the transparency of operations
- Scrutinising local partners
- Establishing accountability mechanisms
- Providing quick, effective remedies in the context of their own operations for matters that do not concern grave human rights abuses
- Ensuring the rights of people to participate
- Providing opportunities to speak out
- Providing safety and security to the vulnerable
- Offering refuge where appropriate

These are the steps that are necessary for companies to undertake on their own. Their conduct and actions, together with similar conduct by other businesses and concerned actors, can help create collective action to prevent violent conflict and, in some instances, genocide.

<sup>35</sup> **PROXIMITY:**  
*To the Violator:* The closer the company is to the violator/abuser, the higher the risk. Proximity may be through transactional, geographic, or other business relationships.  
*To the Violation:* The closer the company is to the actual violation, the higher the risk.  
*To the Victim:* The closer the victim is to the company, the greater the risk.

<sup>36</sup> **AID/ABET:** If the company has assisted in commissioning the abuse, the risk increases.

<sup>37</sup> **KNOWLEDGE:** (Known and should have known): What did the company know, and when did it know it? The more a company knows, the greater the risk.

<sup>38</sup> **DURATION:** The longer the abuse has gone on, the risk increases.

<sup>39</sup> **BENEFIT:** If the company derives a benefit from the abuse, risk increases.

<sup>40</sup> **INTENT:** (Mens Rea) If the company intended the abuse to take place, the risk increases.

<sup>32</sup> <http://www.fafo.no/liabilities/index.htm>  
<sup>33</sup> [www.redflags.info](http://www.redflags.info).  
<sup>34</sup> The reports are accessible at: <http://www.business-human-rights.org/Updates/Archive/ICJPaneloncomplicity>

Many, if not most, companies comply with the law and help to generate prosperity by creating jobs, paying taxes, producing goods and providing services. There are several examples of corporate presence creating an island of peace in a conflict-ridden area. The Norwegian oil company Statoil has been praised for its operations<sup>41</sup> in the Niger Delta. This is because the company has been scrupulous in engaging local communities, and has initiated development programmes in consultation with all stakeholders. It has been transparent about what it does and can do, and has brought in independent NGOs to operate the programmes. Extractive industries have come together to form two initiatives. The Voluntary Principles<sup>42</sup> for Security and Human Rights provides guidance to companies so that they can operate while protecting their people and assets and respecting human rights. The Extractive Industry Transparency Initiative<sup>43</sup> provides a framework for companies to ensure transparency for their transactions with the countries in which they operate.

The challenge for the international community is to develop a framework that creates powerful incentives for businesses to act in a positive way, and to establish strong disincentives to ensure that businesses do not act in a negative way. Some things governments – and in particular home states – can do to ensure that companies operate within the law include:

- **Advise and Inform:** Home states should offer clear advice to businesses about the countries in which they are about to invest. Home states should also help businesses familiarise themselves with international law, in particular international humanitarian law, when they operate in conflict zones. States should provide information about local partners, including those in the civil society, with whom companies can collaborate to foster a peace-building environment so that their activities are consistent with the genocide prevention agenda. When home states have information that can prevent genocide, and they know of businesses that can play an effective role in disseminating it or providing assistance or resources, then those states should work with the respective businesses as a matter of priority.

- **Collaborate:** Home states should be inclusive in developing strategies to prevent genocide, working with businesses that operate in conflict zones. Businesses often have access to information and intelligence that states do not, and businesses should be encouraged to share their insights on a confidential basis with the relevant authorities.<sup>44</sup>
- **Promote:** Home states can act collectively to lobby other states to act in ways that uphold international law. This includes promoting the effective governance of wealth generated from natural resources.<sup>45</sup> Furthermore, home states can also foster a climate of peace and justice by providing specific technical assistance to train the local judiciary, police forces and the army. They can channel development assistance towards security sector reform, including improved prison conditions. They can provide training to foster a climate that supports non-discrimination.
- **Incentivise:** Home states can provide incentives for good behaviour by granting preferential access to certain opportunities, structures such

<sup>44</sup> The UN Secretary-General's Special Representative for Business and Human Rights has initiated a programme of work with states to ensure that companies in zones of conflict do not contribute to human rights abuses. The main objective of the project is to help identify policy options that home, host and neighboring states have, or could, develop to prevent and deter corporate-related human rights abuses in conflict contexts—where the international human rights regime cannot possibly be expected to function as intended. The measures could include providing advice and guidance to companies, structuring incentives via export credit, risk insurance, development assistance, or investments by para-state agencies; and through the individual and collective roles of states in fostering corporate accountability. Further details of the project can be found at: <http://198.170.85.29/Ruggie-conflict-project-note-Oct-2009.pdf>

<sup>45</sup> In a recent report *Lessons Unlearned: How the UN and Member States must do more to end natural resource-fuelled conflicts* Global Witness (2010) has argued: "The problem with natural resources is not so much the nature of resources themselves, their abundance or their scarcity, but how they are governed, who is able to access them and for what purposes. In many places, predatory natural resource exploitation has contributed to the loss of sovereign control over resources, undermined social and economic development, enabled crippling levels of corruption and helped sustain armed violence. This dynamic of exploitation and violence is in reality a downward spiral in which the informalisation of the state, or what is sometimes referred to as "state fragility", leaves people to fend for themselves while natural resource production falls under the control of those with access to coercive force. If the state is not an effective provider of services, security or legitimacy, armed groups will often claim those roles, reinforcing the strength of the latter vis-à-vis the state."

<sup>41</sup> See in particular its Akassa Development Project, in collaboration with BP and the NGO Pro-Natura. Details at <http://www.pronatura-nigeria.org/adf.htm>

<sup>42</sup> [www.voluntaryprinciples.org](http://www.voluntaryprinciples.org)

<sup>43</sup> [www.eitransparency.org](http://www.eitransparency.org)

as export credit guarantees, access to intelligence briefings, and concessional lending.

- **Warn:** Home states should clearly warn companies that operate within their jurisdiction of the risks they face if they fail to comply with the laws. In certain instances, states should consider the issuing of a public warning.
- **Prevent:** although it may not be legal for a state to prevent a company from operating in a particular field, states have sufficient means at their disposal to prevent illegal activities from occurring. Examples of the measures available to them include:
  - o Restrictive trade policies to prevent specific businesses from participating in public bidding or contracts
  - o Refusal of export finance, export credit, or any other assurances
  - o Refusal to offer political risk insurance
  - o Refusal to grant concessional lending<sup>46</sup>
- **Prosecute:** Home states should empower their prosecutors offices and cooperate with international tribunals.

Preventing genocide is too important a task to be left in the hands of any one actor. Some businesses have been part of the problem; many businesses can be a part of the solution. To advance the agenda of genocide prevention, business should be seen as a part of the solution. Areas where businesses have specific skills should be leveraged. They should be encouraged to play a role in spheres where they have core competency. But they should not be seen as an alternative, or substitute, to international collective action. Businesses are often lacking expertise, capacity, skills, or the mandate to perform tasks the state should perform. But their presence in fragile states and conflict zones presents challenges and provides opportunities. The international community must face the challenge and harness business considerable skills for the greater good.

<sup>46</sup> While the World Trade Organisation's rules prevent states from preferring one business over another under normal circumstances, or preferring one form of trade over another, the WTO's rules are not meant to be incompatible with international law. As such, when international peace and security are at stake, the WTO grants exemptions for mechanisms which are outwardly restrictive but intended to serve the broader goal of international peace and security, as for example it has done with the Kimberley Process Certification Scheme.



# Masculinity and Transitional Justice: An Exploratory Essay

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## Abstract<sup>2</sup>

In recent years, there has been a growing focus on including women in transitional justice processes. Some scholars question whether transitional justice mechanisms take obstacles for women, such as ongoing domestic violence, into account. This article follows this line of inquiry using the prism of ongoing violence against women in South Africa. It focuses on masculinity, and questions the degree to which masculinity, and violent masculinities in particular, are considered in transitional justice studies. The article calls for a nuanced understanding of masculinities and their relationship to transitional justice, and sets parameters for a more concerted study of the subject.

## Introduction

The capacity of transitional justice mechanisms to prevent violence, develop a human rights culture or generally contribute to human security in societies in transition has not been thoroughly evaluated. Questions remain regarding the impact of learning about and documenting human rights violations, for example via a truth commission.<sup>3</sup>

There is little empirical evidence to demonstrate that lessons from transitional justice processes are generalised to the prevention of other types of violence, such as that based on gender in the wake of political conflict.

Such questions risk overloading transitional justice mechanisms with aims that are beyond their influence. Yet, societies emerging from conflict face a plethora of issues of security, social exclusion and poverty that extend beyond the conventional political arena. A broader view of justice that embraces social justice seems necessary. With regard to gender in particular, a more comprehensive analysis of transitional justice – one that takes “intersectionality”<sup>4</sup> into account – is needed.<sup>5</sup> Christine Bell argues that we should not try to make a feminist notion of justice fit transitional justice processes but rather ask how transitional justice helps or hinders projects to secure material gains for women.<sup>6</sup> Meanwhile, the roles of men and of masculinity as cross-cutting themes within such a debate are largely unexplored.

This article is intended as an exploratory essay on masculinity and transitional justice. It aims to set parameters within which a more concerted

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2 Thanks to Fionnuala Ní Aoláin for commenting on a draft of this article and Robin Wilson for his editorial assistance.

3 Tristan Anne Borer, ed., *Telling the Truths: Truth Telling and Peace Building in Post-Conflict Societies* (Indiana: University of Notre Dame Press, 2006); Brandon Hamber, “Nunca Más” and the Politics of Person: Can Truth Telling Prevent the Recurrence of Violence?” in *Telling the Truths: Truth Telling and Peace Building in Post-conflict Societies*, ed. Tristan Anne Borer (Indiana: University of Notre Dame Press, 2006).

4 A definition of intersectionality is challenging and the subject of much academic debate. See for example, Rooney and Ní Aoláin’s article in this issue, as well as the recent special issue on intersectionality in *Politics & Gender* 3(2) (2007). The central premise of the concept is that identities are “integrated” and “mutually constitutive,” or that gender differences must be understood “within a particular context and in connection with other aspects of identity, both individual and collective.” (Editorial Comment, “Intersectionality,” *Politics & Gender* 3(2) (2007): 229). In other words, as Eilish Rooney notes, intersectionality provides a framework for analysis “of how gender relations, class relations and configurations of ethnicity and race are interwoven in the structural make-up of a given society.” (Eilish Rooney, “Engendering Transitional Justice: Questions of Absence and Silence,” *International Journal of Context and Law* 3(2) (2007): 98).

5 Rooney, *ibid.*

6 Christine Bell and Catherine O’Rourke, “Does Feminism Need a Theory of Transitional Justice? An Introductory Essay,” *The International Journal of Transitional Justice* 1(1) (2007): 23–44.

study of the subject could be undertaken. The article questions the degree to which violent masculinities in particular are taken into account in societies in transition and in the study of transitional justice. It begins by outlining some of the key literature on masculinity. It then addresses the debate in South Africa, where the literature on masculinity is burgeoning, and uses the South African case as a prism to raise questions about the relationship between transitional justice and violent masculinities. It calls for a nuanced understanding of masculinity within transitional justice debates.

The article concludes with four key points relevant to a new theoretical and research agenda. First, it recommends a greater focus on the issue of masculinity in transitional justice research and practice. Second, it highlights the dangers of an approach to masculinity that treats “men” as an interest group devoid of a gendered analysis. Third, the article criticises responses to the questions raised by masculinity that centre on the “crisis in masculinity” discourse. Finally, it highlights the importance of considering how transitional justice mechanisms infused with a greater understanding of masculinity can influence types of violence (such as intimate partner violence) traditionally seen as outside their focus.<sup>7</sup>

### Masculinity: An Open Field

In recent years, there has been a growing focus on including women in transitional justice processes. This has involved, inter alia, an improved sensitivity to the concerns of women in processes such as national reparations programs,<sup>8</sup> the International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR)<sup>9</sup> and truth commission

hearings and final reports.<sup>10</sup> Such changes, although they represent progress, have been criticised because of the lack of capacity of such institutional reforms “to deliver feminist transformation and the tendency of interim reforms to produce new obstacles for women.”<sup>11</sup> A move beyond thinking about women in transitional justice to thinking about the role of gender more broadly, including a focus on men, has also been advocated.<sup>12</sup> To date, however, studies on masculinity and transitional justice are all but nonexistent.

Masculinity studies, largely in sociology and psychology, have in turn said little about political transitions or transitional justice. That said, the study of masculinity itself is still developing. The sociology of masculinity, which has until recently largely focused on Western masculinities, only came into its own in the second half of the 20th century.<sup>13</sup> The study of masculinities in Africa is still in its infancy.<sup>14</sup> Although the topic is mentioned in some peacebuilding research that explores gender questions,<sup>15</sup> a systematic treatment of the subject is not readily available. The psychology of masculinity, or more precisely psychologists attempting to understand the male psyche, has been part of the discipline for over a century, but critical analyses of the interrelationship between psychology and a gendered social context are limited. Where the study of the psychology of men exists, it is clinical and largely experimental,<sup>16</sup> although the last decade has

7 Rachel Jewkes uses the term “intimate partner violence” to describe “physical violence directed against a woman by a current or ex-husband or boyfriend .... Intimate partner violence often includes sexual violence and can also include psychological abuse; both these forms of abuse often, but not always, accompany physical violence.” (Rachel Jewkes, “Intimate Partner Violence: Causes and Prevention,” *The Lancet* 359 (2002): 1423). That said, there is confusion in the literature as to whether the term includes sexual violence. In this article, the terms “intimate partner violence” and “domestic violence” include the full gamut of violence Jewkes outlines in the quote above.

8 Ruth Rubio-Marin, ed., *What Happened to the Women? Gender and Reparations for Human Rights Violations* (New York: Social Science Research Council, 2006).

9 Bell and O'Rourke, supra n 5.

10 Beth Goldblatt and Sheila Meintjies, “Gender and the Truth and Reconciliation Commission” (Johannesburg: Unpublished submission to the South African Truth and Reconciliation Commission, 1997).

11 Bell and O'Rourke, supra n 5 at 33.

12 Rooney, supra n 3.

13 Stephen Whitehead and Frank Barrett, “The Sociology of Masculinity,” in *The Masculinities Reader*, ed. Stephen Whitehead and Frank Barrett (Cambridge: Polity, 2005).

14 See for example, Lisa A. Lindsay and Stephan F. Miescher, ed., *Men and Masculinities in Modern Africa* (Portsmouth, NH: Heinemann, 2003); Robert Morrell, ed., *Changing Men in Southern Africa* (London: Zed Books, 2001); Lahoucine Ouzgane and Robert Morrell, ed., *African Masculinities: Men in Africa from the Late Nineteenth Century to the Present* (Basingstoke: Palgrave Macmillan, 2005); and footnote 29 below.

15 For example, Gender Action for Peace and Security, “Report on Involving Men in the Implementation of UN Security Council Resolution 1325 on Women, Peace and Security Based on the Gender Action for Peace and Security (GAPS) Event Hosted by the Canadian High Commission” (Canada House, London: GAPS, 2007); Sheila Meintjies, Anu Pillay and Meredith Turshen, “There Is No Aftermath for Women,” in *The Aftermath: Women in Post-Conflict Transformation*, ed. Sheila Meintjies, Anu Pillay and Meredith Turshen (London: Zed Books, 2001); Mireille Widmer, ““Real Men” without Guns,” *New Routes: A Journal of Peace Research and Action* 11(4) (2006): 12–14.

16 See the journal, *Psychology of Men and Masculinity*.



seen a growing number of studies on masculinity in discursive and critical psychology.<sup>17</sup> In the legal field, masculinity has been largely restricted to the field of criminology<sup>18</sup> and family law.<sup>19</sup>

Clearly, there is a vast literature on masculinity,<sup>20</sup> with some 700 references identified in sociology alone.<sup>21</sup> *The Men's Bibliography*,<sup>22</sup> an online resource, lists 17,300 books and articles on a wide range of subjects. A full review is beyond the scope of this article. That said, masculinity, because of its nature and being "unhave-able"<sup>23</sup> is not an object around which a coherent science can be developed.<sup>24</sup> One of the best-kept secrets in the literature on masculinity, according to Kenneth Clatterbaugh, is that "we have an extremely ill-defined idea of what we are talking about."<sup>25</sup> There is a need to theorise masculinities,<sup>26</sup> and theorising about masculinity in transitional justice is an open field.

Most theorists and researchers working on this subject argue that it is more accurate to talk of masculinities than of masculinity.<sup>27</sup> There are

multiple masculinities<sup>28</sup> and as many masculinities as there are men.<sup>29</sup> In South Africa, research on masculinity in transition is burgeoning, and some of the views emerging from this work are instructive.<sup>30</sup> For example, it has been asserted that stereotypes dominate views of men in South Africa and fail to capture masculine diversity,<sup>31</sup> as well as that there is no typical South African man.<sup>32</sup> What could be more different in South Africa, Robert Morrell asks, than the "image of a grim-faced, rifle-toting soldier clad in camouflage gear, patrolling the streets of a township and a colourful cross-dresser, strutting his stuff in a gay pride march?"<sup>33</sup> Such questions could apply to many societies around the world.

In a similar vein, the international literature on masculinity generally suggests that masculinities are not uniform and that power relations exist within them. There are subordinate and marginal masculinities,<sup>34</sup> as well as hegemonic masculinities.<sup>35</sup> As Raewyn Connell writes,

We have to unpack the milieu of class and race and scrutinise the gender relations operating within them. There are, after all, gay black men and effeminate factory hands, not to mention middle-class rapists and cross-dressing bourgeois.<sup>36</sup>

In South Africa, any discussion of masculinity must be infused with an analysis that addresses different racial and class positions, not to mention sexual locations. Such an analysis also must recognise that

17 See for example, Desmond Painter, Martin Terre Blanche and Jill Henderson, "Critical Psychology in South Africa: Histories, Themes and Prospects," *Annual Review of Critical Psychology* 5 (2006); Margaret Weterell and Nigel Edley, "Negotiating Hegemonic Masculinity: Imaginary Positions and Psycho-discursive Practices," *Feminism & Psychology* 9(3) (1999). Also see selected essays in the *International Journal of Critical Psychology*.

18 See for example, Judith Allen, "Men, Crime and Criminology: Recasting the Questions," *International Journal of the Sociology of Law* 17(1) (1989): 19–39; Richard Collier, "Men, Masculinities and Crime," in *The Blackwell International Companion to Criminology*, ed. Colin Sumner (Oxford: Blackwell, 2003); Richard Collier, "Reflections on the Relationship between Law and Masculinities: Rethinking the 'Man Question'" *Current Legal Problems* 56 (2003): 345–402.

19 See for example, the subsection entitled "Divorce, Separation and Child Custody" in *The Men's Bibliography: A Comprehensive Bibliography of Writing on Men, Masculinities, Gender and Sexualities*, compiled by Michael Flood, 16th edition (2007), <http://mensbiblio.xyonline.net>.

20 Tim Edwards, *Cultures of Masculinity* (New York: Routledge, 2006).

21 Stephen Whitehead, *Men and Masculinities* (Cambridge: Polity, 2006).

22 Flood, supra n 18.

23 Edwards, supra n 19 at 1.

24 Robert William (now Raewyn) Connell, "The Social Organization of Masculinity," in Whitehead and Barrett, supra n 12.

25 Kenneth Clatterbaugh, "What Is Problematic About Masculinities?" *Men and Masculinities* 1(1) (1998): 28.

26 Harry Brod and Michael Kaufman, ed., *Theorizing Masculinities* (California: Sage, 1994).

27 Arthur Brittan, "Masculinities and Masculinism," in Whitehead and Barrett, supra n 12; Whitehead and Barrett, supra n 12.

28 Connell, supra n 23.

29 John MacInnes, "The Crisis of Masculinity and the Politics of Identity," in Whitehead and Barrett, supra n 12.

30 See for example, Mamphela Ramphele, "Teach Me How to Be a Man: An Exploration of the Definition of Masculinity," in *Violence and Subjectivity*, ed. Veena Das et al. (Berkeley: University of California Press, 2000); Robert Morrell, "The Times of Change: Men and Masculinity in South Africa," in Morrell, supra n 13; Graeme Reid and Liz Walker, "Masculinities in Question," in *Men Behaving Differently: South African Men since 1994*, ed. Graeme Reid and Liz Walker (Cape Town: Double Storey Books, 2005); Liz Walker, "Men Behaving Differently: South African Men since 1994," *Culture, Health & Sexuality* 7(3) (2005): 225–238. Thokozani Xaba, "Masculinity and Its Malcontents: The Confrontation between 'Struggle Masculinity' and 'Post-Struggle' 'Masculinity (1990–1997)," in Morrell, supra n 13.

31 Morrell, supra n 13.

32 Ibid.

33 Ibid, 3.

34 Whitehead and Barrett, supra n 12.

35 Robert William (now Raewyn) Connell, *Masculinities*, 2nd ed. (Berkeley: University of California Press, 2005).

36 Connell, supra n 23 at 38.

all masculinities influence one another.<sup>37</sup> Although white masculinity has been hegemonic in South Africa, urban black and rural African masculinities are now jostling for ascendancy.<sup>38</sup> New masculinities are developing, as is true the world over.

Despite the complexities of trying to define masculinity,<sup>39</sup> Stephen Whitehead and Frank Barrett do so in terms of “behaviours, languages and practices, existing in specific cultural and organisational locations, which are commonly associated with males and thus culturally defined as not feminine.”<sup>40</sup> Connell agrees that “masculinity” does not exist except in contrast with “femininity” and no masculinity arises except in a system of gender relations.<sup>41</sup> Masculinity is “simultaneously a place in gender relations, the practices through which men and women engage that place in gender, and the effects of these practices in bodily experience, personality and culture.”<sup>42</sup> Masculinity can also be ways of “doing gender,” which are related to a social environment.<sup>43</sup>

Masculinity, for the purposes of this article, is defined as the widespread social norms and expectations of what it means to be a man,<sup>44</sup> or the multiple ways of “doing male.”<sup>45</sup> Bearing in mind its inherent plurality, “widespread” needs to be understood in the broadest terms possible. Within transitional justice, and particularly transitional justice mechanisms such as truth commissions or trials, the social norms and expectations under scrutiny are often those developed and shaped during war and its aftermath. Implicit will be the roles of men, and their relationship to women, as combatants and victims of political conflict. Critical masculinity studies would urge one to look beyond this to the positioning of men in a range of social and political settings following conflict.

The ways of “doing male” are continually changing, shaped not only by the experience of war but also by the shifting social, economic and political context during and after conflict. To fully understand the role of masculinities within the transition from conflict to “peace,” the continuities between past and present need to be tackled. This is a challenge to many transitional justice processes, which are often founded on liberal legal frameworks that demand the delineation of what is considered political violence and what is not. This kind of delineation has been challenged from a gender perspective. Defining what is conflict and what is non-conflict can result in a lack of emphasis on socio-economic exclusions (which can be seen as a form of structural violence) or violence deemed private, such as domestic violence.<sup>46</sup> For example, forced marital unions or forced domestic labour have to date not been adequately recognised as human rights violations in reparations debates.<sup>47</sup> The South African Truth and Reconciliation Commission (TRC) was criticised for its narrow focus on individual, physical forms of harm that underplayed the “everyday” experience of women.<sup>48</sup> A narrow view of violations can lead to a gendered hierarchy of suffering because, generally, more men are directly affected by what is considered conflict-related violence.<sup>49</sup>

### South Africa and Violent Masculinities

Violence against women is a global problem. Survey data reveals that 40, 42, 46 and 60 percent of women report being physically abused regularly in Zambia, Kenya, Uganda and Tanzania, respectively.<sup>50</sup> Studies in the United States show that between 33 and 37 percent of men have demonstrated physical aggression against their female dating partners.<sup>51</sup> In

37 Morrell, *supra* n 13.

38 *Ibid.*

39 Clatterbaugh, *supra* n 24.

40 Whitehead and Barrett, *supra* n 12 at 15–16.

41 Connell, *supra* n 23.

42 *Ibid.*, 33–34.

43 Walker, *supra* n 29 at 237.

44 Widmer, *supra* n 14.

45 Drawing on the work of Connell and Whitehead, cited in Ken Harland, Karen Beattie and Sam McCready, “Young Men and the Squeeze of Masculinity: The Inaugural Paper for the Centre for Young Men’s Studies,” Occasional Paper No. 1 (Belfast: Centre for Young Men’s Studies, 2005).

46 Fionnuala Ní Aoláin, “Political Violence and Gender During Times of Transition,” *Columbia Journal of Gender and Law* 15 (2006): 829–850.

47 Ruth Rubio-Marín, “The Gender of Reparations: Setting the Agenda,” in Rubio-Marín, *supra* n 7.

48 Fiona C. Ross, *Bearing Witness: Women and the Truth and Reconciliation Commission in South Africa* (London: Pluto Press, 2003).

49 Beth Goldblatt, “Evaluating the Gender Content of Reparations: Lessons from South Africa,” in Rubio-Marín, *supra* n 7.

50 Katherine Wood and Rachel Jewkes, “Violence, Rape and Sexual Coercion: Everyday Love in a South African Township,” in Whitehead and Barrett, *supra* n 12.

51 Amy Holtzworth-Munroe and Glenn Hutchinson, “Attributing Negative Intent to Wife Behavior: The Attributions of Maritally Violent Versus Non-violent Men,” *Journal of Abnormal Psychology* 102 (1993):206–211; Jacquelyn W.White and Mary P.Koss, “Courtship Violence: Incidence in a National Sample of Higher Education Students,” *Violence and Victims* 6 (1991): 247–256.

South Africa, a society that has undertaken major transitional justice initiatives as well as numerous policy and legislative interventions focused on addressing violence against women,<sup>52</sup> incidence remains extremely high – it is one of the highest rates in the world for a country not at war.<sup>53</sup> According to police statistics, there were 52,733 reported rapes in South Africa from 2003 to 2004.<sup>54</sup> Domestic violence is more difficult to assess because it is not classified as a separate crime. One study found that 50 percent of women in South Africa report experiencing domestic violence, whether physical, emotional or financial,<sup>55</sup> and another that one in four women in South Africa have experienced physical violence from an intimate partner.<sup>56</sup> Levels of intimate femicide are also high. On average, four women are killed per day by an intimate partner in South Africa, or 8.8 per 100,000 women.<sup>57</sup>

Attitudes toward violence against women, especially among men, are also alarming. According to a survey of 2,059 men in the Southern Metropolitan Local Council Area of Johannesburg (an area which includes Soweto, various informal settlements and the central business district), 31 percent of men believe that they can be violent toward women and one in four believes women mean “yes” when they say “no” to sexual advances.<sup>58</sup> One in thirteen in the same survey feel that it is acceptable to hit one’s wife as a form of punishment if she argues.<sup>59</sup> A more recent countrywide survey found that 10 percent

of South Africans feel domestic violence against women could be justified.<sup>60</sup>

When it comes to sexual violence, a household survey of South Africans found that almost two-thirds of men believe women are partly to blame for sexual violence, and 4 percent of women believe forcing sex with a wife or girlfriend is not sexual violence.<sup>61</sup> Nine percent of women surveyed said they are drawn to sexually violent men.<sup>62</sup> Of the male sample, 20 percent said they had had sex with women without their consent, with 6 percent saying that they like “jackrolling” (a popular term for gang rape) or that it is a game.<sup>63</sup>

The connection between poverty and sexual violence is also well established in South Africa and elsewhere. Although all women surveyed in the South African study above believe they have a right to avoid sexual violence, some 60 percent feel they would accept it if they did not have enough money and 47 percent of respondents said they would allow their children to be abused in the same situation.<sup>64</sup> Rachel Jewkes reviewed studies across the world and concluded that although violence occurs in all socio-economic groups, poverty and associated stress are key contributors to intimate partner violence.<sup>65</sup> Intimate partner violence is more frequent and severe in groups living in poverty.<sup>66</sup> This is likely at least in part a result of the trapping influence of poverty – studies internationally show that women who are better off are more likely to leave abusive relationships.<sup>67</sup>

These statistics, specifically those concerning South Africa, suggest that the TRC had little impact on the physical security of women, let alone their social and economic security. Transitional justice mechanisms obviously cannot do everything. Their success needs to be evaluated within the context of other institutions, such as national human rights institutions or the criminal justice system, and of social, economic and political change more generally.

52 Human Rights Watch has noted, for example, that South Africa had some of the most progressive domestic violence legislation in the world but that it was not being properly implemented. Cited in Shanaaz Matthews and Naeema Abrahams, *Combining Stories and Numbers: An Analysis of the Impact of the Domestic Violence Act (No. 116 of 1998) on Women* (Pretoria: Gender Advocacy Project and Medical Research Council, 2001).

53 Wood and Jewkes, supra n 49.

54 It is asserted however that only one in nine cases are actually reported to the police suggesting the figures of actual rape would be substantially higher. See, “One in Nine: Solidarity with Women Who Speak Out,” <http://www.oneinnine.org.za>.

55 Liz Walker, “Negotiating the Boundaries of Masculinity in Post-Apartheid South Africa,” in Reid and Walker, supra n 29.

56 Matthews and Abrahams, supra n 51.

57 Shanaaz Matthews et al., “Every Six Hours a Woman Is Killed by Her Intimate Partner: A National Study of Female Homicide in South Africa,” MRC Policy Brief 5 (Cape Town: Medical Research Council, 2004).

58 CIETafrica, *Summary Report South Africa: 1997–2000 Surveys on Sexual Violence* (Johannesburg: CIETafrica, 2000).

59 Ibid.

60 The World Values Survey South Africa, quoted in Sapa/AFP, “SA Proud of its Rainbow Nation - Poll,” *IOL Online*, 27 August 2007, [www.iol.co.za](http://www.iol.co.za).

61 CIETafrica, supra n 57.

62 Ibid.

63 Ibid.

64 Ibid.

65 Jewkes, supra n 6.

66 Ibid.

67 Amy Farmer and Jill Tiefenthaler, “An Economic Analysis of Domestic Violence,” *Review of Social Economy* 55(3) (1997): 337–358.

As Rooney notes, however, while transitional justice experts may not be in a position to influence directly what happens to women, they can shape the discourse that determines the potential for transitions to deliver benefits.<sup>68</sup> This leaves one asking whether transitional justice processes, notwithstanding the context in which they unfold, are fulfilling their full potential in terms of preventing violence against women.

This question may sound tangential but it becomes vitally important to transitional justice studies when, as in the South African context, current gender violence is often explained as an extension of the past. It appears, writes Liz Walker, that violent masculinities of the anti-apartheid era have become even more violent in the present South Africa.<sup>69</sup> Thokozani Xaba, for example, argues that there was a “struggle masculinity”; meaning that young impoverished black men who were associated with the anti-apartheid struggle were endowed with respect and status as “young lions” and “liberators” within their communities.<sup>70</sup> Their violence was revered, and those in leadership positions were coveted by women, with many having multiple partners.<sup>71</sup> “Struggle masculinity” considered women fair game<sup>72</sup> and rape was used at times as a way of “disciplining” women.<sup>73</sup> But the “struggle” version of masculinity is no longer considered acceptable in the new order, with the result that such men (and those that aspire to this type of masculinity), many of whom are unemployed, find themselves vilified and often on the wrong side of the law for the same reasons that they were considered heroes in the past.<sup>74</sup> Demobilisation can often lead to a sense of emasculation and a resulting desire in some men, both ex-combatants and security forces, to

reassert their power through violence.<sup>75</sup> Men whose masculinity is threatened can feel forced to find ways of reasserting their manhood.<sup>76</sup>

Such an analysis on its own however is limited and can feed into stereotyping of ex-combatants – already one of the scapegoats of the new South Africa<sup>77</sup> – and fail to consider their heterogeneous nature.<sup>78</sup> Further, we cannot overestimate the marginalisation and extreme poverty of some ex-combatants in South Africa, and around the world. Poverty and rising expectations have “proved a tragic mixture of fostering violent masculinities.”<sup>79</sup> This stems from an historical context where violence and masculinity are interconnected and “partly imprinted in social and economic conditions.”<sup>80</sup> Reviewing a range of literature that explores the link between poverty and masculinity, Jewkes concludes:

Violence against women is thus seen not just as an expression of male powerfulness and dominance over women, but also as being rooted in male vulnerability stemming from social expectations of manhood that are unattainable because of factors such as poverty experienced by men.<sup>81</sup>

We therefore need to guard against a focus merely on the expressions of masculinity, however critical these are, which do not address structural factors such as unemployment and living conditions that exacerbate violent masculinities and the fact that such dispositions are not shared or typical of all ex-combatants, or men for that matter. That said, the point at the core of Xaba’s analysis is important; there is some continuity between past and present. This is not restricted to ex-combatants. South Africa’s past is steeped in violence, in everyday life and on the sports field, as well as in the anti-apartheid struggle. Many whites sanctioned the use of violence, participating as soldiers, police or in “ordinary” violence against black workers. The result is that some masculinities are deeply enmeshed with violence.

68 Rooney, supra n 3.

69 Walker, supra n 29.

70 Xaba, supra n 29.

71 Ibid.

72 Ibid.

73 Beth Goldblatt and Sheila Meintjies, “Dealing with the Aftermath – Sexual Violence and the Truth and Reconciliation Commission,” *Agenda* 36 (1997): 7–17; Graeme Simpson, *Jackasses and Jackrollers: Rediscovering Gender in Understanding Violence* (Johannesburg: Centre for the Study of Violence and Reconciliation, 1992).

74 Xaba, supra n 29; Graeme Simpson, Brandon Hamber and Noel Stott, “Future Challenges to Policy-making in Countries in Transition, Presentation to the Workshop” (paper presented at the Comparative Experiences of Policy Making and Implementation in Countries in Transition Workshop, Derry/Londonderry, Northern Ireland, February 2001: 6-7).

75 Sasha Gear, *Now That the War is Over: Ex-combatants Transition and the Question of Violence – a Literature Review* (Johannesburg: Centre for the Study of Violence and Reconciliation, 2005).

76 Tina Sideris, “Rape in War and Peace: Social Context, Gender, Power and Identity,” in Meintjies et al., supra n 14.

77 Jacklyn Cock, “Gun Violence and Masculinity in Contemporary South Africa,” in Morrell, supra n 13; Gear, supra n 74.

78 Gear, supra n 74.

79 Morrell, supra n 29 at 19.

80 Reid and Walker, supra n 29 at 7.

81 Jewkes, supra n 6 at 1424.

Research in South Africa has revealed trends to this end. A number of the men interviewed in a recent study seemed to have the strong misapprehension that there had been a dramatic change for women since 1994, in terms of general social and economic security.<sup>82</sup> In reality, “more women than men continue to live in poverty, greater numbers of women are unemployed and have lower education status than men.”<sup>83</sup> Women interviewed, meanwhile, linked men’s perception that women are benefiting from the transition more than them with the challenges to their manhood that men faced, such as unemployment, and with violent behaviour in the home. This was exemplified by the comment of a male participant who directly linked violence against women (by other men, not himself) to the perceived threat of women to men:

So I think that’s the reason why you’d find that incidents of violence against women

<sup>82</sup> The project proposed to assess the impact of political transition on the security of women in South Africa, Northern Ireland and Lebanon by comparing how men and women conceptualise the notion of security. It particularly examined whether the participants had different notions of how women’s security was affected by the transition process. The core research team were Brandon Hamber, Paddy Hillyard, Amy Maguire, Monica McWilliams, Gillian Robinson, David Russell and Margaret Ward with research associates Ingrid Palmary at the Centre for the Study of Violence and Reconciliation in South Africa and Mona Khalaf at the American University in Beirut. See, Brandon Hamber et al., “Discourses in Transition: Re-imagining Women’s Security,” *International Relations* 20(4) (2006): 487–502. In all, 11 focus groups were carried out in South Africa; six all-women groups, four all-men focus groups and one mixed group. A total of 58 participants took part in the focus groups. The six women focus groups were broken down in terms of political campaigners, those in public life, ex-combatants, victims of political violence, those working in NGOs and those involved in economic reconstruction. The four male focus groups included political campaigners, those in public life, ex-combatants and victims of political violence. The mixed group (for logistical reasons) comprised male and female politicians. Twelve interviews with key policymakers were also undertaken. All the male focus group participants were black South Africans, and there were one or two white participants in the women focus groups. Most were from working-class backgrounds, although some of the participants working in NGOs and public life could probably be seen as middle class. The interview and focus group process was carried out by Ingrid Palmary, Sinothile Msomi and Oupa Makhalemele at the Centre for the Study of Violence and Reconciliation in Johannesburg. The above two quotes have been extracted for illustrative purposes from the vast amount of data (one million words from across the three contexts) and belie a wider textual analysis of the data in which key themes were coded and extracted. This project has been funded under the UK Economic and Social Research Council New Security Challenges Programme (Ref No. RES-223-25-0066), <http://www.incore.ulst.ac.uk/research/projects/rwsst>.

<sup>83</sup> Walker, supra n 29 at 227.

... not that they were not there in the past ... but right now they are so in the open because it’s the only weakness that you can now use against women. You can’t use financial resources against them because now they are pretty much earning more than us. So we can’t use that, whereas in the past we’ve had that leverage of saying I am working alone, I don’t need your money, but right now you can’t say that ... they are looking for another weakness within a woman. And that weakness right now is sexual weakness. That we can always rape you, we can physically show you our strength.

A female participant in the study made a similar point:

[The] more women are empowered, the more aggressive men get because they are losing their space in society. So I think in as much as the law of the country allows women to be empowered that is going to have a spin-off effect on men’s behaviour and men’s attitudes towards women. In particular those so-called empowered women. They’ll always be [the] subject of abuse all over the ... everywhere you go.

Although claims in these interviews cannot be generalised given the size and nature of the sample, they certainly point to trends, especially when read in conjunction with the data on gender violence in South Africa and other studies. Walker’s research with men aged 22 to 35 in Alexandra Township elicited remarkably similar comments.<sup>84</sup> For example, some men felt women were being disproportionately advantaged:

Men say, there is a voice for women, what about us? Some believe that the government is treating women much better ... that the government is overdoing it ... when women shout the government listens. Change to men is like taking away their privileges. When things change they fear it, I fear it, because they don’t know what will be happening.<sup>85</sup>

The link between this and violence against women is also made:

We are seen as the enemy now. Women are advancing in education, economically. Men feel threatened. I see a lot of women who have gained a lot of confidence in who they are. I know women who provide for themselves

<sup>84</sup> Ibid.

<sup>85</sup> Ibid, Interview, 11 June 2002.

now and that threat is actually what maybe [is] evoking a lot of violence. It is that strength, it is that threat of knowing that I can no longer hold onto that same position I held, or my father or my brother held. I suppose you could say I feel weaker. I'm not saying the rape is a new thing but it's playing itself out in why men are being more violent.<sup>86</sup>

These narratives point to a security-insecurity cycle; some of the advances in the security of women, in social, political and egalitarian terms, even if not completely realised, have led to other physical insecurities for them. This, of course, is not to say that there should be no such advances. Rather, it highlights the complex interplay among security, insecurity and masculinity, and its highly gendered nature.

Men's identity, argues Tina Sideris, can emerge from conflict more damaged than women's.<sup>87</sup> Since many women have to develop survival strategies throughout the war, they are often better equipped to deal with the aftermath.<sup>88</sup> Traditional gender roles are also often disrupted during conflict, with some women who had previously been excluded from public life becoming economic providers, leaders and activists.<sup>89</sup> Men can feel threatened by the survival of women and try to reassert their manhood in the spaces where they can, most typically in intimate relationships.<sup>90</sup> This may be one of the reasons why women in a number of societies fail to consolidate wartime gains as men reassert their claims, often violently.<sup>91</sup>

Research in psychology contends that masculine socialisation results in men feeling intense pressures to abide by gender-role norms and expectations.<sup>92</sup> Studies show that when masculine norms are

challenged, "gender-role stress"<sup>93</sup> is experienced by some men, which can lead to verbal abuse or violence.<sup>94</sup> However, as Isak Niehaus writes in reflecting on rape, we should not confuse an analysis that relates men's social positioning and violence with a simplistic conception of male violence as merely an expression of patriarchy.<sup>95</sup> It is often the fantasies of powerful identities inscribed in gender hierarchies and emotionally invested in by men that fuel male violence. Violence may ensue when investments are thwarted, when others refuse to take certain subject positions or when men face contrary expectations of identity.<sup>96</sup> The picture is complicated by the fact of multiple masculinities. Feminism has long argued that men collectively have power over women, while critical masculinity studies show that

not all men have the same amount of power or benefit equally from it, and that power is exercised differently depending on the location and the specific arrangement of relations which are in place.<sup>97</sup>

### Masculinity and Transitional Justice: A New Agenda

I argue that masculinity should be considered a cross-cutting issue in transitional justice. As a point of departure for future work, I suggest that four broad areas need to be explored. First, more research is needed to advance a more sophisticated approach to masculinity and transitional justice. A focus on masculinity should not be used to undermine services to female victims or a focus on the needs of women.<sup>98</sup> Yet the lack of rigorous studies, debate and policy direction on the role of men in the perpetuation of violence, political or otherwise, is a threat to the security of women. As Colleen Duggan notes in the foreword to a recent book on gender and reparations, further study is needed on "how men deal with their own compromised masculinity

86 Ibid, Interview, 25 April 2002.

87 Tina Sideris, "Problems of Identity, Solidarity and Reconciliation," in Meintjies, et al., supra n 14.

88 Ibid.

89 Meredith Turshen, "Women's War Stories," in *What Women Do in Wartime*, ed. Meredith Turshen and Clotilde Twagiramariya (London: Zed Books, 1998).

90 Sideris, supra n 86.

91 Meintjies, et al., supra n 14.

92 Todd M. Moore and Gregory L. Stuart, "Effects of Masculine Gender Role Stress on Men's Cognitive, Affective, Physiological and Aggressive Responses to Intimate Conflict Situations," *Psychology of Men & Masculinity* 5(2) (2004): 132-142.

93 Joseph H. Pleck, "The Gender Role Strain Paradigm: An Update," in *A New Psychology of Men*, ed. Robert F. Levant and William S. Pollack (New York: Basic Books, 1995); Joseph H. Pleck, *The Myth of Masculinity* (Cambridge, MA: MIT Press, 1981).

94 Richard M. Eisler, "The Relationship between Masculine Gender Role Stress and Men's Health Risk: The Validation of a Construct," in Levant and Pollack, supra n 92; Todd M. Moore and Gregory L. Stuart, "A Review of the Literature on Masculinity and Partner Violence," *Psychology of Men & Masculinity* 6(1) (2005): 46-61.

95 Isak Niehaus, "Masculine Domination in Sexual Violence: Interpreting Accounts of Three Cases of Rape in the South African Lowveld," in Reid and Walker, supra n 29.

96 Ibid.

97 Morrell, supra n 29 at 9.

98 Colleen Duggan, "Foreword," in Rubio-Marín, supra n 7.

in the face of adversity, since this has a direct impact upon women's long-term chances for recovery and empowerment."<sup>99</sup> In other words, a more thorough analysis is required of the interrelationship between men, masculinity and the insecurity of women post-transition. Central is the "need to critique practices and policies which fuel and flow from violent masculinities."<sup>100</sup> This, in turn, should inform how we construct transitional justice institutions, the discourse with which we infuse them, how they deal with men and the issue of masculinity and how they affect gender relations.

Second, we must consider the impact of transitional justice processes on men. If we are to understand the role of men as the perpetrators of the majority of violence during political conflict and after it (albeit, purportedly, in a different form, such as domestic violence), we must address how we hold men accountable before, during and after transition. We thus need a more complex understanding of changing masculinities, transitional justice processes and their relationships to transition and post-conflict social reform. We must move beyond the idea of simply reforming the male psyche in an individualistic way. It is important to address the societal structures that influence the violent attitudes of many men. Attitudinal change is critical and undervalued in transitional justice, which is often legally driven and focused on larger questions of civil and political rights.<sup>101</sup> A concern with masculinity should not be equated with talking about masculinity in transitional justice as "men's issues" or with asking bland questions like "where are the men in transitional justice?" Men should not be considered an interest group with a focus on men's needs alone. Rather, masculinity should be seen as central to how we conceptualise the outcomes that transitional justice processes can deliver in terms of gender justice more broadly and women's security in particular. The focal point needs to be on how violent masculinities endure post-transition and how transitional justice mechanism can be structured to impact upon this.

Overly stressing the needs of "men" at the expense of considering the place of masculinity in transitional justice and a web of gendered relationships could have negative results, such as the spawning of inwardly focused men's movements around transitional justice processes. As Ross

Haenfler argues, men's movements often lack a feminist understanding of structural inequality, the intentional involvement of women or a thorough comprehension of the gendered nature of society.<sup>102</sup> Jacklyn Cock contends that new gender identities:

cannot be achieved through equal rights feminism – a stunted feminism which focuses on specific issues such as women's access to armies and combat roles. Nor can it be achieved through a radical feminism which focuses narrowly on domestic violence against women. Nor can it be achieved by women acting alone.<sup>103</sup>

In the final instance, any analysis of masculinity and its relationship to transitional justice needs to recognise multiple masculinities. This should not be used to dilute a focus on violent masculinities. Anti-sexist male politics and challenges to violent masculinities, or gender transformation more broadly, at least at this stage, must become a source of disunity among men, not one of solidarity,<sup>104</sup> and include the intentional involvement of women.<sup>105</sup> Points of rupture between dominant masculinities and emerging new masculinities should be continually highlighted and explored. These should be accentuated to increase contestation between masculinities, seeking change through confrontation. In other words, both a structural analysis and a more comprehensive understanding of the interrelationships between men and women, and among men are needed. A robust debate should begin among transitional justice experts themselves as to how best to approach the issue of masculinity if transitional justice mechanisms are to influence post-conflict violence and gender inequities.

Third, the international literature suggests that a theory of masculinity and transitional justice cannot be built on the "crisis in masculinity" discourse. This discourse assumes that men have been reduced to being confused, dysfunctional and insecure because of (i) rampant consumerism; (ii) women's, and more particularly feminism's, assault on male bastions of power; and (iii) the now widespread social and cultural disapproval of traditional displays of masculinity.<sup>106</sup> Contemporary masculinity research generally questions the notion of "crisis," with its

<sup>99</sup> Ibid, 18.

<sup>100</sup> Morrell (1998) cited in Cock, supra n 75 at 54.

<sup>101</sup> Ní Aoláin, supra n 45.

<sup>102</sup> Ross Haenfler, "Manhood in Contradiction: The Two Faces of Straight Edge," *Men and Masculinities* 7(1) (2004): 77–99.

<sup>103</sup> Cock, supra n 75 at 54.

<sup>104</sup> Connell, supra n 34.

<sup>105</sup> Haenfler, supra n 101.

<sup>106</sup> Whitehead and Barrett, supra n 12.

implication that there is one, fixed masculinity.<sup>107</sup> The word “crisis” implies a coherent system of some kind, and this is an illogical way of thinking about a configuration of practices within a system of gender relations.<sup>108</sup> Others argue that the use of the crisis discourse implies that male identity is a fragile and tentative thing, which makes it almost impossible to talk about masculinity without implying it has a substantive base.<sup>109</sup> Furthermore, to convey that traditional masculinities are in crisis implies they are disappearing, whereas “aggressive masculinity is alive and well.”<sup>110</sup> Aggressive masculinities are visible in the rituals of neo-Nazis, paramilitary groups and the military, as well as in films, on television and on the sports field.

Recent changes for men (and women) have been historically significant, and changes within a transitional society are doubly challenging, but Whitehead and Barrett warn against the trap of equating changes in men’s experiences and opportunities with a “crisis in masculinity.”<sup>111</sup> Masculinity may well be in crisis, but not in the way popularly perceived.<sup>112</sup> As Tim Edwards suggests:

Some men are suffering or will in all likelihood suffer some experience of crisis on some level, whether in relation to loss of employment prospects, despair as to their future, rising demands from women in their personal lives, frustration at perceived inequalities with other men, or all of these.<sup>113</sup>

In the South African context, Walker prefers to talk about masculinities being disturbed and destabilised since 1994.<sup>114</sup> Others talk about the disruption and transformation of masculinities not as an overall crisis but rather as tendencies toward crisis.<sup>115</sup>

A contextual analysis recognises that male cries of insecurity do not come out of thin air but that they are the product of a social and political context in which gender is integrally linked with power and changing power relations in a myriad of ways. These power balances are themselves linked to transitional politics and to the transitional justice mechanisms

put in place to deal with violence. As power relations begin to shift and struggles intensify, or when new and powerful discourses of equality emerge, as in the South African case, there will be different responses. Some men acquiesce (reluctantly), other men embrace change and still others resist. We need to understand the nature of these reactions by recognising that men’s expressions of insecurity, which might lead to violent behaviour, are deeply gendered psycho-social-political phenomena that require attention.

Finally, we cannot divorce questions of accountability for human rights violations from the fact that most perpetrators of violence are men and that violence against women seldom stops once the conflict is over as it is deeply intertwined with violent masculinities. Truth commissions, as one transitional justice tool, often are committed to uncovering the truth about the past so “it” will not happen again. However, exactly what “it” means is generally not defined. If “it” means politically motivated human rights violations, truth commissions may have some preventive effect by highlighting in detail what transpired in the name of politics. If “it” means human rights violations of all types (which one has to assume is part of entrenching a human rights culture, another aim of most truth commissions), there is little evidence to date that the lessons of truth commissions extend to the post-conflict society.<sup>116</sup> This is starkly evident when it comes to violence against women in transitional societies, and specifically in South Africa.

Transitional justice literature has been criticised for embracing a simplistic liberal notion of moving “from” male-defined political violence “to” a liberal democratic framework.<sup>117</sup> A binary view of transition fails to recognise the multiple layers of power that exist within society and the continuities between past and present. This is important when considering gender violence before, during and after conflict. More recent truth commissions have given space for women to talk of such violence publicly, but this may create a disconnect between what is defined as being about the transition and the “everyday” violence women experience at home and in the community.<sup>118</sup> The end of violence and the start of political reform, including transitional justice mechanisms primarily concerned with civil and

<sup>107</sup> Connell, supra n 23.

<sup>108</sup> Ibid.

<sup>109</sup> Brittan, supra n 26.

<sup>110</sup> Whitehead and Barrett, supra n 12 at 7.

<sup>111</sup> Ibid.

<sup>112</sup> Edwards, supra n 19.

<sup>113</sup> Ibid, 16.

<sup>114</sup> Walker, supra n 29.

<sup>115</sup> Connell, supra n 34; Connell, supra n 23; Edwards, supra n 19.

<sup>116</sup> Hamber, supra n 2.

<sup>117</sup> Bell and O’Rourke, supra n 5.

<sup>118</sup> Fionnuala Ní Aoláin and Catherine Turner, “Gender, Truth and Transition,” *UCLA Women’s Law Review* 16 (2007): 229–279.



political rights, are insufficient in dealing with the harms suffered by many women before and after the cessation of hostilities.<sup>119</sup> They also do not address how violent masculinities perpetuate these harms. This places an onus on transitional justice processes to move beyond concern only with the public realm, accountability processes, legal and institutional rebuilding or formal equality to consider continued injustices in the private sphere.<sup>120</sup> The study of masculinity is integral to this shift.

In addition, an analysis of masculinity and its relationship to transitional justice processes should recognise the complexities of individual and socio-political processes in which masculinity is deeply linked to notions of femininity and the social positioning of men post-conflict. Hegemonic masculinities generally demand that “real men” have gainful employment and provide for their families.<sup>121</sup> Jewke’s review of the relationship between poverty and intimate partner violence highlights the need for a “renegotiation of ideas of masculinity, and recognition of the effects of poverty and unemployment on men in prevention of intimate partner violence.”<sup>122</sup> This, in turn, demands a more intersectionality-driven analysis<sup>123</sup> of transitional justice and careful scrutiny of how we conceptualise the relationship between transitional justice processes, social reform and prevention of violence in the long term.

The South African case clearly highlights the need for a greater focus on the interrelationship between specific transitional justice reforms (such as targeted reparations for women) and wider social reforms (such as the gender equality agenda). It is vital to understand how violent masculinities persist and react to the advances of women. Undoubtedly, transitional justice processes can shape public discourse and attitudes. To this end, the onus is on these mechanisms and the experts who work with them or theorise about their value to project a nuanced understanding of masculinity that can endure beyond the immediate post-conflict period and thus contribute to a society that allows new masculinities to develop.

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119 Ní Aoláin, supra n 45.

120 Vasuki Nesiah, “Discussion Lines on Gender and Transitional Justice: An Introductory Essay Reflecting on the ICTJ Bellagio Workshop on Gender and Transitional Justice,” *Columbia Journal of Gender and Law* 15 (2006); Ní Aoláin, supra n 45.

121 Harland et al., supra n 44; Ramphele, supra n 29.

122 Jewkes, supra n 6 at 1425.

123 Rooney, supra n 3.



# The Application of Forensic Anthropology to the Investigation into Cases of Political Violence

LUIS FONDEBRIDER<sup>1</sup>

## Introduction

The application of Forensic Anthropology to investigations into cases of political violence (such as human rights violations), its origin and its development are closely linked with phenomena of violence that have occurred in several parts of the world since the 1970s. The need for conducting investigations that followed the disappearance and murder of thousands of people for political, ethnic and religious reasons became a key element in this process. The search for and exhumation of the remains of victims, usually buried in clandestine graves, their identification and the establishment of the cause of death were important components in the transition to democracy.

Although today Forensic Anthropology is used in many countries to investigate cases of political violence, two applications have significantly influenced the discipline. In Latin America, the year 1984 marked the time when human rights violations committed in the region, mostly by military dictatorships (except for Colombia and Peru), started to be investigated. This approach, described below, contributed to broadening the application of Forensic Anthropology beyond its classical definition, particularly as it is known in English-speaking countries.

The second application, which arose several years later and is better documented in English language publications, involves the extensive investigations that began to be conducted in the former Yugoslavia in 1996. Since this time, the International Criminal Tribunal for the former Yugoslavia (ICTY) has

resorted to the services of organizations such as Physicians for Human Rights (PHR) to exhume remains from mass graves scattered mostly across Bosnia. Years later, the International Commission on Missing Persons (ICMP) was engaged to follow through on these tasks, mainly in the field of identification of victims.

Most forensic anthropologists currently working in any field of this discipline—whether in ordinary criminal cases or mass disasters—have been involved, at any given time, in the experiences mentioned above, gaining a valuable and different expertise. For some, these experiences were the springboard for a lifetime of commitment to this application, while for others they helped them in their return to more traditional fields of application, such as ordinary criminal cases.

What cannot be denied is that, regardless of the context, this application of Forensic Anthropology has been the one that developed the most over the last years, producing extensive literature, particularly concerning the archaeological recovery of remains, and osteological analysis of bone trauma. In addition, this enabled many forensic anthropologists lacking practical know-how to receive hands-on experience. For example, before traveling to Bosnia or Guatemala, most professionals had never seen or excavated a contemporary mass grave containing 40 or 50 corpses. Nor had they had the chance of observing traumas caused by tools such as machetes.

## The Political and Legal Framework for Investigations into Political Violence

Some of the forty countries hard hit by political, ethnic or religious violence where Forensic Anthropology has been included in the investigations are now on the transitional road to democracy and to reviewing their past. Well known are the cases of Argentina, Chile, El Salvador, Guatemala and Peru in Latin America; South Africa, Rwanda and Sierra Leone in Africa; the former Yugoslavia in Eastern Europe; and the Philippines and East Timor in Asia.

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Even though each country came up with a solution of its own, the creation of Truth Commissions as well as the intervention of local and international courts have been the preferred choice. As years went by, some initial experiences were adjusted to local contexts, taking into account the geographical, economic, religious and ethnic characteristics of each society. Thus, in some—though few—countries, emphasis has been placed on identifying the remains found rather than on attributing responsibility for the events to someone; however, the general trend has been to identify the remains and establish the victims cause of death as well as to contribute the resulting scientific reports to the relevant criminal proceedings.

In this paper, I will focus on the initial development of the application of Forensic Anthropology to cases of political, ethnic and religious violence in Latin America by examining the origins, evolution and prospects of the Argentine Forensic Anthropology Team (EAAF).

#### **Argentina and its Political Context in 1984**

Democracy returned to Argentina on December 10, 1983, after a military dictatorship (1976-1983) marked by severe human rights violations came to an end. The most patent consequence of the dictatorship was the disappearance of 10,000 to 30,000 people and the kidnapping of about 500 babies born to mothers held in captivity.

During the transition to democracy, there was a strong demand from thousands of victims relatives, as well as from other sectors of society and the new government to know what happened to the disappeared and to condemn the members of the armed and security forces responsible for the crimes.

In 1984 and 1985, the task undertaken by an investigative commission known as the National Commission for the Disappearance of People (or CONADEP, its Spanish acronym) and by the judiciary authorities contributed to confirming the original claims made by thousands of victims relatives, human rights organizations, and survivors from clandestine detention centers. In many cases, the work broadened the original claims, thus gaining a better and more concrete insight into the systematic plan adopted by the military regime to cause the disappearance of people.

#### **Where are the Disappeared?**

During the investigation process, learning what had happened to the disappeared, knowing whether they were dead or alive, finding out where they were or where they had been buried became vital questions that needed to be answered. Unfortunately, the evidence pieced together proved that thousands of people who had not recovered their freedom were dead and that two main killing methods had been employed: a) throwing the living victims from airplanes into the Atlantic ocean, or b) executing them extra-judicially (sometimes staging fake confrontations). Their bodies were subject to one of two fates. If the remains of victims thrown into the ocean washed ashore along the Argentine or Uruguayan coasts (which occurred in only about 60 cases only), they were buried in nearby cemeteries. Those individuals whose bodies were never recovered (the number of which is still unknown) were more than likely lost due to the predation of marine life and tides. The bodies of the victims shot dead were buried in the cemetery closest to the sites where they were found or—in only two documented cases to date—in areas under police or military control.

Therefore, at the beginning of the democratic transition, the challenge was to exhume unidentified, skeletonized bodies buried in individual or mass graves in cemeteries, try to identify them, and determine the cause of death.

However, it became increasingly evident that investigations into these cases could not be conducted in the same way as ordinary criminal investigations or mass disasters. The investigation into cases of human rights violations demands a new approach both from the legal and scientific perspectives. The perpetrator is not an individual but the State and its apparatus.

The multiplicity of traces left by the administrative bureaucracy of the State —particularly in societies with a predominantly urban structure—facilitates the use of a scientific methodology that aims at reconstructing the logic behind its operation. This involves not only collecting but analyzing data in a proper and meaningful context

The secrecy of perpetrators, the difficulties in accessing relevant documents (especially those held by intelligence agencies), the widely scattered information sources, and the relatively short passage of time makes the search for the disappeared as

well as the advance, confirmation and rejection of hypotheses extremely slow.

The exhumation and analysis of the bodies found are mere steps in a broader and more complex process, the explanation of which is the purpose of this paper. An open mind and a deep knowledge of how the repressive regime used to operate do not guarantee a proper investigation but are a solid foundation on which to proceed. In this regard, each identification enables us to ratify or rectify a course of action adopted; therefore, every time a victim is successfully identified, the achievement goes far beyond the humanitarian or legal field since it will have a multiplicative effect upon the entire investigation.

Furthermore, it is worth mentioning that strong suspicion had fallen on other auxiliary investigative bodies, such as the police, for which reason they had to be excluded from the investigations, at least in the early years. As a result of this factor, which was inherent not only in Argentina's early democracy but also throughout Latin America, the application of Forensic Anthropology to these investigations had to be adjusted to unusual methods, such as the intense search for background information about each case, a task usually undertaken by lawyers, prosecutors and detectives.

#### **1983/1984: First Exhumations – Dr. Clyde Snow Arrives in Argentina**

In early 1984, shortly after democracy returned to Argentina, judges began to order exhumations of graves in cemeteries thought to contain the remains of disappeared persons. Relatives of the disappeared, desperate to find out what had happened to their loved ones and hoping to recover their remains, often attended the exhumations. However, these exhumations were problematic in several ways. First, official medical doctors in charge of the work had little experience in the exhumation and analysis of skeletal remains; in daily professional experience they worked mainly with cadavers. Further, exhumations were carried out in a non-scientific manner by cemetery workers and the bones were frequently broken, lost, mixed up, or left behind in the graves. At that time, in the mid-1980s, discussions about archaeology or anthropology in a forensic context were almost unprecedented. Only forensic physicians were deemed experts in the field, supported by odontologists and radiologists—in fact, there was scarcely any room left for any other scientific discipline. The consequence was

that hundreds of bodies were damaged, thus losing valuable evidence that was necessary to identify the remains found and to sustain a legal case against those responsible for the crimes.

Second, some of the forensic doctors involved in these efforts were complicit, either by omission or commission, with the crimes of the previous regime. In Argentina, as in most Latin American countries, forensic experts are part of the police and/or the judicial system, and their independence is often severely hindered during non-democratic periods. Thus, there is a conflict of interest when State bodies have to investigate the State without external oversight. This accounts for the fact that forensic experts from official institutions had very little credibility among victims families. For all these reasons, it was necessary to find an independent, scientific alternative to these procedures.

Early in 1984, CONADEP and the Abuelas de la Plaza de Mayo, a non-governmental human rights organization searching for children who disappeared with their parents or who were born in captivity, requested assistance from the Science and Human Rights Program at the American Association for the Advancement of Science (AAAS, Washington, DC) for the purpose of learning how to: a) establish a biological link between disappeared babies and their family members, and b) scientifically carry out exhumations and identify the remains found. Mr. E. Stover, then Director of the Science and Human Rights Program at AAAS, organized a delegation of American forensic experts to travel to Argentina in order to offer cooperation in this respect. The delegation found several exhumed, unidentified skeletons stored in plastic bags in dusty storerooms at numerous forensic medical institutes. Many bags held the bones of more than one individual. The delegation called for an immediate halt to the exhumations due to improper excavation, storage, and analysis.

Among the AAAS delegation members was Dr. Clyde Snow, one of the world's foremost experts in Forensic Anthropology. Dr. Snow called on local archaeologists, anthropologists, and physicians to begin exhumations and analysis of skeletal remains using traditional archaeological and forensic anthropological techniques. Snow returned to Argentina repeatedly over the next five years, trained the founding EAAF members, and helped form the team. In addition, Snow has helped to start similar teams in Chile, Guatemala, and Peru.

### The Creation of EAAF

When Snow arrived in Argentina, he immediately called on professional archaeologists and physical anthropologists. As he did not get the desired response, he invited students of these disciplines and of medicine, who would then create the Argentine Forensic Anthropology Team (EAAF) in mid-1984 as a non-governmental, not-for-profit scientific organization.

In other words, its origin does not stem from an academic or judicial decision, but from an initiative taken by a group of students who had the support and guidance of Dr. Snow, as well as the initial trust of human rights organizations and of some judges concerned with investigations into cases of disappeared people.

Since the beginning, it was clear for all EAAF members that finding and identifying remains was a highly sensitive issue, since it touched upon many painful and distressing topics for the victims families: the uncertainty as to whether their loved ones were dead or alive, whether it would be possible to bury them and carry out customary funeral rites, and whether justice could be pursued. Unfortunately, these basic and crucial questions could not always be answered, either because the political power was not fully committed to the search and the judicial power was not willing or able to investigate, or simply because the criminals involved would not provide any information and there was lack of power for, or interest in, obtaining their declarations.

It is in this general context, with little specific variations, that the search for the remains of people detained, disappeared or killed has been carried out in many parts of the world over the last 30 years. The organizations of civil society, such as those made up of victims relatives, have been the first to take to the streets to inquire about their loved ones and they are the ones who persist in the search, far beyond truth commissions or the wish of governments to close the investigation proceedings.

Thus, Dr. Snow and EAAF's first application was strongly influenced from the beginning by the awareness that, beyond any consideration as to the best technical procedures to exhume and analyze human remains, the relationship with the victims families and their communities was absolutely vital before, during and after the investigation. This does not mean that families would influence the scientific

work performed, but when they are encouraged to participate in decision-making and information-sharing processes, scientific work gains credibility and transparency, which are indispensable for cases of this kind.

### How to Investigate Cases of Disappeared People

It is often assumed that an investigation into cases of political, ethnic and/or religious violence may be conducted in a way similar to that of an ordinary criminal case, such as an individual killing someone and running away. However, cases of disappeared people are much more complex crimes, because the responsibility lies mainly with the State and its apparatus. This is not exclusive to the Argentine case described but to all contexts where crimes of this kind are perpetrated. Furthermore, the opening of graves and the recovery of remains without a well informed strategy is a mistaken approach, which accounts for the great number of unidentified bodies kept in storage.

Therefore, before recovering and analyzing the remains, it is recommended that what may be called a *preliminary* investigation be conducted with the purpose of determining the identity of the person being sought, what happened to him/her, what circumstances surround the case, etc. To sum up, the goal is not only to reconstruct the victims life, but also to learn what he/she was like from the biological viewpoint, and to put forth hypotheses as to where he/she might be buried.

In order to conduct an investigation of this kind, written and oral sources have to be used. The former involve, first and foremost, documents issued by State bodies in relation to the facts concerned, such as intelligence documents from the security and armed forces, judicial investigations, autopsy reports, cemetery and morgue records, photographs of corpses and death certificates. It is also necessary to survey mass media archives (journalists are often the first to arrive at the site, or conduct investigations on their own initiative) as well as academic research. Oral sources include, first of all, the victims relatives, as well as witnesses, political activists, and police and military officers involved in the events.

All the information collected should be entered in databases specifically designed to store the information related to the searches and help propose specific working hypotheses.

This preliminary investigation—an unusual task among forensic anthropologists engaged in more traditional contexts—is then followed by the archaeological fieldwork and laboratory analysis of the remains.

From the archaeological point of view, the different burial sites pose new challenges. Mass graves containing possibly 30, 50 or 200 remains in different states of preservation, mined areas, 20-meter deep wells full of remains, graves under new buildings, graves in damp soil or at the bottom of a cliff are only some of the burial sites likely to be found when dealing with human rights violation cases. As a result, the strategy for the archaeological excavation should be adapted to the type of environment as well as to the general context. For example, security factors are usually complex, since the sites can be in rural areas where perpetrators might still be present. Another issue is the logistic challenges posed by road and communication deficiencies. It is important to bear in mind that these cases do not occur in developed countries (the so-called first-world countries) but in developing or very poor countries, which have considerable deficiencies in terms of infrastructure and security. Indeed, all this affects and conditions work strategies.

An analogous situation holds for the analysis of remains. In cases like these, conditioning factors do not result from infrastructure issues but from the population under analysis. On the one hand, the use of standards developed for other population groups, such as those in the United States, usually raises doubts as to how accurate the estimation of, for example, age can be. This certainly impacts the identification process, which is already intrinsically complex when ante-mortem information is lacking. Since the target victims are usually people who had no access to dentists or physicians, the lack of records makes matching attempts more difficult.

### **Forensic Anthropology and Investigations into Human Rights Violations**

Snow's initial tasks in Argentina were a source of inspiration for groups of forensic anthropologists who were later trained in Chile, Guatemala and Peru. Thanks to his work, Forensic Anthropology has evolved differently in parts of Latin America than it has in other regions of the world. These differences could be summarized as follows:

- a) Constant interaction with the victims families and their communities before, during and after the investigations, ensuring the credibility of

the results obtained and transparency in the procedures adopted.

- b) The involvement of forensic anthropologists during preliminary investigations makes it possible to better integrate the contextual and historical information of a case with the scientific data gathered in the archaeological and the laboratory (anthropological, medical, dental and genetic) analysis stages.
- c) Collection of ante-mortem data: direct involvement in the interviews with the victims family members, taking an approach closer to that used by social rather than strictly Forensic Anthropology. This creates a climate of trust with the victims relatives allowing the attainment of more detailed information and thus ensuring a better and more accurate data collection.
- d) The use of both the forensic archaeologist and the forensic anthropologist, ignoring the often sharp division between the professionals in such disciplines and their roles.
- e) Finally, a broad experience in the search, excavation and interpretation of complex graves located in different environments. Similarly, a substantial case load of per-mortem injury analysis.

### **Creation of the Latin American Association of Forensic Anthropology (ALAF)**

ALAF was founded on February 28, 2003, in Sherman, Texas at a meeting attended by all the Latin American forensic teams along with others who actively work in the field of Forensic Anthropology in the region. The Argentine Forensic Anthropology Team invited a total of 17 people from seven countries—Guatemala, Peru, Colombia, Mexico, Argentina, Chile and Venezuela.

ALAF is a non-profit association pursuing the following objectives:

1. Establish ethical and professional criteria for the application of Forensic Anthropology in order to guarantee its quality
2. Promote the official use of Forensic Anthropology and Archaeology in judicial investigations in Latin America
3. Promote the accreditation of professionals in Forensic Anthropology by creating an independent board that would guarantee compliance with high professional standards
4. In keeping with the recommendations of international treaties and agreements, promote the

mechanisms that guarantee the deceased person's family access to information on the procedures and to the results of forensic investigations

5. Promote the protection of the physical integrity of those associated with the investigation and their families due to the risks involved in working as a forensic anthropologist in some Latin American countries

6. Defend the scientific and technical autonomy of forensic anthropological investigations in Latin America and the Caribbean

ALAF's first public activity was the organization of a scientific session, "Forensic Anthropology in Latin America," at the 56<sup>th</sup> Annual Meeting of the American Academy of Forensic Sciences in Dallas, Texas. Representatives of forensic teams from Argentina, Colombia, Guatemala and Peru participated in this event.

In its first year, ALAF created a fully functional website.

To date, ALAF has 34 active members, four associate members, six member students, and three honorary members.

### **The International Evolution of EAAF**

After 27 years of work in approximately 40 countries, EAAF has become a benchmark in terms of the application of Forensic Anthropology to cases of political violence. In addition, EAAF has been instrumental in delivering training and providing assistance to other similar teams. The initial collaboration with Snow, which helped train similar teams in Chile and Guatemala, has continued with the training of teams in Cyprus and South Africa.

Furthermore, this method of work has proved that the relationship with the victims families, the respect for their rights, doubts and uncertainties, and the constant dialogue with them produce reliable results that become acceptable to the community. Contrary to what is thought, the relationship with the victims families does not condition the scientific task but adds meaning to the job performed by the judicial authorities.



## Dealing with the Past: The forensic-led approach to the missing persons issue in Kosovo

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### 1. Introduction : Lessons learned

Resolving the fate of missing persons in Kosovo is an extremely lengthy and complex task exacerbated by the particularly sensitive social and political context. This paper retraces the creation of the Office on Missing Persons and Forensics (OMPF) by the United Nations Interim Administration Mission in Kosovo (UNMIK)<sup>2</sup> as an effort to address the issue in a holistic manner, considering simultaneously the right to know of the relatives and the judicial requirement of investigating war crimes and crimes against humanity.

The creation of OMPF however was by no means a smooth process. The Office alone cannot address all the challenges encountered in the search for the missing in Kosovo and other organizations play a crucial role in the process, in particular the International Committee of the Red Cross (ICRC) and the International Commission on Missing Persons (ICMP). The former has concentrated on collecting information about individual missing persons, providing psycho-social support to the families, reminding the authorities of the right of the relatives to know the fate of their loved ones, and OMPF has greatly benefited from ICRC's experience, support and advice. ICMP

is an important partner in the identification process by providing DNA analysis at no cost. The achievements are exemplary as 64% of the initial missing person cases have been solved so far. Whilst acknowledging that other contexts are specific in their nature in terms of problems, limitations and opportunities, the lessons learnt in Kosovo can prove useful to other initiatives addressing the issue of the missing persons and recommendations can be outlined as follows:<sup>3</sup>

- A holistic forensic operation combining judicial and humanitarian approaches should be preferred.
- The coordination of the operation should be entrusted to a lead organization with a clear mandate and the powers to enforce best practice and Standard Operating Procedures (SOPs).
- Families and the civil society should be involved and consulted at all stages of the process. Transparency and accountability should be a priority and expectations should remain reasonable: by the very nature of the phenomenon of enforced disappearances, many remains will never be found, or if recovered, will never be identified.
- The search for the missing persons is a long-lasting process: local forensic capacity should be developed and professional and effective local mechanisms should be established or built upon.
- Detailed *ante-mortem* information regarding individual missing persons should be collected from close relatives. This information should include full identity, age, circumstances of disappearance, physical description, etc. When DNA analysis is available, saliva or blood samples should be collected from close *biological* relatives<sup>4</sup>. Information on patterns and

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\* The Department of Forensic Medicine (DFM) is the new name of the Office on Missing Persons and Forensics (OMPF), but for coherence and clarity, "OMPF" will be used throughout this paper.

\*\* This paper expresses the views of its author and not necessarily those of the EULEX.

<sup>2</sup> Established pursuant to UNSC Resolution 1244 on 10 June 1999.

<sup>3</sup> These recommendations are based on those presented in the article: J.P. Baraybar, V. Brasey, A. Zadel, *The Need for a Centralised and Humanitarian-based Approach to Missing Persons in Iraq: An Example from Kosovo*, IJHR, Vol. 11, September 2007.

<sup>4</sup> In the absence of DNA analysis program, see J.P. Baraybar, *When DNA is Not Available, Can We Still Identify People? Recommendations for Best Practice*, J. Forensic Sci., May 2008, Vol. 53, No. 3.

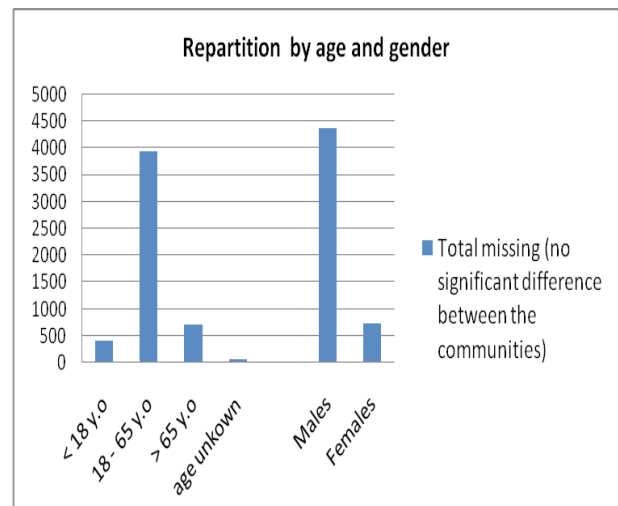
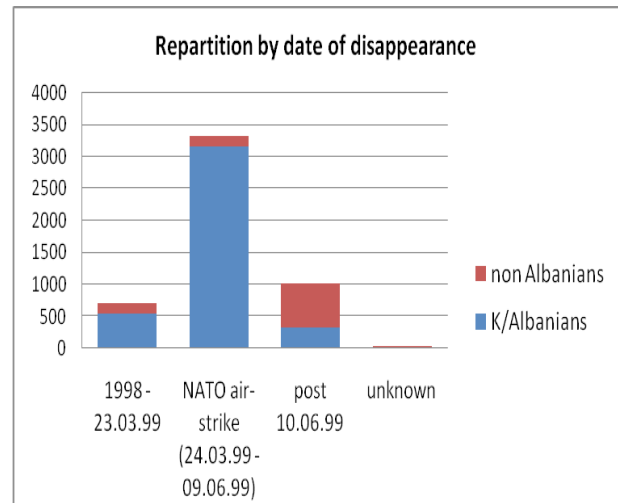
collective events of disappearance should be recorded as they are crucial in the recovery and identification process.

- The collection of information should be coordinated and the information should be centralized and consolidated into a searchable database. A comprehensive list of missing persons should be established and kept up-dated. Information-sharing mechanisms respecting data protection laws and confidentiality requirements should be established between the organizations involved.<sup>5</sup>

## 2. Missing persons in Kosovo

More than 5000 persons were reported missing as a consequence of the 1998-1999 armed conflict in Kosovo between the Federal Republic of Yugoslavia forces and the Kosovo Liberation Army (KLA) and many more were killed, displaced or imprisoned.

Disappearances affected all communities, genders and age ranges, although the majority of the victims are Kosovo/Albanian (K/Albanian) adult males. The majority of the K/Albanian disappearances occurred during the conflict, mainly during the NATO air strike,<sup>6</sup> when thousands were killed or taken away by Serbian forces and paramilitaries. However several hundred individuals had also disappeared after the end of the conflict and the withdrawal of the Serbian forces. Non-Albanian<sup>7</sup> disappearances follow a different pattern: several hundred are reported missing during the conflict, but most had disappeared after it ended on 9 June 1999.



Victims were often buried in unmarked graves in cemeteries in the municipality they were last seen, but also in mass graves hundreds of kilometers from the place they were taken. For instance, the remains of around 850 K/Albanian were found in three different locations in Serbia.<sup>8</sup>

Because of the very nature of the phenomenon of enforced disappearances, hundreds of bodies remain uncovered, many of those exhumed are unidentified, many remains have been destroyed<sup>9</sup> and the fate of hundreds will never be known. Disappearances must be understood then not as crimes committed solely against the individuals, but against their families, their friends and their community. Indeed,

<sup>5</sup> The confidentiality of information obtained during the DNA process should be ensured and should not be limited to individual DNA profiles. Indeed, other information of a private nature can be manifested by the process, such as mis-paternity cases, etc.

<sup>6</sup> From 24 March to 09 June 1999.

<sup>7</sup> Mostly Serbians, but also members of other communities living in Kosovo such as Romas, Bosnians, Gorans, Montenegrins, Ashkalis, Egyptians, Turks, and several mercenaries of other nationalities.

<sup>8</sup> See: *Exhumations in Serbia, Summary*, <http://www.ic-mp.org/wp-content/uploads/2008/02/batajnica-2001-eng.pdf>.

<sup>9</sup> See for instance <http://iwpr.net/report-news/investigation-serbia-more-mackatica-body-burning-revelations>. OMPF has indications that at least 150 bodies of persons reported missing were burned in different places around Kosovo.

by creating unanswerable questions and lasting anguish for the families, these crimes affect the entire society. Solving the fate of the missing persons is therefore crucial to the healing and reconciliation process for the whole region.

### **3. 1999-2000: The forensic process and the competition between judicial and humanitarian approaches**

On 10 June 1999 UNMIK and KFOR were deployed in Kosovo. Their mandate, based on Chapter VII of the UN Charter, included executive powers to perform civilian administrative functions and to restore and maintain rule of law and order.

Following their arrival, a number of countries proffered independent forensic teams to be deployed throughout Kosovo under the coordination of the International Criminal Tribunal for former Yugoslavia (ICTY).<sup>10</sup> These teams immediately began the excavation of a large number of graves to collect evidence of war crimes and demonstrate that crimes were systematic and widespread. The operation was unfortunately characterized by a lack of centralization and common SOP. In addition, given the judicial mandate, identification was not the priority and re-burial locations were not always documented.

The situation improved in 2000: the ICTY launched its forensic operation in a well coordinated manner and though the mandate was still judicial, more attention was given to the identification process and the return of the remains to the families. Unidentified remains were re-buried in recorded individual graves in a dedicated cemetery. Nevertheless, at the close of its forensic operation at the end of 2000, ICTY reported that it exhumed more than 4000 bodies, less than half of which were identified.

In parallel, ICRC was collecting information on missing persons in a systematic manner with the aim to create a comprehensive list of persons unaccounted for as a result of the conflict. Concurrently, UNMIK had established both the Detainees and Missing Persons Bureau (BDMP) within the Office of the Special Representative of the Secretary General (SRSG) and the Victim Recovery and Identification Commission (VRIC). The former was responsible for centralizing information

received by civilian officers and VRIC was mandated to continue the exhumations and identification work once the ICTY would close its operations. At the same time a small Missing Persons Unit (MPU) operating under the UNMIK Civil Police was also gathering information and evidence on occurrences of enforced disappearances, KFOR troops were recording potential grave sites and recovering human remains, the Organisation for Security and Cooperation in Europe (OSCE) had started a small forensic identification program and numerous other local and international humanitarian organizations were gathering information regarding victims of the conflict.

However, ICTY teams were operating under a strictly judicial mandate and no effective communication and coordination mechanism was formally established between the humanitarian organizations present and the Tribunal.

The consequences of this lack of communication and uncoordinated approach were chaotic on a number of levels. Firstly it created a false dichotomy between the judicial and humanitarian processes. Many relatives were denied information about their loved ones, not because it was unascertained, but because their right to know was not considered as a priority within the ICTY's judicial mandate. Secondly the lack of cooperation, coordination and information sharing mechanisms meant that family members had to give the same information to different organizations that only created additional distress, anguish and frustration. Finally, a wealth of crucial information on missing persons, events of disappearances and potential grave sites was scattered between the organizations present or was taken outside Kosovo by the international forensic teams and KFOR. A large number of those documents and records have still not been made available.

### **4. The Office on Missing Persons and Forensics**

UNMIK was slow to accept the magnitude and the sensitivity of the issue of the missing and its crucial impact on the healing and reconciliation process. The VRIC initiative had failed due to a lack of a mission-wide strategy, proper planning and adequate staffing. From 2001, after ICTY ceased its large-scale exhumations, the MPU continued the investigations but with limited forensic expertise and capacity. The OSCE forensic program continued to assist in the identification of the few remains recovered by the MPU.

<sup>10</sup> ICTY was established on 25 May 1993 pursuant to UNSC Res 827. The teams were collecting evidence for the cases against Slobodan Milosevic (IT-02-54), and Milutinovic et al. (IT-05-87-T).

In June 2002, the UNMIK SRSG established OMPF within its Department of Justice as an effort to address the issue in a more coherent, centralized and holistic way. The office was mandated to determine the whereabouts of persons missing as a consequence of the conflict through mechanisms including forensics and community outreach activities. The strategy developed by the office focused on the following key areas: centralization of information, open communication with families of missing persons, cooperation with the other organizations, use of best forensic practices and capacity building.

The BDMP was dismantled and the information transferred to OMPF, OSCE closed down its forensic program and MPU was then transformed into the War Crime Investigation Unit (WCIU). All competencies pertaining to the exhumations, autopsies, identification and return of remains were given to OMPF.

#### **Cooperation with other organizations**

Open communication and information sharing are crucial for the process, and platforms for cooperation and coordination were established with the main stakeholders.

The information pertaining to missing persons was centralized into a consolidated list developed by ICRC in conjunction with OMPF. OMPF also benefited greatly from the ICRC experience and advice in creating an outreach section able to address the needs of the families in an effective and respectful manner.

The OMPF relationship to the ICMP is formalized by a Memorandum of Understanding where DNA analysis is provided at no cost. ICMP is responsible for collecting blood samples from relatives, whilst OMPF obtains bone samples and sends them to their laboratories in Bosnia-Herzegovina for DNA analysis.

On the other hand, no institutional relationship between ICTY and OMPF was established. The responsibility for the management of the unidentified bodies exhumed under the Tribunal's mandate fell to OMPF, but in the pursuit of justice, ICTY retained primacy and OMPF forensic staff was seconded to the Tribunal where required.

KFOR has been a very reliable resource to the OMPF team, providing crucial logistical assistance

during field operations and expert demining teams. However, OMPF has only received minimal information regarding bodies recovered or recorded by KFOR in 1999, this information having been repatriated to countries of military origin.

Eighteen K/Albanian associations reunited under the coordination of the Kosovo Council of Family Associations and eight Serbian associations were created in the years 2000-2001 with the aim to lobby for the right of the families to know the truth on the fate of their loved ones. These family associations are strictly mono-ethnic and have not yet made the steps toward inter-community cooperation. OMPF has established good cooperation and open communication with these associations and relies on information they provide. In fact, more than half of the field operations performed by OMPF are initiated by information received from these associations.

Another major player in the missing persons issue is the Kosovan Governmental Commission on Missing Persons (GCMP) created under the Office of the Prime Minister. The mandate and responsibilities of the GCMP and its relationship with OMPF will be addressed in more detail in Section 5.

Cooperation with the Serbian Commission on Missing Persons (SCMP) has always been crucial as approximately 850 K/Albanian victims were exhumed in Serbia (prior to OMPF's inception) and needed to be repatriated to Kosovo, and around 250 remains of Serbian victims killed in Kosovo had to be transported to Serbia for burial.<sup>11</sup> Furthermore, the SCMP provided valuable information on potential burial sites of presumed non-Albanian victims. The cooperation between OMPF and the Serbian Commission on Missing Persons includes coordination regarding assessments of potential sites, identification and repatriation of remains.<sup>12</sup>

11 There are currently around 220,000 Serbians originally from Kosovo and probably 20,000 unregistered Roma displaced in Serbia as a consequence of the conflict. The majority of the relatives of non-Albanian missing persons are living in Serbia. See <http://www.internal-displacement.org/>.

12 This relationship was initially regulated by two protocols signed in 2001 between UNMIK and the Serbian Government: the Protocol on Cross-boundary Repatriation of Identified Remains and the Protocol on the Exchange of Forensic Experts and Expertise. The procedures were revised and up-dated and at present, Serbian forensic experts are invited to all exhumations of potential non-Albanian victims, their autopsies and identification process.

### Forensic process and the search for the missing

OMPF established a coherent system of working procedures and protocols on exhumations, autopsies, identifications, returns of remains, and mortuary work. The process that has been developed focuses on individual identification and providing answers to the families of the missing, while respecting the requirements of the judicial system and the legal aim of gathering evidence to prosecute war crimes. OMPF cooperates with national and/or international war crime prosecutors and police (mainly the WCIU) that are responsible for the investigation of criminal acts related to forced disappearances.

The search for missing persons begins with the investigation into the circumstances in which they were last seen. Interviewing relatives and friends provides invaluable ante-mortem data, giving a crucial description of the person prior to his or her disappearance. Ante-mortem data includes age, sex, stature and all identifying characteristics, such as dental records, old trauma, healed fractures and degenerative physical conditions.

Initially ante-mortem information was collected by several organizations, but in 2002 ICRC took over this responsibility. Indeed, ICRC has access to the families living in the Balkans via its delegations in the region and to the general diaspora through the Red Cross societies network.

Separately, the physical search for human remains is conducted in the field. In Kosovo, bodies are usually found in unmarked graves in cemeteries or illicit grave sites and occasionally in mass graves or as surface remains. When information is received, the OMPF archaeologist performs an assessment of the site from which a search strategy is developed. Intrusive excavation is then only undertaken with a Court Order.

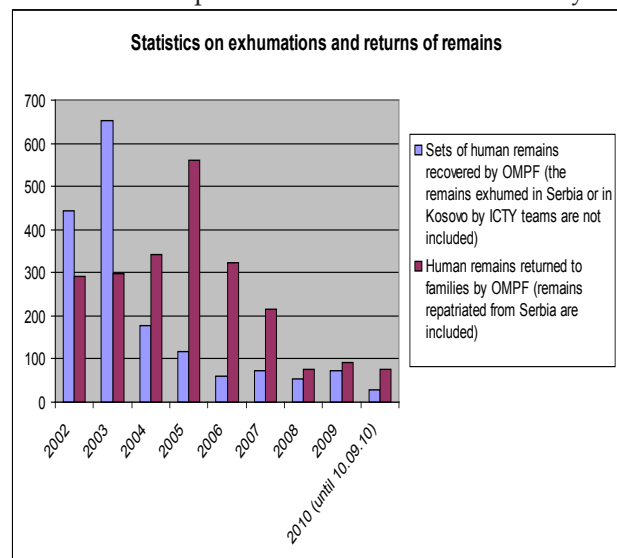
Once exhumed, the human remains are autopsied by a forensic pathologist who determines cause of death where possible. At the same time the forensic anthropologist records all physical features necessary for the purpose of identification and takes bone samples for the DNA analysis.

In most of the cases DNA analysis is necessary to make a final identification. Identification through DNA is usually only possible when there is both bone and blood samples (from biological relatives) available for comparison. However, in extreme cases and only with permission from family members,

OMPF will take bone samples from dead parents of missing persons where no blood reference is available.

When a positive DNA match is received, the OMPF forensic anthropologist does a final review prior to confirmation of identity. The remains, including clothing and artifacts, are returned to the family together with relevant information and official legal certificates which are given to the next-of-kin.

OMPF performed thorough forensic examination of all remains repatriated from Serbia and their identities were confirmed before being returned to the affected families for burial. In case of doubt, new bone samples were sent for DNA analysis.



Through the systematic audit of records, the closure of cases of persons no longer missing, the exhumations of all known graves and the identification and return of remains to the affected families, the number of missing persons in Kosovo was reduced from 5104 (total number of cases reported to ICRC and/or OMPF) to 1839 (ICRC official list, July 2010).

### Challenges faced by the forensic process

Expectations should remain realistic. Despite the undeniable results achieved, the forensic process has limits and not all remains will be found and not all remains that are exhumed can be identified. Indeed, thousands of damaged, burnt, fragmented bones and bags of ashes that have been recovered by OMPF are not suitable for DNA analysis.<sup>13</sup>

<sup>13</sup> An estimation of the number of individuals represented is impossible.

DNA analysis is by no means a quick or straightforward process and depending on the complexity of the case, months or years might elapse between the initial sampling of the remains and the final identification. Indeed, the extraction of the DNA sometimes fails and additional bone samples have to be sent. In other cases, remains are highly commingled and multiple samples are necessary to re-associate the bones belonging to each individual. Once a bone is profiled, the matching process with the reference blood/bone profiles relies on occasionally complex kinship statistical calculations.<sup>14</sup>

The use of DNA for identification is only part of a broader strategy of information-gathering, including, for example, analysis of events of disappearances and interviews with families. In some instances, OMPF has made available selected sets of clothing and artifacts found on exhumed bodies in order to generate presumptive identifications. This, combined with a thorough comparison of the ante-mortem and post-mortem information, can facilitate an identification by narrowing down the number of profiles to be compared. Strong -mortem/post-mortem correlation is also used to complement DNA analysis for those cases in which blood references are incomplete or where only partial bone profiles have been obtained.

The presentation of clothing can be a cathartic event: the families feel intimately included in the identification process and the event might constitute the opportunity for early mourning.

Evidence of mis-identifications also starts to emerge, and the phenomenon might be relevant for as much as 10% of the estimated 2000 bodies buried by families in 1999 without scientific identification.<sup>15</sup> Almost none of these victims buried by relatives in 1999 were reported missing. However, misidentifications are not frequent enough to justify systematic re-exhumations of all the remains buried in 1999, a process that could cause unnecessary trauma and pain for the families concerned. On the other hand, their number is not negligible, and the remains wrongly buried might belong to a person reported missing while in turn the correct body might lie among the unidentified remains currently

at the OMPF mortuary.<sup>16</sup> Each case of potential mis-identification merits an individual approach, and a specific strategy is developed after analysis of all available information, including ICTY and Serbian documents and interviews with witnesses, families and community leaders. In many cases all that are required is a blood sample and ante-mortem information; whilst for others, an exhumation is needed.

### Outreach activities

OMPF has focused on maintaining an “open door” policy, receiving anyone who has a query or who would like to volunteer information. The office has made considerable efforts toward transparency, public scrutiny and accountability by involving families and their associations in the search for graves, the identification process and by keeping them informed of progress and the challenges encountered. However this cooperation has not always been easy. The families initially did not want to hear about the forensic process as they hoped that their loved ones were still alive. A shift occurred in 2003 with the beginning of the repatriations of the remains exhumed in Serbia. Families from all communities started to accept that most of the missing are no longer alive.

In 2005, OMPF initiated the “Memory Project” in an effort to recognize and record the experiences of the families of the missing. As a pilot project, it aimed at showing how experiences of loss are common to all communities. The first component, the Interactive Theatre Initiative, comprised a series of discussion workshops held in schools and among families of missing persons. A multi-ethnic team of writers created a play about the experiences of a family with a missing person, which was used as the focus of discussion about the issue. Short dramatic scenes were also presented to encourage persons to share their personal experiences and opinions. The program visited K/Albanian and Serbian communities and the report and the reaction of the public were published in May 2006 in the book “Zërat/Voices/Glasovi”.<sup>17</sup>

<sup>14</sup> See for instance [www.dna-view.com](http://www.dna-view.com).

<sup>15</sup> This percentage was extrapolated from the results obtained after the exhumations of 81 bodies identified by families in 1999 from different locations around Kosovo. Nine DNA results came back negative.

<sup>16</sup> As of end of August 2010, OMPF had the remains of at least 420 unidentified individuals in its custody. This number is based on the number of different bone profiles. The number changes on a weekly basis as remains are exhumed and others are identified.

<sup>17</sup> Office on Missing Persons and Forensics (OMPF), *Voices*, an interactive theatre initiative addressing the issue of missing in Kosovo. Transitional Justice Series, OPDF & CCTD; 2006 available on [http://www.unmikonline.org/justice/documents/OMPF\\_CCTD\\_Theatre\\_Book.pdf](http://www.unmikonline.org/justice/documents/OMPF_CCTD_Theatre_Book.pdf).

The second component, the Oral Histories Initiative, was an effort to compile a collection of videotaped interviews with the families of the missing or formerly missing. A total of 147 interviews were recorded and will be made available in a database. In October 2006, OMPF published “Dëgjoni çfarë themi ne/Hear what we are saying/Slušajte šta ćemo vam reći”, presenting the concept of the Oral Histories Initiative and the transcripts of ten interviews.<sup>18</sup>

### Building local capacity and ownership

If OMPF was initially mandated to carry out the forensic expertise relevant to the search for missing persons. Soon after its inception the office received the additional responsibility to provide forensic medicine in Kosovo, including performing autopsies in case of unnatural death, examination of victims of sexual or physical assault and providing toxicological or histo-pathological analysis. Indeed, the forensic services provided by the existing Forensic Institute under the Kosovan Ministry of Health were deemed of questionable quality by the UNMIK prosecutors and justice system monitors, who mainly criticized the archaic procedures and protocols used in the examination of rape victims. The Institute’s forensic experts were to be transferred to OMPF in order to work with international colleagues and receive on-the-job training. However all except two doctors and one autopsy technician refused, the majority remaining in the Institute which was no longer performing autopsies or clinical examinations. Consequently OMPF had to rely on international experts to carry out its work.

OMPF launched a number of training initiatives for new forensic experts, such as forensic nurses, toxicologists, histopathology and autopsy technicians, photographers, identification officers, etc. These programs were either delivered in-house or abroad in partnership with different forensic institutes or universities. In conjunction with the University of Coimbra, Portugal, a one-year International Diploma of forensic medicine was created to provide young medical doctors with advanced knowledge in Forensic Medicine and bring their expertise more in line with European forensic practices and standards. This training was vital as the University of Pristina was no longer having a specialization program in forensic medicine.<sup>19</sup>

A new mortuary facility was built in Pristina furnished with modern equipment.<sup>20</sup> When OMPF was transferred to the newly created Kosovo Ministry of Justice in 2007, a local Director was appointed. UNMIK and local OMPF experts continued working together and a year later EULEX took over UNMIK’s responsibilities within OMPF.<sup>21</sup>

In June 2010, pursuant to the adoption of Law No. 03/L-137 issued by the Assembly of the Republic of Kosovo, OMPF was transformed into the “Department of Forensic Medicine” under the Kosovan Ministry of Justice. The DFM was established “as the competent public authority responsible for providing forensic medicine and medical death investigation expertise, including exhuming the human remains related to the armed conflict in Kosovo and returning the remains to the families”.

Though the standard of forensic work has been consistently high and the DFM was finally established by the Kosovan government, the transition to reliance on local experts remains difficult. On the positive side, the toxicology and histopathology laboratories are now exclusively under local management, but qualified forensic doctors are still lacking and the Department has not yet been able to send students to specialize in forensic anthropology. The search for the missing and the forensic process still relies largely on international experts.

## 5. Partner mechanisms

### The Governmental Commission on Missing Persons

The GCMP was created in 2003, as an inter-ministerial body under the Prime Minister’s office. Its structure and responsibilities were formalized in 2007. In its present form, the GCMP is headed by a Chairperson and consists of a secretariat, members from different ministries, including the Ministry of Justice and OMPF, and observers, such as ICRC, ICMP and family associations. Its primary mandate is the coordination of governmental activities regarding the search for missing persons. The GCMP is also responsible for the establishment of municipal commissions on missing persons and for the creation and maintenance of the future Central

<sup>18</sup> Idem on <http://www.unmikonline.org/justice/documents/compressed.pdf>.

<sup>19</sup> This post-graduate program was held twice. A total of 11 doctors were trained, out of which only two are currently working for OMPF.

<sup>20</sup> A large part of the mortuary and toxicology laboratory equipment was funded by the Swiss government.

<sup>21</sup> Currently, 47 Ministry of Justice employees and 14 EULEX staff are working together in OMPF.

Record on Missing Persons foreseen by the Law on Missing Persons.

The Commission has no forensic capacity or mandate and relies on OMPF expertise. The Commission is invited to all exhumations and family visits pending identification and provides coffins and defrays some reburial costs. It also assists OMPF when the Office's projects require the cooperation or input of other ministries or municipal authorities. For instance, GCMP has recently liaised with municipal authorities during the organization of a major exhumation near Pristina.

However, the GCMP still needs to mature and gain full political support from the government in order to become a truly professional institution able to fulfil its ambitious mandate. Furthermore, the commission is currently mono-ethnic and has yet to develop its ability to efficiently deal with non-Albanian missing persons cases.

#### **The Working Group on Missing Persons (WG)**

The WG on Missing Persons was established in 2003 as part of the process of direct dialogue between Belgrade and Pristina and has been chaired by ICRC since February 2004. The GCMP chairperson and local Director of OMPF are members of the Pristina Delegation.

The WG is essentially a forum to exchange information pertaining to potential graves. Delegations also present reports on progress in the search for the missing. The WG's mandate is strictly humanitarian, and it conducts an average of five sessions each year, allowing family associations and other stakeholders to participate as observers during the public sessions. The WG is currently the only official functioning platform for dialogue between Kosovo and Serbia. Four joint visits to potential sites in Kosovo and Serbia were recently successfully organized.

In addition, ICRC established a Sub-Working Group on Forensics (SWG), which is a forum to discuss specific issues of a technical nature regarding the identification process. The SWG formally reports to the WG.

#### **Draft Law on Missing Persons**

The purpose of the law is to regulate the search for persons unaccounted for as a consequence of the conflict. The current draft covers all persons missing between 01 January 1998 and 31 December

2000. The period covered by the law, i.e. its extension to the end of the year 2000, provoked some heated discussion among the drafters and some governmental observers. The initial proposal considered only disappearances during the conflict and was therefore highly discriminatory since it excluded, de facto, most of the non-Albanian victims from the list of beneficiaries.

The law protects the right of the families to know the fate of their loved ones. It clarifies the role and the structure of the GCMP and the obligations of the different ministries to cooperate and share information to the extent permitted by the law on the protection of personal data and by specific confidentiality requirements. But the law does not include any rights to financial compensation.

The drafting process has started in 2008 and was making progress during 2009 when the concept of the law was removed from the Ministry of Justice and transferred to the Office of the Prime Minister. The Law has been approved by the Kosovo Assembly on 16 September 2010.

#### **6. Conclusion: challenges and opportunities**

In the last decade, undeniable results have been achieved, with 64% of the persons initially reported missing now accounted for. OMPF established a coherent forensic system dedicated to the search for the missing, which uses best forensic practice and respects the requirements of the judiciary while giving priority to the needs of the families. Local structures were created, including the DFM and the GCMP, and a Law on Missing Persons is soon to be adopted by the Assembly. However, the families of more than 1800 missing persons are still waiting for answers. There are still challenges to overcome and opportunities to cease:

##### **Information management**

The centralization and consolidation of information are still on-going. ICTY provided OMPF with some 85,000 pages pertaining to its forensic operations, which are being analyzed with the aim of locating unidentified remains. Nevertheless many more crucial data and records are still unavailable, including Serbian and KLA archives, as well as KFOR records.

The GCMP will need assistance in the creation and maintenance of the Central Record, including establishing SOP for data entry and access to the information by families, civil society and



organizations involved in the search for the missing.

### **Lack of information on potential graves**

The number of remains recovered has considerably decreased since 2005. Witnesses are reluctant to come forwards for fear of prosecution or persecution as efficient witness protection programs are still to be developed in the region. In addition, memory starts to fade away and most of the witness statements recently collected have become imprecise and approximate.

### **Political apathy and lack of local ownership**

Many former KLA commanders are currently in the government, or are very influential in the political arena. While some have displayed interest in shedding light on the fate of missing persons of all communities, the issue however is not always high in importance on the political agenda and governmental priorities. Furthermore, the missing persons issue is used all too frequently for political bargaining.

In addition, national forensic experts are lacking, and the Kosovan GCMP has yet to evolve into a professional body fully able to deal with its responsibilities and mandate.

### **Limits of the forensic process**

The search for the missing has relied almost exclusively on the forensic process. However many remains will never be found or identified and complementary approaches need to be developed in order to provide answers to the families and help them to achieve closure.

For instance, the Humanitarian Law Center (HLC), within the framework of its Documentation and Memory Programme,<sup>22</sup> has developed the War Crimes Database which includes victims and witnesses statements, ICTY trial transcripts and scanned exhibits, as well as other documents pertaining to the conflicts in former Yugoslavia. The information the database contains might in some cases provide answers to families in the absence of a body to be interned. Opportunity for cooperation and information sharing mechanisms between HLC and the GCMP Central Record could be explored.

The creation of memorial is another avenue worth consideration. The idea of creating one – or

several - memorial complexes that would include a museum and resource center has been discussed by families and associations for years. There has been no consensus on the location, design and content among the families and some municipalities have started to build their own monuments that tend to commemorate fallen local KLA soldiers. A notable exception is the village of Meja, western Kosovo, where a complex has been built in memory of more than 350 civilians taken away by the Serbian forces on 27 April 1999. In 2001, the remains of these men were exhumed from a mass grave found in the shooting range of the military base of Batajnica on the outskirts of Belgrade. The bodies have been repatriated and are buried in the cemetery that lays the ground for the memorial. However, this initiative remains local and the GCMP could take the lead in re-opening the discussion for a national memorial and museum.

### **Reconciliation process**

Finally, resolving the fate of missing persons plays a central role in the reconciliation process. Conversely, the search for missing persons can greatly benefit from a truth and reconciliation commission, as new information on grave sites can emerge. However, the road leading to the reconciliation process is long and by no means easy. The Reconciliation Commission (or RECOM) initiative<sup>23</sup> launched in May 2008 advocates “the establishment of an official inter-state (regional) and independent commission that will investigate and disclose the facts about war crimes and other serious violations of human rights committed in the former Yugoslavia, including resolving the fate of the missing and locating their mortal remains”. This initiative needs the support from all stakeholders involved in the search for the missing.

<sup>22</sup> <http://www.hlc-rdc.org/stranice/Documentation-and-Memory.en.html>

<sup>23</sup> <http://www.korekom.org/webpage/1>



## A holistic approach to dealing with the past in the Balkans Some challenges and examples from the PA IV dealing with the past program

JONATHAN SISSON<sup>1</sup>

After the dissolution of former Yugoslavia and the destruction wrought by almost a decade of war, it is not surprising that the Swiss Federal Department of Foreign Affairs (FDFA) chose the Balkans as a focus for its humanitarian assistance and long-term development cooperation. What is perhaps more unusual was the choice of dealing with the past as a priority for its political program in the region.

In 2003, the Political Affairs Division IV (PA IV) Balkans program stationed its first team of peacebuilding advisers for the region at the Swiss embassy in Macedonia. The initial phase of the program was an exploratory one. An early analysis came to the conclusion that the macro-political conditions for dealing with the past were not yet in place. Despite the existence of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the Hague since 1993, a state of *de facto* impunity for war crimes, supported by a culture of silence and denial, was the rule rather than the exception throughout the region. Furthermore, and because of the ICTY, most of the local interventions were focusing on the prosecution of war crimes and crimes against humanity, while very few initiatives were being undertaken in the realm of restorative justice. Taking note of the challenges posed by working in this context, an early policy paper of the Balkans program identified the support of on-going efforts in the areas of justice reform and prosecution, as well as the search for missing persons and the rehabilitation of trauma victims as priority objectives. Beyond that, however,

it was recognized that a longer-term goal of the program would be to create public spaces and the political and social conditions necessary for truth-seeking initiatives as a means of coming to terms with the painful legacy of the wars of 1991 to 2001. In the past few years, the significance of truth-seeking in particular has increased, as recent efforts to establish fact-finding bodies at national and regional levels demonstrate.

In the following pages, an effort will be made to provide an overview of some of the main activities of the PA IV program on dealing with the past in the Balkans.<sup>2</sup> In particular, attention will be drawn to the regional dimension of the program and to specific contributions made to the development of a holistic approach to dealing with the past in Bosnia and Herzegovina, and in Kosovo.

### 1. Regional cooperation in dealing with the past

From the outset, a regional approach to dealing with the past was seen to be of key importance to the PA IV Balkans program. Accordingly, an emphasis was placed on the support of domestic activities relating to war crimes prosecution and truth-seeking in the region. Although Switzerland was only a minor donor in the area of prosecution due to the scale of the undertaking against the background of the ICTY completion strategy, it took on a pioneering role with respect to truth-seeking.

#### 1.1. War crimes prosecution

In view of the original UN Security Council decision that the ICTY should conclude all first instance trials by 2008 and all appeal proceedings

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<sup>2</sup> No attempt has been made here to provide a comprehensive overview of the program, which has involved numerous state and non-state actors in all four principal areas of dealing with the past over the years. A few selected examples have been presented for the purposes of illustration.

by 2010,<sup>3</sup> the PA IV Balkans program placed an emphasis on supporting initiatives relating to building domestic capacity and expertise in the area of war crimes prosecution. Given the sheer number of cases to be investigated (estimates range between 10,750 and 16,000<sup>4</sup>), the question of capacity-building in Bosnia and Herzegovina was seen to be crucial to the success of the ICTY completion strategy, and thus to the credibility of the right to justice in the region. Following an agreement reached between the Office of the High Representative and ICTY in January 2003, the War Crimes Chamber of the Court of Bosnia and Herzegovina (BWCC) was established two years later in March 2005. Although domestic war crimes trials were already taking place at the national and entity levels, the creation of the BWCC was regarded as a necessary step in the effort to provide the national judiciary with the capacity and expertise to conduct war crimes trials according to international standards. The PA IV Balkans program contributed financially to the ongoing operational costs of the BWCC and its predecessor, the third chamber of the Bosnia and Herzegovina national court.<sup>5</sup> In addition, financial assistance was provided to the Victims and Witnesses Unit (VWU) of the ICTY in Sarajevo, which supplies logistical assistance and psychosocial counseling, and offers protective measures to victims and witnesses before, during and after their appearance at the court in The Hague. The VWU field office, in turn, was responsible for setting up the witness protection program for the BWCC.

Established initially as a hybrid court, the BWCC is gradually completing its transition to full national responsibility. International personnel have been phased out of the court management, the VWU, and the legal department according to schedule. Despite an original target date of the end of 2009, however, the mandate for international judges and prosecutors has been extended. In 2008, the

Ministry of Justice prepared a national war crimes strategy that will direct the focus of the work of the BWCC and the courts at the entity level for the years to come. In view of the long-term task of the courts in this regard, the PA IV Balkans program is now supporting the development of outreach and monitoring activities that, on the one hand, will improve public understanding of their work and encourage potential witnesses to come forward and, on the other, will attempt to ensure that the trials themselves continue to meet international standards.

## 1.2. Truth-seeking

Addressing a culture of silence and denial, as alluded to above, proved to be the most immediate challenge in the area of truth-seeking. A decade of internecine war in the region had left behind not only a terrible legacy of human losses and material destruction, but also an unprecedented level of traumatization among the population at large, which contributed to a widespread and generalized sense of victimhood on all sides of the conflict.

In this context, the PA IV Balkans program chose a multi-faceted approach to truth-seeking. Recognizing that there are social and dialogical dimensions as well as factual and forensic elements of truth-seeking, the program sought to support initiatives in both areas. In the area of fact-finding and forensics, the dealing with the past program focused on the issue of missing persons. At the inception of the program in 2003 it was estimated that there were as many as 34,000 persons throughout the region whose fate and whereabouts remained unknown. Initial support in this area focused on project assistance for the two main international actors in the field, namely the International Committee of the Red Cross and the International Commission on Missing Persons. In this respect, synergy was sought with other Swiss FDFA initiatives in the region. The office of the Swiss Agency for Development and Cooperation (SDC) in Pristina had agreed to finance the construction and outfitting of the toxicological laboratory for use by the Office of Missing Persons and Forensics (OMPF), while the Swiss Expert Pool seconded an expert to develop its program on exhumations.<sup>6</sup> Both of these initiatives contributed considerably towards increased capacity and expertise in the search for missing persons in Kosovo.

3 The current date of completion of the ICTY is set for 2014. For a discussion of the Security Council decision and the extension of the original dates, see Ivanišević, Bogdan. 2008. *The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court*. International Center for Transitional Justice. Footnote 19. Available at: <http://www.ictj.org/images/content/1/0/1088.pdf> (accessed on 1 October 2010).

4 Ivanišević, Bogdan. *Idem*. Page 9.

5 In the period before the creation of the BWCC, the dealing with the past program had supported the "Rules of the Road" unit of the Office of the Prosecutor of the ICTY. This unit was set up in response to growing concerns over arbitrary arrests in the aftermath of the war and introduced a procedure of supervision of domestic prosecutions for war crimes in Bosnia and Herzegovina by the ICTY. The unit was disbanded in connection with the establishment of the BWCC.

6 See the article by Valerie Brassey on dealing with the past and missing persons in this edition of *Politorbis*.

With respect to the social and dialogical dynamics of truth-seeking, the dealing with the past program favored an approach that would build bridges of dialogue among communities in the region. It was hoped that this would contribute to a more differentiated understanding of past events and, at the same time, question the validity of stereotypical images of the "other". To this end, the program supported activities of NGOs specialized in working with victims and former combatants at the community level, particularly in the areas of trauma counseling and public debate. An important dimension of the program from the outset has been the support of independent investigative media. Aside from some specific projects of domestic media related to dealing with the past, the program has focused on regional media, in particular the activities of the Balkan Investigative Reporting Network and the Institute for War and Peace Reporting, both of which have sections specializing in transitional justice.

One of the most significant initiatives in the area of regional cooperation and truth-seeking has been the support of three human rights documentation centers: the Humanitarian Law Center (HLC) in Belgrade, the Research and Documentation Center (RDC) in Sarajevo, and Documenta in Zagreb. Contacts between the three centers, facilitated to a large extent by the PA IV Balkans program, led to the signing of a memorandum of understanding, in which they agreed to collaborate in the areas of the documentation of human losses, monitoring of war crimes trials and the creation of a regional truth-seeking body. A first development in the area of documentation was marked by the publication in 2008 by the RDC of its research on human losses during the Bosnian war. The RDC succeeded in establishing the identities of around 97,207 persons killed or missing during the conflict.<sup>7</sup> In the absence of any authoritative investigation by an official body, the significance of this research for the region should not be underestimated. Until now, estimates of losses throughout the region have varied greatly and are open to manipulation for political purposes. Both the HLC and Documenta are currently in the process of completing similar projects on war-related human losses in Serbia and Montenegro, and Kosovo and Croatia respectively.

More significantly perhaps, the collaboration of the three centers has led to the establishment of a regional coalition for the creation of a Regional Commission (ReCom), "tasked with establishing the facts about war crimes and other serious violations of human rights committed during the wars on the territory of the former Yugoslavia".<sup>8</sup> The coalition grew out of a series of local and regional consultations initiated in Sarajevo in May 2006, and was launched at the Fourth Regional Forum, which was held in Pristina in October 2008. Since then, more than 900 civil society organizations and individuals from all of the successor states of former Yugoslavia have joined the coalition. As such, it represents the largest civil society movement in the region. In June 2010, the coalition for ReCom publicly announced its intention to submit a draft mandate and model for the future commission, together with one million signatures of support, to the parliaments in the region for their approval.

As might be expected, however, the growth of the coalition has not been without controversy. In December 2008, the RDC (a founding member), resigned from the coordination council and left the coalition because of differences regarding its goals and its manner of internal decision-making. Other important NGOs from the region have withdrawn their support for similar reasons. Indeed, ReCom faces a number of internal and external problems. Internally, it must design a convincing commission model that will address the multiple concerns and priorities of its constituency, which includes organizations and individuals from across the region with differing perspectives and expectations. At the same time, the mandate and model must be seen to be politically viable in a region that is still deeply divided and marked by political deadlock on key issues of national identity and sovereignty.

While the PA IV Balkans program remains a supporter of the ReCom coalition, both the Netherlands and the European Commission have since emerged as its main benefactors. This support must be seen in terms of the regional process of accession to the European Union and the role that dealing with the past has assumed in that connection. Significantly, in this regard, two separate delegations of the ReCom coalition have been received recently by the presidents of Serbia and Croatia respectively. The latter voiced his qualified support for the initiative. A delegation has also

<sup>7</sup> For an overview of the results of the RDC human losses project, see [http://www.idc.org.ba/index.php?option=com\\_content&view=section&id=35&Itemid=126&lang=bshttp](http://www.idc.org.ba/index.php?option=com_content&view=section&id=35&Itemid=126&lang=bshttp) (accessed on 1 October 2010).

<sup>8</sup> For information regarding the coalition, see <http://www.korekom.org/>

just recently been received by the EU Parliament. Whatever the final outcome of the initiative, ReCom has already succeeded in raising public awareness about the importance of truth-seeking in the region.

## **2. A holistic approach to dealing with the past: examples from Bosnia and Herzegovina, and Kosovo**

Two examples of the holistic approach of the dealing with the past program and its application in two different contexts in the Balkans are presented below. The first is drawn from the experience of a consultancy for the transitional justice program of UNDP in Bosnia and Herzegovina, and the second is based on an initiative taken by the PA IV Balkans program in connection with the negotiations on the status of Kosovo. In both cases, the author of this article figured as the swisspeace consultant and acted in connection with the standing mandate of the Center for Peacebuilding (KOFF) – swisspeace to support the development and implementation of the PA IV dealing with the past program in the Balkans.

### **2.1. A national strategy for transitional justice in Bosnia and Herzegovina**

In October 2007, UNDP began a program of collaboration with the Ministry of Justice (MoJ) and the Ministry of Human Rights and Refugees (MHRR) in Bosnia and Herzegovina to develop a national transitional justice strategy and a program for its implementation. The first phase of the program involved facilitating a government-led national consultation on transitional justice and the development of a resource manual on transitional justice. In preparation of the second phase of the program, the PA IV Balkans program, as one of its principal donors, seconded an expert from swisspeace to work with the transitional justice team at UNDP. The expert was asked to provide input and advice on a number of issues concerning the program, the main issue being the composition, function, and capacity-building of the Transitional Justice Working Group to be set up by the MoJ and MHRR. The task foreseen for the working group was to design a national transitional justice strategy based on further regional consultations.

As a result of discussions with numerous international, state and non-state actors, swisspeace introduced a process model for the Transitional Justice Working Group, which consisted of a steering board, a core working group, and four thematic working groups, each focusing on one of the four principal areas of dealing with the past.

Whereas the steering board was to be composed of government representatives at the federal (MoJ and MHRR) and entity levels (MoJ of the Federation of Bosnia and Herzegovina and of the RS and the Judicial Commission of Brcko), the core group and the thematic working groups involved the joint participation of both government and civil society representatives. The significance of this model therefore lay not only in the substantial work to be done in each of the principal areas, but also in the inclusion of civil society representatives in the formulation of its policy recommendations. Moreover, the coordination by a core group would ensure that the different initiatives and mechanisms identified by the thematic working groups would build upon one another in a coherent way, utilizing the linkages between the pillars as an opportunity to build synergies. In addition, the process model included a secretariat staffed by the UNDP and liaising with a civil society working group that would accompany the development of the transitional justice strategy from a critical distance. This model was subsequently adopted in 2009 with certain modifications by the MoJ and MHRR and, as such, represents an example of the attempt to develop a national strategy that is both comprehensive and inclusive.<sup>9</sup>

The development of the strategy itself will involve further regional consultations, the first of which took place in the Bosnia and Herzegovina Parliament building in Sarajevo at the end of March 2010. The plan for drafting the national transitional justice strategy was presented at that time to an audience of government officials and civil society representatives for their comments and critique. In addition, the results of a public opinion survey on transitional justice were discussed with respect to their possible relevance to the development of a national strategy.

### **2.2. Dealing with the past and the negotiations on the status of Kosovo**

In 2006, the PA IV Balkans program commissioned swisspeace to prepare an option paper on dealing with the past in connection with the then ongoing negotiations on the final status of Kosovo, conducted under the aegis of the UN Security Council by former Finnish President Marri Ahtisaari. The idea was to prepare an assessment of topics relating to dealing with the past that were relevant to the

<sup>9</sup> Because a national war crimes strategy for Bosnia and Herzegovina now exists, the Transitional Justice Working Group will focus only on truth-seeking, reparation and institutional reform.

future status of Kosovo and reflected the differing levels of responsibility borne by Serbian and Kosovo Albanian authorities for human rights violations during the decade of conflict. On the basis of this assessment, options for dealing with the past were formulated for the negotiating team. The assessment and options were submitted in the form of a Swiss non-paper by PA IV Human Security to the office of Marrti Ahtisaari in August 2006.<sup>10</sup> As outlined in the option paper, the minimum goal for the mediator was to reach an agreement in principle with the two parties to address issues of dealing with the past as part of the settlement. The modalities of the agreement could have been part of a separate annex to the settlement (maximum goal), or have been delegated to a working group to be formulated afterwards (minimum goal). As it was, the negotiations broke down over the fundamental issue of status, and the UN Secretary General then asked Marrti Ahtisaari to submit his own proposal for a settlement. The issue of dealing with the past was introduced into the Ahtisaari proposal as a separate article.<sup>11</sup> This was a strategic decision, as it obligates the Kosovo government and the International Civilian Office (the European mission supervising the independence of Kosovo) to address the issue.

The significance of the Swiss non-paper lay in the fact that it presented options to address specific issues of dealing with the past in Kosovo and Serbia from a holistic perspective, utilizing the conceptual framework developed by PA IV and swisspeace as a mapping tool to identify issues and the challenges involved in working on them.<sup>12</sup> In particular, it proposed the creation of a national liaison office that would be responsible for developing a comprehensive, integrated, and gender-sensitive strategy for dealing with the past in Kosovo on the basis of consultations with relevant state and civil society actors. The liaison office was to be established by Parliament, but would have functioned independently with its own budget. Accordingly, it would have submitted thematic and administrative reports to Parliament on a regular

basis, which in turn would have been made public. Following the unilateral declaration of independence by Kosovo in February 2007, the PA IV Balkans program chose the issue of missing persons as an initial focus of its activities relating to dealing with the past in the new state of Kosovo. A number of factors influenced this decision, including the previous SDC support of the Office of Missing Persons and Forensics (OMPF). Predominant, however, were humanitarian concerns pertaining to the welfare of the families of the victims and to the importance of calling the attention of government authorities to their obligations as a State with respect to the right to know (i.e. the right of the families to learn the fate and whereabouts of their missing relatives) and the right of reparation (i.e. the right of the families to receive adequate material and non-material compensation). In the course of the last two years, the PA IV Balkans program was able to provide project assistance in the area of exhumations and expertise in support of a draft law on missing persons.

More recently, however, the question of a more comprehensive approach to dealing with the past, as originally foreseen in the Swiss non-paper, has again become relevant in connection with the decision of the ICO to create a position for a special adviser on dealing with the past. The main task of this adviser will be to assist the Kosovo government authorities in the formulation of a coherent national and regional strategy for dealing with the past, which contributes towards a process of reconciliation among its communities. In particular, the adviser will support the government in developing a holistic and integrated institutional approach to dealing with the past, including the identification of priority issues, the definition of policy and planning concepts, and the provision of guidance regarding their implementation. An important aspect in this regard will be a broadly based consultation process with civil society actors and initiatives in the area of capacity-building. The ICO sought the advice of the PA IV Balkans program in formulating the mandate for this position, and the Swiss Expert Pool has now seconded a Swiss expert to serve as adviser on dealing with the past.

### 3. Concluding remarks

The issue of dealing with the past has been a focus of the PA IV Balkans program from its inception. The depth and quality of the program have grown in parallel with the development of the topic within the peace policy section of PA IV, which established

10 FDFA Political Affairs Division IV, Human Security. 2006. Dealing with the Past and the Negotiations on the Status of Kosovo. An Option Paper. Available at: <http://www.eda.admin.ch/eda/en/home/topics/peasec/peac/confre/depast/linkdown.0010.html#faq0010>

11 See Article 2.5 of the Comprehensive Proposal for the Kosovo Status Settlement (S/2007/168/Add.1) Available at: [http://www.unosek.org/docref/Comprehensive\\_proposal-english.pdf](http://www.unosek.org/docref/Comprehensive_proposal-english.pdf) (accessed on 1 October 2010).

12 See the article "A Conceptual Framework for Dealing with the Past" above. This was the first time that the framework was introduced by PA IV as a mapping tool.

a dealing with the past desk position in 2004. As the examples given above illustrate, the real contribution of the Balkans program has been its emphasis on a holistic approach and the introduction of a mapping instrument, which enables policy makers to identify outstanding issues and to develop coordinated and integrated policies to address them.

Having said that, it remains to be seen how the region itself will deal with the multitude of issues facing it as a legacy of the past. Not surprisingly, the lure of European accession has acted as a beacon to the political leadership of the region and its constituencies. The recent attention given to public apologies suggests that moral values are also regarded as indicators in the accession process. On 31 March 2010, after a prolonged and, at times, bitter debate, Serbian Parliament issued a resolution on Srebrenica in which it condemned the crimes committed against the Bosnian Muslim population and apologized to the families of the victims because Serbia had failed in its obligation to prevent the tragedy.<sup>13</sup> Two weeks later in a speech before both houses of the Bosnia and Herzegovina Parliamentary Assembly, Croatian President Ivo Josipović expressed his personal apology to the Bosnian people because of the suffering that Croatia “with its policy of that period” had inflicted upon them, and for the divisions that still plague the societies in the region.<sup>14</sup>

These are encouraging signs and yet, fifteen years after the signing of the Dayton Agreement to end the war in Bosnia and Herzegovina, and eleven years after the UN-mediated cease-fire in Kosovo, there are still many voices in the region which claim that it is too early to speak about reconciliation. That may well be true insofar as reconciliation is a long-term goal of social and political conflict transformation. But a process of dealing with the past has already begun. As the mother of a victim of enforced disappearance in Kosovo once remarked in a private conversation with the author, “In my heart I am always dealing with the past.”

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13 See the article “An Apology for Srebrenica” by Serbian President Boris Tadić, published on 17 April 2010 in the Wall Street Journal. Available at: <http://online.wsj.com/article/SB10001424052702303695604575182284149946008.html> (accessed on 1 October 2010).

14 See the article “Josipović Delivers Unprecedented Apology to Bosnia,” dated 14 April 2010, published by Balkan Insight. Available at: <http://www.balkaninsight.com/en/main/news/27333/> (accessed on 1 October 2010).



## West and Central Africa: an African voice on Dealing with the Past

CAROL MOTTET<sup>1</sup>

### West and Central Africa: an African voice on Dealing with the Past

Switzerland has defined a new strategy for its peace policy commitments in West and Central Africa for the 2009-11 period. In this context the aim is to support the peace processes and efforts to meet new challenges with regard to security problems in countries like Chad, Mali and Niger. At the regional level Switzerland's programme, as regards the current peace processes, also aims to promote and support efforts to pool the know-how that exists in the region and make greater use of it to strengthen capacities in French-speaking Africa.

For a number of years, Switzerland and its partners have been actively committed to the area of Transitional Justice (and more generally Dealing with the Past), working towards national reconciliation in countries that are either in conflict or in transition, including those in West and Central Africa.

### *Efforts to achieve familiarisation with the concepts and tools of Transitional Justice in French-speaking Africa*

In this way Switzerland has actively helped to introduce the debate on Dealing with the Past to the continent of Africa, with particular emphasis on sub-Saharan French-speaking Africa. In 2006 Switzerland organised a "Conférence régionale sur la justice transitionnelle dans le monde fran-

cophone",<sup>2</sup> which was held in Yaoundé with the French Ministry of Foreign and European Affairs, the United Nations Centre for Human Rights and Democracy in Central Africa (UN Central Africa) and the International Centre for Transitional Justice (ICTJ) as co-organisers. This was one of the first opportunities at the regional level for French-speaking experts and practitioners, mostly African, to share their experiences, know-how and questions concerning Transitional Justice. The first conference was followed by a number of training opportunities organised by the UN Central Africa Regional Office with Swiss financial support. The second regional conference on "Justice transitionnelle : une voie vers la réconciliation et la construction d'une paix durable" (Transitional Justice and Sustainable Peace), held in Yaoundé at the end of 2009, enabled an assessment of the progress achieved specifically in French-speaking Africa where these issues are of particular importance in view of the many recent conflicts.

### *Promoting contextualisation and a holistic approach to Dealing with the Past in French-speaking Africa*

Switzerland gives precedence to the following approaches in working with its African partners:

- The accent has been deliberately placed on a *practical approach* tailored to the needs of African practitioners and experts involved in Transitional Justice processes in French-speaking Africa. The main aim is to encourage exchanges of experience, draw lessons and promote the networking of these practitioners.
- The idea is to promote a *holistic approach* to Transitional Justice and Dealing with the Past, which is to be seen as an instrument of peacebuilding – an instrument which practical usefulness has to be considered taking into account the sequences of a peace process, and the options existing in each of these. In this approach

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<sup>2</sup> See Bleeker Mò, Mottet Carol, eds. *La justice transitionnelle dans le monde francophone : état des lieux*, Conference Paper 2/2007, Dealing with the Past – Series, DFAE, Berne 2007. Also available at : <http://www.eda.admin.ch/eda/fr/home/topics/peasec/peac/confre/depast/lindow.0001.html#faq0001>.

the question of Transitional Justice and Dealing with the Past is at a crossroad between a variety of needs – for reconciliation and justice, for a ceasefire, for rebuilding confidence and the social fabric – and at a crossroad between unity and social disintegration as well as between the needs and perceptions of the victims and of those formerly in power.

- The *French-speaking dimension* of peacebuilding efforts in African regions affected by present or past conflicts must be taken into account, strengthening the ability of key players in these regions to benefit from their own experiences, particularly in a sub-region. The shared French language thus becomes a vector of communication able to promote authenticity, ownership and the emergence of home-grown practices and solutions.
- The *capacities of peace actors* in the region must be strengthened, promoting an apprenticeship with the tools of Transitional Justice (the so-called “4 Joint principles” – right to the truth, right to justice, right to reparations and guaranty against non-repetition) and their use in a peace process, together with the preparation of recommendations for further action.
- There must be a *response adapted* to the needs of the practitioners in French-speaking Africa for know-how in the area of Transitional Justice. It should encourage reflection on the *contextualisation* of the concepts and key tools of Transitional Justice that are adapted to the needs of French-speaking Africa, and at the same time promote *semantic and terminological ownership*.

#### **Observations – lessons learned**

The progress of work undertaken at this stage, and in particular the various meetings mentioned above, allows us to make several observations.

The first concerns the *insufficient knowledge* of the practitioners of French-speaking Africa with regard to the tools of Dealing with the Past and Transitional Justice. This is due mainly to the region’s remoteness at the time when these concepts and tools were being developed. The tools have remained remote (being mainly Anglo-Saxon in origin), and there is a shortage of any such resources in the French-speaking world.

A second observation is that of a *deficit in the sharing of experiences* and of the instruments of Transitional Justice in the regions of French-speaking Africa itself.

A third observation is that a comparison of the experiences in different regions of the world – French-speaking and other – has made it possible to underline the peculiarities and differences at the level of practice *in relation to that of contexts*. And thus the need to adapt the concepts and tools of Transitional Justice to the needs, culture and know-how that exists in a given region and conflictual context. The tools of Transitional Justice are not sufficiently adapted to the context of French-speaking Africa – be it in relation to accounting for traditional experiences, the particular nature of the processes of reconciliation in the region, or indeed the terms and concepts used.

As a fourth observation it can be said that there is difficulty in learning to use *complex* – and at times somewhat “dogmatic” – concepts and tools, which must then be *incorporated into on-going peace processes*. This leads to the following two-fold challenge:

- the ability to master the complexity of the choices to be made, which are linked to the tensions that remain following a conflict, or during the negotiation of a peace agreement between the victims need for justice and the requirements of peace and reconciliation;
- learning *how* to initiate and conduct a process focused on Dealing with the Past.

Finally it should be noted that there is *lack of common ground in the experiences* of the countries of sub-Saharan Africa. Some have benefited from structured processes of reconciliation, making use of the concepts and tools of Dealing with the Past. Examples can be found in the Democratic Republic of the Congo (see the following article for an interpretation of experiences in that country), Burundi, Chad (Commission of Inquiry into the crimes of the Habré regime, 1982-90), Togo (recent creation of a truth, justice and reconciliation commission on violence of a political nature in the period between 1958 and 2005), and, a little further North, Morocco (justice and reconciliation authority). Additionally one could mention the occasional “days of forgiveness” or “days of peace” and national conferences. However, other conflicts and crises in these or other countries (notably Chad, Central African Republic, Mali and Niger) did not lead to any processes of this kind. Thus it can be said that needs and experiences vary within the region of French-speaking Africa.

*Towards greater ownership – towards an African voice and word*

The challenge now is to give practitioners in French-speaking Africa more of a voice. This should enable them to be more active and to make the concepts and tools of Dealing with the Past and Transitional Justice their own, thus promoting reconciliation.

Giving them a voice, first by providing support to the efforts of practitioners in French-speaking Africa whose perception of the situation will be based on the reality of the past actions that most concern them, the concrete obstacles that stand in their way in this context, the tools that already exist and the experiences of their African kin.

Secondly, giving them a voice by supporting their efforts to draw up proposals adapted to the reconciliation needs identified, the emergence and implementation of which will be facilitated by the “appropriateness” of the perception mentioned above.

And finally giving them a voice by promoting the development of their own reference tools, capitalising on experiences and concepts native to the region (and if not a proper voice, the capitalising at least of African “words” to express them). Supporting an exchange of the available resources thereafter, and putting these to use in African processes for Dealing with the Past, will ultimately support local efforts to institute and conduct such processes.

It is against this background that Switzerland, before the end of the year, plans to organise a workshop to strengthen the capacities of French-speaking Africa for the ownership of Transitional Justice concepts, working with France and the International Relations Institute of Cameroon (IRIC) and linking up with the activities of the UN’s Central Africa Regional Office in Yaoundé. The workshop will focus on the practitioners of peace processes in French-speaking Africa, while its objectives will address questions of practical rather than conceptual terms when faced with initiating and conducting a process of reconciliation.



## Dealing with the Past in the DRC: the path followed?

DIEUDONNÉ DIKU MPONGOLA<sup>1</sup>

### Dealing with the Past in the DRC:<sup>2</sup> the path followed?

As a result of the lack of preparedness on the part of the political elite and against the background of the Cold War, the creation of the Democratic Republic of the Congo (DRC) on 30 June 1960 gave rise to rebellions and secessions which led to a number of violations of human rights and International Humanitarian Law. Although General Mobutu's ascension to power on 24 November 1965 brought about a period of relative political stability, human rights violations did not cease.

Weakened by diplomatic isolation and even more so by the rebellion that erupted in the East in October 1996 which was led by the Alliance of Democratic Forces for the Liberation of Congo-Zaire (ADFL) of Laurent-Désiré Kabila, the Mobutu regime collapsed on 17 May 1997. Barely installed in office the ADFL regime itself had to face a rebellion supported by Rwanda in the East in August 1998 and another, this time supported by Uganda, which saw the light of day in the Equateur province in November 2008. A major conflict erupted, involving eight African countries and described as "the first African world war".

In an effort to resolve this crisis with its onerous humanitarian consequences, inter-Congolese political negotiations were organised in South Africa as of February 2002, bringing together the combatants, the political opposition and representants of the civil society. These negotiations resulted in a so-called period of transition (June 2003 – June 2006) after which multiparty elections were held. However, the creation of the election machinery did not prevent the outbreak of conflict in the Kivus, in the Oriental Province and the Equateur province.

This document will attempt to summarise the situation with regard to Transitional Justice in the DRC today. Has it been omitted from the debate? Are there currently "windows of opportunity"? What are the challenges and limitations with regard to the question of Dealing with the Past?

### *Mechanisms for Dealing with the Past: Truth and Reconciliation Commission and International Criminal Tribunal*

Resolution DIC/CPR/ 04 created the Truth and Reconciliation Commission, one of five institutions in support of democracy called for by the Constitution of 4 April 2003.<sup>3</sup> The Commission's functions were determined by Law 04/018 of 30 July 2004. Its task was "to establish the truth and promote peace, reparations, forgiveness and reconciliation in an effort to consolidate national unity".<sup>4</sup>

Its mandate was to shed light on the events of the past including crimes and human rights violations that occurred between 30 June 1960 and the end of the transition period.

Its functions included the following:<sup>5</sup>

- to receive complaints, denunciations, confessions of perpetrators and all statements from victims relating to massive violations of human rights, in particular those concerning the rape of women and girls in wartime;
- to investigate the nature, causes and extent of political crimes and massive human rights violations committed by both Congolese and foreigners against the nation and/or Congolese populations on or beyond the national territory between 30 June 1960 and the end of the transition period;
- to identify the perpetrators and pinpoint individual and/or collective responsibilities

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2 The terms Dealing with the Past and Transitional Justice will be used interchangeably.

3 The National Observatory of Human Rights, the High Media Authority, the Independent Electoral Commission, the Commission for Ethics and the Struggle vs Corruption, and the Truth and Reconciliation Commission.

4 Article 5 of the above-mentioned law.

5 Article 8 of the above-mentioned law.

in perpetration of the said crimes and violations;

- to identify the victims and determine the extent of harm;
- to seek all appropriate protective mechanisms, as requested by participants in the hearings who fear there may be threats to their safety following testimony.

Despite the establishment of the necessary structures in the preparatory stage the TRC never really became operational. It made no effort to receive complaints, denunciations or confessions, there was no investigation into the crimes committed in the DRC, and the victims were never identified.

The workshop evaluating the TRC, which was held 22-24 June 2006,<sup>6</sup> and the report based on it, identified the causes which prevented the TRC from successfully fulfilling its mandate: *“lack of political will on the part of government, lack of financial means and economic independence, lack of security in the East, the distrust of certain components and bodies with regard to the Truth and Reconciliation Commission, and the latter’s non-conformity to the classical principles of a traditional TRC in its composition”*.

Participants in the workshop mentioned above came to certain conclusions with regard to the dysfunctional nature of the TRC and drew up a list of recommendations appropriate to renewing the effort:

- The participants recommended beginning with **consultations** to collect the views of the victims and survivors. Men and women should participate in these consultations on an equal footing. The criteria of competence, impartiality and independence should be respected.
- The **mandate** should be limited in scope, clearly defined and based on the principle that the Truth Commission should not attempt to act as a substitute for justice. *The period covered by the mandate should also be limited, in contrast to the over-ambitious aim of investigating the nature, causes and extent of the human rights violations committed within or beyond the DRC between 30 June 1960 and the end of the transition period on 30 June 2003, a total of 43 years.*

<sup>6</sup> Report of Synthesis of the workshop for evaluation of the TRC and future prospects of 22-24 June 2006, organised by the UNDP, the Truth and Reconciliation Commission, the International Centre for Transitional Justice and MONUC with the participation of civil society. /Forces Vives

- The **Commission mandate** should focus its investigations on serious human rights violations (torture, disappearances, extrajudicial executions, crimes against humanity, genocide, etc.) as well as on serious violations of International Humanitarian Law. The victims of violations of the rights of women and of the rights of the child should receive special attention, particularly the victims of sexual violence.

- The participants also recommended that the Truth and Reconciliation Commission, in its final report, should call for the establishment of **reparations programmes**, especially those that would provide financial compensation for victims and for reform of the police, army, judiciary and civil administrations.

As of Resolution DIC/ CPR/ 05 creating an international criminal tribunal, it stipulates that *“a request must be made to the UN Security Council by the transitional government with a view to the creation of an international criminal tribunal for the DRC, to have jurisdiction covering crimes of genocide, crimes against humanity including rape as an act of war, war crimes and massive human rights violations committed or presumed committed since 30 June 1960 and those committed or presumed committed during the two wars of 1996 and 1998”*.

President Kabila had asked for the creation of this *ad hoc* tribunal in a speech to the UN General Assembly.<sup>7</sup> However there did not seem to be unanimity for this particular mechanism, primarily due to its costly nature.<sup>8</sup> The lack of interest is not shared by the **New Congolese Civil Society (grouping of more than 120 NGOs)** which, on 2 May 2010, initiated a campaign to gather 100,000 signatures as a prelude to addressing a petition to the United Nations for the creation of an international criminal tribunal for the DRC.

It should also be noted that the DRC’s ratification of the Statute of Rome of the International Criminal Court on 11 April 2002 has not yet resulted in the adoption of the law necessary to implement complementarity, which is an essential characteristic of permanent international criminal jurisdiction.

According to present Congolese law, war crimes, crimes against humanity and genocide are under

<sup>7</sup> Address to the UN General Assembly of 23 September 2003.

<sup>8</sup> See the Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies, 23 August 2004, S/ 2004/616.

the jurisdiction of the military courts.<sup>9</sup> This procedure runs counter to the challenges involved in the subordination of military justice to the high command<sup>10</sup> and is indicative of the lack of measures to protect victims and witnesses, and the lack of conformity of the formulation of crimes against humanity and war crimes with the Statute of Rome and the Geneva Conventions of 12 August 1949.

In accordance with III.8 of the Global and All-Inclusive Agreement, the President of the Republic promulgated a law on 29 November 2005 that granted amnesty for acts of war, political offences and crimes of dissident opinion. The adoption of this text gave rise to differences of interpretation between the Presidential camp on the one hand and the Congolese Rally for Democracy (Rassemblement Congolais pour la Démocratie, RCD) and the Movement for the Liberation of the Congo (MLC) on the other. The differences concerned the interpretations attributed to the term “political offences” by the two camps, and whether or not the assassination of the Head of State qualifies as such.

The observation must be made with regard to Transitional Justice that amnesty is a mechanism that has been frequently relied upon. Indeed if one considers the Global and All-Inclusive Agreement which paved the way for the inter-Congolese political negotiations, or the subsequent accords designed to put an end to the situation of conflict in the DRC, such as the Acts of Engagement of Goma of 23 January 2008<sup>11</sup> and the Goma Accords of 23 March 2008,<sup>12</sup> one realises that all of these agreements are careful to exclude war crimes, genocide and crimes against humanity from their field of application.

9 Law 024/ 2002 of 18 November 2002 concerning the military penal code, notably heading V.

10 In the explanation for the reasons for the said law, it may be noted in particular that “military justice by now seems to be an instrument of judicial power in the service of the High Command, the guarantee of the legal and regulatory action of the judicial power in the armed forces”.

11 The Acts of Engagement of Goma of 23 January 2008, which paved the way for the Conference on Peace, Security and Development in the provinces of North Kivu and South Kivu were signed by the Government and the various armed groups of the two provinces in the presence of representatives of the European Union, the African Union, the United States and the International Conference for Peace, Security and Development in the Great Lakes Region.

12 The Goma Accords of 23 March 2009 were concluded by the Government of the DRC and the National Congress for the Defence of the People. On the same day the Government concluded the same agreement with the armed groups of North Kivu as well as the CNDP and the Armed Groups of South Kivu.

In fact this amnesty does not concern itself with justice, or the right of the victims to justice and reparation. The approach is supposed to promote reconciliation and avoid further conflicts that would result from an “untimely” recourse to justice. Such an approach is flawed, however, in that it favours a restricted aspect of reconciliation (between leaders and/or combatants), leaving aside the victims with whom the combatants should be seeking reconciliation in an effort to build an inclusive and new post-conflict society.

#### *And what about Dealing with the Past today?*

The elections held in 2006 did not manage to conceal the need for Congolese society to face up to the legacy of past human rights violations. During a visit to the DRC in May 2007 the High Commissioner for Human Rights, Ms Louise Arbour, announced the launch of a project for “mapping” violations of human rights and International Humanitarian Law committed in the DRC in the period from 1993 to 2003.

The submission of the report on this mapping to the authorities of the Congo by the Office of the United Nations High Commissioner for Human Rights at the beginning of June 2010 served as a reminder of the importance of mechanisms for Dealing with the Past and the need for their implementation.

Indeed, in a speech made on the occasion of International Justice Day on 17 July 2010 the Minister for Justice and Human Rights declared that “The tally of five million deaths together with a number of rapes persuaded the government to ratify the Statute of Rome of the International Criminal Court in 2002, and in so doing to submit its situation to the said Court as of 2004. As for the earlier crimes committed between 1998 and 2002 (...), the gulf of impunity created by the temporal jurisdiction of the International Criminal Court will be compensated by strengthening of the principle of complementarity. In this context, the government plans in coming days to create specialised chambers within the Congolese criminal court system, since the creation of a criminal tribunal for the DRC, although just, would be very costly and unrealistic”.

It will be necessary to give content, as well as concrete form, to these special chambers. Organisations which defend human rights were not slow to react to the announcement by the Minister of Justice. In a press release dated 27 July 2010, the Congolese Coalition for Transitional Justice noted “that given the present functioning of the system of

*justice in the Democratic Republic of the Congo, the mixed chambers made up of Congolese and foreign judges and prosecutors acting within Congolese criminal courts would be the appropriate response".* It should be pointed out that this NGO grouping has been arguing on behalf of the creation of mixed chambers in the framework of Congolese courts since 2005.

### ***Challenges and prospects in relation to Transitional Justice in the DRC***

As a country that has suffered many years of conflict and numerous violations of human rights and International Humanitarian Law, the Congo is trying very hard to restore order. It will be a long-term process with many challenges, including reform of the security sector in general and especially of the judicial system.

While it is true that development partners need to accompany this long term endeavour with technical and financial support, the Congolese authorities could provide a strong signal by giving legislative and budgetary priority to the judicial system reform. The very existence of the DRC as a state as well as the consolidation of its democracy depend on it.

Another significant challenge with regard to Dealing with the Past is the need to consult with the victims. One of the recurrent errors characteristic of the implementation of Transitional Justice mechanisms – and not only in the Democratic Republic of the Congo – is the failure to take the concerns and interests of victims into account. This is an indispensable condition both for restoring dignity and for gaining their support to ensure the success of post-conflict development programmes.

A holistic approach such as that offered by Transitional Justice should be given preference in an effort to take into account the wide range of parties involved. Indeed, given the extent of past human rights violations it would be a mistake to give preference to one approach at the expense of others. It is for this reason that an effort should be made to combine criminal prosecutions, the search for truth, the creation of a programme of reparations on behalf of the victims, and the reform of entities that abuse their power together with an in-depth reform of institutions. Initiatives for commemoration should not be omitted from this gamut of measures, as they help at little cost to underline the importance of respecting the dignity of the victims and recognition for what they have suffered.

It cannot be sufficiently emphasised that a process of Transitional Justice in a country like the DRC calls for a national consultation to collect the views of all of the actors concerned: victims, churches, civil society, women's associations, the various authorities (government, parliament, judiciary), former combatants, NGOs involved with human rights, etc. Only in this way can the purpose of achieving ownership, particularly national ownership, of this type of process be achieved.

Genuine national reconciliation, which is to say reconciliation that takes into account the concerns of all components of society, i.e. those affected in one way or another by human rights violations and armed conflicts in the DRC, should integrate the entire panoply of mechanisms for Dealing with the Past, both judicial and non-judicial.

The United Nations could make a useful contribution towards this end.<sup>13</sup>

Up to now, the question of Transitional Justice has been a "top-down" process, limited to the parties to the conflict as well as international mediators and facilitators. It excluded the victims. This approach, which is both elitist and "arrogant", is a serious mistake that should be avoided in the future. Even so, it is feared that the general elections scheduled for 2011 in the Democratic Republic of the Congo will relegate the debate on Dealing with the Past to a lower level of importance.

<sup>13</sup> UN Security Council Resolution 1756 (2007) of 15 May 2007 among other things called on the MONUC "to help prepare and implement a strategy of transitional justice, and to cooperate with national and international efforts aimed at bringing the perpetrators of serious violations of human rights and International Humanitarian Law to justice".



## Challenges in implementing the peace agreement in Nepal: Dealing with the impasse

LISA IBSCHER<sup>1</sup>

**A democratic movement initiated by the people, a peace agreement with a high level of ownership, the bloodless abolition of the monarchy – until 2008 Nepal was a model of successful political and social breakthroughs following an armed conflict. Now, however, the country is in a political stalemate amounting to paralysis, and efforts to deal with the past have not even cleared the first hurdles.**

On paper, Nepal's approach to dealing with the past has been exemplary. The Maoist combatants are supposed to be rehabilitated and integrated, and the army is supposed to have been restructured and its training methods remodelled "as per the democratic principles and values of human rights". A National Peace and Rehabilitation Commission is to be created as is a Truth Commission, plus a further commission to investigate enforced disappearances. The Comprehensive Peace Agreement of 2006 also enshrines civilian supremacy and democratic principles. The parties have committed themselves to protecting civil liberties and the political and socio-economic rights of the people, and they have mandated the Office of the United Nations High Commissioner for Human Rights (OHCHR) to oversee the human rights situation.

Very little of all this has been accomplished, however. By August, only 4,000 verified minors and late recruits of the Maoist ex-combatants had been released, i.e. those who were under age at the time of the armed conflict or who had joined up after the ceasefire. There are still some 19,000 Maoist ex-combatants waiting in the cantonments under UNMIN surveillance while the Nepalese Army (NA) has resumed the recruitment of fresh troops instead of attempting to integrate their

former opponents within its ranks. Worse still, the Army has the active support of the present Defence Minister Bidya Devi Bhandari as well as of India

The Peace and Rehabilitation Commission has been transformed into a toothless body subject to the Ministry of Peace and Reconstruction, itself dependent on one of the parties, while neither the Truth and Reconciliation Commission (TRC) nor the Commission on Disappearances, which is supposed to investigate the fate of more than a thousand persons still missing, have as yet not been created. The relevant bills have been bogged down in parliament for months along with much other outstanding business. Furthermore, both bills have been criticised by international as well as domestic human rights organisations as failing to reflect international standards, e.g. those of international humanitarian law, despite the fact that Nepal has signed the relevant treaties.

Little progress is being made with returns and reparations, which are among the designated tasks of the TRC. Although a first instalment of "interim relief" has indeed been paid out to war victims and their relations, since effective monitoring is lacking, one has to assume that the payment is likely to have benefited a number of persons with no entitlement while actual victims have gone empty handed. Furthermore, the payments are being misused as an instrument of propaganda to the extent that a large section of the population sees them *less* as compensation for the wrongs committed against them in the past than as a reward for many newly named "martyr-families".

This kind of politicisation, that has penetrated all official bodies and mechanisms, is a major obstacle for dealing with the past. And since the rural population has little or no access to independent sources of information, it is easy for the political parties to present the procedures in a distorted manner to their own advantage.

The mandate of the United Nations Mission in Nepal (UNMIN) has in the meantime been curtailed and is due to end on 15 January 2011.

<sup>1</sup> Lisa Ibscher, mediator and trainer, was based in Nepal from 2007 to 2010, after peace missions in Kosovo and Sudan. As a Regional Peace Building Adviser of the German "Civil Peace Service Program", she was working on mediation training and conflict transformation on grassroot and district level, mainly in the eastern parts of Nepal. Since September 2010, she is working as a Peace Building Adviser of the Swiss Federal Department of Foreign Affairs in Southern Sudan.

Even the OHCHR, which is fighting on all fronts for recognition, has recently had to close two field offices. The human rights situation has indeed improved since the end of the armed conflict in that there are fewer human rights violations occurring. Nonetheless in so far as past wrongs are concerned, the situation is one of absolute impunity. This seems to be a constant factor of the Nepalese system. It was a major reason in the 1990s for the Maoists to take up arms against the regime. Now that it is a question of their own crimes however, they use a different yardstick since they too wish to protect the perpetrators in their own ranks. Their People's Liberation Army (PLA) accepts "as an institution" responsibility for the wrongs of the past, whereas the Nepalese Army (NA) excuses its behaviour during the civil war as being simply due to "operational necessities". Both insist on internal mechanisms for punishment, and with regard to human rights violations maintain that these are isolated cases of lack of discipline at the individual level. That this is not true is eminently clear in the report of the International Crisis Group of January 2010, for example: both institutions systematically encouraged human rights violations during the civil war – the PLA with ideological justification, the NA by means of a success-oriented system of incentives.

To date not a single one of these cases has had any consequence at the level of criminal justice. A number of cases are well documented, ranging from abusive detention to torture and the murder of civilians. In certain emblematic cases in which considerable international pressure was brought to bear, even this was to no avail. When the chips are down it becomes clear just how inadequately the rule of law functions and how little effect "civilian supremacy" in fact has in the real world. Civil arrest warrants are simply ignored, the perpetrators being protected from the civilian police force.

One particularly flagrant example is the murder of Maina Sunuwar. This 15-year-old girl was tortured to death in February 2004 in the Panchkhal Training Centre where soldiers are trained for UN peacekeeping operations. As a result of continuing pressure from human rights organisations and the OHCHR the circumstances of the girl's death came to light and her mortal remains were exhumed. Some of those responsible were subsequently given lenient sentences by a military court, notably for "failing to follow appropriate procedures in disposing of the body". The army refused to cooperate with the police or the courts, and its inquiry report shifted part of the blame for the death to the victim

herself. The district court of Kavre issued an arrest warrant for Major Niranjana Basnet, who by then had been deployed on a UN peacekeeping mission in Chad (MINURCAT). When the UN Department of Peacekeeping Operations (DPKO) learned of the on-going investigation he was repatriated. However, the police made no attempt to arrest him on his return to Nepal, leaving him to the Army which has since kept him in hiding. Nonetheless, the repatriation of Basnet by the DPKO amounts to a first important step, making it clear to the NA that DPKO vetting requirements are to be taken seriously. This is a decisive step, since as the fifth-ranking contributor of peace troops to the DPKO - - which contributes substantially to the financing, prestige and motivation of Nepal's armed forces, Nepal is likely to take heed.

The Maoists also "protect" their cadres from criminal prosecution. For example, they have failed to cooperate with criminal investigations into the involvement of their cadres in serious human rights abuses during and after the conflict, including the killing of nearly forty civilians in the bombing of a public bus in Madi, Chitwan district in 2005. They also fly the flag of "civilian supremacy" but they see it only as being relevant to their own claim to power. In May 2009, the Maoist leader, Pushpa Kamal Dahal (*nom de guerre* Prachanda), resigned as prime minister because his decision to sack the chief of army staff, Rookmangud Katawal, was overruled by President Ram Baran Yadav. Since then the country has experienced a series of political deadlocks. The Constituent Assembly, which also acts as a parliament, has been unable to function for months. The deadline for a new constitution had to be extended in May 2010 for a further year.

Nepal's most influential neighbours have not been particularly constructive in their contributions. India, which has its own "Maoist problem", is contributing to weakening the Maoists in Nepal. China does not want to expose itself to criticism regarding human rights issues and in any case has its own priorities in Nepal. Even the international donors, whose contributions make up a considerable part of the Nepali state budget, are playing controversial roles at times. For years the United States has supported the Nepalese Army with considerable funds for training purposes, while keeping the PLA on its list of terrorist organisations. However, even the US has been stepping up pressure on the parties to respect rule-of-law principles. Like the United Kingdom, which historically has close military ties with Nepal,

the US has joined the public appeal of all donors with regard to human rights questions.

The peace process in Nepal is still cited as exemplary when it comes to the issue of ownership of the process by the former warring parties and the bloodless revolution. But as long as lip service is all that is forthcoming on the question of genuine implementation, there is a real possibility that the achievements to date will be reversed at any time. Little has been done to address the causes of the conflict, and with the emergence of new armed groups and the flaring up of ethnic conflicts signs of the next outbreak of violence are already visible.

To break this vicious circle of violence and counter-violence, it will be necessary to create the conditions for a process of dealing with the past that is worthy of the name, for example by setting up a central database on victims which would make it possible to monitor compensation payments and the status of judicial proceedings (at present various organisations maintain separate registers). Complete clarification of cases of disappeared persons - whose families are still holding out hope for their return - would be another way to create a credible process. If at least the most serious human rights violations were to be prosecuted, this would send a clear signal with regard to impunity. In the meantime only a thorough reform of the entire security and justice sector in Nepal can halt systematic misuse of the security apparatus. This would help break down the self-sustaining dynamics of impunity and open the way to democratic control, leading eventually to a guarantee of non-recurrence.

However, the country's dominant forces are not in the least interested in any serious effort to deal with the past. They are afraid that such a process might further destabilise the country, while taking its toll in their own ranks. To many of them "peace" does not so much mean a social transformation as a continuation of the status quo - which in fact means suppressing interest groups that call it into question rather than making any effort to involve them effectively in the political process.

In this way and through the political deadlock the peace process has now been brought to a standstill. The victims of the armed conflict do not even have in the government an opposite number to which they can turn with their concerns. Once again then, those who suffered most from the armed conflict and who had the greatest hope that a peace agreement would mean an improvement in their living conditions, are

to be disappointed, left alone with their losses, their anger and the feeling that some things in Nepal will never change.



## Dealing with the past in Nepal: “More haste less speed”?

MARKUS HEINIGER<sup>1</sup>

When I began work as Switzerland’s Special Adviser for Peacebuilding in Nepal in 2007, my attitude to dealing with the past could be described as based on the following idea: when reading a novel, to fully understand the story, we know that we must read a page before turning to the next. Similarly, we cannot go forward in the book of history without having dealt actively with unresolved problems from the past. If we don’t, they will come back and create more problems. My intention was to support a process of dealing with the past that would be oriented towards victims and be constructive, not an exercise in whitewashing, but one that looked to the future without attempting to suppress or ignore problems from the past. Between 2007 and 2010, I saw clearly how the difficult events of the past could serve equally as potential material for igniting further conflict as well as, if actively dealt with, for bridge-building. Before sharing a few of my own impressions on the subject, I would like to say a few words about the background (see in particular also the article of Lisa Ibscher, starting on page 185, “Challenges in implementing the peace agreement in Nepal: Dealing with the Impasse”).

Nepal’s elite is more or less well informed on how dealing with the past/transitional justice has been approached in (other) peace processes, and they are aware that one day the process will come in one form or another to Nepal too. The Army leadership in particular understands this from experience in other countries thanks to deployments in UN peacekeeping missions. Political leaders including the Maoists have also had some exposure since 2006 (study tours, seminars, etc.). And there are some

very active human rights organisations in Nepal, not only at the national level. Without the pressure put on the former government of Nepal by these organisations it is unlikely that its consent to a UNHCHR field mission would have been obtained in 2005. The inclusion of human rights and the punishment of war crimes in the Comprehensive Peace Agreement is due to them, as well as to the influence of the informal advisers at the time on drafting of the Agreement, including indeed the Swiss.

### **Elections saved – victims of the conflict not reconciled**

Two days before the election of the Constituent Assembly in April 2008, seven young Maoists were shot, from nowhere, on an open road in West Nepal. A delegation of officials from the Peace and Conflict Management Committee (PCMC), which the government had created within the Ministry of Peace and Reconstruction and with which I worked daily on an informal basis as one of two international consultants, flew early the next morning by helicopter from Kathmandu to the scene of the incident. There a series of intensive discussions were held with police, various authorities, political parties and local personalities. Nearby about a thousand young Maoists had gathered around the bodies of the seven who had been shot; they were seeking vengeance, the presumed target being the police station. It was only with difficulty that the leadership of the CPN(M) managed to keep them under control. The members of the PCMC, known throughout the country for their efforts on behalf of human rights and peace, were successful in restoring calm, so that it was possible to avert the imminent danger of Maoists causing riots to take revenge on the police and the political masterminds alleged to have been pulling the strings from behind the scenes. Our involvement, as all international and national observers agree, was decisive in bringing about the de-escalation. The situation was indeed so tense that an escalation would have seriously endangered not only the elections in West Nepal but indeed across the country, together with the peace process as a whole. The PCMC members argued that it would be better for the peace process

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to recognise that something terrible had happened, and that a thorough investigation should be held, and to promote de-escalation. The catchwords were truth, justice and compensation. On return to Kathmandu, to keep our word, we met with the National Human Rights Commission, the UNHCHR Mission as well as influential government offices and civil society representatives. It was clear to all concerned that this was potentially an "emblematic case". Unfortunately it was not possible to make this happen. To date neither those responsible nor those who masterminded the crime have been brought to justice. The political circles who were indicated to me as the masterminds – "dividers" in peacebuilding parlance – have in the meantime once again risen to a position of respectability within their political party. We did manage to help save the elections, which at the time had everyone's support, in particular that of the "ordinary" Nepali, to carry them out successfully, and thus contribute to the peace process. As for dealing with the past however, much remains to be done, including for the families of these seven young men.

#### **"Do-harm" danger due to non-conflict-sensitive compensation of victims?**

In the summer of 2008, the World Bank in Nepal announced that it was launching a new programme to support compensation of victims of the armed conflict. This came as a surprise in view of fact that there had not been adequate consultation on, or acceptance of, compensation guidelines. As is often the case, there were various lists of victims in existence that had been drawn up by a number of non-governmental organisations and government bureaux. The State Register of Victims also seemed to be not yet finalised, being based to some extent on politicised criteria. These lists were forwarded by local authorities to the district authorities, then on to the Ministry of Peace and Reconstruction. Since local authority elections have not been held for years, the municipalities are strongly dominated by the main political parties who tend to fill the lists with their own people. An informal "formula" was thus established allowing Maoists to obtain funds for their ex-combatants in the cantonments while the other parties, almost as a *quid pro quo*, could claim funds for their internally displaced persons (IDPs). This is one of the main reasons why we worked strongly in favour of the Local Peace Committees (LPCs) which were to be set up in each district in accordance with the peace agreement. At the time however, there were only a few of these LPCs, and only at a later stage after many consultations, discussions and

a certain amount of "pressure" did it become possible to activate the LPCs, the composition of which was relatively inclusive (with a quota for women, Dalits, etc.) so as to obtain fairly impartial lists of victims. In the summer of 2008, we feared however the so-called "do-harm" effect of actions like the one of the World Bank. When certain groups of victims seem to other victims to be given preference for payments and other benefits without proper controls, this often leads to resentment among the less fortunate victims and the feeling of again having been cheated. In reality, this results in groups being played off against each other, be it either deliberately or inadvertently, so that victims probably receive less than would be the case if there were coherent negotiations. In addition, this also has a negative effect on support for the peace process among the victims in question. The World Bank therefore made certain adaptations following intensive discussions behind the scenes with others, including the Swiss Development Cooperation which played an important role thanks to good and close relations with the World Bank in Nepal and in Washington. However, there continues to be a lack of generally accepted rules for some considerable time.

#### **The military - talks before the talks before the Commission?**

In informal and confidential talks behind closed doors between military persons and the former Maoist combatants, which dealt with other themes, the issue of war-related human rights violations came sporadically up for short side remarks as well. These short side discussions were almost exploratory, at times offering justifications, but at the same time the sides listened to the each other and observed, in what might be described as "talks before the talks before the commission". One person for example went to great lengths to talk about the role that one of the PLA commanders present had played in a specific military situation -- his way of making it clear that the Army knew the other side only too well, and if there were to be any question of human rights violations the relevant information would be brought to light in any procedures engaged. The person spoke in favour of a structured truth and reconciliation commission (TRC) of the kind specified in the CPA, for self-interested reasons, in particular because this would lead to an even-handed debate on past human rights violations. For without such proceedings, namely a TRC, the Army would be much more in the public eye and subject to a stream of accusations. He described the feelings he had once when a member of his unit just missed being shot by a Maoist.

Another example: his colleague Y, was accused by a human rights organisation of responsibility, as commander of an army unit, in a well-known and "emblematic" case of rape and murder. He said that in fact Y. had not been involved in the incident, having been at the time deployed abroad on a peacekeeping mission – so how could he have been responsible? In response to the assertions by the Maoists that this was not true, he recounted having had to make a statement about the same incident to a group of prominent women politicians earlier, in which he acknowledged that the incident may have taken place - though no one knew for certain - but did not wish simply to deny it. He concluded by reiterating that he had not been present at the incident and that in any case it was now necessary to look to the future. He evoked these discussions, initially without attempting to distance himself from his colleague, the other military, although later he did indirectly. He went on to stress his present positive attitude to reconciliation (but as discussed above, concerning the TRC, this served primarily to improve his own position – which is after all legitimate), all the while watching to see how the other side reacted, and what the only foreigner present had to say. (I made my position clear, referring to the point of view of the victims as the essential criterion, and the relevant human rights, saying that what was important for the future was to actively comes to terms with the truth). It looked a bit like an effort of someone preparing possible positions to adopt before a truth commission or tribunal that might be established some time in the future.

### Having rights – helping to enforce them

In 2008, an expert opinion was given as to Nepal's obligations with regard to the human rights violations during the armed conflict. This was based on previous undertakings such as the CFA, the CPA, the interim constitution and the international conventions to which Nepal has acceded as well as the general standards on such questions. This opinion considered that a future TRC might discuss the pros and cons of recommending amnesty (for consideration by the public prosecutor) in "small" individual cases, but naturally not for war crimes, crimes against humanity or gross human rights violations. (In Article 5.2.5 the CPA states, within going into detail: "Both sides agree to constitute a High-level Truth and Reconciliation Commission ... in order to investigate truth about those who have seriously violated human rights and those who were involved in crimes against humanity in course of the war and to create an environment for reconciliations

in the society."). It was also stressed that the Nepali must themselves address the questions of the correct measures to take, including any possible pardoning provisions, in the framework of their own peace process. The ideas of this text was criticised by some human rights organisations, following which there was for some time a very emotional debate, in particular among rather embittered expats on the attitude which Nepal should adopt on this question. This somewhat reduced the pressure on Nepali actors with regard to moving ahead with the TRC. Here there was a need for some kind of mediation or facilitation with those supporting the peace process and human rights (which in fact should be one common cause), to which I attempted to contribute but with little success. The leading politicians on both sides who were not seriously interested in independent assessments were strengthened by the tension among the internationals. The efforts of serious government officials – and they do exist -- to prepare sensible draft legislation for the TRC supported by consultations, were once again undermined. Human rights specialists in Kathmandu and abroad who had sent each of the government's proposals on the Commission on the Missing and the TRC back with well-reasoned legal arguments as to why they were insufficient, were undoubtedly justified in terms of "state of the art". Each time, however, the questions remained as to how to be supportive in a way that would enable the rights of the victims of the war to prevail within a reasonable period of time; how to progress from the "having rights" stage to a "rights enforcement" stage; and in such a situation, how to engage in a way meaningful which is victims-oriented? Is there such a thing as conflict-sensitive dealing with human rights? Objectively, and seen from a distance, it is indeed a good idea, worth putting forward, that the discussion regarding *sequencing* is a right and proper method for facilitation between the divergent views described in such difficult, dilemma-like situations. The Joinet-Principles (see the article of Jonathan Sisson, "Conceptual Framework for Dealing with the past", page 11-15) being put into practice by the FDFA in its efforts to build peace and promote human rights are a great help in this context. Anyone in the midst of it all must wrestle each day with this need for balance.





# Switzerland, the Third Reich, Apartheid, Remembrance and Historical Research. Certainties, Questions, Controversies and Work on the Past

MARC PERRENOUD<sup>1</sup>

During the twentieth century, Switzerland was neither ravaged by the two world wars nor torn apart by civil war. However, international conflicts and racist policies had consequences on Switzerland, which have led this country to examine its past and the history of its foreign relations, particularly with the Third Reich and with South Africa during the apartheid era.

## *Controversies and research on Switzerland and the Third Reich*

Like other countries, Switzerland has known heated and contentious debates about the Second World War.<sup>2</sup> At the end of the twentieth century, these debates focused particularly on the destruction of European Jews and relations with the Nazis. An important difference sets Switzerland apart: an institutional and political continuity (that includes the trade unions and the Social Democratic Party, which joined the Federal Council in 1943) has formed a social consensus that is also based on a shared memory of the Second World War.

This national identity is based on a "bricolage" [a patchwork or construction], a concept introduced by Claude Levi-Strauss, which Bernard Crettaz has used to analyse Swiss culture. Crettaz points out that the result of such a "bricolage" remains fragile. This structural weakness is severely tested when identity claims are questioned by critics from abroad. From the 1950s onwards, discussions on recent history involved academics, journalists and the political authorities. The resurgence and

transformations of these debates can be summed up in three names: Carl Ludwig, Edgar Bonjour<sup>3</sup> and Jean-Francois Bergier. These three authors symbolise milestones in historical re-examinations that resulted in the publication of reports in 1957, 1968-1970 and 1998-2002. Three different areas were addressed in these reports. The first study focused on policy towards refugees. The second study was devoted to the question of neutrality and foreign policy.<sup>4</sup> The third was centred on economic and financial aspects. A common characteristic of the three reports is that the Swiss government commissioned experts to write them after the publication of documents that had been archived outside Switzerland and which challenged beliefs accepted as certainties founded on the historical memory developed after the 8<sup>th</sup> May 1945.

The public debates that took place between 1996 and 2002 constitute the longest and most profound crisis in the Swiss people's relationship with their past.<sup>5</sup> Whereas the two previous waves of public discussion had been rather limited, a series of tidal waves swept over Switzerland since 1996. Increasingly heated debates were fought out in many electronic media and printed publications. In order to examine these debates in a few pages, this article begins with a discussion of *five processes* that characterise the last decade of the twentieth century, and then presents *six categories* of actors. It concludes with a discussion of the *six phases* of the debates.

## **Five processes underlying the historical debates**

What processes explain the significance of the debate about the Second World War that shook Switzerland between 1996 and 2001?

1 Marc Perrenoud, historian, PhD. From 1997 to 2001, Perrenoud was the scientific advisor to the Independent Commission of Experts Switzerland - Second World War ("Bergier Commission"). Since 2002, he is serving in the same capacity for the publication of Diplomatic Documents of Switzerland (dodis.ch). The views expressed here are his own and are not binding on the FDFA.

2 The main part of this article is a summarised and updated version of my article "Or, diamant et refoulements : les historiens suisses et la Seconde Guerre mondiale" [Gold, diamonds and rejections: Swiss historians and the Second World War] published in *L'historien, l'historienne dans la cité*. Lausanne: Ed. Antipodes, 2009, pp. 153-175. Full notes and references, which have been kept to the minimum necessary in this article, are found in the 2009 book.

3 Sacha Zala, «Governmental Malaise with History: From the White Paper to the Bonjour Report», in: Georg Kreis (Hg.), *Switzerland and the Second World War*, Frank Cass: London 2000, S. 312-332.

4 Sacha Zala, *Gebändigte Geschichte. Amtliche Historiographie und ihr Malaise mit der Geschichte der Neutralität. 1945-1961*, Bern: Swiss Federal Archives, 1998.

5 On the state of knowledge in the late 1990s, see the collection articles *Switzerland and the Second World War*, ed. by Georg Kreis; with a foreword by David Cesarani, London and Portland: Routledge, 2000.

First of all, the *end of the Cold War* triggered a process of redefinition of international relations. After the fall of the Berlin Wall in 1989, Switzerland, which still leaned on the concept of the national "Réduit" (shelter) inherited from the Second World War, gradually realised that the upheavals in Eastern Europe were leading to changes in its international status. Long preserved by the division of the world into two opposing sides, Switzerland now seems to have an anachronistic place, which generates critics from other Western countries that were no longer inclined to moderate their disapproval. Previously, in contrast, the Communist threat had justified international goodwill for a country, which though neutral was also useful. The opening of archives and the free movement of people revealed previously hidden or neglected aspects.

At the end of the twentieth century, Switzerland was characterised by a second process: the *expansion of the Swiss financial centre* picked up pace and enabled Swiss banks to substantially strengthen their position, to the considerable irritation of their competitors. According to a report published in 2006 by the Swiss Bankers Association, Swiss banks managed more than four trillion Swiss francs in customer security deposits and one third of private assets invested internationally.

A third process set Switzerland apart: in a referendum in 1992, Swiss voters *rejected Switzerland's accession to the European Economic Area*, despite the Federal Council claiming that this modest degree of participation in the construction of Europe was in the continuity of the policy pursued since 1945. This statement stood in stark contrast with the very reserved tradition with regard to Europe that had characterised Swiss politics since the 1950s. The political consequences of this rejection in 1992 were: on the one hand, the growth of the Swiss People's Party (SVP), which vehemently defends the virtues of fierce independence and, on the other hand, Switzerland's growing isolation amidst European neighbours who scarcely defended the country against attacks from the other side of the Atlantic. Another consequence was a dichotomy between, on the one hand, an affirmation of Switzerland's independence underscored by a particular vision of its national history and, on the other, a shaking up of accepted convictions of Swiss history and relations with Europe. In a book published in October 1992, Jean-François Bergier noted that historians' publications were largely absent from the debates on Switzerland's European policy:

[Protagonists] in the debate – and sometimes members of the Federal Council themselves in their speeches – make references to history, but generally through myths that condense history or by resorting to meaningless stereotypes that do not stand up to critical analysis. [In fact, history is] accepted as a friendly and useful discipline, even when it serves the invention or restoration of a national identity. [Nevertheless, other authors publish critical works, resulting in two visions of the past:] the glorified legend is the moral certitude that we draw from heroism, exceptional wisdom and our brave ancestors' perpetual concordance: an idealised vision of our past. The dark legend delights in exposing its opposite's inconsistencies, hypocrisies and manipulations, which did, in fact, exist in the past as they still do today: our society is not more exempt from them than others.<sup>6</sup>

A fourth process unfolded in the 1990s. *Generational changes* meant that Switzerland entered, in its own way, the "era of the witness" and that the mass media began to use methods that contrasted with the usual even-handedness of traditional newspapers and with the structural moderation of political culture in Switzerland.

The fifth process was constituted by *the activism of Jewish organisations*, especially American ones, which understood the fragility of the Swiss position in the new international context and which exploited media techniques to the fullest.<sup>7</sup> The raised problems mainly concerned the stolen and unclaimed assets.<sup>8</sup>

This context led to the creation, by the Federal Council in October 1996, of a "Task Force Switzerland – World War Two", headed by Ambassador Thomas Borer until its dissolution in March 1999, within the Department of Foreign Affairs. His mission

6 Jean-François Bergier, *Europe et les Suisses. Impertinence d'un historien*, Carouge-Geneva: Éditions Zoé, 1992, pp. 10-11, 145, 173.

7 Cf. Thomas Maissen, *Verweigerte Erinnerung. Nachrichtenlose Vermögen und die Schweizer Weltkriegsdebatte 1989-2004*, Zurich: NZZ-Verlag, 2005.

8 Cf. Regula Ludi, "Why Switzerland?" – Remarks on a Neutral's Role in the Nazi Program of Robbery and Allied Postwar Restitution Policy," in *Robbery and Restitution: the Conflict over Jewish Property in Europe*, ed. by Martin Dean, Constantin Goschler und Philipp Ther, New York, Oxford: Berghahn, 2007, 182-210.

was to coordinate the research and to defend Swiss interests.<sup>9</sup>

The Independent Commission of Experts Switzerland-Second World War (ICE), better known as the “Bergier Commission”<sup>10</sup>, was established in December 1996 by the Swiss government and the Parliament. Furthermore, not one single person, but nine experts were responsible for the research, among whom five were Swiss nationals. Composed of eight historians<sup>11</sup> and a jurist, the ICE published its final report in early 2002, after having published two interim reports, one in 1998 on gold transactions and the other in 1999 on refugees.<sup>12</sup>

### Six categories of actors

Particularly during the last decade of the twentieth century, debates over history involved different activities. *Six categories of actors* can be distinguished: the political and military authorities, companies (especially banks), historians based in institutions, witnesses, archival researchers and journalists. Each category works in accordance with its own motivations, timeframes, deadlines and rhythms, potentially leading to divergences and phase shifts, and even to rifts.

The first category consists of the *political and military authorities* that elaborated, from the last months of the Second World War onwards, a set of arguments and a narrative about Switzerland during the war. The publication of General Guisan’s report in 1946 on the period of active military service formed the matrix of a particular discourse and culture about a Swiss Army and Swiss Confederation that had preserved itself from military invasion. Guisan went so far as to claim special merit in the creation of the strategy that transformed him into an iconic saviour in the eyes of the population, while the actual contributions of other strategists to the elaboration and realisation of the doctrine of the national Réduit were obscured. The historian and former member of the Federal Council Georges-

André Chevallaz (1915-2002) also instilled a vision of Swiss history to generations of school students in French-speaking Switzerland through his textbooks. Even after he became a member of the Federal Council, his textbooks were used in schools. Political and military authorities became increasingly involved in the elaboration of the historiographical narrative and memorials in 1989 to pay tribute to the generation that had performed active service during the War. Parliament voted to allocate six millions of Swiss francs to pay homage to that generation fifty years after 1939. With the so called “diamond jubilee” (Diamantfeier), Switzerland thus affirmed itself as the only country that commemorated the start of the Second World War. However, critical voices rose and were then partially integrated in publications and exhibitions organised in 1989. In the 1990s, the dominant feeling remained one of complacency. As far as the majority of the political class was concerned, Switzerland had traversed the war years with rectitude. Criticisms could only be levelled at a few individuals who had become too compromised with the Axis, or too involved in the export of war material. In 1996, a large part of the Swiss political class was convinced that the criticisms from the United States were the result of ignorance on the part of the Americans of Switzerland specific conditions. Ignorance of Swiss history explained the virulence of the criticisms levelled against Switzerland from beyond its national borders. From this perspective, the creation of a commission of experts could be justified in order to solve the *communication* problem caused by this controversy. Many parliamentarians failed to grasp the scale of historiographical issues and gaps raised by the questions that had been posed. That was why in December 1996 both Houses unanimously approved a bill calling for the formation of a commission of experts. Many parliamentarians within the Federal Assembly affirmed strong patriotic convictions and a personal commitment to traditional values. They would later be among the harshest critics of the ICE, which was created and conceived in a particular political context that would prove to be short-lived.

A *second* category of protagonists in the historical debates was constituted by *companies, particularly banks*. When the problem of unclaimed assets of Nazi victims was raised by Jewish organisations at the end of the war, the banks adopted a perspective of strict economic calculation: they noted that banking secrecy had constituted a mainstay for the expansion of financial institutions since the beginning of twentieth century and were unwilling to tolerate any questioning of that institution. The

9 See Thomas Borer-Fielding, *Public Affairs. Bekenntnisse eines Diplomaten*, München: Econ Verlag, 2003, pp. 175-225.

10 On the personality and career of the President of the ICE, see Pietro Boschetti, Bertrand Müller, *Entretiens avec Jean-François Bergier*, Carouge-Geneva: Éditions Zoé, 2006.

11 After his death in 2000, the historian Sybil Milton was replaced in February 2001 by the economist Helen B. Junz.

12 The ICE website, [www.uek.ch](http://www.uek.ch), contains more detailed information on the three reports cited above, which can be downloaded. A summarised version of the ICE’s publications was written by Pietro Boschetti under the title: *La Suisse et les nazis. Le rapport Bergier pour tous*, Carouge-Geneva: Éditions Zoé, 2004. Preface by Jean-Francois Bergier.

search for unclaimed assets threatened to be a Trojan horse before the bank fortress that had been built over several decades. Therefore, the banks refused to allow any investigation by an administrative authority in their protected domain. In response to foreign pressure, Swiss diplomats tried to take concrete steps to follow up on the commitment signed in Washington in May 1946 to examine "favourably"<sup>13</sup> this matter. Officials therefore proposed legislative measures. In August 1947, the General Secretary of the Swiss Bankers Association (SBA) argued vehemently that these were "stupid"<sup>14</sup> questions and that the independent measures taken by the banking institutions were sufficient.

The Federal Decree of 20 December 1962 (Registration Decree) concerning the assets located in Switzerland of foreign nationals or stateless persons persecuted on racial, religious or political grounds obliged all natural and judicial persons, commercial companies, and associations in Switzerland to report any Swiss based assets about which there had been no reliable information since 9 May 1945 and whose last known owners were presumed to have been the victims of racial, religious or political persecution. The weakness inherent in its implementation was the fact that the key operation for implementing it effectively had been delegated to the banks. Once again the principle of corporate self-organisation was not abandoned; independence, self-reliance and executive autonomy of the banking system remained intact. This Decree was not entirely successful, and the issue of «unclaimed assets» thus remained unresolved.

Thus, the archives remained under lock and key. From the 1980s onwards, historians tried to persuade the banking community to open its archives, even to a limited extent, to enable Switzerland to make up for its historiographical delay, which stood in contrast to the expansion of the Swiss financial centre. Faced with threats of a boycott that risked leading to discriminations on the US market, the banks agreed with Jewish organisations on the 2<sup>nd</sup> May 1996 to establish the Independent Committee of Eminent Persons, which was chaired by Paul Volcker, the former chairman

of the US Federal Reserve, and commonly known as the "Volcker Committee". The investigations in the archives of the Swiss banks were conducted by professional accountants and corporate fiduciaries. The Committee's mandate was to search for monies deposited by victims of Nazi persecution. It was not meant to be a historical analysis, although ultimately it turned out to be much more costly for the banks, which had to pay approximately 800 millions of Swiss francs for the services of auditing companies.

The persistence of criticisms against the Swiss business community prompted the heads of the Swiss banks to negotiate with the Jewish organisations and to reach an agreement: the deal signed in August 1998 provided for the payment of US\$ 1.25 billion to Holocaust survivors or heirs of unclaimed accounts.<sup>15</sup> But the Swiss political and diplomatic authorities were neither consulted nor informed about these negotiations between private parties. It is also noteworthy that the work of historians had no impact on the decision of bankers who agreed to spend a huge sum to settle this dispute. Yet at that time, the ICE had only published its interim report on gold transactions. Among 25 questions which had been posed to the ICE and which were supposed to be dealt with in its final report in 2001 only one was actually addressed in that report. It was therefore an independent decision taken by the banks, which did not discuss the matter with the Federal Council and did not take the work of historians into account.

Subsequently, financial interest groups promoted the publication of works which, at the end of the day, justified their past and present behaviour. Around 2001, as the ICE's work was in its publication phase, several books were published by Michel Fior, Daniel Heller and especially Joseph Jung. The latter managed the banking group's archives and oversaw publications about the different financial institutions that constitute the Credit Suisse Group. It is striking that the book about Credit Suisse contains a highly critical passage on the management of unclaimed assets after 1945 and the attitude of the banking community. It was as if this devastating criticism was published to justify the substantial financial concession that had been agreed to in August 1998. To protect the credibility of Credit Suisse, arguments were put forward to provide justification for the magnitude of the payout, whereas previously Jewish organisations had been blamed for harshly

13 Letter dated the 25<sup>th</sup> May 1946 (although it was not published in the *Federal Gazette* in 1946, this letter is an integral part of the Washington agreement). It is available online: [dodis.ch/1730](http://dodis.ch/1730).

14 Minutes of the meeting of the 21<sup>st</sup> August 1947 between representatives of the SBA and the Federal Political Department on the question of the property and assets of victims of National Socialism which had been left unclaimed in Switzerland, [dodis.ch/2004](http://dodis.ch/2004).

15 Assigned to Judge Edward Korman, the distribution of this money will be completed only in 2010 (see articles in the *Neue Zürcher Zeitung* of the 1<sup>st</sup> July 2010).

castigating Swiss banks by resorting to details, highly particular cases and litigation over tiny amounts of money. Moreover, these books published by the business community were designed to demonstrate the analytical capacity of the historians selected by their sponsors. While the ICE, which was composed of eight historians and one jurist, was accused of lacking the competence to understand economic realities, these books claimed to have been written by highly qualified authors and not to be susceptible to anachronisms.

A *third* category of actors intervened in the debates about Switzerland during the Second World War: the *witnesses*. After the fall of the Axis Powers, the “mobilisation generation” dominated the public space and dictated the discourse on the years from 1939-1945. The valorisation of the memories of Swiss people who had lived in Switzerland during this dark period made it possible to transmit memories without having to rely on written sources. This valorisation enjoyed a revival in 1989 during the so called “diamond jubilee” commemorations of the mobilisation of 1939; but it was of small benefit to the people who had been victims of the Axis beyond the Swiss borders. When the Holocaust survivors sought to recover assets deposited in Switzerland by their deceased parents, they faced latent distrust. Bankers demanded official documents to prove the oral evidence presented by the survivors. As the secretary of the SBA had said in August 1947, bank attestations were essential to obtain the right to search for assets deposited in Switzerland by victims of the Nazis. Ignored in the 1950s, the victims voices began to be heard from 1995 onwards. The emotional impact of television testimonies helped convincing banking and political leaders to consent to research being conducted in the archives. After several months of agitation driven by the media’s hunger for “revelations” from “declassified” archives, the negative image of Switzerland that emerged began to provoke reactions. In this context, the devalorisation of analyses based on archival documents motivated a valorisation of the words and memories of people who had lived through the years from 1939 to 1945. In 1998, the Archimob project was launched, which went on to record interviews with 555 individuals and mount *L’histoire, c’est moi* (History, that’s me), the title – without qualifying quotation marks – of an exhibition hosted in 15 Swiss cities from 2004 to 2008.<sup>16</sup> After the criticism based on written sources, the exhibition was presented as “the revenge of the oral”. In fact, the testimonies were for the most

part collected from members of the immediate post-mobilisation generation (whose education had consisted more of myth than of real history). In addition, the Histoire Vécue (“Lived history”) association, founded in late 1997, militated against historical analyses, particularly the ICE’s.<sup>17</sup> Its articles of incorporation indicated its main goals:

- Promote the reputation of Switzerland, both at home and abroad, by undertaking and supporting actions to correct any misrepresentation of its history;
- Raise awareness of and respect for the personal experiences of contemporary witnesses, particularly in discussions about Switzerland’s attitude in the recent past;
- Make the population receptive to a reliable historical presentation of this past;
- Fight the feeling of insecurity among the population and strengthen its confidence in itself and in Switzerland;<sup>18</sup>

*Histoire Vécue* published studies and issued press releases challenging the results of historical research.<sup>19</sup> Sigmund Widmer (1919-2003), former member of the National Council and Mayor of the City of Zurich, stands out among the leaders of this association.

The *fourth* category of actors was composed of *historians based in institutions*, especially in universities and historical societies. Walter Hofer, professor at the University of Bern and SVP member of the National Council (1963-1979), is worth mentioning in this context. An archetype of this category was Jacques Freymond (1911-1998), who headed the Graduate Institute of International Studies from 1955 to 1978 and was a member of the Nestlé administrative board from 1958 to 1984 and of the International Committee of the Red Cross

17 See Charles Heimberg, «Commission d’experts et «Histoire vécue’ : une forme helvétique d’instrumentalisation des témoins », *Bulletin trimestriel de la Fondation Auschwitz*, No. 90, 2006, pp. 55-62.

18 Statutes adopted on the 5<sup>th</sup> December 2005 and the 10<sup>th</sup> May 2006, replacing those of the 8<sup>th</sup> May 2001, [http://www.gelebte-geschichte.ch/AGG\\_F/statuten/frame\\_statuten\\_f.htm](http://www.gelebte-geschichte.ch/AGG_F/statuten/frame_statuten_f.htm) (this site was last verified on 28. June, 2008. The link was no longer valid on 2. November 2010.) Considering its mission to have been accomplished, the association decided to dissolve on 26 May 2008.

19 References to these publications and texts of press releases are available on the website <http://www.gelebte-geschichte.ch>. See in particular: Groupe de travail Histoire vécue, *La Suisse au pilori ? Témoignages et bilan à la suite du rapport Bergier*, Yens sur Morges: Cabédita, 2006.

16 Cf. <http://www.archimob.ch>.

(ICRC) from 1959 to 1972. A General-Staff colonel, Freymond published, in 1989, a book to voice his opposition to the initiative demanding the abolition of the Swiss army. The book contains the following stand on the historiographical debates:

It seems to me that, in fact, revisionist historiography fosters or sometimes seeks to foster a guilt complex in Switzerland or to call into question the policy of neutrality that was conducted in particularly difficult circumstances by the government of an encircled country. The sources available to us today do not support the claim that the Third Reich "preserved Switzerland" to "conduct its business transactions, finance its espionage networks and dispose of looted assets." They do not allow us to say that "geographic and economic arguments proved decisive".<sup>20</sup>

In the same vein, Philippe Marguerat, professor of History at the University of Neuchâtel, became known from 1983 onwards as an outspoken and polemical critic of scientific publications that nuanced the statements issued by the Swiss National Bank from 1944 to 1946 in order to justify and legitimize its relations with the Reichsbank in the name of neutrality and monetary policy. Persuaded by the arguments *pro domo* that the central bank had made at the end of the war, Marguerat became their advocate, particularly from 1997 onwards.

A *fifth* category of actors was constituted by *researchers in archives*. In many cases, they did not occupy institutional positions but conducted archival research in their own capacity and wrote publications that contributed to develop new perspectives. It was above all the publication in 1974 of Daniel Bourgeois thesis, based on a deep probe of archives in Germany, which initiated a new phase of historical analyses in which Bourgeois himself would play a leading role with articles and advice to researchers from the Swiss Federal Archives, where he was employed.<sup>21</sup> In the 1980s, Hans Ulrich Jost's contribution to *Nouvelle Histoire de la Suisse et des Suisses* (A new history of Switzerland and the Swiss), integrated the role of the Swiss financial centre and played down the importance of the threat of a German invasion.

Moreover, the Second World War was a decisive phase in the stabilisation and consolidation of social

and political compromises in Switzerland. The social peace that prevailed after 1945 was hardly conducive to historical debates and criticism of the ruling circles. General Guisan became an icon. In 1985, Oscar Gauye, Director of the Federal Archives, published lengthy extracts from documents signed or spoken by the General. The reactions were very strong. The publication of texts on some of Guisan's convergences with the far right and his admiration for Mussolini and Pétain drew criticism and a virulent characterisation of the federal archivist as "a certain Oscar Gauye, a rat escaped from his library."<sup>22</sup> In an editorial entitled "Ne touchez pas au sacré!" (Hands off the sacred) in the *Nouvelle Revue de Lausanne* of the 11<sup>th</sup> April 1985, Michel Jaccard wrote:

By laying hands on the person and the work of the General, they have laid hands on something sacred. The history of the mobilisation of 1939-1945, dominated by the personality of Guisan, is written. It must not be altered, especially in as futile, superficial and fragmentary a manner. [...] What our country owes to Guisan, to his army, to all those who enabled the country to make that perilous journey across the desert is truly beyond words. It is huge. It is sacred. So keep your hands off it, Mr Gauye.

But research continued. The compilation of the volumes published by the Diplomatic Documents of Switzerland project made available new sets of information and stimulated the analyses found in Marco Durrer's and Linus von Castelmur's thesis on financial relations with the United States. Although these works met high scholarly standards, they were only consulted by a limited audience of specialists. They shifted away from the widespread vision after 1945 of a Switzerland that had resisted (with the exception of a small number of partisans of collaboration or adaptation), of an Army that had deterred Hitler from invading the country and of a Swiss Confederation that had stepped up its humanitarian activities and had taken in a growing number of refugees. Several books proved the extent of political and economic concessions to the Axis, revealed the weaknesses and deficiencies in the military system for national defence and described the limitations and restrictions that had affected the Red Cross and the country's asylum policy.

A *sixth* category of actors played a central role: *journalists* manifested a keen interest in these

<sup>20</sup> Jacques Freymond, *Pas d'armée, pas de guerre?*, Lausanne: Le Matin, 1989, p. 21.

<sup>21</sup> Daniel Bourgeois, *Le Troisième Reich et la Suisse, 1933-1941*, Neuchâtel: La Baconnière, 1974.

<sup>22</sup> Jacques Perrin, "Faites votre fasciste vous-même!", *La Nation*, 30 March 1985.

historiographical debates, which the media fed for a longer period than some expected in 1996. Among the journalists who played a central and pioneering role between 1970 and 1980, two names stand out: Werner Rings (1910-1998) and Niklaus Meienberg (1940-1993). First, Rings directed a major television series and wrote a book that was widely read from 1975 onwards. He then provided an important impetus in 1985 with the publication of a book on Nazi gold, based on archival research abroad and in Switzerland, and even in the archives of the Swiss National Bank.

In the last years of the twentieth century, other journalists turned their attention to Switzerland during the war years, but employed different methods. The acceleration of the pace and presentation of communication and the ever fiercer competition between media organisations influenced the work of journalists. Two films were to have a lasting impact. One BBC documentary featured, in particular, the anonymous testimony of a woman who maintained that when she had been a young girl in Zurich, she had seen a train with deportees bound for the death camps.<sup>23</sup> This statement, which was immediately refuted by many scholars, prompted a historical analysis by the ICE which demonstrated the impossibility of trains headed for the Nazi camps having passed through Switzerland.

A film produced by the French-speaking Swiss Television station also provoked very strong reactions. Broadcast in March 1997, Daniel Monnat's documentary "L'honneur perdu de la Suisse" (The lost honour of Switzerland) sparked off much discussion. The film, which focused on the new analyses that contrasted sharply with the traditional view of the history of Switzerland, motivated members of the SVP to lodge a complaint with the Independent Complaints Authority for Radio and Television. On the 24<sup>th</sup> October 1997, said authority validated the complaint and ruled that the documentary had violated the licence that required journalists to remain objective so as to present a plurality and diversity of opinions. This decision meant that the documentary could no longer be broadcasted and that no video copies of it could be sold. Despite an appeal by the Swiss Broadcasting Corporation, this decision was upheld by the Federal

Supreme Court on the 21<sup>st</sup> November 2000.<sup>24</sup> Acting in a private capacity, Daniel Monnat instructed a lawyer to file an application with the European Court of Human Rights stating that his freedom of expression had been violated. On the 21<sup>st</sup> September 2006, the Court recognised that the journalist's application was justified. It wrote that the decision of the Swiss authorities was in no reasonable proportion to the pursued aim. According to the Court, it was necessary to have particular regard "to the interest of a democratic society in ensuring and maintaining freedom of expression, to the limited margin of appreciation regarding information of public concern, to the fact that the criticism in the instant case concerned the actions of senior government officials and politicians, and to the serious nature of the report in question and the research on which it was based."<sup>25</sup>

Journalists, witnesses, political figures and historians (sometimes expressing profound differences of opinion) intervened in this affair, which lasted almost a decade and which illustrates the complexity and passion that have characterised the debate about Switzerland during the Second World War.

In fact, the approaches of the six categories of participants in the debate identified above had very different objectives, methods and time frames. Professor Jean-Claude Favez, who in 1988 had published a book on the ICRC during the Second World War, described these differences in February 1997:

The media do not have the same criteria as historians. I felt this strongly during my last interviews about national histories or about the ICRC: I did see that my interlocutors were interested in my answers not in terms of what I was saying, but based on what they already had in mind. This is a serious problem. The medias, especially television, deal in emotion. Yet in fact, the historian's work consists in keeping a critical distance from emotions to

<sup>23</sup> For an analysis, see Hans-Ulrich Schlumpf, "Wahre Geschichte und Storymaking": am Beispiel des BBC-Films "Nazigold und Judengeld", *Schweizerisches Archiv für Volkskunde*, 1999, Vol. 2, pp. 225-237.

<sup>24</sup> Brigitte Studer, «Geschichte als Gericht – Geschichte vor Gericht. Oder: wie justiziabel ist die Historie?», *Traverse*, No. 1, 2001, pp. 97-104.

<sup>25</sup> Judgement by the European Court of Human Rights (Third Section), case of Monnat v. Switzerland, Application No. 73604/01 (final version of 21.12.2006), p. 22. The full text of the Judgement on Application No. 73604/01 is available on the website of the Court: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=3&portal=hbkm&action=html&highlight=73604/01&sessionid=10192022&skin=hudoc-fr>  
On the reactions to this decision see, for example, the article in *Swissinfo.ch* of 20 September 2006 and in *La Nation*, No. 1801, 5 January 2007.

try to understand what happened. [...] And modern historians, out of a concern to be serious and objective, have almost forgotten that history is also the history of emotions and human passions. We must not incorporate emotion into our work, but we need to be aware that it plays a role in the transmission of information. [...] In my opinion, the crisis is not where we think it is. It is not in our relationship with our past; it is in the fact that today we do not know how to come to terms in a positive way with this questioning of our past and with the divergent interpretations to which it gives rise.<sup>26</sup>

It was in this context that from 1995 to 2002 the differences, connections and collusions between these disparate approaches brought forth a renewal of perspectives and memories.

### Six phases of historical debate

During a *first phase in December 1996*, the drafting and the appointment of the members of the ICE set in place the legal means "to examine from a historical and legal perspective the extent and the fate of assets deposited in Switzerland before, during and immediately after the Second World War", in the words of the Federal Assembly's decree of the 13<sup>th</sup> December 1996. To answer the questions and fill the gaps in previous research, the authorities decided that commercial secrecy could not be invoked to limit the research, which meant the opening of private archives to members of the ICE and their staff. Other historians noted that issues such as neutrality, national defence or daily life were outside the mandate of the ICE, and thereby fed in to reservations, expressed with greater and lesser degrees of scepticism and severity, about the ICE.

During a *second phase in 1997*, the first round of research by the ICE revealed private archives in far greater numbers than had been assumed to exist when they were hermetically sealed. This led the ICE to ask the Federal Council for additional resources in order to fulfil its mandate. Thus, the funds allocated to the ICE for five years of work were raised from 5 to 22 millions of Swiss francs. This was a very significant sum compared with other research programmes, but it must be put into perspective by comparison with other federal expenditures. Two examples will suffice: on the 6<sup>th</sup> of April 2005, the Federal Council adopted a new logo designed to

appear on all federal administration documents. The implementation in 2005 and 2006 of this "new visual identity of the Confederation" cost some 25 millions of Swiss francs.<sup>27</sup> A second example: in October 2006, the Management Committee of the Council of States published the results of a report it had requested from the Parliamentary Control of Administration. According to its evaluation, in 2004 the federal administration had spent some 490 millions of francs on just over 6100 consultancy contracts. "Taking into account gaps in the evaluation and a second study conducted by the Federal Audit Office, according to a conservative estimate, the federal administration undoubtedly spent between 600 and 700 millions of francs on consultancy contracts."<sup>28</sup>

It was also in early 1997 that the SVP, under the leadership of Christoph Blocher, stepped up ringing declarations against new analyses of history and criticism from abroad. In defence of a national identity buffeted by recent turmoil, the SVP asserted itself by claiming to reassure the population and reinforce its convictions.

The *third phase* was during 1998. In May 1998, the publication of the first ICE interim report on gold transactions aroused public interest and criticism from economists such as Jean-Christian Lambelet, who argued that financial and monetary issues were beyond the expertise of historians. The announcement in August 1998 of the "global agreement" negotiated and signed in secret by the banks threw the political authorities into confusion and marked the ebb of public interest in the economic and financial aspects of this historical event. Considered too technical and difficult to understand by the general public, these issues no longer attracted the attention of journalists forced to work to tight deadlines, write short articles and disseminate succinct information.

During the first months of 1999, the Swiss government made two decisions: a) to set up a Contact Bureau on Looted Art which falls under the Federal Office of Culture. This bureau became operational in January 1999. The Swiss Confederation bases its activities in the area of looted art on three pillars: transparency, legality and adequacy,<sup>29</sup>

<sup>26</sup> Jean-Claude Favez, "Pourquoi la Suisse est débordée", *Coopération*, 12 February 1997 (interview by Laurent Rebeaud).

<sup>27</sup> See press release of the Federal Chancellery and the Federal Department of Finance, 6 April 2005, available at [www.parlement.ch](http://www.parlement.ch).

<sup>28</sup> Press release of the Management Committee of the Council of States, 16 October 2006, available at [www.parlement.ch](http://www.parlement.ch).

<sup>29</sup> See: <http://www.bak.admin.ch/themen/raubkunst/index.html?lang=en>.



and b) on 14<sup>th</sup> April 1999, “to initiate uncomplicated application procedures for former refugees, who were interned during World War II and whose compulsorily managed accounts and deposits were never recalled, to have their balance paid out.”<sup>30</sup>

A *fourth phase* began in December 1999 with the publication of the second interim report of the ICE on the policy towards refugees. Although the ICE’s mandate meant addressing the economic and financial aspects of the asylum policy, in the report the chapters dealing with this subject attracted almost no interest in the general public and even among historians. A controversy did ensue, however, but was limited to statistics on refoulement, because the ICE had incorporated without lengthy explanations the results of a research on this issue conducted in the Federal Archives. On this admittedly very important question, available sources remained very thin because of events that had not been recorded in writing during the war and because of the destruction of archives. Nonetheless, criticism came from all sides. It was as if the history of asylum policy could be analysed and judged by anyone, whereas economic and financial problems were to be reserved for bankers and professors of economics, who were the only people authorised to give their opinions about these issues. Some documents and witness statements were instrumentalised to counter the analyses of the ICE and of other researchers who had previously worked in virtual anonymity.

The *fifth phase*, from the summer of 2001 to March 2002, was marked by the publication of the ICE’s 25 volumes and its final report, which came off the press in March 2002. Over 11,000 pages were published. Notably, the ICE demonstrated a) that Switzerland’s economic and financial benefits to the Axis Powers were more significant than had previously been stated, b) that, therefore, Swiss companies, banks and government authorities had more room for manoeuvre vis-à-vis the Axis and that they had been able to make the most of it, c) that the policy towards refugees and victims of anti-Semitic persecution could have been more generous, confirming the criticisms expressed at the time about the very restrictive policy. These analyses by the ICE gave rise to articles in the daily press and some reports in the electronic media.

30 See: Chronology: Switzerland and the Second World War, Put together by the Parliamentary Services, <http://www.parlament.ch/e/dokumentation/dossiers/dossiers-archiv/ch-weltkrieg-2/Documents/do-ch-wk2-chronologie-e.pdf>.

The Swiss government published a declaration whose final words were:

“The Federal Council hopes that the ICE’s findings will be received by a wide and attentive audience. It invites Swiss citizens and all those who carry major responsibility to reflect upon the invaluable clarification of our past that it provides, while acknowledging that past errors cannot be fully righted and that some omissions can never be rectified. The Federal Council is nevertheless convinced that by facing history we not only become more aware of our obligations to today’s victims, but can also draw inspiration which will guide our actions.”<sup>31</sup>

But the debates the ICE had hoped for remained very embryonic and short-lived. While these volumes contained a great deal of previously unpublished information, it generated less public debate than the facts, largely already known to specialists, that had sparked broad and sustained public interest from the autumn of 1996 to the beginning of 2000. It should also be noted that academic historians by and large neglected studying these volumes, although Professor Hans Ulrich Jost organised a series of in-depth readings. Reviews were published in specialised journals. A number of books published abroad contained contributions written by ICE authors. But only a few specialists cited the work of the ICE, which came up against “academic scepticism”.<sup>32</sup>

Other authors announced that the ICE had not heard the last of it: in the Sunday newspaper *Dimanche.ch* of the 24<sup>th</sup> March 2002, Professor Lambelet published an article entitled “Le procès de la maison Bergier ne fait que commencer” (“The Trial of Bergier and his team has only just begun”).<sup>33</sup> The right-wing “Ligue Vaudoise” published a collection of contributions entitled *La Suisse, la 2e Guerre mondiale et la crise des années 90. Les conditions de la survie* [Switzerland, World War II and the crisis of the 90s: the conditions of survival]. (*Cahiers de la Renaissance Vaudoise* No. 140, 2002). The orientation and tone of this publication prompted François Walter, Professor of National History at the University of Geneva,

31 For the whole text, see: [http://www.admin.ch/cp/d/3c9b033b\\_1@fwsrv.g.bfi.admin.ch.html](http://www.admin.ch/cp/d/3c9b033b_1@fwsrv.g.bfi.admin.ch.html).

32 Gilles Forster, “Ecrire l’histoire entre pressions médiatiques et scepticisme académique : les travaux de la Commission Bergier et leur influence sur la mémoire de la Suisse durant la Seconde Guerre mondiale», *Carnets de bord*, No. 12, December 2006, pp. 51-55.

33 The text can be consulted at <http://www.hec.unil.ch/jlambelet>.

to write a review examining the points of contention. He concluded:

Is a free-for-all witch-hunt against historians in the offing? If we are not careful, if we allow ourselves to be blinded by scholarly manipulations and inanities, that is precisely where some of the authors of the League of Vaud's collection would like to lead us.<sup>34</sup>

A number of works, notably by Herbert A. Reginbogin, were published seeking to rectify the ICE's analyses and reproaching it for neglecting the historical context and international comparisons. The ICE was also accused of exaggeration, of having goaded Switzerland on to self-flagellation, of having applied today's standards to criticise a past generation, and of having failed to examine the daily life of the population.

Another attitude was apparent from comments by Professor Michel Porret of the University of Geneva, who said in 2010:

Switzerland lived for a long time in the belief that it could have a clear conscience about its past. In the eyes of our parents and our grandparents, the Mobilisation and the food rationing demonstrated that Switzerland had done what it had to escape evil during the Second World War. The Bergier Report has shown incontestably that we, like others, made accommodations with the reality of the moment and that our hands were not necessarily clean. This has contributed significantly to disillusioning the image that the Swiss had of themselves. [...] Altering the national memory inevitably leads to a modification in a country's political configuration. And to many Swiss citizens today, it still seems difficult to accept the disillusionment.<sup>35</sup>

In 2002, a *sixth phase* began, which was characterised by three aspects:

- attempts to downplay the ICE's results;
- debates about school education;
- activities to keep the memory of the Holocaust alive.

Attempts to downplay or denigrate the ICE's analyses grew out of the desire to consider the phase that had begun in 1996 an interlude that had to be concluded as soon as possible. Governmental attitudes repeatedly contributed to this development.

In July 2001, the Federal Council decided to approve a demand by private enterprise interest groups for the return of photocopies made during the course of the ICE's research. The Federal Archives were granted funds to meet the demands of the companies that wanted to recover these photocopies. The change in governmental discourse on history became glaring in 2005. Whereas in May 1995, Swiss President Kaspar Villiger (FDP, "Radical Party") had, on the occasion of the commemoration of the 8<sup>th</sup> May, apologised for the "J" stamp on the passports of Jews that had been negotiated with the Third Reich in 1938,<sup>36</sup> the speech by Samuel Schmid (SVP) which was broadcast on the 8<sup>th</sup> May 2005 appealed for the crimes of Nazism and the threats that Hitler had made against the Swiss Confederation not to be forgotten.

"But it is with pride that Switzerland can look back at the war years, because democracy prevailed.

This attitude earned us respect abroad.

Winston Churchill spoke of "freedom in self-defence" – Switzerland succeeded in maintaining its freedom through self-defence. In recent years, we have revisited the history of the Second World War. There have also been some difficult chapters.

Today, we would prefer that in 1942 the Federal Council had not delegated to the administration the authority to close our country's border. We would prefer that subsequently the relaxation of this closure had been more generous. The corrections made by the authorities at the time were feeble and came too late.

It is also true that hundreds of thousands of persecuted people found welcome and refuge in our country. Thus, Switzerland remained true to its humanitarian tradition. Unfortunately, thousands of refugees were also turned away at the border.

But is it for us to condemn leaders who faced a difficult and painful situation at the time? Leaders who today are no longer able to explain and defend themselves for the decisions they took then.

As a nation, our duty is, rather, to remember. And this remembrance includes the love of

34 François Walter, "Rapport Bergier. Usages politiques et polémiques", *Choisir*, February 2003, pp. 25-28.

35 *Campus*, No. 97, January-March 2010, p. 13 (Dossier: *L'histoire, fabrique des nations*).

36 In his speech on the 7<sup>th</sup> May 1995, Villiger declared in particular: "We made at the time a bad choice in the name of a national interest taken to its narrowest sense. The Federal Council deeply regrets this error and apologises for it, aware that such an aberration is ultimately inexcusable."

truth, understanding towards another time and its problems, the search for the causes and meaning of things.

In a pluralistic society, many visions of history will always coexist. Whatever conclusion we reach, certain values remain when we think about the end of the Second World War: a due sense of recognition and respect for the actions of the generation that lived through this dark period."<sup>37</sup>

The apology of 1995 was not repeated in 2005 by the President of the Confederation.

On the 8<sup>th</sup> May 2005, the head of the SVP, Christoph Blocher, who was a member of the Federal Council from 2004 to 2007, held a speech at Rafz, a frontier village in the canton of Zurich, to express his gratitude to all those who had preserved freedom during the Second World War and to pay tribute to a family killed a few weeks before the capitulation of the Reich "here in Rafz, under the blows of misdirected bombs".<sup>38</sup> After asking for a minute of silence, the Federal Councillor presented his vision of Switzerland from 1933 to 1945, adding: "Even if some decisions were wrong and the behaviour of certain individuals was questionable and opportunistic, on the whole the Switzerland of the time deserves respect, esteem and admiration for its policy."

These two speeches were, in fact, written without taking account of the ICE's findings concerning the economic and financial problems. Although for a time (1996-1997), the political authorities may have appeared to use the ICE as their instrument, they subsequently distanced themselves from it and restricted it to be an exercise for specialists.<sup>39</sup>

On the occasion of the commemoration of the 50th anniversary of the death of General Guisan, books were published to celebrate and valorise the commander-in-chief of the Swiss Army. The authors of these publications, Jean-Jacques Langendorf and

Markus Somm,<sup>40</sup> repeatedly rejected the analyses published by the ICE. A hagiographic book was also published in honour of Jean Hotz, the director of the foreign trade section of the Federal Department of Economic Affairs during the war.<sup>41</sup> On the other hand, other publications that did not position themselves against the ICE but sought, instead, to deepen its research received less media coverage.<sup>42</sup>

A second aspect characterised the effects of the ICE's work: debates about school education began to emerge. In 2000, the historian and school teacher Charles Heimberg wrote a booklet entitled *Le rapport Bergier à l'usage des élèves: la question des réfugiés en Suisse à l'époque du national-socialisme* (The Bergier report for use by school students: the issue of refugees in Switzerland at the time of National Socialism), which he revised and completed in 2002 on the basis of the ICE's final report. The booklet drew criticism from people who did not want teaching tools to be updated in this way.<sup>43</sup> In 2006, a new history textbook, published with the support of the Zurich authorities, was written by four experts, two of whom had worked for the ICE.<sup>44</sup> The utilisation of this book in schools in the canton of Zurich, but also in other cantons, sparked off discussions and articles which turned it into a bestseller, a rare exception for a book of this genre. In July 2006, the issue was discussed in the Aargau cantonal parliament, following a motion by the SVP faction of the cantonal parliament.<sup>45</sup> One of the two

40 See Markus Somm, *General Guisan. Widerstand nach Schweizerart*, Bern: Stämpfli Verlag, 2010. Cf. in particular the review published in the *Neue Zürcher Zeitung* on the 1<sup>st</sup> April 2010.

41 René Bondt, *Der Minister aus dem Bauernhaus. Handelsdiplomats Jean Hotz und seine turbulente Zeit*, Zurich: NZZ Libro, 2010.

42 See in particular: Dario Gerardi, *La Suisse et l'Italie, 1923-1950: commerce, finance et réseaux*, Neuchâtel: Alphil, 2007; Janick Marina Schaufelbuehl, *La France et la Suisse, ou, La force du petit: évasion fiscale, relations commerciales et financières (1940-1954)*, Paris, Presses de Sciences Po, 2009; Cornelia Rauh, *Schweizer Aluminium für Hitlers Krieg? Zur Geschichte der Alusuisse 1918-1950*, München, C. H. Beck, 2009.

43 See *Le cartable de Clio. Revue romande et tessinoise sur les didactiques de l'histoire*. No. 2, 2002.

44 Barbara Bonhage, Peter Gautschi, Jan Hodel, Gregor Spuhler, *Hinschauen und Nachfragen - Die Schweiz und die Zeit des Nationalsozialismus im Licht aktueller Fragen*, Zurich: Lehrmittelverlag des Kantons Zürich, 2006.

45 See the minutes of the meeting of the 4<sup>th</sup> July 2006. [www.ag.ch/grossrat/jga\\_grw\\_dok.php?DokNr=06.034961&S howEdok](http://www.ag.ch/grossrat/jga_grw_dok.php?DokNr=06.034961&S howEdok). This was a motion brought forward by Jürg Stüssi-Lauterburg and Sylvia Flückiger-Bäni. On the 11<sup>th</sup> November 2003, Flückiger-Bäni and 49 other signatories had also brought forward an interpellation on the ICE report and its integration in the school curriculum in the canton of Aargau, which was discussed at the session of the 3<sup>rd</sup> March 2004.

37 <http://www.vbs.admin.ch/internet/vbs/fr/home/documentation/reden/reden2005/050508a.html>.

38 It is evident that the bombs were dropped by mistake by allied aircraft. [http://www.ejpd.admin.ch/content/ejpd/de/home/dokumentation/red/archiv/reden\\_christoph\\_blocher/2005/2005-05-08.html](http://www.ejpd.admin.ch/content/ejpd/de/home/dokumentation/red/archiv/reden_christoph_blocher/2005/2005-05-08.html)

39 For the Parliament, the matter has been basically closed since the 4<sup>th</sup> May 2002, see: <http://www.parlament.ch/e/dokumentation/dossiers/dossiers-archiv/ch-weltkrieg-2/pages/default.aspx>.

authors of this motion was Jürg Stüssi-Lauterburg (SVP), head of the Federal Military Library and author of numerous publications on military history and on the Second World War in particular. On the other hand, Daniel Heller (FDP), MP in the Aargau Parliament, spokesman of his group, didn't support the motion on the grounds of freedom of speech and for reasons of competence. Interestingly enough, considering that Heller, a historian, is a partner in a communications agency whose publications include books on Switzerland and World War II that are critical of the ICE's publications. In the end, the motion was rejected by 74 votes against 40. In 2010, school teacher Dominique Dirlewanger published *Tell me. La Suisse racontée autrement* (Tell me. Switzerland retold),<sup>46</sup> a work of synthesis that incorporated the ICE's results. The success of this innovative publication attested to the social need for a renewed and updated historiography, despite the reluctance of the traditionalist movement.

While works on history multiplied, the "duty of memory" also motivated activities to pass on information about the Holocaust to future generations.

In 2004, Switzerland joined the *Task Force for International cooperation on Holocaust Education, Remembrance and Research (ITF)*. The ITF was founded in 1998 by Sweden, the United States and the United Kingdom; Germany and Israel joined soon thereafter. It currently has 27 Member States that have endorsed the Stockholm Declaration on the Holocaust (January 2000), which calls on members to promote research about the Holocaust and education about it in schools, to organise an annual Day of Holocaust Remembrance and to facilitate access to archives.<sup>47</sup> Within this framework, activities are organised in schools with the support of the Swiss federal government.

Other initiatives led to educational publications. In 2007, the Swiss Federation of Jewish Communities issued a DVD containing testimonies of Holocaust survivors and interviews with historians.<sup>48</sup> The testimonies of survivors who had told their stories in

schools were published.<sup>49</sup> A 12-volume series entitled *Memoiren von Holocaust-Überlebenden* (Memories of Holocaust survivors) is currently being published with the support of the Federal Department of Foreign Affairs.<sup>50</sup>

Furthermore, on the 20<sup>th</sup> of June 2003, Parliament passed a new act to rehabilitate persons convicted for having provided assistance to refugees who had been persecuted under the Nazi regime. This act quashed criminal convictions and provided for a rehabilitation committee to cancel a given sentence. Between 2004 and 2008, the Rehabilitation Committee rehabilitated 137 persons.<sup>51</sup>

### *Research on Switzerland's relations with South Africa during the apartheid era*

While Swiss attitudes towards anti-Semitic persecution during the Second World War were controversial in the 1990s, the controversy also provided a justification for research on Switzerland's relations with South Africa. In the 1980s, Mascha Madörin and others authors published studies about the economic and financial relations. Munch information was provided by the movements against apartheid and by the international organisations.

In 2000, the Federal Council commissioned the National Research Fund to conduct research on Switzerland's policy towards South Africa during the apartheid era (1948-1994). Allocated two millions of Swiss francs, this national research programme was not authorised to consult private archives.<sup>52</sup> But the Federal Council declared that it was willing to allow more open access to federal administration files which were subject to a retention period of 30 years under the Federal Act on Archiving. On the 16<sup>th</sup> April 2003, however, the Federal Council decided that access to certain data in the Federal Archives relating to exports, including assets, to South Africa

49 See, in particular, Sigmund Toman, «Vous, vous savez, mais moi je ne sais pas» : questions à un survivant de la Shoah; interview by Michèle Honsberger and Martine Mouron, Neuchâtel: Editions Delibreo, 2008. Ruth Fayon, Patrick Vallélian, «Auschwitz en héritage» : de Karlsbad à Auschwitz : itinéraire d'une jeune fille dans l'enfer de la Shoah, Neuchâtel: Editions Delibreo, 2009.

50 This project was launched in 2008 by the Kontaktstelle für Holocaust-Überlebende (Resource centre for Holocaust survivors), with the support of the FDFA and the Swiss Conference of Cantonal Ministers of Education.

51 See the report of the Rehabilitation Committee of 2 March 2009, <http://www.parlament.ch/f/organe-mitglieder/kommissionen/weitere-kommissionen/rehabilitierungskommission/Document/bericht-rehako-schlussbericht-2009-03-02-f.pdf>

52 See [http://www.snf.ch/F/NewsPool/Pages/mm\\_05oct27.aspx](http://www.snf.ch/F/NewsPool/Pages/mm_05oct27.aspx).

46 Book published by the Science-Society Interface, a department of the University of Lausanne.

47 See the ITF's website: <http://www.holocausttaskforce.org>. François Wisard, Head of Historical Unit of the FDFA, is Chair of the Museums and Memorials Working Group in 2010.

48 Eva Pruschy, project director, *ÜberLebenErzählen - Holocaust-Überlebende in der Schweiz - Survivre et témoigner. Rescapés de la Shoah en Suisse*, Zurich and Geneva: Verlag Pestalozzianum und Editions ies, 2007.

would be restricted and that the retention period would be extended retroactively to the 1<sup>st</sup> January 1960. This decision meant that documents pertaining to Swiss exports during the most violent years of apartheid (beginning with the Sharpeville massacre of the 21<sup>st</sup> March 1960) could no longer be consulted. The aim of this government decision was to prevent Swiss companies targeted by class action suits filed in the United States from being disadvantaged in comparison with foreign companies. The Federal Council wanted thereby to prevent the names of Swiss companies and information on their activities from being published. This prompted criticism from historians, notably from the Société générale d'histoire (General History Society), which stated that these restrictions risked turning the research programme into an "alibi exercise".<sup>53</sup> From 2000 to 2003, the access to the public archives was free. But this embargo impeded research whose main results were published on the 27<sup>th</sup> October 2005. In his conclusion, Georg Kreis wrote:

"The fact that Switzerland did not join the sanctions movement supported, aided and abetted the apartheid state with its enterprises which yearned for credit sums and with its high national expenditure rates. This consequence is reflected at the level of economic efficiency, especially as a result of the capital export flow and the decline of the South African gold export. However, this probably hardly entailed any major significance for the longevity of the regime."<sup>54</sup>

Nonetheless, Switzerland's role was problematic: bilateral relations, trade, financial and military relations were particularly intense at the height of apartheid in the 1980s. Economic opportunities, anti-Communist arguments and a questionable interpretation of neutrality which were used to justify the refusal to participate in international sanctions contributed to Switzerland's failure to do everything possible to fight apartheid.

After this publication, other authors (so Mascha Madörin, Sébastien Guex, Bouda Etemad, Peter Hug or Sandra Bott) voiced their criticism because the private archives have remained closed and therefore the analysis of the economic relations remains still insufficient.

After 2005, research gaps and the issues raised by these publications motivated historical works and parliamentary interventions.<sup>55</sup> On the 24<sup>th</sup> of October 2006, the Swiss Apartheid Debt and Reparations Campaign sent an open letter to the Federal Council, signed by 268 public figures and 17 organisations from the fields of politics, culture, the sciences, the church and development cooperation, demanding that the Federal Council apologise to the South African victims of gross human rights violations for the Swiss policies practiced during Apartheid and pay substantial reparations.<sup>56</sup>

A parliamentary initiative proposing the creation of a parliamentary commission of inquiry was rejected by the National Council on 25 September 2007 by 107 votes against 66.<sup>57</sup> Other parliamentary interventions were unsuccessful: On the 18<sup>th</sup> August 2010, the Federal Council responded to Paul Reichsteiner's proposal that access to the archives which had been closed since 2003 be authorised by noting that while since the 20<sup>th</sup> November 2009, no Swiss companies had been directly affected by class-action suits. But because this process was still ongoing, there was a risk that as new information came to light after the reopening of the archives, these companies would be brought back into trial. The interdepartmental working group continues to follow the situation.

In general, it may be observed that historical and legal research on relations with South Africa have provoked less public debate and fewer historical publications than was the case with the Second World War. It is clear that National Socialism had much more important and more long-lasting effects on Switzerland than apartheid.

Whereas in South Africa it was the Truth and Reconciliation Commission that played a central role, what was sought in Switzerland was not so much truth as clarity. Work on the past did not really lead to reconciliation among the Swiss. There was, rather, a broad discussion in a country whose national identity is shaped by a particular memory of the Second World War and relations with Germany. The new perspectives on the past have involved

<sup>53</sup> Statement issued by the Société générale d'histoire [General History Society] on the 1<sup>st</sup> May 2003. This document and the responses of the Federal Council are available online at [http://www.sgg-ssh.ch/material/intern/SGG-Suedafrika\\_fr.pdf](http://www.sgg-ssh.ch/material/intern/SGG-Suedafrika_fr.pdf).

<sup>54</sup> Georg Kreis, *Switzerland and South Africa 1948-1994 : final report of the NFP 42 + commissioned by the Swiss Federal Council*, Bern ; Oxford : Peter Lang, 2007 (English translation of the original German report published in 2005), p. 514.

<sup>55</sup> See the online database from the Historical Unit of the Federal Department of Foreign Affairs, <http://www.eda.admin.ch/eda/fr/home/topics/histor/parvor/safind.html>

<sup>56</sup> See the open letter and the replies of the Swiss authorities, <http://www.apartheid-reparations.ch/en/politikschweiz.php>

<sup>57</sup> Parliamentary proceedings on historical research on South Africa are available online on the Parliament's website: <http://www.parlament.ch/e/dokumentation/curia-vista/Pages/default.aspx> Curia Vista - Database of parliamentary proceedings.

historical research, but also debates on national characteristics, on external relations and on relations between the various components of Swiss society.



