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**Tenth Anniversary of the  
International Criminal Court:  
the Challenges of  
Complementarity**

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# Politorbis

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# Introduction

Mô Bleeker<sup>1</sup>

This edition of *Politorbis* is published at the occasion of the 10-year anniversary of the International Criminal Court

The Task Force for Dealing with the Past and Prevention of Atrocities<sup>2</sup> wanted to celebrate this anniversary, by delivering a reflection on the progress made to date under the Rome Statute and by the International Criminal Court, as well as an interdisciplinary conversation on the exercise and impact of international justice. The latter requires an 'on the ground' treatment, as this is where, in complement to the efforts of international justice, national justice is struggling to become reality.

This collection of articles is therefore simultaneously a tribute to the work accomplished so far, a reflection upon the practical issues and a testimony to the complexity of the exercise. The creation of the International Criminal Court launched a new era in the fight for justice and against impunity; it indeed marked a point of no return. The first part of this *Politorbis* refers first and foremost to issues specific to the development of the ICC which is responsible for judging crimes of genocide, war crimes, crimes against humanity, the crime of aggression, and to the issues of complementarity and universal jurisdiction.

"Now is too late".

Sara Coric's opening contribution, reminds us that the victim is core to the justice endeavor. It also describes disturbingly the (too) common post-conflict situation where victims and perpetrators

share the same territory in a situation of impunity. And when the (too) long-delayed moment of justice arrives, witnesses and victims are terrified, the exercise of justice is very/too slow, and negotiations for sentence reductions dominate proceedings, to the detriment of truth and justice, which is, above all, what the victims want. We are still far from the "universal shared justice" wanted by Antoine Garapon, which would necessitate not only a new level of cooperation between States and with the Security Council, but also a more qualitative, holistic and visionary approach to complementarity.

The second part of this edition of *Politorbis* provides illustrations of real-life situations, in societies where ICC-referable crimes have been perpetrated, such as Burundi, Colombia, Kosovo, Serbia and Bosnia and Herzegovina. Written by actors living in these societies, these articles provide an insight into the daily realities of impunity, the (unhappily often inadequate) endeavors to apply justice and the opinions of victims and interested observers of these processes. .

In certain contexts, criminal justice cannot be the only answer; it must always be combined with other efforts. First because, mathematically, when you take into account the large number of mass violations committed, criminal justice- in some context, it could take a century, or even two, to bring all the authors of these imprescriptible crimes to justice! What shall we do then? Do we have to accept this "de facto" impunity?

Furthermore, in situations where mass crimes have been committed, impunity has become systemic. We can even assert that this "system of impunity" has contributed to the organization and reproduction of this machinery of violence. Of course the blame lies with certain individuals, but State machinery has often, through action or omission, contributed to these violent crimes. To break out of the vortex, these violations and this system of impunity must

1 Mô Bleeker, Special Envoy, Head of the Task Force for the Dealing with the Past and Prevention of Atrocities.

2 Since 2011 the Federal Department of Foreign Affairs has a **Task Force for Dealing with the Past and Prevention of Atrocities** which brings together members of the Directorate of International Law (DIL), the United Nations and International Organisations Directorate (UNIOD), the Swiss Agency for Development and Cooperation (SDC) and the Human Security Division (HSD).

be tackled in a systemic way. For example, by establishing the facts, protecting archives detailing human rights abuses, judging the perpetrators, reforming Rule Of Law institutions, purging institutions and at times even elaborating new constitutions. There are many time-consuming steps required before the exercise of justice can be complete.

As for fragile States, we now also admit that institutions must literally be created or at least receive substantial support, if they are to be able to perform their role as guardians of the Rule of Law and contribute to the enormous task of combating impunity. Luz Amparo's article on Colombia reminds us that structural exclusion, including land grab by a minority of the population, is at the root of the Colombian conflict which has lasted for over 50 years. Thus, that it will take considerable and combined efforts in justice, security and development to achieve a lasting end to this conflict

After a reading of the first two sections we can formulate three working hypotheses

- 1 In situations where mass atrocities and violations of human rights have occurred, in light of the needs, criminal justice whilst essential cannot be the only answer. To address the enormity of the task it must be combined with other endeavours to combat impunity.
- 2 The "principles to combat impunity" prepared by Louis Joinet for the Human Rights Commission in 1997, suggest just such a set of measures which could most appropriately complement and strengthen the exercise of criminal justice. They identify four key areas in the struggle against impunity, which involve the rights of the victims and the duties of states; the right (of victims) to know and to be guaranteed (the duty of a State) access to information, the right (and the duty of a State) to justice, the right (of victims) to reparation (duty of a State), and guarantees of non-recurrence, among other through institutional reform.
- 3 Justice, as fairness, contributes to a lasting solution. As a matter of fact, structural exclusion can only be maintained through violence, which itself can only recur through impunity. To break this perverse cycle, equity, fair access to material and

immaterial resources, must be enshrined in a new societal agreement, for example, in a new constitution.

Thus, in a holistic vision of the fight against impunity, complementarity could possibly bridge the gap not only between national and international laws, but could also connect national strategies in the domains of truth, reparation and establishing guarantees of non-recurrence, as well as endeavours in the domain of security and development, in the pursuit of equity. Whether in Nepal or Burundi or the other situations described, this holistic approach is as yet insufficiently anchored in national strategies or those of the International Community.

The third part of this edition of *Politorbis* sheds lights on a European case, the Basque Country. These articles develop the hypothesis that the truth exercise can be an ally to the process of peace and justice; thus reminding us that producing memory is an essential pillar in the new foundations for building a new future.

Discussions within the task Force, particularly those between the Directorate of International Law (DIL) and the Human Security Division (HSD) provided the framework for this innovative consideration of complementarity. Pierre Hazan has edited this publication with great talent, professionalism and knowledge of the subject, identifying, with the assistance of our in-house human security advisors, contributors of the highest quality. As a result, a document worthy of this 10-year anniversary of the ICC has been produced. P. Hazan deserves our warm thanks and congratulations.

# Ten Years after the Birth of the International Criminal Court, the Challenges of Complementarity

Pierre Hazan<sup>1</sup>

Ten years ago the International Criminal Court (ICC) was born. And with it, a new blueprint for globalizing justice according to the principle of complementarity. Complementarity, first, in the legal sense of the term, i.e., between the ICC and national courts responsible for the prosecution of international crimes. Complementarity, also, in the broader sense, for the law alone cannot fulfil the need to restore societies that have endured gross human rights violations. Only the combination of legal and extra-legal instruments can help rebuild social bonds and trust in social institutions shattered by violence. This is the meaning of the Joinet-Orentlicher principles, named for the UN's first two Special Rapporteurs Against Impunity for whom the right to truth, the right to justice, the right to compensation and the guarantee of non-repetition all play a role in social reconstruction.

In this publication marking the 10th anniversary of the ICC, Mò Bleeker and I highlight the crucial role of complementarity. It is a choice we feel all the more justified in that the ICC is a court of last resort. Its first merit was - and remains - to stimulate local initiatives for justice. The ICC has raised the hopes of millions of people around the world. It has also stimulated local actions of resistance against impunity and the trampling of fundamental rights.

Indeed, initiatives in these areas have multiplied in recent years, to the point that it is now impossible to list them all. Here, we focus on five countries where

the DFAE supports Dealing with the Past programs - Burundi, Bosnia-Herzegovina, Colombia, Kosovo and Nepal. Five countries located on almost as many continents. In their contributions to this volume, the various authors, who are involved in building a State of law in their countries, underscore the need to implement a holistic approach to conflict-transformation. To be successful, criminal and restorative justice must be integrated into a larger process, including, in particular, economic, social and cultural rights, development and education.

If complementarity is a necessity, it also brings many challenges. First, there is the challenge of implementation, given the irreducible tension between international standards and local specificities. Secretary-General Kofi Annan recognized this tension already in 2004 in his influential report on transitional justice: "Success will depend on a number of critical factors, among them the need to ensure a common basis in international norms and standards and to mobilize the necessary resources for a sustainable investment in justice. We must learn, as well, to eschew one-size-fits-all formulas and the importance of foreign models, and, instead, base our support on national assessments, national participation and national needs and aspirations."

There is also the cultural challenge of importing tools shaped in the North and applying them to traditional societies, as Brother Emmanuel Ntakarutimana of Burundi reminds us. To this challenge is added that of transcending national boundaries, for example, the Recom initiative, working to develop a common narrative of war crimes committed during the wars in the former Yugoslavia in the 1990s. Then, there are political challenges, for example, governments under international pressure that make commitments never acted upon, as in Nepal according to Mandira Sharma and Ram Kumar Bhandari.

The most important fact remains: never has the need for justice been as strong on all the continents. It as

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<sup>1</sup> Former fellow at Harvard Law School and at the Peace Institute in Washington D.C., Dr. Pierre Hazan is currently teaching in the Geneva Center for Education and Research in Humanitarian Action and in Neuchâtel University. Prior to that, he was a diplomatic correspondent to the U.N. with *Le Temps* (Geneva) and reported on numerous conflicts. He then served as special advisor to the U.N. Human Rights High Commissioner before working as Senior Media Analyst. Pierre is a founding member of the Human Rights International Film Festival (Geneva) and a member of the International Contact Group for the Basque Conflict, which initiated the October 2011 Peace Conference. He is the author of *Judging War, Judging History, Behind Truth and Reconciliation*, SUP, 2010, <http://www.sup.org/book.cgi?id=18259>

if, driven by human rights associations, this idea has brewed and developed a virtually global awareness of common, inalienable rights. Tragically, but understandably, this awareness of what Hannah Arendt called “the right to have rights” has occurred only after people have been disenfranchised.

In this volume, we wanted to show complementarity in action. We have brought in people working on the global structure of the justice system, such as the President and the Prosecutor of the International Criminal Court, diplomats and lawyers, as well as those who are on the frontlines in the fight for human dignity, often at considerable risk to themselves and their loved ones: human rights activists, members of truth commissions, journalists. You find in them a combination of lucid analysis and the will to act in spite of challenges and obstacles they do not hide: political obstacles, attempts to derail transitional justice, manipulation of truth commissions, exploitation of victims, State corruption, even the glorification of war criminals long after peace has been restored.

This volume is organized into two parts: in the first, more theoretical part, the contributions focus on the development of justice as it goes global and, more specifically, on initiatives to curb the arbitrary manner of politics, whether in the tension between the pursuit of peace vs. justice, the principle of universal jurisdiction, the operation of truth commissions, or the use of the UN Security Council’s veto.

The second part is itself divided into two parts. In the first sub-section, contributors from five countries where Switzerland supports Dealing with the Past programs – Bosnia-Herzegovina, Burundi, Colombia, Kosovo and Nepal - report on the initiatives they have launched to combat impunity. The second sub-section discusses the Basque conflict, the last conflict in Western Europe that is, finally, moving towards resolution. We felt it symbolic to show how the question of memory has today become a hot issue in Spain, although that country exited the Franco dictatorship through a policy of amnesty.

Involving so many actors in creating a more effective justice system primarily seeks to restore dignity to the victims. We thought it important to begin this volume with the testimony of one of them, Saja Coric. Victim of violence during the war in Bosnia

and Herzegovina, Saja Coric has fought a tough and sometimes dangerous fight in the courts for recognition of the harm that was done and for punishment of the criminals who did it. Nearly 20 years after the fact, 16 years after the end of the war, she has obtained partial satisfaction. Told without complacency, her story leads to a profound reflection on the gap that still exists between the justice promised to victims and, beyond them, to their devastated society, and the justice that is actually rendered in countries that have pulled themselves with difficulty from the claws of nationalism and terrible civil war. And Saja Coric’s words encourage us to act so that this gap narrows.

# We built the greatest Monument. Our Monument is not made of Stone. It is the Verdict itself.

Saja Coric<sup>1</sup>

All of the women had the same symptoms: trembling hands, sleep disorders, difficulty functioning. The bravest would see a doctor and the doctor would give her some medicine and, then, the women would share it between them, because the others did not dare see the doctor. It was not until 1996, three years after our liberation, that we dared to speak of the sexual abuse to the doctors.

From 1999 on, we were faced with a new problem: those who had committed the crimes were returning to live in the region. We would meet them on the street, in the market, everywhere. Our first reaction was to withdraw even more into ourselves. Then, we sought solutions so that they would be punished, so that the truth would come out, as the only way to protect ourselves. From 2000, we were thinking in terms of a trial. But we had to wait for that until 2006, because it was only then that the prosecutor's office of the War Crimes Chamber of Bosnia and Herzegovina became operational. It was also a difficult struggle against ourselves: How could we talk about it publicly? The day that you are able to stand in front of a mirror and tell your story, only then are you ready to testify before a Court.

The truth is terribly difficult to prove. The international prosecutor told us, 'Give me six women and six men who are willing to testify and we will stop these war criminals.' Nobody, myself included, believed that Marko Radic would ever be arrested. But the morning when the police arrested him, with two other camp officials, was like a birthday.

But we were unaware of all that awaited us. We naively believed that the criminals had been arrested,

that justice would be done, that we were living in a State of law.

I testified at the trial. Then, the cross-examination went on for five days. Five days of threats, humiliation and insults on the part of the defense lawyers. I would look at the judge, seeking someone who would protect you, but there was nothing, no reaction. Many women spoke as protected witnesses. But their identity was soon revealed, with all the risks involved. 'Witness protection' amounted to a car that would pick you up, take you to the Court, lead you through different corridors than those used by the defendants - and that was that.

The youngest of the defendants tried to strike a bargain with the prosecutor and I was called several times to discuss this. He proposed serving five or six years in prison and refused to testify about the crimes committed by his co-defendants. We refused. But things really began to deteriorate in 2008, when Barisa Colak became Minister of Justice of Bosnia and Herzegovina. He would visit the accused men in prison, the same men who had slaughtered, killed, raped. Can you imagine what this means for us victims, to see that state officials were visiting these criminals in jail? And when we, the victims, tried to contact the authorities, there was no response.

I participated as a witness for the reconstruction of events in the camp at Vojno. That day, I was entitled to no protection. It seems that nobody was available to protect me. I was very scared. Fortunately, there was a doctor who told me what medication I should take and how I should react. On that day, I realized that a witness is like a dust-cloth. You are used to remove dust and, once no longer needed, thrown away.

The first judgment was reached in 2010, but the defendants appealed. We had, in the meantime, managed to keep them in prison, because we had recorded the death threats we received. The final

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1 Saja Coric is President of the Center for Victims of Vojno Camp "GERD-Sumeja". She created this association 21 days after being liberated to generate mutual support for the hundreds of women who were incarcerated and endured cruel and degrading treatment in the camps near Mostar during the war. Saja Coric testified about her ordeal at the War Crimes Chamber in Bosnia-Herzegovina.

judgment was to be delivered on March 10, 2011. We were afraid that the defendants would be released because the appeals verdict had to be delivered no later than 12 months after the first judgment, or the accused would go free.

During this period, our association's office was attacked. All our archives, all of the hard drives of our computers were stolen. Everything that served to support our memory disappeared.

In the appeals trial, the defendants were sentenced to 12, 16, 20 and 21 years in prison. But the words I spoke just after the trial have since proved true. I said then that the criminals would stay two months at Zenica prison before being transferred to the prison in Mostar - a city where their friends hold positions of power. The day after Marko Radic's transfer to Mostar, posters were put up in the region proclaiming "Welcome to Herceg-Bosna". His former comrades visited him a lot. Among his comrades were seven who work at the Potoci police department, the very place where we're supposed to go if someone threatens us!

The worst part, and something that I have understood in recent years, is the fact that war criminals - whatever their community - are considered to be national heroes, or at least, heroes of their community. And that it is we, the victims, who are reduced to fighting for a place in society. Some of these criminals have even been decorated and are paid compensation, while a victim of sexual violence in Republika Srpska gets 45 KM (less than 30 dollars) per month, a pittance.

The final verdict says that the victims have the opportunity to institute civil proceedings for reparations. This means that we would have to start a new trial, to prove once again what has been already proven, to endure new threats, to hire lawyers at our own expense, to seek compensation that will, no doubt, never be paid. Even if our primary goal was always to establish the truth, not receive damages, these procedures are still shocking.

If only we could have at least obtained security, after the trial. But the threats, phone calls and insults do not stop. With all this, we begin to think that it would have been better to remain silent.

Sometimes, I do regret having testified. Fear is always the sort of the victims, never the war criminals. The destroyed houses of these women have never been rebuilt. Why? Because the criminals have their friends, their former comrades-in-arms, or their families who control the commissions.

But I also tell myself that we were right to testify. Our trial was the only one, besides that of the International Criminal Tribunal for the Former Yugoslavia, where the perpetrators of crimes committed in Mostar have been punished. We have managed to erect the greatest of monuments. Our monument is not made of stone or concrete. It is the verdict itself. It is the memory that will remain for future generations.

It is also a victory in that we have had to overcome ourselves, our fear, in daring to testify. Whenever one of us returned from court, from testifying, she would open a bottle of champagne. For she had managed to speak.

I knew all the defendants. Marko Radic, the main defendant, and I went to the same school, we grew up together, we took the train to Zagreb together, we went to the leisure center together, we swam together in the Neretva. It would have been easier if I had not known Marko, him and the others.

I have no explanation. There is none. It is a bizarre situation. At first I did not understand what was happening to me. The starting point of this madness was when the Muslims had to put white flags in their windows to be identified. Then one day, as I was getting ready to go out, the building superintendent told me, 'Neighbor, you cannot go out like that. You must wear a white band around your arm.' I began to laugh: 'What do you mean, a white band?' Shortly after, I was arrested. I still did not realize that the situation was so serious. I was read an indictment: 'Sanja Coric has not resisted arrest, but documents have been found in her home that prove she is part of a resistance movement and she had a radio hidden in the toilet.' I started laughing. I said, 'You are not going to do the same thing when you stopped the Serbs, because you didn't find anything,' and that's when the beatings began for the first time. And I realized that the situation was serious indeed.

The first time I saw Marko Radic, I told him, 'What's wrong with you? It's me!' He said: 'I am the boss here' and that's where the torture began. After four days I confessed everything, thinking that they would stop, but no.

I spent 100 days in a cell, on concrete. There was also a mother there, with her 18-month-old child. And every time, Marko would come in, we had to get up, keeping our heads hanging. Imagine that this 18-month-old child also had the reflex to lower his head when he heard the door open. Then, the torture would begin again.

Every time I go to Mostar today, I turn my head in front of the camp where 36 people were murdered. I have sworn, for them, that the truth will be known. I have never thought of leaving, but now that Marko Radic is in Mostar, I do sometimes want to go somewhere else. But how could I abandon my friends? We try to encourage each other by saying that no rain lasts forever. Everything was taken from me in the camp: the person I was, my friends. It has been a terrible search for myself for 20 years. The only thing they couldn't take away from me is my love for mankind. You are left with a strong desire for truth and justice.

Each year we make a commemoration where we throw flowers into the river. Before the trial, there was never any obstruction to this ceremony. Now, we are told, "You cannot pass," but we manage to do it anyway. Transitional justice would have been a good thing right after the war ended in 1995, but now it is too late. Nationalism is much stronger than before. The media spread the hatred today. We thought, 'Well, we have had a terrible wound, just as the country has itself suffered. We have made a few stitches and the wound will heal.' Unfortunately, the stitches are splitting open again. Fifteen years after the war, instead of progress, the situation is getting worse.



# Looking toward a universal international criminal court: A comprehensive approach

Judge Sang-Hyun Song<sup>1</sup>

This year, the International Criminal Court (ICC, Court) celebrates its landmark 10<sup>th</sup> anniversary as a permanent and independent judicial institution prosecuting the gravest crimes of international concern – genocide, crimes against humanity, and war crimes. As the world makes ever-louder calls for justice, the ICC has progressively strengthened its position as a leading international organization in the area of rule of law. One of the strongest indications of the international community's growing trust in the ICC was the decision by the UN Security Council on 26 February 2011 to refer the situation in Libya to the ICC Prosecutor. This was the first time that the entire Security Council – including states not party to the Rome Statute such as China, India, Russia and the United States – voted unanimously in favour of tasking the ICC with investigating and prosecuting a situation. Undeniably, the ICC has become the institution to look to if justice for international crimes seems otherwise unattainable.

Since the adoption of the Rome Statute on 17 July 1998, the ICC's progress towards global ratification, or *universality*, has been much faster than anyone expected. The requisite number of 60 ratifications for the Statute to enter into force was reached in less than four years, bringing the ICC into existence on 1 July 2002. Ten years on, 121 states have already voluntarily ratified or acceded to the Rome Statute, thereby accepting the obligations as well as the

benefits that the Statute brings. Consequently, 60% of the world's sovereign states are within the ICC family, including 33 African states, 18 Asia-Pacific states, 18 Eastern European states, 27 Latin American and Caribbean states, and 25 Western European and other states. Of the five regional groups, Asia-Pacific is the only one in which the majority of states – including the world's two most populous countries, China and India – have so far not joined the ICC.

Regardless of the significant progress made thus far, the ICC community must redouble its efforts to further strengthen the Rome Statute system and to strive for global ratification. After all, more than 70 states and the majority of the world's population remain outside the Rome Statute's protection. Increasing the Court's ability to hold perpetrators of mass atrocities accountable for their crimes not only enhances the Court's credibility, but also helps to entrench legal and social norms that will ultimately prevent atrocity crimes.

How can we help to increase the number of ICC states parties? Clearly, joining a treaty is a sovereign decision for each state to make. However, there is much that the international community can do to support the ever-broader acceptance of the Rome Statute. Cooperation is crucial here, since it is impossible for one state, organization or individual to achieve this goal alone. As discussed at a high-level retreat on the future of the ICC hosted by Liechtenstein last year,<sup>2</sup> we need a more systematic, analytic and dynamic approach to universality. The remainder of this article will highlight some key features of a comprehensive universality strategy.

The states parties to the Rome Statute play a critically important role in the advancement of universality efforts. States parties should strive to mainstream

<sup>1</sup> A member of the ICC panel of judges since 11 March 2003 and President of the Court since 11 March 2009, Judge Song (1941) has extensive practical and academic experience in the areas of court management, civil and criminal procedure, and the law of evidence. He taught as a professor of law at Seoul National University Law School for more than thirty years and has also held visiting professorships at a number of law schools, including Harvard, New York University, Melbourne and Wellington. Judge Song has vast experience in international law, principally humanitarian law and human rights law. He is co-founder of the Legal Aid Centre for Women in Seoul and is the President of UNICEF/KOREA. Judge Song is also the author of several publications on legal issues.

This article does not necessarily represent the views of the International Criminal Court.

<sup>2</sup> Assembly of States Parties, "Retreat on the Future of the International Criminal Court", ICC-ASP/10/INF.3 (2011).

Rome Statute ratification into political dialogue in bilateral and multilateral contexts, especially with the governments and heads of state of non-states parties with whom they have close relations.

Regional connections often provide fertile ground for advancing universality. A recent indication of this was a meeting of Pacific Island states held on 16 February 2012 in Sydney, Australia. The meeting, convened by Australia and New Zealand, together with the Commonwealth Secretariat, gathered government officials from 11 of the 16 member states of the Pacific Island Forum (PIF), together with senior officials of the ICC. The meeting proved to be an excellent opportunity to exchange experiences and views between those PIF states that have joined the ICC and those that have not, and to create momentum toward wider acceptance and implementation of the Rome Statute in the region. Former ICC judge Tuiloma Neroni Slade, who is currently the Secretary-General of the PIF, attended the meeting and offered his help in facilitating communication among the Pacific Island states with a view to ultimately bringing all of them into the ICC family.

Other regional or multilateral organizations that have provided support to the ICC include, for instance, the Organization of American States, the European Union, the Commonwealth and the International Organisation of la Francophonie (OIF). Last year, the ICC also organized conferences jointly with the League of Arab States, the African Union, the Caribbean Community and the Asian-African Legal Consultative Organisation. Importantly, the OIF assisted the Court by sponsoring several regional conferences in Africa which discussed the ICC, including events in Cameroon, Senegal and Tunisia. These seminars have been highly valuable opportunities for a structured exchange of views between the Court and relevant government officials.

Apart from bilateral and multilateral political dialogue, states parties can assist universality efforts by offering technical assistance with accession or ratification, or by supporting the universality-related activities of civil society, the ICC or other relevant actors.

The Assembly of States Parties to the Rome Statute (ASP) is in a position to play a pivotal role in global ratification efforts, by urging states parties

to undertake concrete measures to promote universality, and by coordinating such efforts. Ambassador Tiina Intelmann, the new President of the ASP, has been very active in this regard, and has travelled this year to Morocco, Ethiopia and Egypt in an effort to further dialogue with non-states parties.

While the efforts of states and the ASP are crucial, we must not overlook the important role that civil society plays in spreading knowledge about the benefits of the Rome Statute, and in working with governments to support the ICC's mandate. Civil society and NGOs work directly in the national context and have a keen understanding of what is needed in a particular jurisdiction. Civil society's voice is crucial in highlighting the significance of the ICC's mandate and the importance of every country's participation in the evolving system of international criminal justice.

For example, the Coalition for the International Criminal Court works to advance the Court's mandate in a variety of ways with uncompromising commitment and tireless activism. It gives a voice to the world's population at large, including victims. The determined and impassioned work of NGOs around the world has been an invaluable asset to the Court and it is crucial that these important contributions continue to strengthen and build the evolving Rome Statute system. In addition, Parliamentarians for Global Action (PGA) is an organization that empowers key domestic decision-makers within a global network based on common values. PGA has launched a campaign to promote the universality of the Court, and initiated the process of calling on states to join the ICC during the Universal Periodic Review process undertaken by the UN Human Rights Council.

Often, the sheer lack of knowledge about the ICC is one of the biggest obstacles to accession in many countries. Misconceptions about the Rome Statute still persist, and merely clarifying fundamental principles, such as the limits on the ICC's jurisdiction, can greatly enhance the willingness of states to consider joining the ICC. Some states may fear that ICC membership would result in interference with their domestic jurisdiction, and I have often found it crucial to stress that the ICC is a court of last resort, only able to prosecute when the courts with national jurisdiction are unwilling or unable to do so. States may also fear prosecutions for past

atrocities crimes, and it is important to explain that the ICC's jurisdiction is non-retroactive. Prosecutions can only be initiated for crimes committed *after* the state has ratified the Rome Statute. Spreading knowledge about these core principles may do a great deal to clear the way for a proper consideration of ICC membership.

It is also important to emphasize that ratification brings several benefits for a country: enhanced legal protection for its population and territory, international recognition for its commitment to peace and the rule of law, and the possibility of participating in the work of the ICC alongside the growing majority of the world's states.

Concerted action by the ICC community, when conducted in a strategic and comprehensive manner, has the power to increase the membership of the ICC. Impunity for crimes that threaten the peace, security and well-being of the world remains a grave concern to humanity as a whole, and it is essential that we remain focused, decisive and vigilant in our efforts to promote justice. The Court's 10th anniversary is an ideal year in which to make greater progress toward a universal International Criminal Court. I call upon all nations of the world who have not yet done so to consider joining the ICC – the centrepiece of a new and evolving international criminal justice system.



# What does complementarity commit us to?

Antoine Garapon<sup>1</sup>

Would anyone have considered assigning a German judge to the International Military Tribunal at Nuremberg? No, it wouldn't have occurred to anyone, possibly due to the bitter memories of the Leipzig trials in the 20s where the German soldiers accused of war crimes received derisory sentences and left the courtroom to the applause of the crowd. More recently, the two ad hoc tribunals excluded judges from the former Yugoslavia and Rwanda. So how do we explain the shift in approach created by Article 17 of the Rome Statute which engraves in gold the principle of "complementarity"? What are we supposed to make of the fact that the very same human rights NGOs who initially cold-shouldered what they perceived to be a watering-down of the Court's powers in the face of States are now demanding complementarity. Perhaps because it offers a convenient solution for certain ambiguities in international criminal justice. Is the latter too cumbersome and onerous? Is it only interested in judging the 'big fish' whilst off-loading the small fry to the States? Is it too detached from reality and in ignorance of local situations? Does it only relate to concrete situations; is it criticised for having no clout with the institutions of beleaguered countries? Does it incite them to apply justice; does it restrict itself to a negative punitive role? It encourages the reconstruction of justice systems.

In fact, the principle of complementarity does not just make the ICC a default court, a last resort when national courts cannot or refuse to act, it also requires it to actively promote local justice. It does so indirectly, in the form of a threat. We could, in an ideal world, envisage a court which never issued a judgement but which nevertheless achieved its objective through what is known as positive or proactive complementarity, to use the expression

coined by William Burke-White. Through complementarity the ICC performs an indirect function, by judging not the actual crime but the due process of judgement of the crime.

This is all very well... on paper, for initial experiences can, at best, only be described as modest. The case of Colombia, long held up by the ICC as an example of how "positive complementarity" had compelled the country's authorities to choose the path of justice, is far from convincing. Recently the NGO LawyerswithoutBordersCanada(LWBC)vehemently contested the optimistic conclusions of the ICC Prosecutor, finding them more concerned with quantity than quality.

The Rome Statute targets States which are "unwilling" or "unable" but how often have we seen political powers "want" justice? Is it not precisely to combat this conspiracy of inertia towards all political powers who seek first and foremost to retain, consolidate and even increase their hold on power, that international criminal justice was created? All the more pertinent for the ICC which, because it is permanent and resembles a real judicial institution, has no other priority than justice (whilst diplomats, despite their best intentions, must always weigh the considerations of justice against those of peace, security or I know not what other overriding political objective)? How far up the chain of command will any State permit itself to be examined and risk putting its own servants in the dock? Always too early or too late, it is well-known that politicians never see their day of justice. Even when peace returns, democratically elected governments, like the Republic of Guinea, for instance, hesitate to put justice at the top of their agenda. Guinea is stalling the Truth and Reconciliation Commission project and delaying prosecutions linked to the 28 September 2009 massacre. This case is nevertheless considered by the ICC as the litmus test of the will to fight against impunity. It is clearly easier to delegate the exercise of justice than the will for justice.

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<sup>1</sup> Antoine Garapon, French Magistrate, was formerly a vice-Secretary General with the International Federation for Human Rights; he is the author of *Crimes that can neither be punished nor pardoned. An Essay on International Justice* (Odile Jacob, 2002) and *Can history be repaired? Colonisation, Slavery, Shoah* (Odile Jacob, 2008).

There is a risk, in many cases, that complementarity, becomes a bonus for the most cunning, if not the most hypocritical powers. There is little margin for error, because on one hand the ICC must expose the “imitations” (the Columbian case or, even more striking, the creation of a Special Court for Darfur by the Sudanese Government in 2005) but on the other hand it must assess to what extent initiatives without convictions can trigger a positive momentum and, in fine, a just one. It must also allow things time and not jeopardise the future. The former Yugoslavia example supports this view: who would have thought that one day the principal offenders (Milošević, Mladic and Karadžić) would find themselves in the dock at The Hague? But, it will be said, it was more political pressure than the force of public judgement which was ultimately decisive, the overwhelming desire to join Europe for example. To quote an old French proverb “Chassez le naturel, il revient au galop” (you can change your ways but they’ll just come running home/A leopard cannot change his spots).

When assessing the performance of complementarity we must not purely take account of its efficiency, because it is pioneering a whole new concept of international (even global) justice. Indeed it is redesigning how all the parts and everything else work as one, a new way of bringing the world together, and this is perhaps its greatest challenge. It signals the passing from an international Westphalian world – that of Nuremberg, where the judges came from the warring sides (victor’s justice has been greatly criticised, whilst forgetting that what preceded it was justice between combatants, which calls to mind its military origins<sup>2</sup>), to civil, but supranational courts where the community of nations stands in judgement over of a few of its members (the ICTs), to a transnational justice based on the principle of universal jurisdiction. Complementarity is changing the landscape: the administration of justice is no longer left to the warring parties, any more than it supersedes or replaces faltering justice; no it should henceforth be regarded as a shared possession of sorts between peoples and the supranational ladder. Once the idea that all peoples share a common justice is accepted (an innovation which often goes unnoticed by commentators but which is the condition for

complementarity), it follows that whatever States or peoples (if we include the reconciliation tool) can achieve by themselves, need not be referred up the ladder.

It is this view of a common world, this sense of an already shared but adaptable justice that we must now examine. To begin with, complementarity assumes homogeneity between national and supranational courts. We cannot disguise the fact that, in many so-called failed States, ravaged by civil war, the legal institutions which would be partners to complementarity quite simply do not exist (especially as many crimes fall under military jurisdiction which affords even fewer safeguards). To be feasible, complementarity must be shouldered by powerful backup within these countries: determined and well-organised victims, a well-trained and courageous judiciary and also a long-established respect for the word of law. The contrast between the luxurious glass construction of The Hague and the often precarious conditions of local courts, is in danger of becoming indefensible.

Digging deeper, complementarity assumes a common perception of justice, a common understanding that crimes against humanity are an absolute of inhumanity, the denial of which would require a new policy. It must not see the tragic fate of victims as an inevitability but the most universally applicable experience of mankind: suffering that we all share in common. In modern-day Lebanon, public opinion always struggles to accept the idea of victims in this sense: there are just Druze victims, Maronite victims, Shiite victims, etc. that is to say none who testify to a universal crime – a crime against humanity - just losses which can be attributed to one camp or the other. The adjective changes the nature of the victim; their story ceases to be universal but is just one more chapter to add to the others in the tale of a war of fratricide. Mass crimes leave their mark on a bad policy, as in the case of Cambodia, as does a collapse of that policy and a return to its pre-policy identity. In this situation, we have to seek justice in the traditional jurisdictions: but how do we connect this universally? Can complementarity take us this far? The project of turning to the traditional chiefdoms of Burundi (the Bashingantaha) over-estimated their authority and, in any case, never came to fruition. Tradition cannot relieve us of the difficulties of imposing justice when policy collapses.

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2 “Who are you to sit in judgement, you who have never fought?” said Victor Hugo (Songs from streets and woodlands).

Complementarity is not just a mechanism for the ICC Prosecutor to bypass cases: it carries with it the hope for a more harmonious world in which we are all engaged; starting with the Third States. If this institution is not supported by respected States prepared to lend their weight in the service of justice in a coordinated development policy, complementarity will become purely cosmetic. This would be a great pity as, at a time when international relations are so marked by resentment, the restoration to a country of its judicial powers and through this, of moral sovereignty over its own history, is a question of dignity.

Despite its failures – which are to this day many – the complementarity route mustn't be discouraged, because it bears a world vision, and better still, a way to make ourselves mutually better, more humane, by reaching agreement on minimum – but not minimalist – justice.



# Justice and Peace: The Role of the ICC

Fatou Bensouda<sup>1</sup>

## Introduction

Peace, security and justice are much debated elements in today's international political arena, as well as in the media. One of the central debates concerns the role of the International Criminal Court ("ICC" or the "Court"), and how it can contribute to peace in conflict-ridden settings while fulfilling its criminal justice mandate. Can the law provide leverage during peace negotiations? How can the legal framework be respected when negotiating to end conflicts?

In order to give an answer to these questions and others, the relationship between international politics on the one hand, in particular represented by the United Nations Security Council ("Security Council" or the "Council"), and the ICC on the other must be properly understood.

## The International System as We See it Today

<sup>1</sup> On 12 December 2011, Ms Bensouda of The Gambia was elected Prosecutor by the Assembly of States Parties by consensus. She took office on 15 June 2012. Before this, Ms Bensouda served as the Court's Deputy Prosecutor for eight years, having been elected to that position on 8 September 2004. As Deputy Prosecutor, she was in charge of the Prosecutions Division of the Office of the Prosecutor. Prior to this, Ms Bensouda worked as Legal Advisor and Trial Attorney at the International Criminal Tribunal for Rwanda (ICTR) in Arusha, Tanzania, rising to the position of Senior Legal Advisor and Head of the Legal Advisory Unit. Before joining the ICTR, she was the General Manager of a leading commercial bank in The Gambia. Between 1987 and 2000, she was successively Senior State Counsel, Principal State Counsel, Deputy Director of Public Prosecutions, Solicitor General and Legal Secretary of the Republic, she then became Attorney General and Minister of Justice, in which capacity she served as Chief Legal Adviser to the President and Cabinet of The Republic of The Gambia. Ms Bensouda also took part in negotiations on the treaty of the Economic Community of West African States (ECOWAS), the West African Parliament and the ECOWAS Tribunal. She has been a delegate at United Nations conferences on crime prevention, the Organisation of African Unity's ministerial meetings on human rights, and the delegate of The Gambia to the meetings of the Preparatory Commission for the International Criminal Court. Ms Bensouda holds a masters degree in international maritime law and the law of the sea and, as such, is the first international maritime law expert from The Gambia.

The international debate on peace and justice shows how innovative the idea of an international criminal justice still is.

Unlike the idea of permanent justice, the concept of peace has been around for a long time. The Peace of Westphalia of 1648 ended the 30 Years' War and the 80 Years' War, declaring a permanent peace among European states based on certain overarching principles such as non-intervention. Even though Westphalia was not the end of all wars, it was the first time that peace was accepted as a permanent concept, not just as a period of time between wars.

The Treaty of Versailles and the establishment of the League of Nations were the next steps in the evolutionary process of international politics. Even though the League of Nations was the apex of the ideas formed through centuries of deliberation and experience, its failure to prevent the Second World War led to the creation a new model: the security model of the United Nations system as it still exists today.

Where international justice is concerned, those who committed mass crimes were held accountable before the international community for the first time only 60 years ago, at the Nuremberg Trials. For the first time, the victors in a conflict chose the law to define responsibilities.

Nuremberg was a landmark. Yet the world was not ready to transform such a landmark into a lasting institution. In the end, the world would wait for almost half a century after Nuremberg, and would witness two further genocides – first in the Former Yugoslavia, and then in Rwanda – before the Security Council decided to create the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, thus connecting peace and international justice again.

The *ad hoc* tribunals paved the way for the decision of the international community to establish

a permanent criminal court, to avoid a repetition of the past. It was to be a court built upon the lessons of decades when the world had failed to prevent mass crimes.

In 1998, the Rome Statute added an independent and permanent justice component to the world's efforts to achieve peace and security. The Rome Statute offers a solution, creating global governance without a global government but with international law and courts. Accountability and the rule of law provide the framework to protect individuals and nations from mass atrocities, and to manage conflicts.

In a way, the world today consist of two models: the United Nations peace and security model, with the Security Council, and the justice model, with an independent permanent International Criminal Court and Office of the Prosecutor.

In 1998, the latter was just an idea on paper. In 2012, it is a reality.

### **The ICC's Role in the World**

Who is responsible for work to secure peace? Who is responsible for work to secure justice? The two are obviously closely connected, but the international community has put in place some clear divisions of responsibility. With the creation of the ICC under the Rome Statute, as part of the UN Security Council's mandate to deal with peace and security, it now has the option under Article 13(b) of the Rome Statute to refer situations for investigation to the Prosecutor. This is particularly relevant in cases concerning those states not party to the Rome Statute, where there are *prima facie* indications that widespread serious crimes are being committed with impunity.

By the same token, the Council also has the power under Article 16 to request a temporary deferral of an investigation or prosecution undertaken by the Court. The reasons for which this power may be exercised are clearly a matter for Security Council members themselves, and are not issues with which the Court and the Office of the Prosecutor can or should be involved. The Office's role under the Statute is a strictly legal and judicial one, designed to bring justice in cases of the most serious crimes of concern to the international community, to put an end to impunity for the perpetrators, and to contribute to the prevention of such crimes. Political considerations relating to peace and security are a matter for

others to debate and decide. What the Office can – and does – do, in those situations where it is invited to report to the Security Council, is to place facts before the Council. However, it is for the Council to decide whether the conditions are fulfilled to take the exceptional step of deferring judicial proceedings.

The world today is increasingly united by the conviction that no leader can be allowed to commit mass atrocities to gain or retain power. The responsibility of turning that conviction into reality, as in so many other areas of international life today, is shared. In those states which are parties to the Rome Statute, the system foresees that, in case of mass crimes, there will be investigations and prosecutions carried out by the state party itself, or otherwise by the ICC. In situations concerning states not party to the Rome Statute, if the state concerned takes no action the Security Council may decide, on a case-by-case basis and without reference to any given standard, to refer the situation. This distinction between consequences is the result of the two models I referred to earlier. To increase the prospect of changing behaviour and preventing crimes or an escalation thereof, the Security Council can warn states of the possibility of an ICC referral.

From the moment the Security Council refers a situation, the judicial process will run its course. The Office of the Prosecutor will decide independently whether or not to open an investigation. If the Office decides to go ahead, it will investigate according to the Statute and pursue cases wherever the evidence may lead. The judges will issue arrest warrants or summonses to appear. A judicial process will be underway which can be interrupted only by a further decision by the Security Council, acting under Article 16.

It should nonetheless be remembered that an Article 16 deferral does not divest the Court of jurisdiction. The Court has and continues to have jurisdiction with respect to the investigation or prosecution concerned, but the exercise of that jurisdiction will be halted, for a 12 month period. This deferral period may be renewed, but the Council will need to have a majority with no veto to adopt the resolution under the same terms. In this regard, the Council would no doubt need to consider whether there had been a change of circumstances that would support either the continued suspension of investigations and prosecutions, or their resumption. A deferral is

neither an amnesty nor an offer of immunity from prosecution. It buys time perhaps, but it does not buy a way out for alleged war criminals.

The drafting history of the Rome Statute indicates – and practice suggests – that any recourse to the deferral power would be highly exceptional. We have seen moves by some states to seek deferral of cases before the Court in two situations: Darfur/Sudan and Kenya. However, the Council has not suggested that the Court's work has impacted negatively on international peace and security. On the contrary, a number of Council members stated that the Court's intervention was sought as a contribution to international peace and security. This link was clearly recognized in the Chapter VII referrals to the ICC under Security Council Resolution 1593 (2005) on the situation in Darfur/Sudan, and under Security Council Resolution 1970 (2011) on the situation in Libya.

### **Peace and Justice**

In all of the situations put before the Court, conflict management and often specific peace negotiations have been underway while ICC preliminary examinations, investigations or prosecutions are conducted. In none of these cases has the role of the ICC precluded or put an end to such processes. On the contrary, in several instances it has proved a spur to action. One example here is the case of the LRA in Uganda, where ICC arrest warrants themselves were widely acknowledged to have played an important role in bringing the LRA to the negotiating table in the Juba Peace Process in the first instance, despite initial fears by some – emphasised and exploited by the LRA leadership themselves – that if the indictments were not lifted, they might threaten the peace talks. At the time, Prosecutor Moreno-Ocampo called such a position by its real name – blackmail.

As the example of Joseph Kony shows, there can be obvious adverse side-effects from deferring judicial proceedings in the name of peace and security. Succumbing to pressure to restrain justice may send out a message to perpetrators that arrest warrants can be stayed if only they commit more crimes or threaten regional peace and security. Court proceedings or the possibility of Security Council deferrals should not be used by alleged war criminals as a tool to divide the international community.

The interplay between conflict resolution initiatives and justice is a prominent feature of the work of the

Office of the Prosecutor in all the countries in which it works, with investigations and prosecutions carried out during or directly after a period of conflict with other actors working concurrently on conflict resolution, security, humanitarian relief and peace building, as well as justice initiatives. The mandate of the Office is to ensure that those who bear the greatest responsibility for the commission of the most serious crimes are brought to account. The policy of the Office is to pursue its independent mandate to investigate and prosecute those few most responsible, and to do so in a manner that respects the mandates of others and seeks to maximize the positive impact of the joint efforts of all. To preserve its impartiality, the Office cannot participate in peace initiatives, but it makes clear that any proposed solutions in peace talks must be compatible with the Rome Statute. It will inform the political actors of its actions in advance, so they can factor the Court into their activities.

After nine years, the experience of the Office of the Prosecutor, looking at various conflict resolution initiatives around the world, has reaffirmed our deep-seated belief that both peace and justice are necessary and integral elements in any sustainable route to lasting stability. UN Secretary-General Ban Ki-Moon, speaking at the ICC Review Conference in 2010, emphasised much the same point:

*“Perhaps the most contentious challenge you face is the balance between peace and justice. Yet frankly, I see it as a false choice. In today's conflicts, civilians have become the chief victims. Women, children and the elderly are deliberately targeted. Armies or militias rape, maim, kill and devastate towns, villages, crops, cattle and water sources – all as a strategy of war. The more shocking the crime, the more effective it is as a weapon. Any victim would understandably yearn to stop such horrors, even at the cost of granting immunity to those who have wronged them. But this is a false peace. This is a truce at gunpoint, without dignity, justice or hope for a better future. (...) [T]he time has passed when we might speak of peace versus justice, or think of them as somehow opposed to each other. (...) We have no choice but to pursue them both, hand in hand. (...) Now, we have the ICC. Permanent, increasingly powerful, casting a long shadow. There is no going back. In this new age of accountability, those who commit the worst of human crimes will be held responsible. Whether they are rank-and-file foot soldiers or military commanders; whether they are lowly civil servants following orders, or top political leaders, they will be held accountable.”*

If perpetrators and potential perpetrators of war crimes, crimes against humanity and genocide are to be deterred from committing more crimes, a strong and consistent message is required from all quarters – whether from the Court, state parties to the Rome Statute, the UN Security Council or others – that peace and justice can work together and that the era of impunity is over.

### **Conclusion**

The ICC is a powerful new tool to control violence in the world, to deter crimes, and to promote national judicial proceedings, but it can only be successful if we never yield to political considerations.

The Court is a new tool, a judicial tool, not a tool in the hands of politicians who think they can decide when to plug in or unplug it. If the Court does not receive consistent and strong support from those who shape international relations, such as political leaders, international and regional organizations as well as civil society organizations, the Court will not be able to fulfil its mandate, and it will become more unlikely that we can end impunity and realize international justice.

As we celebrate our ten-year anniversary, the Rome Statute is extending, building a network of actors around the world, to maximize the prevention of mass crimes and enforce common standards in situations where such mass crimes are committed within our jurisdiction.

Step by step, the Rome Statute system is moving ahead and creating a new international dynamic, impacting other institutions such as the United Nations, and changing international relations forever. The Rome Statute system is changing the balance of power between those few powerful individuals who thought they could get away with mass crimes, and their victims.

# Towards a Stronger Commitment by the UN Security Council to the International Criminal Court

Valentin Zellweger<sup>1</sup>  
Matthias Lanz<sup>2</sup>

## Introduction

When representatives of UN States met in Rome in 1998, they decided “to establish an independent permanent International Criminal Court *in relationship with the United Nations system*”<sup>3</sup>. This short phrase in the preamble to the Rome Statute of the International Criminal Court contains a dichotomy: how can the International Criminal Court<sup>4</sup> be “independent” and “in a relationship with the United Nations system” at the same time? Indeed, the first ten years of the ICC’s existence have revealed ambiguity in the relationship between the Court and the UN. In particular, the relationship between the ICC and the UN’s primary body for peace and security issues, the Security Council, cuts both ways.<sup>5</sup>

## Nature of the Relationship Between the ICC and the Security Council

### *Right to extend the jurisdiction of the ICC*

One important feature of the relationship between the ICC and the Security Council is the latter’s right

to extend the jurisdiction of the Court to States not parties to the Rome Statute.<sup>6</sup> Since the ICC has become operational ten years ago, on 1 July 2002, the Security Council has used this power twice. In 2005 it referred the situation in Darfur, Sudan, to the ICC<sup>7</sup>, and in 2011 it did the same with the situation in the former Libyan Arab Jamahiriya.<sup>8</sup> The Libya referral, in particular, was hailed as a significant step forward in the fight against impunity, since the resolution was adopted unanimously, i.e. including the affirmative vote of the United States and China, which had abstained on the earlier Darfur resolution.

The referral power of the Security Council provided for in the Rome Statute – and the fact that the Council actually uses it – is of crucial importance. On the one hand, a referral paves the way for accountability in the situation at hand, because the ICC can investigate and prosecute crimes over which it would otherwise not have jurisdiction. On the other hand, the referrals send a message to all potential perpetrators of serious crimes in States not party to the Rome Statute. They can no longer rely on impunity but must consider the possibility of a referral by the Security Council. This sword of Damocles dangling over the heads of possible criminals undoubtedly has a deterrent effect. Referrals by the UN Security Council are thus pivotal not only in dealing with the past, but also in preventing atrocities in the future.

However, there is also a flipside to this coin. The referral power of the Security Council is precisely that: a power. The Security Council, a political body guided by interests of UN States, exercises that power over the ICC, a judicial institution guided by the law. One may argue that the ICC Prosecutor is still free to refrain from pressing charges in relation to a referred situation. It is clear, however, that the referral as such creates enormous expectations of the Court.

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- 2 Matthias Lanz is Legal Officer at the Directorate of International Law of the FDFA and member of the FDFA Task Force for Dealing with the Past and the Prevention of Atrocities. He holds a LL.M. in international law from the University of Cambridge, UK, and an MLaw degree from the University of Zurich, Switzerland.
- 3 Preambular paragraph 9 of the Rome Statute of the International Criminal Court (emphasis added), 2198 UNTS 3, 17 July 1998 (hereinafter: “Rome Statute” or “Statute”).
- 4 Hereinafter: “the ICC” or “the Court”.
- 5 See also the following recent publications: Hemi Mistry / Deborah Ruiz Verduzco, Chatham House, The UN Security Council and the International Criminal Court, 16 March 2012, <http://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/160312summary.pdf> (accessed on 13 June 2012); Lawrence Moss, Friedrich Ebert Stiftung, The UN Security Council and the International Criminal Court, March 2012, <http://www.fes.de/cgi-bin/gbv.cgi?id=08948&ty=pdf> (accessed on 13 June 2012).

6 Art 13(b) of the Rome Statute.

7 UN Doc S/RES/1593 (2005), 31 March 2005, operative paragraph (hereinafter: “OP”) 1.

8 UN Doc S/RES/1970 (2011), 26 February 2011, OP 4.

Furthermore, the power of the Security Council is not only manifest when it decides to refer a case, but also when it decides not to, despite the commission of severe crimes in a State not party to the Rome Statute.

#### *Right to defer proceedings*

The other important feature of the ICC-Security Council relationship is the Council's right under Article 16 of the Rome Statute to defer proceedings before the Court for a (renewable) period of 12 months by adopting a resolution under Chapter VII of the UN Charter.<sup>9</sup> The idea behind this provision is basically to allow the Security Council to step in when proceedings before the Court put peace and security at risk.

However, the deferral that the Security Council adopted in 2002 (and which it renewed one year later)<sup>10</sup> did not fulfil the intended purpose of Article 16. The United States had threatened to veto the extension of the UN peacekeeping mission in Bosnia and Herzegovina unless the Council adopted a separate deferral resolution. The other Security Council members did not want to jeopardize the ongoing peacekeeping mission and approved the deferral. The legally questionable effect was that all UN peacekeepers from States not party to the Rome Statute were also granted immunity, despite the fact that there were no actual legal cases pending, and that there was no risk to peace and security that would have justified the measure.

#### **Room for Improvement**

The aforementioned episode demonstrates the danger that the ICC may be politicized through the Security Council. One can only hope that the Security Council does not apply this deferral mechanism in this way again, however useful that mechanism may be in itself. The first ten years of the ICC's existence also give rise to a number of other potential improvements in the future relationship between the Court and the UN Security Council.

#### *Consistency and transparency of the referral policy*

Which situations should the UN Security Council refer to the International Criminal Court, and which

should it not refer? The Rome Statute provides for a relatively low threshold for referrals. The Security Council, acting under Chapter VII of the UN Charter, can refer any situation in which one or more crimes under the Rome Statute "appears to have been committed".<sup>11</sup> This wide margin of discretion afforded to the Council must be respected. However, in the interest of the credibility of the Security Council, the ICC and international justice in general, referrals should be made in a consistent and transparent manner.

Consistency is achieved if referrals follow a clear pattern. If a specific situation is referred to the ICC, a different but comparable situation should also be referred. For instance, the situation in the Syrian Arab Republic is most probably as severe as the situation in Libya at the time when the Security Council decided on the referral in 2011. From the viewpoint of international criminal justice, it is therefore inconsistent if the Council does not consider a referral. The UN High Commissioner on Human Rights,<sup>12</sup> Switzerland<sup>13</sup> and a number of other States have indeed called upon the Council to act.

Given the political nature of the Security Council, it would be naive to believe that consistency in its referral policy will be achieved easily. However, the minimum standard should be that the Council is transparent about its motives for action or inaction. This call for transparency was also a cornerstone of the "Small Five Initiative" by Costa Rica, Jordan, Liechtenstein, Singapore and Switzerland, which was aimed at improving the working methods of the Security Council.<sup>14</sup> The draft resolution, withdrawn before the vote of the General Assembly, also encouraged the permanent members of the Council to refrain voluntarily from using a veto to

<sup>9</sup> Article 16 of the Rome Statute.

<sup>10</sup> UN Doc S/RES/1422 (2002), 12 July 2002; S/RES/1487 (2003), 12 June 2003. A third attempt at renewal in 2004 failed.

<sup>11</sup> Article 13(b) of the Rome Statute.

<sup>12</sup> Navi Pillay, High Commissioner for Human Rights, Briefing to the General Assembly, <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11820&LangID=E> (accessed on 12 June 2012).

<sup>13</sup> Statement of Switzerland at the 19th Special Session of the UN Human Rights Council on Syria, 1 June 2012, <http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/intorg/un/redeun/drho.Par.0174.File.tmp/Session%20extraordinaire.Syrie.CDH.pdf> (accessed on 12 June 2012).

<sup>14</sup> See draft resolution UN Doc A/66/L.42/Rev.2, 15 May 2012, which was withdrawn before the vote of the General Assembly.

block Council action aimed at preventing or ending genocide, war crimes and crimes against humanity.<sup>15</sup>

Consistency and transparency in the decisions of the Security Council in respect of the Court would not only strengthen the credibility of the Council and the ICC, but also improve the deterrent effect of international criminal justice.

#### *Strong and cohesive referral resolutions*

The two existing referrals by the Security Council display several weaknesses which appear to run counter to the purpose of the referrals themselves because they make the quest for accountability more difficult. Three examples are particularly relevant here:

Firstly, the referrals fail to require all UN Member States to cooperate with the ICC. Instead, the individual resolutions stipulate that “States not party to the Rome Statute have no obligation under the Statute”.<sup>16</sup> This is a significant step backwards from the Security Council resolutions establishing the *ad hoc* tribunals for the former Yugoslavia and for Ruanda where, indeed, “all States” were obliged to cooperate.<sup>17</sup> It is difficult to understand why the Security Council should adopt a more restrictive approach towards the ICC, which is more solidly legitimized than the *ad hoc* tribunals, and which was intended to strengthen international criminal justice. The multiple visits to States not party to the Rome Statute of Sudan’s President Al Bashir, wanted by the ICC, is ample evidence of the loophole that the Security Council’s approach has created. This loophole should be filled in the future.

Secondly, the referral resolutions do not permit the ICC jurisdiction over nationals of States not party to the Rome Statute (other than the Sudan and Libya) for alleged acts and omissions in the context of operations authorized by the Security Council or the African Union.<sup>18</sup> This selective shielding of a group of people negatively affects the independence of the ICC and should not be repeated in future resolutions.

Thirdly, in the referral resolutions the Security Council “recognizes that none of the expenses incurred in connection with the referral ... shall be borne by the United Nations”<sup>19</sup>. This paragraph is at odds with the competence of the General Assembly to deal with all UN budgetary matters<sup>20</sup> and the fact that the Rome Statute<sup>21</sup>, as well as the Relationship Agreement between the ICC and the UN<sup>22</sup> provide for the possibility of funding by the UN on condition that an agreement to this effect is reached between the two institutions. Recently, ICC States Parties have stepped up efforts to achieve progress on the issue<sup>23</sup> – a development that must be welcomed. If the Security Council refers a situation to the ICC in the name of all UN Member States, why should not all UN Member States contribute to the financing of the referral?

#### *Commitment and support following a referral*

Following the referrals concerning Darfur and Libya, the Security Council has done little – at least publicly – to follow up on the situation, despite its assurance “to remain seized of the matter”<sup>24</sup>. It is true that the ICC Prosecutor makes biannual appearances before the Council to report on the progress made and the obstacles encountered in the two situations.<sup>25</sup> Council members, however, usually merely note these briefings without taking any concrete action to support the Court in the mandate the Council had previously issued to it.

The lack of action by the Council is particularly evident with respect to the execution of arrest warrants. For instance, the Council has not resolutely put pressure on Sudan to carry out arrest warrants or, alternatively, to initiate domestic proceedings against the suspects. Furthermore, despite the fact that the Council was informed about the decision, it has abstained from reacting to the finding of ICC Pre-Trial Chamber I that Malawi and Chad (States Parties to the Rome Statute) had failed to cooperate

15 Ibid., Annex, para. 21.

16 See supra, note 5, OP 2 and supra, note 6, OP 5.

17 UN Doc S/RES/827 (1993), 25 May 1993, OP 4; UN Doc S/RES/955 (1994), 8 November 1994, OP 2.

18 See supra, note 5, OP 6 and supra, note 6, OP 6.

19 See supra, note 5, OP 5 and supra, note 6, OP 8.

20 Article 17(1) of the Charter of the United Nations, 1 UNTS XVI.

21 Article 115(b) of the Rome Statute.

22 Article 13(1) of the Relationship Agreement between the International Criminal Court and the United Nations, 2283 UNTS 196, 4 October 2004.

23 See ICC Doc ICC-ASP/10/Res.4, 21 December 2011, section G.

24 See supra, note 5, OP 9 and supra, note 6, OP 7.

25 See, for instance, the Prosecutor’s latest briefing on Darfur, UN Doc S/PV.6778, 5 June 2012.

with the Court by not arresting and surrendering Al Bashir to the Court when he visited those countries.<sup>26</sup> As described above, the difficulty in executing arrest warrants is also linked to the referral resolution as such, in which the Council refrained from requiring all UN Member States to cooperate with the ICC. Finally, it is rather surprising that, in 2011, Al Bashir was received on an official state visit to China, a permanent member of the Security Council.<sup>27</sup>

The existing referrals have left the impression that the Security Council considers the decision to refer a situation to the ICC Prosecutor as the end of its involvement in the issue of accountability. However, the referral should be seen as only the very first step in a process that requires the full commitment and support of the Security Council.

### **Conclusion**

The relationship between the International Criminal Court and the UN Security Council has always been controversial. The relevant provisions were the subject of heated debate even during negotiations on the Rome Statute itself. As shown above, the concrete application of these provisions during the first 10 years of existence of the Court is equally controversial.

Given the nature of the relationship between the Security Council as a political and the ICC as a judicial body, such controversies are not surprising. The Security Council, however, should step up its commitment to the International Criminal Court. The referral policy should be consistent and transparent, referral resolutions should be strong and cohesive, and the Council should follow up on referrals. After all, active, cohesive and persistent support for the ICC from the Security Council is not only in the interests of justice, but also in the interests of international peace and security.

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26 ICC, the Prosecutor v. Omar Hassan Ahmad Al Bashir, decision pursuant to article 87(7) of the Rome Statute (Malawi), ICC Doc ICC-02/05-01/09-139-Corr, 13 December 2012; ICC, the Prosecutor v. Omar Hassan Ahmad Al Bashir, decision pursuant to article 87(7) of the Rome Statute (Chad), ICC Doc ICC-02/05-01/09-140, 13 December 2012.

27 Xinhua, Sudanese president arrives in Beijing for China visit, [http://news.xinhuanet.com/english2010/china/2011-06/28/c\\_13952886.htm](http://news.xinhuanet.com/english2010/china/2011-06/28/c_13952886.htm) (accessed on 13 June 2012).

# Where do we stand on universal jurisdiction?

## Proposed points for further reflection and debate

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### Introduction

Those who believe in the principle of universal jurisdiction accord it a crucial role in ensuring that perpetrators of serious international crimes do not go unpunished. This is especially true whenever the state where the crime was allegedly committed or the state(s) of which the suspect or victims hold(s) citizenship are manifestly unwilling or unable to prosecute. The advocates of universal jurisdiction encourage national courts to assert their jurisdiction over serious international crimes, regardless of where the offence was committed or the nationality of the alleged perpetrator or victims. They consider the fight against impunity to be a matter of global concern – a fight that can be won only if there is a network of tribunals that are competent, willing and able to try international crimes and punish those responsible. In their view, those who might be in a position to commit such crimes would be deterred from doing so if an effective system of justice were in place.

There are others, however, who express reservations about recourse to universal jurisdiction by national courts. They maintain that its application by countries in the North represents an abuse towards countries in the South. They add that the current application of universal jurisdiction has often led to an aggravation of inter-state tensions, resulted in perceptions of abuse on political or other grounds, and thus has never contributed to the effective prevention or repression of international crimes.

The issue is currently the topic of heated debate within the United Nations, as well as in regional

forums. The points of view expressed above are supported by both states and important regional groups.<sup>3</sup> It is thus important to go back to basics here and recall a number of issues that are related to universal jurisdiction. This should permit a better view of what universal jurisdiction is, and further a discussion on the conditions that might render it more effective in the fight against impunity.

With this in mind, we first present the essential elements that comprise the principle of universal jurisdiction. This in itself is a challenging task because they may vary greatly from one academic opinion to the next. Second, we will look briefly at treaty practice on universal jurisdiction, with a particular focus on IHL-related treaties. Far from being exhaustive, this treatment will nevertheless help us understand further state practice when it comes to attaching bases of jurisdiction to international crimes. Third, we will discuss the conditions for and limits to the application of universal jurisdiction. We shall see that it is, in fact, these conditions – or their absence – that make the exercise of universal jurisdiction discretionary, controversial and problematic. Finally, we will venture a number of preliminary observations to feed into future work in this area.

### 1. Defining universal jurisdiction

Many of the issues surrounding universal jurisdiction are strongly related to what is actually understood by the concept. In its 2009 report, the AU-EU Technical Ad Hoc Expert Group on the Principle of Universal Jurisdiction defined universal jurisdiction as follows:

*Universal criminal jurisdiction is the assertion by one state of its jurisdiction over crimes allegedly committed*

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This paper reflects the views of the authors and not necessarily those of the organizations with which they are or were associated.

3 See, for instance, "The scope and application of the principle of universal jurisdiction", report of the Secretary-General prepared on the basis of comments and observations of governments, Off. Doc. AGNU A/65/181 (29 July 2010) and "The scope and application of the principle of universal jurisdiction", report of the Secretary-General, Off. Doc. AGNU A/66/93 (20 June 2011).

*in the territory of another state by nationals of another state against nationals of another state where the crime alleged poses no direct threat to the vital interests of the state asserting jurisdiction. (citation omitted)*<sup>4</sup>

It is clear that the main difference compared with any other grounds for jurisdiction (such as territoriality, nationality, passive personality or the protective principles of jurisdiction) is precisely that there need be no link to the crime which has been committed, its author or its victims. This definition is subject to numerous qualifications, some of which will be tackled briefly below.

As to its origins, few would contest that the first example of universal jurisdiction was the crime of piracy, against which states agreed to join forces and label the perpetrators *hostis humanis generis*, or common enemies of mankind. In practice, this meant that any state could apprehend and prosecute a pirate, without needing to have been affected specifically by that pirate's deeds.

It is also worth mentioning that the principle of universal jurisdiction also has a foundation in the international community's perceived need to allow (and, to a point, encourage) states to establish as many grounds for jurisdiction as possible, and thereby avoid the most serious crimes possibly going unpunished for lack of a competent court to try them.<sup>5</sup> The risk of positive conflicts of jurisdiction, to be resolved on an *ad hoc* basis, was preferred to the prospect of no applicable jurisdiction at all.

## **2. International humanitarian law (IHL)-related treaty practice on universal jurisdiction**

In the last 60 years, several international treaties and state practices, together with scholarly opinions, have extended the same notion of universality to

other international crimes. One of the most striking examples is the grave breaches regime found in the four Geneva Conventions (GC) of 1949 and their Additional Protocol (AP) I. This regime provides that every state:

*[s]hall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers,... hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.*<sup>6</sup>

Although the provision makes no reference to the location where the crime was committed, the phrase "regardless of their nationality" clearly establishes an obligation for states to give priority to the prosecution of serious crimes, wherever or by whomever committed, over any other consideration. As Pictet explains in the *Geneva Conventions Commentary*:

*The obligation on the High Contracting Parties to search for persons accused of having committed grave breaches imposes an active duty on them. As soon as a Contracting Party realizes that there is, on its territory, a person who has committed such a breach, its duty is to ensure that the person concerned is arrested and prosecuted with all speed. The necessary police action should be taken spontaneously, therefore, not merely in pursuance of a request from another State.*<sup>7</sup>

As to the customary nature of this obligation, there is little controversy in the case of the 1949 Geneva Conventions, as all states are now parties, and have thus expressly consented to the repression of crime regime found therein.

Beyond the grave breaches regime, IHL-related treaties provide for a number of different approaches to jurisdiction. These have more or less extensive extraterritorial effects, for instance:

1. The first approach – the most restrictive – does not provide for any basis of jurisdiction and leaves it to the state to decide which measures ought to be taken to ensure that the treaty's provisions are

4 Council of the European Union. "The AU-EU Expert Report on the Principle of Universal Jurisdiction" (the AU-EU Report on Universal Jurisdiction). Doc. 8672/09 (16 April 2009), p. 7. At the 10th and 11th meetings of the AU-EU Ministerial Troika, it was decided to set up a technical and ad hoc expert group to clarify the individual understandings on the African and EU sides of the principle of universal jurisdiction. On the definition of universal jurisdiction, see also La Rosa, A.-M. Sanctions as a means of obtaining greater respect for humanitarian law: a review of their effectiveness. *International Review of the Red Cross*, Volume 90, Number 870, June 2008.

5 This was the Permanent Court of International Justice's approach to criminal jurisdiction in the S.S. Lotus case, CJI, 7 September 1927, Series A, No. 10.

6 GCI, art. 49; GCII, art. 50; GCIII, art. 129; and GCIV, art. 146.

7 Pictet, J. (Ed.), *The Geneva Conventions of 1949. Commentary*. Volume IV, ICRC, Geneva, 1958, p. 593 (on art. 146).

respected at the domestic level, as well as the bases for criminal jurisdiction that may be required in this regard. This approach is found in the 1972 Biological Weapons Convention and the 1925 Gas Protocol;

2. The second approach is a little more specific and extends the obligation to take legal action (including penal measures) against persons or acts committed in the territory under a state's jurisdiction or control. This approach has been adopted in instruments such as the 1997 Ottawa Convention (the Mine Ban Treaty)<sup>8</sup> and the 2001 Amended Protocol II to the Convention on Certain Conventional Weapons;<sup>9</sup>
3. The third approach refers to acts committed in "any place under [the State's] control" but also obliges every state, under the active personality principle, to "extend its penal legislation [...] to any activity prohibited [...] under this Convention undertaken anywhere by natural persons, possessing [the forum State's] nationality, in conformity with international law". This approach can be found in conventions such as the 1993 Chemical Weapons Convention;<sup>10</sup>
4. Under the fourth approach, states are obliged to take action when the offence is committed within their territory (thus acting under the territoriality principle), when the alleged offender is a national of that state (active personality principle) and, for certain types of offences, when the alleged offender is present in their territory (a form of universal jurisdiction). In this last case, it is further required that, if the state does not extradite that person, it should "submit, without exception whatsoever, and without undue delay, the case to its competent authorities, for the purpose of prosecution". This approach is found in the 1999 Second Protocol to The Hague Convention for the Protection of Cultural Property.<sup>11</sup>

The same approach can be found in human rights treaties. Both the 1984 Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment<sup>12</sup> and the 2005 International Convention for the Protection of All Persons from Enforced Disappearances, which entered into

force in December 2010,<sup>13</sup> oblige states to take such measures as may be necessary to establish their jurisdiction in cases where the offence was committed in the territory under their jurisdiction, when the offender is a national of that state, when the victim is a national of that state and, finally, when the alleged offender is present in any territory under the state's jurisdiction and it does not extradite that offender.

With regard to other serious violations of international humanitarian law which entail individual criminal responsibility, including non-international armed conflicts, customary law would allow a state's exercise of universal jurisdiction, albeit in the form of a right – not an obligation – to prosecute. Such was the conclusion of the ICRC study on customary international humanitarian law.<sup>14</sup>

In practice, when implementing IHL-related treaties at national level, states usually refer to the jurisdictional bases included in the treaties themselves, regrettably missing the opportunity to develop a common and integrated approach to the prevention and repression of international crimes.<sup>15</sup> This fragmented and à la carte approach might lead to serious difficulties in practice whenever the judiciary is required to apply and understand the scope and extent of its jurisdiction for a given crime. Fortunately, it is encouraging to observe that, when implementing the ICC (Rome) Statute, states are often opting for a more pragmatic approach by ignoring any distinction and applying the same bases of jurisdiction, including universal jurisdiction, to all ICC crimes.

### 3. Conditions on and limits to the application of universal jurisdiction

Evidently, a principle of jurisdiction that appears not to require a link to the crime raises multiple questions, such as that of *non bis in idem* (being tried

8 Art. 9.

9 Art. 14 (1).

10 Art. VII (1).

11 Art. 17 (1).

12 Art. 5.

13 Art. 9.

14 See Rule 157 of the ICRC Customary Law Study, which states that "States have the right to vest universal jurisdiction in their national courts over war crimes". Available at <[http://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule157](http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule157)>.

15 For further information on the integrated approach to the prevention and repression of serious violations of IHL at national level, see La Rosa, A.-M., Chavez Tafur, G., Implementing International Humanitarian Law through the Rome Statute, *International Criminal Justice: Law and Practice from the Rome Statute and its Review*, edited by R. Belleli, Ashgate Publishing Limited, 2010.

twice for the same crime), or much-feared intervention in the internal affairs of another state. For this reason, several conditioning factors are commonly associated with its exercise in state practice.

a) *Ratione materiae*

The first of these limitations is *ratione materiae*, which determines those crimes for which a court may resort to universality to exercise its jurisdiction. Most scholars writing on the topic readily admit the list of core crimes in international law, namely war crimes (including the “grave breaches” found in the Geneva Conventions of 1949), crimes against humanity, genocide and torture – although justification for each is found in different sources of law and is still subject to challenge. Provisions allowing for universal jurisdiction may also be found in treaties dealing with more specific offences, such as the hijacking of aircraft, crimes against internationally protected persons, and the taking of hostages and others. Their status under customary law is still under debate, however.

b) *Presence of the accused*

The second, and perhaps most significant, condition on the exercise of universal jurisdiction is that of the presence (temporary or permanent) of the suspected criminal in the territory of the forum state. As will become clear later on, it is around this element that much of the debate about universal jurisdiction revolves. The need (or otherwise) to respect such a condition is reflected in two distinct approaches, which are presented below.

One, sometimes called *absolute* universal jurisdiction, would require only the suspicion that one of the aforementioned international crimes had been committed in order to trigger proceedings against the alleged offender in the courts of any state. This position was defended by three judges at the International Court of Justice (ICJ) in the Arrest Warrant case,<sup>16</sup> a number of cases at the national level (most notably *Eichmann* in 1968, Israel), and allowed by the *Princeton Principles on Universal Jurisdiction* (for the purposes of extradition,

16 Judges Higgins, Buergenthal and Koojijmans, joint separate opinion appended to judgment, 14 February 2002.

provided the state can establish a *prima facie case*).<sup>17</sup> It has also been severely criticized by states and scholars in terms of both its incompatibility with long-established international law on jurisdiction (arguably prioritizing prosecution based on the territoriality principle), and its procedural shortcomings (difficulty of practical application) regarding evidence available for trial, and the rights of the victims and the accused, etc.

This approach to universal jurisdiction might, initially, allow a difference to be established between issues of jurisdiction proper (which questions the appropriateness of the forum to which the claim is presented), and admissibility (which questions the appropriateness of the claim itself). This was precisely the position of the Constitutional Tribunal of Spain in the *Guatemalan Generals* case in 2005, when it overturned the decision of the *Tribunal Supremo* not to prosecute owing to the absence of any sufficient link between the case and the forum.<sup>18</sup> Clearly favouring an absolutist approach to universal jurisdiction, the higher court argued that international law allowed the Spanish courts, as representatives of the international community, to exercise jurisdiction over the most serious of crimes. Only in a second stage – that of admissibility – could the absence of the accused or unavailability of evidence, if not appropriately resolved by the prosecution, result in the dismissal of the case.

The second approach, or *conditional* universal jurisdiction, finds much greater consensus. This is mainly reflected in treaty law, and is often associated with the principle of *aut dedere aut judicare* (to extradite or to prosecute).<sup>19</sup> Sometimes referred to as a delegated form of extra-territorial jurisdiction, the presence

17 Approved in January 2001, the Principles were the end result of the Princeton Project on Universal Jurisdiction, chaired by Professor S. Macedo, consisting of several working groups of experts. The ICRC was consulted, and participated in the process.

18 *The Case of the Guatemalan Generals*, Constitutional Tribunal, judgment of 26 September 2005, STC 237/2005, available at: <http://www.tribunalconstitucional.es> (in Spanish).

19 The scope and application of this principle have been the subject of considerable work by the ILC since 2005. Four reports on the issue have been produced by the *Special Rapporteur* (Off. Doc. A/CN.4/571 (2006); A/CN.4/585 and Corr. 1 (2008); A/CN.4/603 (2008); and A/CN.4/648 (2011)). The principle is under review by the International Court of Justice in the case of *Belgium v Senegal* on the prosecution and trial of Mr. Hissène Habré, former leader of Chad: *Questions relating to the obligation to prosecute or extradite*.

of the accused, as the triggering factor, is deemed a condition *sine qua non*.<sup>20</sup> Examples of this approach to universality are best found in the 1949 Geneva Conventions' provisions on "grave breaches", as already mentioned, which provide for an obligation to search for and initiate proceedings against a suspected offender *present in the territory*, regardless of their nationality or where the offence was committed or, alternatively, to hand the person over for trial to another state party (*italics added*). Another good example is the Convention Against Torture.<sup>21</sup> It is less compelling in that it provides only for the right, and not the obligation to take action, but it also provides for a choice between the prosecution or extradition of an alleged offender. The Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property<sup>22</sup> sets out an obligation for states parties to take the necessary legislative measures to establish their jurisdiction for certain offences, regardless of where they are committed, if the suspect is present in their territory. A number of conventions on terrorism, as well as the recent UN Convention for the Protection of All Persons from Enforced Disappearance, is another example here.<sup>23</sup>

A middle ground between absolute and conditional universal jurisdiction was suggested by the Institute of International Law in 2005, when it stated that "apart from acts of investigation and requests for extradition, the exercise of universal jurisdiction requires the presence of the alleged offender in the territory of the prosecuting State".<sup>24</sup> This thus presents a similar view to the *Princeton Principles*, but the IIL then went on to clarify potential conflicts of jurisdiction by stating that any state willing to prosecute should, "before commencing a trial on the basis of universal jurisdiction, ask the State where the crime was committed or the State of nationality

20 The presence of the suspect on the territory of the state is necessary for the prosecution of war crimes, crimes against humanity or genocide on the basis of universal jurisdiction, for example, in the following countries: Denmark, Ethiopia, France, Ireland, the Netherlands, the Democratic Republic of the Congo, Senegal, South Africa and the United Kingdom. The list is not exhaustive.

21 Art. 7(1).

22 Art. 16.

23 Art. 9 (2).

24 Institute of International Law, *Universal Criminal Jurisdiction with Regard to the Crime of Genocide, Crimes Against Humanity and War Crimes*. 17th Commission, Krakow Session, 2005. On the same subject, see also the May 2012 *Zimbabwe Torture Docket Decision* of the Pretoria High Court (SALC v NDPP).

of the person concerned whether it is prepared to prosecute that person".<sup>25</sup>

c) *Obligation to prosecute or jurisdiction of last resort*  
There is much discussion concerning the international obligations of states in respect of the prosecution of international crimes. This debate becomes yet more complex when the purported obligation involves the exercise of universal jurisdiction. One way in which this has been tackled has been to question the *raison d'être* of the principle of universality itself, presenting two alternatives. One empowers states to act in the name of an international community which has been wronged by the commission of an international crime. With the other, universality is no more than an express agreement between states, which consent to defer their powers to one another, for and under specific circumstances.

In the first approach, the logic is that certain crimes violate universal values, embodied in imperative norms or *jus cogens*, which concern all states. Consequently, any state can have an interest, a right or even an obligation not to tolerate the commission of such crimes, following a view somewhat similar to that found in Article 48 of the ILC 2001 draft articles on state responsibility for internationally wrongful acts.<sup>26</sup> This position, proposed by some scholars,<sup>27</sup> pushes for the unconditional application of universality and supports the *absolute* universal jurisdiction approach mentioned above, where the alleged offender is not required to be on the territory of the prosecuting state. This rationale is also

25 *Ibid.*

26 Off. Doc. A/56/10 (2001), art. 48. Invocation of responsibility by a State other than an injured State

1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:

(a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or

(b) the obligation breached is owed to the international community as a whole.

2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:

(a) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and

(b) performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached. [...]

27 Among them, Bassiouni in *International Crimes: "Jus Cogens" and "Obligatio Erga Omnes"*, Law and Contemporary Problems, Volume 59, No. 4, Autumn 1996, page 66.

reflected in the ICJ ruling in the *Barcelona Traction* case, where some obligations (including the protection of human rights) were considered to be *erga omnes*, and thus applicable to the international community as a whole. Further arguments in this regard have been made by invoking more general international human rights treaties, and more specifically the duty to investigate violations of human rights which is incumbent upon state parties to these treaties.<sup>28</sup>

In other words, if we accept the absolutist approach, we might lead to assume that universal jurisdiction is a right of states, *qua* members of the international community, to take action against crimes that offend the community as a whole. If such violations are then accepted as counter to *jus cogens* norms, there might actually be an obligation to prosecute, irrespective of the place where the crime was committed or where the alleged offender is to be found.

The second option, which undeniably finds extensive support in the analysis of treaty law but, most importantly, in state practice and *opinio juris*, holds that universal jurisdiction should be resorted to only when the more traditional grounds fail.<sup>29</sup> The proponents of the most restrictive view would add that universal jurisdiction is possible only when a specific provision so allows, and evidently only between those states parties to the treaty that provides for it. This argument finds support in the inclusion of an ever-present *aut dedere* alternative, which keeps open a means for any state to disentangle itself from a potentially problematic case if a state with stronger links to the crime proves willing to prosecute. At the domestic level, this is corroborated by the significant degree of discretion afforded to the prosecutor or other high official. This judicial scope might take the form of authorization for legal proceedings, or allow for their suspension or cancellation if they are regarded as counter to national interests, the relations of the state with the state

where the crimes were committed, and other considerations.

Furthermore, the degree of the obligation to prosecute when all alternatives fail (extradition, exercise of alternative jurisdictions, etc.) also varies in treaty law. The Geneva Conventions are at one end of this spectrum. They are perhaps the most proactive in spelling out a state party's obligation to take action against an offender. At the other end of the scale, the 1999 Second Protocol to the Hague Convention for the Protection of Cultural Property limits itself to requiring states to pass legislation providing for specific grounds for jurisdiction, but does not require them actually to prosecute anyone on those grounds.<sup>30</sup>

#### d) *Non bis in idem* (double jeopardy)

As a general rule, states which are willing to prosecute under universal jurisdiction should be prevented from proceeding if the suspected offender has already been tried for the same acts before another forum. Embodied in the principle of *non bis in idem*, the notion and practice is well established in international relations, and most specifically in the ambit of extradition law.

One exception may arise, however. As determined by both the International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR respectively)<sup>31</sup> and the International Criminal Court (ICC),<sup>32</sup> the principle of *non bis in idem* should not apply if the proceedings in the first court were very clearly carried out for the purpose of shielding the person concerned from criminal responsibility, or were conducted in a manner, in the circumstances, that was completely inconsistent with an intent to bring the person concerned to justice. Even though it is logical to believe that such exception should also apply to states exercising universal jurisdiction, practice is not fully conclusive in this regard.

#### e) *Prosecutorial discretion*

As mentioned briefly above, another condition – albeit one found only in the domestic legislation of some states – is that of special prosecutorial discretion. This is usually applied to cases with an international connection, and thus certainly covers the exercise

28 The ICCPR, IACHR and the ECHR have taken this stand in their rulings. Leading cases on the responsibility to investigate violations of human rights include *Isayeva, Yusupova and Bazayeva v. Russia*, ECtHR, judgment, 2005, paras. 201-225; and *Myrna Mack v. Guatemala*, IACtHR, judgment, 2003, paras. 152-158.

29 See Cassese, A. "Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction"; and Abi-Saab, G. "The Proper Role of Universal Jurisdiction", in *Journal of International Criminal Justice*. Volume 1, 2003.

30 Art. 16.

31 ICTY Statute, art. 10; ICTR Statute, art. 9.

32 ICC Statute, art. 20.

of universal jurisdiction. In common law countries such as Canada, this may manifest itself as the need to obtain approval from the attorney general<sup>33</sup> or the director of public prosecutions<sup>34</sup> before proceedings may be carried out. In civil law countries, although generally less common, such discretionary powers are incumbent upon the public prosecutor.<sup>35</sup>

Evidently, the rationale behind such a measure is to include extra-judicial considerations – such as the potential effects of the case on the bilateral relations with the state where the crime was committed or of which the accused is a national, as well as questions of national interest or national security – in the decision on whether or not to initiate proceedings.

Prosecutorial discretion should not result in arbitrariness, however, and such decisions should be taken by an independent judiciary, rather than the executive. In 1997, for example, a group of experts convened by the ICRC to address a number of issues related to the repression of violations of IHL stressed that

[t]he principle of discretionary prosecution concerns the question of whether proceedings should be instituted. There must be a clear distinction between universal jurisdiction and the obligation to prosecute. Universal jurisdiction could be considered only if the principle of discretionary prosecution were recognized. There were concrete considerations regarding the appropriateness of prosecution that determined whether persons outside the territory concerned may be prosecuted. Universal jurisdiction must be understood as the possibility for the national judicial authority to initiate a preliminary investigation, even if the results are subsequently used by other authorities. [...] The ability to put together a case and marshal

the available evidence would naturally limit the implementation of universal jurisdiction.<sup>36</sup>

#### f) *Issues related to extradition*

A practical approach to universal jurisdiction must also take into consideration potential issues arising from the need by a state that is willing to prosecute a suspect not present in its territory under universal jurisdiction to request the extradition of the suspect in order to proceed with a trial. This might become an additional hurdle, especially in those states in which investigations into international crimes committed abroad are allowed, but trials in *absentia* are prohibited.

Extradition law is ruled by two major principles: that of dual criminality, by which the acts committed by the suspect must constitute a crime in both the custodial and requesting states; and the principle of speciality, by which the requesting state is bound to try the extradited person only for those crimes stated in the request, and which were accepted by the custodial state for the purposes of granting the extradition. Evidently, such conditions might seriously endanger prosecution on the basis of universal jurisdiction where:

- the custodial state does not have appropriate legislation on international crimes, including rules which prevent the commission of such crimes being considered a political offence (and thereby exempting the perpetrator from extradition);
- the custodial state grants extradition, but not for all of the alleged crimes, or imposes undue restrictions on the offences for which the suspect may be prosecuted before the courts of the requesting state.

In addition, each particular context may reveal other conditions attached to a process of extradition, and a careful analysis should be carried out in all cases. Such conditions may include a minimum sentence requirement, judicial guarantees, the non-application of the death penalty, etc.).

33 Countries such as Australia, Botswana, Israel, Kenya, Lesotho, Namibia, New Zealand, Seychelles, Sierra Leone, Swaziland, Tanzania and Zimbabwe also have similar provisions.

34 See, for instance, Malawi, Uganda and the United Kingdom.

35 See Belgium (Federal Prosecutor), Burundi, Cameroon, Finland, Norway, DR Congo, Czech Republic.

36 ICRC, "National measures to repress violations of international humanitarian law", Report on the 1997 Meeting of Experts (civil law systems), 2000, p. 131. It must be noted that, in many countries where prosecution is mandatory, the obligation is offset by other considerations. For instance, prosecutors may decide not to prosecute crimes committed abroad by reference to certain specified criteria (Germany): *AU-EU Report on Universal Jurisdiction*, p. 22.

#### 4. The question of immunity

There is clear concern about the effect that universal jurisdiction might have on the immunity of public officials as they are recognized under international law. This is easily understood when *absolutist* arguments in favour of universal jurisdiction are read to mean that all other norms of international law must yield to the “higher purpose” of punishing serious violations of human rights. In the *Arrest Warrant Case* of 2002, the ICJ had to resolve this apparent conflict, and considered that the norms on jurisdiction do not contradict or alter the rules on immunity. The latter may be summarized as follows:

##### *a) Immunity from prosecution in domestic courts*

Two general categories of immunity are recognized under international law. Personal immunity is that which is granted to heads of state, ministers of foreign affairs, heads of mission and, arguably, other very high officials of a state. They cover all acts, *private or public*, and prohibit the initiation of proceedings against them, providing a procedural bar against prosecution. This responds to the logic that, while in office, these high authorities should not be tried, cited or summoned by foreign courts, at least without their consent, as this might seriously affect the running of government, the international relations between their and other states, and be potentially embarrassing to the nation as such. As the ICJ stated in the *Arrest Warrant case*, however, immunity from jurisdiction should not mean impunity. Any of the aforementioned public officers may be tried, including under universal jurisdiction, if the state they represent decides to waive their immunity. Once they cease to hold office, they may be prosecuted for acts committed prior or subsequent to their time in office, or committed during their time in office in a private capacity.<sup>37</sup> The whole question here would be to define the extent of “private capacity” as applied to such high-level state representatives while in office, and whether international crimes might be considered as falling within this concept.

On the other hand, functional immunity is attached to the acts of any public official, including those mentioned above, committed while carrying out their functions (or in an *official capacity*). They are

a substantial bar to prosecution. The person may be brought before a court, where the defence of immunity might then be raised. Acts committed privately are not covered and, since immunity is attached to the act, and not the person, it continues to apply even after the person has left office.

Where the prosecution of international crimes is concerned, there is a strong trend in opinion in international jurisprudence and among scholars that, while personal immunity would preclude the prosecution of even the core crimes while in office (genocide, crimes against humanity, war crimes, et.), the functional type no longer constitutes an allowable defence in court. In practical terms, this means that while an incumbent head of state or similar may not be indicted or prosecuted for international crimes in a foreign court (the *Arrest Warrant case*), they may be subject to proceedings once their term in office expires. Lesser officials might be prosecuted for international crimes even while in office, since functional immunity would not cover international crimes.

##### *b) Immunity from prosecution in international courts*

Although restricted to their respective temporal and territorial jurisdictions, the ICTY, the ICTR and the Special Court for Sierra Leone (SCSL) provide for no exception from prosecution, regardless of official position. Article 7 of the ICTY Statute reads: “The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment”. The Statute of the ICTR uses the same language.<sup>38</sup>

Similarly, the ICC Statute also provides that “immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person”.<sup>39</sup>

It is worth noting that a similar position has recently been adopted by a number of states when implementing the ICC Statute, effectively preventing any resort to immunity against prosecution

37 ICJ, Case Concerning the Arrest Warrant of 11 April 2000 (DR Congo v Belgium), 14 February 2002, para. 61.

38 ICTR Statute, art. 6.

39 ICC Statute, art. 27.

for international crimes when tried at the domestic level.<sup>40</sup>

### Concluding remarks

Some have recently argued that the principle of universal jurisdiction might be abused excessively on political or other grounds. The fact that the Geneva Conventions' grave breaches provisions have been little more than a dead letter for more than 60 years, however, would clearly attest to the contrary. That said, if universal jurisdiction is to play an effective role in the fight against impunity, weight and consideration must still be given to the concerns expressed in this regard. We propose a number of preliminary observations to feed into reflection on the role universal jurisdiction might play in the future.

First, it must be accepted that there is no way around the issue. Universal jurisdiction is a central element in the repression of serious violations of international humanitarian law and their prevention. Rather than questioning its existence or value, ways of improving its effectiveness must be found.

Second, reflections on the effective application of universal jurisdiction should also cover all forms of extraterritorial jurisdiction, exercised by both states and international criminal tribunals. They all present the same practical and even political challenges in terms of connecting the forum to the crimes and alleged perpetrators.

Third, we must admit that universal jurisdiction, up to now, has been applied in a somewhat unpredictable manner, emphasizing the perception that it might be politically driven. This situation surely has an impact on the dissuasive character

of universal jurisdiction and its capacity to prevent violations of international humanitarian law.<sup>41</sup>

Fourth and finally, it appears clear from the above that there is a need to reflect on conditions that would make universal jurisdiction more effective. It seems to us at this stage that such conditions should pursue a two-fold objective. On the one hand, they should make universal jurisdiction more appealing for states to apply but, at the same time, not strip it of its universal character. These conditions may concern, *inter alia*, the better identification of international crimes to which universal jurisdiction is attached, the conditional presence of the suspect on or their links with the territory of the state wishing to prosecute, reflections on the nature of the immunity limited to high-level public officials, if any, greater clarity on the rules applicable to international cooperation and assistance in criminal matters<sup>42</sup> and, finally, a set of rules aiming at resolving whatever conflicts of jurisdiction may arise.<sup>43</sup> Addressing these issues credibly requires a thorough knowledge of what exists in domestic legislation and how it has been applied in practice. This examination must obviously take into consideration the work accomplished so far.<sup>44</sup>

Such conditions, determined and promoted at the international level, may have a positive impact on the interpretation given to universal jurisdiction at

40 For example, in at least three AU Member States, namely the Democratic Republic of the Congo (Penal Code, Book 1, Section VI, art. 21-3), Niger (Law no 2003-025 of 13 June 2003, art. 208.7) and South Africa (ICC Implementation Act 2002, art. 4(1)). This last provision reads as follows: "Art. 4. [...] (2) Despite any other law to the contrary, including customary and conventional international law, the fact that a person (a) is or was a Head of State or government, a member of a government or parliament, an elected representative or a government official; or (b) being a member of a security service or armed force, was under a legal obligation to obey a manifestly unlawful order of a government or superior, is neither (i) a defence to a crime; nor (ii) a ground for any possible reduction of sentence once a person has been convicted of a crime." Italian and Dutch courts have taken the same stand for the prosecution of international crimes.

41 See "Sanctions. Humanitarian debate: Law, Policy, Action", *International Review of the Red Cross*, Vol. 90, No. 870, June 2008.

42 See the initiative launched by the Netherlands, Belgium and Slovenia: "'Addressing the international legal gap: Netherlands, Belgian and Slovenian initiative for a multilateral instrument for domestic prosecution of international crimes". These countries have concluded that the existent current international legal framework for international cooperation in criminal matters, concerning the investigation and prosecution of these international crimes at the national level, is insufficient and should therefore be improved. They have organized an expert meeting on 22 November 2011, to explore the extent of the legal gap and the way it should might best be addressed.

43 Article 90 of the ICC Statute could be used as guidance for the resolution of conflicts of jurisdiction involving a custodial state, the ICC and a third state willing to prosecute on some basis of jurisdiction, including universal jurisdiction.

44 To name just a few: the Princeton Project already mentioned (2001); extensive scholarly work and the resolution passed at the 17th Session of the Institute of International Law in 2005 should also be taken into account. The *Association internationale de droit pénal* has also looked into the issue: see resolution adopted in 1984 by the 13th International Congress of Criminal Law.

national level, even for those which are the most proactive in this regard. Domestic courts relying exclusively on their own interpretation of the principle – and even those strongly favouring a liberal approach to universality – may jeopardize the development of an international standard that could then be applied by and, most importantly, be demanded from any national court. Such a lack of legal certainty would, in effect, counter the current efforts to bring international criminals to justice. This has already been seen in some countries, where the risk of a proliferation of cases against a number of world leaders led to strong political pressure on parliaments to adopt or amend the laws on jurisdiction, eliminating all traces of absolute universality, and effectively raising the alarm about its potential abuse.

In these efforts, consideration should be always given to building and reinforcing the national capacity of the states where the crimes have been committed. Delocalization by universal jurisdiction or other means should be envisaged only as a very last resort, and must necessarily be accompanied by a local awareness-raising programme on, among other things, the role that states are called upon to play in ensuring effective international measures to combat impunity.<sup>45</sup>

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45 Sanction report , op. cit. note 39, p. 245. Along the same line, see also the AU-EU Expert Report on the Principle of Universal Jurisdiction.

# Challenges in prosecuting under universal jurisdiction

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## Introduction

On 1 January 2011, Switzerland introduced several new aspects into its legislation and judicial organisation in order to broaden the existing framework for the prosecution of international crimes. The implementation of the Rome Statute of the International Criminal Court (ICC) is to be most welcomed because its primary purpose is to signal Switzerland's commitment to the fight against impunity and the intention to retain jurisdiction over potential perpetrators of Swiss nationality which otherwise may fall under the complementary jurisdiction of the ICC. The aim of the present paper is to illustrate the key aspects of these new aspects and to highlight the operational challenges that may have to be faced by the prosecuting authorities.

## I. A new framework for criminal prosecution

### 1. *New provisions of the Swiss Criminal Code (CC)*

The most important innovation resulting from the 2011 revision of the Swiss Criminal Code (CC)<sup>2</sup> is the introduction of a specific heading on "crimes against humanity" (Art. 264a CC). Beforehand, this crime was captured under Swiss legislation as a common crime like murder, assault, rape, hostage-taking or other serious crimes. Crimes against humanity encompasses these offences if committed in a systematic and widespread manner against a civilian population. At the same time, the legislator decided to define more precisely the various categories of war crimes against civilians in the context of international and non-international armed conflicts by providing a detailed catalogue in both the Military Criminal Code (MCC) and the CC (Art. 264b – 264j CC). Genocide (Art. 264 CC), in contrast, had already been introduced into Swiss

legislation in 2000. This provision addresses acts committed with the special intent to destroy in whole or in part a national, racial, religious, ethnic, social or political group. The merit of the Swiss provision is the extension of its protection to the category of "social group" and "political group", which are not covered by international law. To ensure comprehensiveness, the Swiss legislator also enacted several general principles applicable to all three categories of crime (crimes against humanity, war crimes and genocide), such as the principles of command responsibility (Art. 264k CC), of the non-defence of superior orders (Art. 264l CC), of universal jurisdiction over crimes committed abroad (Art. 264m CC) and of the exclusion of relative immunity (Art. 264n CC). Finally, the CC further provides for the punishability of preparatory acts to all three offences (Art. 260bis CC) and for non-prescription thereof (Art. 101 CC).

### 2. *New provisions of the Swiss Criminal Code of Procedure (CCP)*

In 2011, a new Swiss Criminal Code of Procedure (CCP) replaced the previous 26 cantonal codes and the previous Federal Code of Criminal Procedure, stating the new rights and duties of the parties, also with regard to international crimes. Pursuant to the 2011 revision of the CC, jurisdiction over the newly introduced offences has been transferred from military to civilian justice. The Office of the Attorney General of Switzerland (OAG) is now the competent authority for the prosecution of international crimes (Art. 23 (1)(g) CCP). Only war crimes committed in the context of an armed conflict with Switzerland or involving a member of the Swiss Armed Forces will be retained under the jurisdiction of Swiss Military Justice (MJ). A hand-over arrangement has been made between the OAG and the MJ so that most cases that were pending on 1 January 2011 will now be prosecuted on the basis of the new CCP. The new CCP also stipulates that the OAG cannot delegate cases concerning international crimes to the Cantons (Art. 25 (1) and 23 (1)(g) CCP). For crimes against humanity com-

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2 See also the Message on the modification of federal laws for the implementation of the Rome Statute of the International Criminal Court, 23rd April 2008, Feuille Fédérale 2008 3461.

mitted prior to 1 January 2011 however, the Cantons retain jurisdiction and prosecute them as common offences so as not to infringe the principle of non-retroactivity.

### 3. *The new Centre of Competence for International Crimes (CC HuK)*

On 1 January 2011, two prosecutors and a legal officer were assigned to prosecute international crimes at the OAG, undertaking this endeavour in addition to handling cases of common crimes. The cases dealt with in this initial phase included the execution of mutual assistance requests and criminal investigations initiated by the prosecutors following up criminal complaints. The OAG has recently established a Centre of Competence for International Crimes (German abbreviation: CC HuK) to intensify its work in relation to the investigation of international crimes. The Centre is being professionalised with four full-time members (two prosecutors and two legal officers), two of which are additionally incorporated within Swiss Military Justice, thereby guaranteeing cooperation and know-how transfer between the two institutions. The aim of this professionalisation is to allow the Centre to develop the capacities and modalities to become proactive, rather than reactive, in the identification and prosecution of cases.

## II. The principle of universal jurisdiction

### 1. *Meaning of the concept*

Until the introduction of Titles Twelve<sup>bis</sup> to Twelve<sup>quater</sup>, the CC based the competence to conduct criminal investigations on the principles of territoriality and (active and passive) personality, meaning that either the misconduct or the perpetrator need to be linked to Swiss territory. Subsidiary universal jurisdiction was only recognised for those cases in which an extradition request was refused for reasons unrelated to the nature of the offence, or if the offender had committed a particularly serious felony proscribed by the international community (Art. 7 (2) CC). Switzerland underlined its commitment to prosecute crimes under universal jurisdiction through the implementation of Article 264m into its CC, which now provides the legal basis for national jurisdiction over extraterritorial crimes. This allows the competent Swiss authority to investigate crimes under universal jurisdiction even if neither the alleged offender nor the victim are of Swiss

nationality, and even if the crime has not been committed on Swiss territory. The principle of universal jurisdiction has its origin in an understanding that certain crimes are so harmful that third States are entitled to prosecute these crimes committed in a foreign state, by a foreign citizen, against foreign victims.

### 2. *Prosecution in Switzerland according to Article 264m CC*

According to Article 264m CC, criminal investigations under universal jurisdiction are subject to the condition that the alleged offender is present within Switzerland and cannot be extradited to another State or delivered to an international criminal court or tribunal whose jurisdiction is recognised by Switzerland. Unlike its predecessors, Article 264m CC does not require the suspect to be in close connection (*nexus*) with Switzerland. Rather, the presence of the alleged offender in Switzerland is sufficient to open an investigation of an offence committed abroad. To ensure that prosecution authorities do not instigate sumptuous and futile criminal proceedings under universal jurisdiction *in absentia*, the prosecutor has been vested with the power to close the investigation if “the suspected perpetrator is no longer in Switzerland and is not expected to return there” (Art. 264m (2)(b) CC), provided that he has ordered the necessary conservatory measures.

## III. Challenges: a practitioner’s view

### 1. *Legal challenges*

The legal basis for opening a criminal procedure is provided within Articles 299 ff CCP. Based on the suspicion that an offence has been committed, enquiries shall be carried out and evidence gathered in order to establish incriminatory and exculpatory facts in relation to the alleged offence. Criminal investigations are opened after the prosecution authority considered and affirmed “reasonable suspicion that an offence has been committed” (Art. 309 (1) CCP). In relation to the crimes under universal jurisdiction, this requires an efficient and complex analysis of the facts at hand, including the study of the conflict, its political context and the parties involved. However, once the prosecutor receives precise information on serious offences and other serious incidents, e.g. massacres or other atrocities, the formal opening of a criminal investigation is mandatory (Art. 309 (1)(a) and (c) CCP).

As mentioned, criminal investigations can only be pursued under Swiss law if the alleged offender is present on Swiss territory and if the individual in question cannot be extradited to another jurisdiction (Art. 264m (1) CC). On behalf of the prosecutor, this implicates enquiries into possibilities for an extradition and in many cases into the willingness of the country of origin to undertake its own proceedings, which due to the political context of the crimes can be a delicate endeavour. In relation to the precondition of being present on Swiss territory, there is no jurisprudence available to date. From the above, it is argued here that a transit journey through Swiss territory shall be regarded as sufficient to meet the requirement of “being present”. Considering the gravity of the crimes at stake, it is justifiable to first open a criminal investigation and then assess prospects of no-return to the territory, as foreseen within Article 264m (2)(b) CC. This concept is in favour of a rather broad use of the right to open an investigation and is also reflected in Article 264m (2)(a) CC. According to this provision, domestic criminal proceedings may be closed or dispensed with in cases in which “a foreign authority or an international criminal court, whose jurisdiction is recognised by Switzerland, is prosecuting the offence, and the suspected perpetrator is extradited or delivered to the court”. However, even if opting for the non-opening or closure of a case in consideration of Article 264m (2)(a) or (b) CC, the prosecution authority must ensure conservatory measures to secure evidence – be it for a re-opening of the case or foreign criminal proceedings.

Obstacles to the exercise of universal jurisdiction result from the question of immunity from criminal liability. There exist two categories of immunity that may come into play when exercising universal jurisdiction: immunity *ratione materiae*, relating to acts performed in an official capacity, and immunity *ratione personae*, resulting from the official status of certain categories of state officials. Immunity *ratione personae* is of an absolute nature in order to protect the conduct of state agents while in office and undoubtedly enjoyed by incumbent heads of State or Government and Ministers of Foreign Affairs with respect to acts of common crimes committed in an official and a personal capacity, both while in office and prior to holding office. Being linked to the particular post, immunity *ratione personae* is of a temporary nature and

ceases upon the expiration of the term in office. In relation to immunity *ratione materiae*, various rationales and justifications have been put forward by legal practitioners to allow exemptions, thus calling for criminal liability within foreign courts for the prosecution of international crimes. On the other hand, from a political perspective, arguments are put forward in the interest of international relations that promote an understanding of immunity *ratione materiae* that allows its successful invocation at foreign courts. Jurisprudence has yet to clarify the nature of immunity *ratione materiae* and it remains to be seen to which agenda it gives preference.

Within the 2011 revision of the CC, the Swiss legislator decided to adopt a strict interpretation of the principle of non-retroactivity, pursuant to which a provision cannot be applied to facts that occurred prior to its entry into force. With regard to crimes against humanity, this implies that the OAG will not be competent to prosecute these crimes unless they were committed after entry into force of Article 264a CC. Crimes committed before 1 January 2011, as said, will have to be prosecuted as common offences by the Cantons. War crimes, on the other hand, were punishable under the Military Criminal Code (MCC) until 1 January 2011 so that revision of the MCC in respect of war crimes constitutes a transfer of jurisdiction over war crimes (from military to civilian justice), not involving the application of the principle of non-retroactivity. In order to conclude jurisdiction over crimes against humanity and war crimes, the OAG therefore first has to qualify a conduct as falling either under the heading of war crimes or crimes against humanity in order to establish jurisdiction and to be able to open criminal proceedings. Analogous problems of non-retroactivity may also arise in relation to those crimes, the scope of which was extended by the new provisions, e.g. Article 264k CC on superior responsibility. With regard to genocide (Art. 264 CC), apart from the issue of its applicability to facts that occurred prior to its entry into force on 15 December 2000, another question to be dealt with will be its applicability to social or political groups as new categories of protected people under Swiss legislation.

## 2. Operational challenges

The public prosecutor may only initiate a criminal case against a person suspected of internation-

al crimes if that person is on Swiss territory at the moment of the opening of proceedings. The legislator imposed this restriction to the application of the principle of universal jurisdiction, so that the prosecutor, prior to ordering a coercive measure such as an arrest or an interrogation, will always have to determine first the physical presence of the suspect in the country. At the operational level, this has several consequences, particularly in the (common) event of a suspect being only in transit through the country. If the suspect has never visited Switzerland before, the prosecutor will be unable to anticipate his/her (first) visit to the country by alerting the national search database with a view to carrying out an arrest or interrogation, since such coercive measures may only be ordered against suspects who have already been to Switzerland and against whom criminal proceedings have already been opened. In this case, if the arrival cannot be anticipated, the only possibility to proceed for the cantonal and federal prosecutorial authorities (i.e. the police and the OAG) is to design coordinated working processes ensuring their rapid and flexible reaction once such presence is signaled (e.g. by an NGO, a complainant or the media) or discovered by the prosecutorial authorities. This is one of the peculiarities of investigations conducted on the basis of universal jurisdiction, and it will be the CC HuK's task to find an efficient solution to this challenge.

Another particularity is the necessity of leading the investigation of such crimes in a foreign context, impacting on the sovereignty of third States, thus requiring reliance on international legal assistance mechanisms. Even though domestic and international legal instruments provide the Swiss prosecutor with the formal possibility to seek judicial assistance worldwide, the responses in practice are often disappointing. Apart from States with similar procedural systems to ours, in other States international legal assistance may be a lengthy process, fully dependent upon the willingness to cooperate. International crimes generally occur in States affected by crises or wars, so that the concerned authorities may often face additional difficulties in supporting the investigation, either because of the temporary inefficiency of their judicial institutions or because of an unfavourable political context to criminal prosecution. Therefore, as long as necessary evidence is located in a State that is not interested in seeing its previous policy or representatives put on trial by other States,

the principles of universal jurisdiction and international judicial assistance may hardly manage to outweigh the underlying contrasting political interests. In order to overcome this obstacle, the prosecutor needs to be able to rely on different partners: at national level, these may be the Federal Office of Justice or the Federal Department of Foreign Affairs, which may incline foreign States to cooperate under the aegis of the principles of reciprocity and in terms of foreign policy considerations; at international level, these may be international tribunals and foreign States experienced in the prosecution of international crimes, which may have collected useful information during their own investigations and have established contacts with international legal assistance authorities. Last but not the least, there are also the privileged contacts established by prosecutors, e.g. through the *Network for investigation and prosecution of genocide, crimes against humanity and war crimes* to which the OAG participates on a regular basis.

Criminal proceedings concerning international crimes are thus challenging per se and present issues that do not usually arise in conjunction with common crimes. Their objective, i.e. the collection of incriminatory and exculpatory evidence, is complicated by the fact that such crimes generally occur in a foreign scenario unknown to the prosecutor leading the case, far away in an area that may still be affected by an armed conflict. In addition, since these crimes are not subject to prescription they may have been perpetrated in the past, sometimes even decades ago, thus rendering the collection of evidence difficult, if not impossible because it may have been destroyed in the meantime. It may therefore become complicated for the prosecutor to understand and analyse the facts. Furthermore, in many cases forensic investigation (the scientific investigation of the crime scene along with the use of forensic medicine) may have not been undertaken so that the material evidence - with the exception of documentation - may be often non-existent. In this case the investigation will essentially have to rely on witness statements, the evidentiary value of which will need to be assessed at the discretion of the judicial authority entrusted with the case.

Often testimonial evidence is hard to collect. The prosecutor has to select the key witnesses among a large number of people who may have heard or seen themselves something relevant. Apart from

those willing to volunteer, the prosecutor may have to identify those whose identity or whereabouts are unknown and therefore develop strategies to access them. Once the witnesses have been identified and their status defined (witness, victim or potential suspect), they have to be interrogated either in Switzerland or abroad, in this latter case meaning that other difficulties may arise with regard to travel arrangements, the language to be used and the existing cultural context. Moreover, witness statements need to be in a format that permit the prosecutor to assess the credibility of the witness. This is crucial since some witnesses may have already been heard several times about the same facts, within different contexts, so that their motivation to testify may vary depending on their interests. As soon as it appears that they may themselves become suspects for the commission of the crimes under investigation, their obligation to testify may moreover shift into the right to remain silent.

It may be necessary to provide for safety guarantees to those participating in the proceedings (witnesses, victims and third parties), particularly abroad. Such protective measures were introduced on 1 January 2012 into the CCP but have been rarely used in ordinary cases to date. In cases of investigating crimes under universal jurisdiction, protective measures are most likely to be necessary, due to the nature of the crimes and the profile of the suspects, who may either threaten those willing to testify or exercise pressure on relatives in the home country. It is the strength of the prosecutor to use all available legal means at hand, combined with a certain amount of creativity in their practical implementation, to overcome the challenges that may result from prosecuting under universal jurisdiction.

### **Conclusion**

Criminal prosecution on the basis of universal jurisdiction goes *prima facie* counter to the paradigms of ordinary procedures conducted by a prosecutor in relation to acts committed in Switzerland by or against a Swiss citizen. There are, therefore, several challenges that need to be met with regard to the application of Swiss legislation and the conduct of criminal proceedings under universal jurisdiction. These challenges constitute at the same time an opportunity to develop the law in this field and to be innovative in ways to identify, investigate and punish crimes against humanity, war crimes

and genocide. Our legislation now provides the appropriate legal tools to ensure the prosecution of crimes against humanity, war crimes and genocide and to investigate such crimes under universal jurisdiction. With the launch of the new CC HuK in July 2012, the OAG feels well empowered to handle its newly assigned tasks and to make efficient use of the new legal provisions so as to make sure that Switzerland will not provide a safe haven for perpetrators of crimes subject to universal jurisdiction, considered to be among the most heinous of crimes.



# Commissions of Inquiry : Lessons Learned and Good Practices

Juan E. Méndez<sup>1</sup>

## I. Commissions of Inquiry: Objectives, added value and current practices

The principal objective generally pursued by commissions of inquiry is to discover, clarify and formally acknowledge the causes and consequences of past violations in order to establish accountability. In this capacity, commissions of inquiry are fact-finding mechanisms that aim to establish an accurate record of the past by clarifying and deepening the public understanding of certain events or a particular period of time. This objective is met by means of numerous interviews and/or providing a venue for the public testimony of a broad array of actors, including victims, witnesses and Government officials. The resulting bolstered historical record allows for a more detailed account of patterns of violence, identifies where safeguards are lacking against torture and other forms of ill-treatment, opens space for public dialogue that may not have previously existed and corrects public misperceptions about certain events or a particular time period. Effective commissions of inquiry may aid in the establishment of accountability by paving the way for an effective strategy to prosecute perpetrators.

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Commissions of inquiry may also be designed to address other objectives, including:

- (a) To contribute to accountability for perpetrators;
- (b) To respond to the needs of victims;
- (c) To identify institutional responsibility and propose institutional, legal and personnel reforms<sup>2</sup>
- (d) To promote reconciliation.

Indeed, the process of achieving accountability can be aided by the work of a commission of inquiry where the information and names collected by the commission are shared with prosecuting authorities. While evidence collected by a commission of inquiry is often inadmissible in a court of law owing to the lower standards of evidence used by commissions to encourage broad participation, such information may be used as background information and provide further evidentiary leads.<sup>3</sup>

### Added value

When used by States, a commission of inquiry can serve as a valuable tool in addressing the State's duty under international human rights law to investigate and hold an independent inquiry into torture, deaths (for example, in the case of extrajudicial executions) and other atrocities (A/HRC/8/3, para. 12).

Although commissions of inquiry can vary in their origin and mandate, there are three characteristics that make them an effective and unique tool: they are generally ad hoc, autonomous and inde-

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<sup>2</sup> For example, the report from the National Commission for Truth and Justice in Haiti (1995) was subsequently used to vet new applicants to the civilian police force.

<sup>3</sup> See for example Inter-American Commission on Human Rights, Application to the Inter-American Court of Human Rights in the case of Florencio Chitay Nech et al. (Case 12.599) against the Republic of Guatemala (April 2009); Inter-American Court of Human Rights, Plan de Sánchez Massacre v. Guatemala, judgment of 29 April 2004 (Merits), Series C No.105; Inter-American Court of Human Rights, Maritza Urrutia v. Guatemala, judgment of 27 November 2003 (Merits, Reparation and Costs), Series C No. 103; and Inter-American Court of Human Rights, Myrna Mack-Chang v. Guatemala, judgment of 25 November 2003 (Merits, Reparations and Costs), Series C No.101.

pendent, as well as being victim-centred, therefore allowing greater and active participation of victims in the process of establishing facts and identifying the priority elements that comprise reparations.

For some victims and others, the importance of public truth-telling is not only that it reveals new information, but also provides a forum that officially acknowledges facts already known. Scholars in the field of transitional justice have emphasized that the importance of official acknowledgement of the facts is proportional to the extent to which the facts were previously hidden or disputed; the more facts are hidden or disputed, the greater the importance and significance of a correct and more complete official statement of the historical record.

Commissions of inquiry may satisfy some of the needs of victims for adequate healing and remedy by providing them with a public venue to tell their stories. In this context, commissions of inquiry may also aid in providing closure for family members of victims. Generally speaking, commissions of inquiry also deliver their findings in a timely manner, enhancing the victim-centred approach of this mechanism, especially when compared with judicial proceedings that ordinarily take much longer.

Commissions of inquiry may be established in the aftermath of major incidents where there are concerns about the ability of investigative bodies to uncover promptly, thoroughly and impartially the root causes of certain large-scale or politically motivated crimes or systemic violations. As pointed out by a previous mandate holder, State authorities that would normally be relied upon to investigate and prosecute are reluctant or unlikely to do so adequately.<sup>4</sup>

The independent structure and mandate of commissions of inquiry may also make them well suited for identifying institutional responsibility and proposing reforms. Due to the numerous sources of evidence and facts submitted to commissions of inquiry, they are often able to pinpoint the failure of particular policies and detect systemic shortcomings or practices of certain Government agencies. Lastly, commissions of inquiry can aid in identifying measures to promote reconciliation within divided societies by directly confronting past violations.

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4 A/HRC/8/3, para 12

Commissions of inquiry are particularly useful where there is a lack of public information about a specific event or issue, such as when, for reasons of national security or intelligence, certain information is secret or classified. Under these circumstances, in order to respect the principles of constructive and meaningful participation of victims in establishing the facts, truth-seeking and holding perpetrators accountable, it is essential to ensure that a victim's right to effective investigation and redress is secured. In this respect, commissions of inquiry can help to maximize the disclosure of relevant information into the public domain. Where information is received in camera, a commission of inquiry may submit an excerpt or summary of that information to the appropriate judicial authority to ensure that a State's assertion that certain information is privileged is subject to the highest level of scrutiny.

### **History and current practice**

Commissions of inquiry into torture and other forms of ill-treatment may be traced back at least to the practice of ad hoc public inquiries or royal inquiries into a defined issue in the United Kingdom in the eleventh century, and subsequently in other Commonwealth countries. In the nineteenth and twentieth centuries, public inquiries became prolific in Australia, Canada, New Zealand and the United Kingdom of Great Britain and Northern Ireland. The inquiries were appointed to advise the Government on a wide range of public policy issues, allegations of wrongdoing by Government officials and investigation into the causes of major disasters. Many other States, including Argentina, Brazil, Chile, Kenya, Morocco, Sierra Leone, South Africa, Sweden and the United States of America, have also historically or recently established commissions of inquiry with prescribed membership or given national human rights institutions the mandate to undertake inquiries more systematically in order to investigate specific crimes or events.

In general, it should be seen as a positive development if States undertake to establish a commission of inquiry in response to alleged violations, since States are accountable to the international community for their solemnly acquired obligations. Some States may, however, establish a commission to give the impression that there is a serious inquiry under way so that the international community is less likely to take action. It is appropriate to presume good faith on the part of the State that establishes

a commission of inquiry, but ultimately that good faith should be tested in the results of the exercise.

There are also examples of commissions of inquiry that have had limited success owing to other factors. In 2009, the Government of Sri Lanka dissolved the Presidential Commission of Inquiry, established to look into serious violations of human rights committed since 2006. The Commission was unable to complete its mandate as no extensions were granted owing to a lack of resources and political will.<sup>5</sup> The final report of the truth and reconciliation commission in Liberia received criticism that it was poorly drafted, lacked transparent explanation of the evidence on which it was based and contained inconsistent policy recommendations.<sup>6</sup> The law that established the truth and reconciliation commission in Indonesia in 2005 was struck down by the Constitutional Court on the grounds that the prerequisite of granting amnesty to perpetrators violated victim's rights as protected by the Constitution of Indonesia.<sup>7</sup> The truth and reconciliation commission established in the Democratic Republic of the Congo in 2003 suffered from a number of critical flaws in its structure, including, most prominently, a lack of transparency in the selection of the commissioners, who included individuals with ties to those implicated in the crimes to be investigated.<sup>8</sup> (...)

## **II. Identifying best practices and establishing standards for commissions of inquiry**

The wealth of experience in national and international commissions of inquiry is a source of multiple lessons on both good and bad practices. The Istanbul Protocol and the Principles to Combat Impunity provide examples of standard-setting that apply to the institution, objectives, working methods and outcomes of commissions of inquiry. Given the wide variety of contexts and purposes for which commissions of inquiry are created, standards should be understood to be indicative and not fully binding

5 See Amnesty International, « Twenty Years of Make-Believe : Sri Lanka's Commissions of Inquiry », ASA 37/005/2009.

6 See « Beyond the Truth and Reconciliation Commission : Transitional Justice Options in Liberia, International Center for Transitional Justice, May 2010.

7 See « Derailed : Transitional Justice in Indonesia Since the Fall of Soeharto », International Center for Transitional Justice and Commissions of the Disappeared and Victims of Violence, March 2011.

8 See « Difficult Peace, Limited Justice : Ten Years of Peacemaking in the DRC », International Center for Transitional Justice, March 2009.

as a matter of international law. Nevertheless, it is important to discuss standards as a way to determine when and how commissions of inquiry actually advance principles of international law and aid States, and the international community, in the fulfilment of their international legal obligations.

### **A. Resources**

A commission of inquiry should be given the means to conduct a serious and rigorous examination of facts, most of which will be hidden or difficult to ascertain. For that reason, it is imperative that a commission have at its disposal the financial resources to travel, to provide for witness protection, to commission reports from experts and to finance forensic investigations and examinations. A commission should be able to hire staff of confidence and with proven professional expertise, including legal counsel, who should be shielded from political influence. Technical expertise and investigatory experience should be part of the recruitment process.

### **B. International vs. national commissions of inquiry**

Where possible, national commissions of inquiry ought to be pursued before the establishment of an international commission of inquiry. Proximity to the affected population often adds to the legitimacy and potential impact of a commission of inquiry. States should, however, seek international assistance where they lack necessary resources and/or expertise. The international community has a duty to establish a commission of inquiry, using the various mechanisms available, when the State fails to break the cycle of impunity or is unwilling or unable to explore the truth and provide justice or where human rights violations threaten international peace and security. In addition, international commissions of inquiry can play a valuable role in promoting subsequent national investigations.

### **C. Composition**

The people selected to be members of a commission of inquiry should be chosen on the basis of criteria designed to ensure the independence and

impartiality of the body.<sup>9</sup> The commissioners should enjoy a stature and recognition within the local community that will inspire confidence in the public. Importantly, commissioners should be persons of such high moral character and professional achievement that victims and witnesses should feel that they can approach the commission and participate in its proceedings without fear that their testimonies might be misused.

There are various models of what to look for in the profile of members of a commission of inquiry, and each model is valid within the particular circumstances and legal culture of each State. For example, States may wish to ensure representation of the entire political or ideological spectrum, while others may not. In all circumstances, however, it is necessary for States to appoint commission members who will rise above partisanship and be first and foremost dedicated to the truth. It is important to include individuals with experience in fact-finding methodologies and assessment of the quality of evidence; for this reason, it is advisable to include at least some acting or retired magistrates or prosecutors. At the same time, it is important to reflect a wide range of expertise within the commission to ensure that the work benefits from diverse interpretations of the underlying problems. People of high moral standing from the sciences (especially medical, psychiatric and forensic sciences) and from social science and liberal arts backgrounds, including journalism, should also be included.

Where human rights violations have had a distinct ethnic, racial, or religious dimension, it is important to include people who fully understand the plight of affected communities. Under all circumstances careful attention should be paid to the inclusion of women in the composition of the commission. Of additional value is the inclusion of individuals with a gender perspective to better understand the specific ways in which vulnerable persons, including, women, children, lesbian, gay, bisexual and transgender persons, persons with disabili-

ties and persons belonging to a minority or indigenous group suffer from gross violations, including torture and other forms of ill-treatment and how they affect their communities. Geographic and cross-cultural balance in a commission is also of the greatest importance, as long as the standards of expertise and professionalism are not diminished for the sake of political balance.

In the case of commissions appointed by the international community, the appointment of members should reflect first and foremost well-recognized expertise in international law. Previous experience with commissions of inquiry has been an important factor in the success of recent commissions.

#### **D. Mandate, powers and attributions**

A commission of inquiry should be created by way of the legal instrument that is most appropriate to its context and should reflect the high importance that States give to such investigative bodies. The legal instrument establishing a commission of inquiry may be an act of parliament, an executive order or decree, or a decision of the highest courts in exercise of their investigatory functions. In all circumstances, the legal instrument establishing a commission of inquiry should identify clearly the terms of reference of the commission's mandate, including a clear temporal and/or geographic framework that is appropriate for the issue being investigated. The mandate should not excessively broaden the universe of violations to be investigated. The text of the authorizing instrument should also set out clearly the scope of the inquiry, citing with precision the events and issues to be addressed. The terms of reference should be stated in neutral language to avoid the impression of a predetermined outcome. A commission should have flexibility to amend its terms of reference in exceptional circumstances, as long as newly found elements warrant the amendment and the commissions' decision is publicly and transparently explained.<sup>10</sup>

The legal instrument should also clearly establish the powers and attributions of the commission. Regardless of whether the findings of the commission have legal force in the national jurisdiction or are guidelines for future action of State institutions, it is imperative that commissions be seen as "official" bodies whose work and outcome the State

9 The Istanbul Protocol recommends that no member of a commission of inquiry should be associated with an agency suspected of having practiced torture or with any individual, political party or State agency potentially implicated (para. 109). It also suggests that commissions of inquiry should be composed of at least three members.

10 Istanbul Protocol, para. 107.

pledges to respect and abide by. A commission must have the ability to inspect all documents in public agencies and archives, including those classified as secret or of limited distribution. A commission of inquiry should have subpoena powers; alternatively, it should be empowered to obtain evidence by applying to courts in order to summon witnesses and compel testimony, subject to the right of a person to remain silent if testimony might tend to be self-incriminating. These powers should extend to obtaining warrants for the inspection of places and search and seizure of documents and material evidence. In addition, a commission should have legally granted powers to protect witnesses, victims and their families from possible reprisal for their testimony.<sup>11</sup>

### **E. Methodology**

In discharging its duties, a commission must be careful to design a strategy for the effective discovery of every fact relevant to its mission, as set out in its terms of reference. To ensure inclusiveness and ownership of a commission's methodology, broad and genuine consultations with relevant international and national actors, including civil society, should be undertaken when drafting the commission's terms of reference. Moreover, it is important to disclose the terms of reference and working methods to the public as a means to ensure their confidence in the proceedings and ultimate findings of the commission.

Hearings that are open to the public, like those pioneered by the truth and reconciliation commissions created in South Africa and Peru, are strongly preferred.<sup>12</sup> Open hearings where victims and witnesses may speak directly to the public in their own voices are crucial to building understanding and trust in the public in the methodology used by the commission of inquiry. At the same time, it is important that open hearings be conducted in a manner that respects the dignity of each victim and witness, and protects the rights of alleged perpetrators, in the criminal law setting, from any breach in the presumption of innocence. The preference for open hearings should be without prejudice to some exceptions made for testimony to be

received in camera, as required, for example, to ensure confidentiality and the security of victims or witnesses or when there are legitimate claims of national security interests.<sup>13</sup> Under no circumstances should "secrets of State" be invoked as a justification to conceal the commission of human rights violations. The members of the commission of inquiry should alone be the judges of whether confidential or closed proceedings are necessary. Only in exceptional circumstances should hearings be confidential; in such cases, the precise justification for the confidentiality must be transparent and disclosed to the public.

### **F. Evaluation of evidence**

The purposes of a commission of inquiry warrant a more flexible approach to rules of evidence, including the credibility of witness testimony.<sup>14</sup> In assessing the credibility of evidence, a commission of inquiry should give special weight to corroborated testimony and to testimony subjected to cross-examination. A commission should also apply general rules in their assessment of the credibility of witnesses, including demeanour, subject to cultural and gender sensitivities. A commission should always accept testimony that is not subject to cross-examination, and should also avail itself of testimony that, if rendered in court, would be excludable as hearsay.

### **G. Relationship with prosecutions**

By itself, a commission of inquiry is never sufficient to fully satisfy a State's obligations under international law with regard to torture and other forms of ill-treatment. This framework demands that States (and, in default, the international community) ensure truth, justice, reparations for victims and guarantees of non-repetition through deep institutional reform. A policy or practice designed to fulfill one of those objectives to the detriment of others would violate well-established legal obligations.

11 *Ibid.*, para. 108.

12 Perpetrators must not, however, be permitted to dominate or intimidate proceedings whereby victims are pressured into forgiving in the interest of national reconciliation.

13 The Arar Commission heard the testimony of 85 witnesses in public sessions. The Order in Council establishing the inquiry set out directions for dealing with information that was subject to National Security Confidentiality. See the Report of the Events Relating to Maher Arar: Analysis and Recommendations, Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, 2006, sect. 3.2.

14 47 Istanbul Protocol, para. 117.

Commissions of inquiry should therefore be considered complementary to other mechanisms, including criminal investigations and prosecution of perpetrators, the provision of reparations to victims, and extensive reforms to institutions, including the vetting of public officials. When carried out simultaneously with prosecutions, commissions of inquiry play a very important role in establishing a more comprehensive and nuanced picture of policy decisions (whether adopted publicly or in secrecy) that have resulted in patterns of torture and other forms of ill-treatment. The first duty of a commission of inquiry is to explore and develop facts in a rigorous and comprehensive way so that the precise details of torture campaigns may be discovered, protected against tampering or destruction, and disclosed to the public. This process of truth-seeking requires strict adherence to the guidelines set forth in the Istanbul Protocol. The information gathered by a commission of inquiry can also orient the investigative and prosecutorial strategies without substituting them. Moreover, the findings of a commission of inquiry can inform policy decisions of the executive or legislative branches, which should not depend on the outcome of trials. In that manner, the findings and recommendations of commissions of inquiry can help to fill gaps in the protection of human rights in the future, without prejudice to the determination of individual guilt or innocence, which only courts can make.

In countries emerging from post-conflict situations or repressive regimes, there is a need to prioritize reform to the judicial system so that the courts may be considered independent, impartial and effective enough to meet the State's obligations to prosecute and to guarantee fair trials. In such circumstances, employing a commission of inquiry as a first step in the process of establishing truth and justice may be not only useful but necessary.

In all cases, however, certain steps must be taken to ensure that the activities of a commission of inquiry do not jeopardize criminal due process standards, including, importantly, the rights of potential criminal defendants. Commissions of inquiry should not identify individuals as being criminally responsible for acts described in the final report if doing so violates the rights of the identified individuals, who should be presumed to be innocent, and may inject additional bias

into any subsequent official criminal investigation or prosecution. It may be possible to "name names" in a non-accusatory manner, without necessarily affirming criminal responsibility.<sup>15</sup> However, where a commission determines that evidence strongly indicates participation by one or more individuals in crimes within its mandate, it should submit the names and the underlying information or evidence to relevant judicial or prosecutorial bodies for the latter to proceed in accordance with procedural and substantive laws applying to criminal justice. Under no circumstances should a commission of inquiry delay or obstruct formal criminal investigation and prosecution of torture and other forms of ill-treatment.

In its recommendations, a commission of inquiry should identify clearly the ways in which the report is intended to be utilized by other mechanisms, including, but not limited to, investigation and prosecution of torture and other forms of ill-treatment, the provision of remedy and reparations to victims, and the prevention of torture and other forms of ill-treatment.

#### **H. Reporting**

The instrument of authorization must clearly empower a commission to issue a public report of its findings.<sup>16</sup> Such a report must be published as an official document and circulated widely without interference of any sort. The contents of the report should be determined exclusively by the commission members and not subject to any form of prior censorship by any governmental authority. If commission members do not agree on every aspect of the report, dissenting and concurring opinions by individual commissioners should be made a part of the record<sup>17</sup>. In addition, to ensure public confidence in the working methods and findings of a commission of inquiry, it is essential that the public be informed in advance of when to expect the publication of the commission's final report.

The final report of the commission of inquiry should be comprehensive and fulfill all aspects of

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<sup>15</sup> As seen for example in the reports of the commission on the truth for El Salvador and of the United Nations Independent Special Commission of Inquiry for Timor-Leste.

<sup>16</sup> Istanbul Protocol, para. 108 (b).

<sup>17</sup> *Ibid.* para. 118.

its terms of reference as set forth in the legal instrument that created the body. Beyond a recitation of facts, the report of a commission of inquiry should attempt to provide an accurate picture of the social and political background against which the acts of torture and other international crimes took place. Crucially, the report should identify loopholes in the public and private institutional order that have allowed for the breakdown of legal and procedural protections and led to a culture of impunity for the crimes investigated by the commission. The report should make concrete and detailed recommendations on how to restore checks and balances of “horizontal accountability” between branches of Government and the effective functioning of institutions of control.

Evidence will often point to key actors responsible for the collapse of the rule of law, because institutions often break down when public officials in charge of them fail to live up to their duties. Nevertheless, the commission should resist the temptation to “name names”. As stated above, officials must benefit from the presumption of innocence, and their conduct should be judged by the courts, not by a quasi-judicial investigatory body. This rule is also applicable to those individuals whose participation in the alleged criminal conduct was indirect. In all cases, the commission should submit the names and the preliminary evidence against each suspected individual to courts or prosecutors for appropriate legal action. If the commission decides to separate institutional failings from potential criminal activity and to name names of persons responsible for the former, it should still institute a measure of due process for those so identified; at the very least they must be able to appear before the commission, confront the allegations about their misconduct and offer their own version of events.

The report of the commission of inquiry should be published widely and in a manner findings of fact and the legal analysis that supports its conclusions. The report should also contain detailed recommendations for all branches of Government (or to the international community, if applicable) on how to fulfill the State’s obligations with regard to truth, justice, reparation to victims and guarantees of non-repetition. Through its highest authorities, the State should respond promptly to the publication of the commission’s report,

indicating its acceptance or rejection of each recommendation, with carefully reasoned explanations, and ideally a timetable for implementation of the recommendations.<sup>18</sup>

## Conclusions

Commissions of inquiry into torture and other forms of ill-treatment are strong and flexible mechanisms that can yield substantial benefits for Governments, victim communities and the wider public. Unlike other mechanisms commonly engaged in the aftermath of allegations of torture and other forms of ill-treatment, such as criminal investigations and prosecutions, commissions of inquiry provide unique opportunities for a deeper understanding of the underlying context in which violations were committed, review of governmental policies, practices and institutional shortcomings, truth-telling and contributing to the healing of victim communities, and independent expert recommendations on reparation and guarantees of non-repetition. Commissions of inquiry can also play an integral role in providing impetus and eventually facilitating the formal investigation of current systems or legacies of torture and other forms of ill-treatment, and pave the way to effective and fair prosecutions. In these ways, commissions of inquiry may aid States in the fulfilment of their international legal obligations when allegations of torture and other forms of ill-treatment arise. However, in the absence of judicial mechanisms, a commission of inquiry alone will not satisfy a State’s obligation’s.

For States interested in establishing a commission of inquiry, the Istanbul Protocol and the updated set of principles for the protection and promotion of human rights through action to combat impunity<sup>19</sup> provide key guidance for the elaboration and implementation of international practice. The present report complements these highly regarded documents and previous work of the special procedures by identifying additional recommendations and best practices that are specific to the conduct of commissions of inquiry into torture and other forms of ill-treatment.

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<sup>18</sup> *Ibid.*, para. 119.

<sup>19</sup> E.CN.4/2005/102/Add.1.



# Morocco: Towards the Creation of a New Political Community

Driss el Yazami<sup>1</sup>

On 6 January 2006, the king of Morocco, in the presence of dozens of former victims of serious violations of human rights, as well as all senior officials of the State, chaired a working session with hearings on two major reports. These were the report of the Equity and Reconciliation Commission (ERC), which had been created two years earlier, and the Fiftieth Anniversary Report, which covered the history of human development in the 50 years since the independence of Morocco, and highlighted the major challenges facing the country in the future.

Two other decisive moves were made in the years leading up to the anniversary. The first was official recognition Morocco's cultural pluralism, specifically the Amazigh (Berber) people, and the creation of the RIAC (Royal Institute of the Amazigh Culture). The second was a reform of family law, which marked one of the most important changes in the status of women in the Islamic world since the Tunisian reform fostered by President Habib Bourguiba in 1956. The reforms in Morocco were made after an intense public debate that extended over two years and split society between supporters, on the one hand, and opponents of change, on the other. This culminated in two massive yet peaceful demonstrations organized by each of the two camps – one in Casablanca, the other in Rabat.

## Reform Prior to the Arab Spring

The turn of the century was thus marked in Morocco by the launch of a series of socio-economic and political reforms that focused on a number of central issues in human rights, specifically gender equality, cultural pluralism, civil and political rights,

and economic and social rights. Looked at in its regional context, where rampant despotism in all its forms still prevailed – the Arab Spring was still some time away and almost impossible to predict – Morocco took the lead and paved the way for daring and significant reform. Refraining from imperialistic neo-conservative rhetoric calling for radical change in the MENA region, by force if necessary, Morocco succeeded in making a smooth and soft transition thanks to two major factors. These were the deeply-rooted institution of royalty and the different factions of civil society. These former political opponents, including those from the left wing, joined forces to invest in human rights. Neither the agenda nor the content of the reform were dictated from outside. The effort came as a natural response to the national, domestic need for change.

As the Secretary General of the International Federation of Human Rights at that time, headquartered in Paris, I was fascinated by the two demonstrations on the status of Moroccan women. More important than its outcome, the intensity of the social debate and its peaceful nature gave me renewed hope about the country's evolution. At the bottom line, that is what democracy is all about: the ability of a whole society to engage in a democratic and peaceful debate on controversial issues, divergent views and contradictory visions of a given topic – in this case the central issue of equity and social justice. Obviously, this is not enough to claim a firmly rooted system of democracy, but I strongly believe that it is one of its essential components, and a good, solid step in the right direction. It is in this spirit that I subscribe wholeheartedly to the agenda of the ERC, to be able to contribute to social reform, step by step, here and now.

## Can Lasting Reconciliation be Achieved? If so, how?

The Truth Commission began its work with a controversy and a legacy. Its remit requires it,

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on the one hand, to establish institutional accountability for violations which took place between 1956, the year of independence, and 1999, without publicly naming the individuals responsible. This ban on “naming and shaming” dashed the hopes of some civil society stakeholders, leaving them with no expectations whatsoever from the ERC. Yet the provision was, of course, one of the key elements in the political compromise that permitted the creation of the ERC in the first place, in a country that had not undergone any significant political change for so long. From our perspective, what matters most is to achieve a series of recommendations which will pave the way for the resolution of political, legal and institutional shortcomings. It was these deficits, rather than the actions of certain individuals, which were originally behind the serious violations of human rights. We also advocated a comprehensive approach to redress that will, in every single case, uphold the inalienable right of those victims who wish to take action to request punitive damages through the courts of law. In fact, the majority of the victims took up this option by filing their cases with the ERC in the hope of establishing the truth and settling their damages claims.

Some families nonetheless chose to press charges, and I know some of my friends’ lawyers, including those working in international human rights organizations, who continue to pursue this avenue to this day. With this in mind, I recall something my sister said to me at the time, while contemplating her ten-year-old son with a faint smile: “YES to forgiveness, provided we are promised in return that what we have gone through will never, ever happen again”. It is indeed the same position adopted by some of the victims who were subpoenaed to testify at the hearings. Although totally opposed to the continuing anonymity of individual officials, they all honoured the moral contract we had with them before their live testimony on television.

This shared decision (by members of the ERC, all the politicians concerned and nearly all of the victims) to opt for a kind of voluntary amnesia and tacit forgiveness seems to me today to be an eminently political choice. In other words, it represented a quasi-consensus that permitted reasonable compromise, and which opened up the door to endless possibilities of institutional reform,

without permanently alienating any of the victims’ rights. A judicial appeal has always been possible, and there has never been any form of ordained amnesty.

The legacy that we inherited at the ERC is the Independent Arbitration Commission, which was set up in 1999 to compensate victims of serious violations of human rights, and whose mandate had been completed just as the ERC’s task force was about to start its new mission. Dealing with nearly 8,000 grievances, the Commission managed to rule on about half of the cases. The ERC took over the other half, most of which were submitted after the deadline, but still resulted in new claims being filed. A backlog accumulated, and the ERC had to look into almost 20,000 compensation requests received either directly from victims themselves or their legal counsel. The working groups set up for this purpose at the ERC offices reviewed the criteria established by the Arbitration Commission, and eventually adopted a holistic approach to the compensation process. This included explicit reference to the responsibility of the state for the violations, determining the nature and form of compensation schemes (taking into account the gender approach), providing health assistance and treatment, following up on the administrative situation of victims and, finally, instituting social integration measures for approximately 1,500 people.

Even today, arbitration decisions are made by the monitoring group set up within the National Council of Human Rights (known as the CNDH), whose main task is to follow up the implementation of the recommendations ushered in by the ERC. While more than 95% of the files are considered closed, a few hundred cases – specifically those involving social integration – are still unresolved. Victims who have not benefited from these supplementary measures believe that their requests were unfairly dismissed and their rights denied. Every now and then, a few of them come forward and ask for a form of life pension. Others demand a review of the allowance they have been awarded. With the ERC having completed its mandate and the CNDH restricted to mere follow-up monitoring, there is a clear lack of any legal foundation on which to answer such claims, except where evident material errors have been made.

We can have endless debates on the criteria set and the methodology adopted in this field. The fact of the matter is that, in the Moroccan experience, the founding members of the Truth Commission laid down in its remit five central missions of equal importance:

1. Determine the process for individual compensation cases
2. Establish the truth, especially in the cases of forced disappearances
3. Determine institutional responsibility
4. Explain the historical context of the most serious human rights violations, and
5. Draw up appropriate recommendations to prevent such violations occurring in the future.

However, if the last three of these missions all form part of the reparations package, it is unlikely that this overall approach has been understood and accepted by all. Indeed, certain groups still believe that the financial dimension should prevail, to the detriment of the strictly political dimension of the ambitious work of the ERC.

To understand this situation fully, we must examine its historical context. The individual compensation process started in Morocco as early as February 1993, with the payment for a limited period of a monthly pension to those “missing” who had been released. The year 2000 marked the start of the reintegration into the workforce of former political prisoners, and the payment of their wages, backdated to their arrest. This was followed by the creation of the Arbitration Commission, and then the ERC. With hindsight, however, we might ask if the ERC might not have been better spared such mission, leaving sole responsibility with a follow-up team/committee.

### **Communities and Individuals: Towards a Policy of Rehabilitation**

In fairness, I should say that, while leading the mission to recover compensation for individuals, the members of the ERC instantly sensed the risk that their actions would be reduced simply to the doling out of sums of money which, regardless of their value, would not advance reconciliation. We were therefore quick to stress the importance of public hearings and community compensation schemes.

The community compensation process began in September 2004 with a seminar organized by a local association in Agdez – a city which had been the location of a secret detention centre – and ended with a national symposium held a year later by an intra-association Steering Committee, set up by the ERC and conducted in the presence of more than 250 other associations. The recommendations made at that meeting were reproduced in full in the final report of the Truth Commission. Since the end of its mandate, thirteen regional coordination action plans have been put in place which unite civil society, local authorities and the state’s external services. Six years on, where do we stand?

The programme was geared towards regions which had experienced serious violations of human rights or been the site of detention centres, and communities which were felt collectively to have suffered such violations. Working in consultation with all of the parties concerned, the programme reached some 20 agreements which were signed by various state departments and institutions. In one approach, it has financed around 130 projects with widespread community support, such as income-generating activities for women, including socio-cultural centres, and schemes for the preservation of national heritage, etc. Thanks to a recent agreement with the government, major infrastructure projects (roads, medical centres, etc.) will go ahead in fiscal 2012-2013.

However, a real challenge persists, and is the subject of some debate at present. This challenge is to ensure the sustainability of certain schemes, as well as the viability of economic projects. These endeavours, carried out in a relatively short period of time, were accompanied by a concerted effort to deal with the past. This work is also considered by the ERC as one of the essential elements of reconciliation at the community level, which is possible only when certain conditions are met. This is a point to which I will return later.

Pressured by former members of truth commissions who came to provide us with training when the International Centre for Transitional Justice was set up, we were concerned from the outset, in the first months of the ERC, about the conditions which had to be met to implement the final recommendations as quickly as possible. In my

view, there were four such conditions, which were necessary but not, in themselves, sufficient:

1. Establish political alliances on as large a scale as possible
2. Develop specific recommendations
3. Involve authorities and follow-up committees to ensure the rapid implementation of a process to develop recommendations and, finally
4. Define very specifically the problems affecting human and financial resources.

It is this working philosophy which facilitated action plans which might, at first glance look like typical local development programmes. Such action plans gain in political significance, however, if we keep in mind that the most important thing is to restore a certain degree of confidence in the promises made by the state, spark debate among all sections of society at the national level, and give those who were deprived of everything –especially their political and social voice – the opportunity to act independently and make the transition from victim to citizen.

This political dimension was, of course, amplified by the public hearings which were organized, after much internal debate, between December 2004 and February 2005, and broadcast live on television and public radio stations. Their most striking feature was the testimony of women, and even today, for the majority of the population, the hearings remain the clearest evidence of the outstanding work done by the Commission. These hearings took two forms. The first involved the direct testimonies of former victims, who were asked to describe their personal experiences, without interruption and in the language of their choice. They told their stories to members of the Commission and selected public audiences from the city. The second type were themed round-table discussions at which intellectuals and social stakeholders attempted a pluralistic re-reading of Morocco's history.

These victim hearings were the turning point in the enormous process of social debate, human compassion and free expression. This process also included colloquia, organized by the ERC, on topics ranging from imprisonment literature, the literature of fear and the concept of truth, to political trials, etc. Thousands of articles and dozens of complete studies were published during this two-year period.

Again, a number of initiatives were taken by civil society, including attempts to challenge the work of the ERC.

The dynamics involved in revisiting history (however relative), in pluralistic debate and in controversial yet peaceful disputes is one of the essential elements of transitional justice. The objective is not necessarily to reach a degree of national consensus, but to learn to cohabit collectively and peacefully to manage divergent points of social discontent. When I hear the term "reconciliation", I see it as us embarking together along a long and difficult road, with the delicate and complex task of confronting what we have done to each other, trying to understand the deep wounds and not forget them but put them into context. We must then consign them, beyond human memory, to our national history and the history of our fellow human beings. In other words, we must dare to step in where angels fear to tread and visit what the young Moroccan film-maker Leïla Kilani called "our forbidden places" to recreate a healthy and strong political community.

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

In the process of our investigation, we realized how arduous the search for the truth would prove. We soon had to deal with the deplorable state of public archives. We found out that the law which was then in force dated back to 1926, and that there were few, if any private archives available. It was often very difficult or disappointing, to say the least, to access scarce funds for our work. An inventory of the doctoral theses in humanities in Moroccan universities lead to a conclusive result, however. Almost all of the history theses and research covered the period prior to the protectorate (1912). We therefore worked primarily on the basis of activist history and oral testimony (from victims or former officials), attempting to clarify this information using what we know about the political history of the country. This was hardly an academic approach. Trying to synchronize as systematically as possible the oral data thus collected, and setting it against the stories told in the thousands of written complaints received, we are slowly but steadily knitting together bits and pieces of the new fabric of truth.

By the end of its mandate, the ERC had achieved some significant results, as the final report clearly showed. Nevertheless, the fact that certain famous cases of disappearance, like that of Mehdi Ben Barka, remain unresolved has led to legitimate disillusionment. Certain periods of violent political clashes in the Rif region, or instances of serious discord within the nationalist movement just after independence, for example, remain insufficiently documented. Existing facts and suspicious findings beg for answers. Thus, the number of victims of urban riots, as verified by the ERC, exceeds that of the claims received from families of victims.

We are discovering, along with the whole of Moroccan society, that we suffer from what one might call an inflation of memory and a deficit of concrete history. It goes without saying that an urgent action plan must be put in place to remedy this, with a genuine attempt at academic rigour. This is also the very reason that the Commission has issued several recommendations for updated archiving policy, sustained by an on-going programme of academic training and reinforced by research and an outreach strategy in the form of new museums.

Subsequently, we were pleased to learn that the Modern Archives Act was adopted by parliament in 2007 and the *Archives du Maroc* office was finally officially inaugurated in 2011. It is currently being equipped. In this respect, the first inventory of both state-owned and private archives is expected to be made public shortly. A research study on the modern history of Morocco has been instituted, and a master's degree course on the same subject is now open to students and researchers. The Moroccan Center of Modern History will open its doors in October 2013. Three major colloquia were held in Al Hoceima (July 2011), Dakhla (December 2011) and Ouarzazate (January 2012) to highlight the establishment in the long term of a series of history museums in different parts of the country. Indeed, as part of the Community Relief Programme, many associated projects have received funding to promote research on the national collective memory. In the same spirit, a number of recently-released films, publications and plays have all addressed the same concerns with a similar outlook. This has encouraged stakeholders in society to contribute in their own

way to this pluralistic re-reading of the history of Morocco.

### **Reform Agendas Beyond the Arab Spring**

Since July 2011, Morocco has had a new constitution, which was drafted by an Advisory Board consisting of 19 scholars from different areas of academia, the judiciary and history. It was chaired by a former member of the ERC, assisted by two former members of this Commission. This may be read either as pure chance, or a sign of a serious and continuing commitment to reform. In any case, the guarantee that the past will not be repeated, as recommended in the ERC report, was acknowledged as a reference that fed into the new constitution. At present, a new forum is taking place to launch a nationwide debate on the reform of the justice system. In Tunisia, Libya, Yemen and Egypt, dozens of initiatives are developing out of transitional justice, heralding what may be a new wave of Arab reform, following on from certain Latin American and African countries. Unfortunately, we can already foresee the first queries and controversies, just as we have experienced before. The important thing, however, is to take the first step: to dare look at this past loaded with human suffering, and try to mould it into a strong and safe collective future.



# The Fate of the Truth and Reconciliation Commission in the Federal Republic of Yugoslavia – Serbia

Vojin Dimitrijević<sup>1</sup>

## 1. Fundamental Changes in 2000 in the Structure and Policies of Serbia and Montenegro within the Federal Republic of Yugoslavia.

The creation of the Federal Republic of Yugoslavia in 1992 was a reaction to the dissolution of the Socialist Federal Republic of Yugoslavia. The series of conflicts remembered as the war in Yugoslavia took place in the 1990s, initially resulting in the dissolution of that state and thereafter in the presence of the new state of Federal Republic of Yugoslavia, which was composed of only two units of the former Yugoslavia, Serbia and Montenegro.

Before the democratic changes which took place in Yugoslavia and Serbia in October and December 2000, war crimes, reconciliation between individuals, peoples and states in the region of the former Socialist Federal Republic of Yugoslavia (SFRY), the prosecution of those responsible for the tragic events and a general coming-to-terms with the past were issues which could only be raised within civil society.

## 2. The Truth and Reconciliation Commission of the President of the FRY.

The President of the FRY, Vojislav Koštunica, established the Truth and Reconciliation Commission by Decree on 30 March 2001. According to the Decree, the mandate of the Commission was to “organize research work to uncover evidence in connection with the social, ethnic and political conflicts which led to the war and shed light on the causes of those events; inform the domestic and foreign public about its work and findings; establish co-operation with similar commissions and other bodies in the neighbouring and other countries for the purpose of exchanging operational experience.” The President did not give a constitutional or legal basis for establishing the Commission, but instead cited the “obligation of the President

of the Republic to oversee compliance with and enforcement of constitutionality and legality and to contribute to the exercise of human rights and civil liberties”.

In the Decree, 19 individuals were appointed to the Commission, all of them from Serbia. Three members, Latinka Perović, Vojin Dimitrijević and Tibor Varady, immediately submitted their resignations. The first two explained their reasons in open letters to President Koštunica. Latinka Perović said that she had expected the Commission to be a fully independent rather than a state-appointed body, while Vojin Dimitrijević wrote that, in his view, the Commission lacked sufficient powers (for example to subpoena witnesses), its mandate was too broad (going back too far into the past) and it lacked a member from Montenegro, Serbia’s smaller partner in the federation.

At their first session, the remaining members of the Commission adopted the Commission’s Basic Rules of Procedure, including the following:

“The purpose of the Commission is to confront the truth on the conflicts in the SFRY and the successor states, which resulted in crimes against peace, numerous violations of human rights, as well as the laws of war and humanitarian law, and thus to contribute to the general reconciliation inside Yugoslavia and with neighbouring nations” and ... “The Commission shall comprehensively examine and establish the causes and courses of conflicts conducive to the disintegration of the former state and the war, which caused enormous human suffering and destruction in the past decade.”

The “Commission shall organize research on the state crisis and social conflicts which resulted in the outbreak of the war. The Commission shall also seek to clarify the chain of causality of the events concerned. The Commission shall notify the public on the results of its work, as established by these

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and other Rules of Procedure the Commission may adopt.”

The Commission was also expected to “seek to establish cooperation with similar commissions and other governmental and non-governmental bodies in the neighbouring countries, as well as with international governmental and non-governmental organizations and bodies.”

Certain provisions were added to the Rules on 10 December 2001. They provided that the Commission must complete its work “three years after the commencement of its activity”. At its first meeting, the Commission adopted the elements of its programme document. According to the rather overblown wording, “attempting to find the truth and accomplishing historical reconciliation means, *inter alia*:

- openly appraising the situation in a state which is materially impoverished, morally damaged, extensively neglected, spiritually confused, destruction-riddled, eroded by separatisms and demolished by nationalisms;
- coming face to face without complexes and in a rational manner with the frightening contours of the image the world has formed of the Serbs and Serbia in the last decade of the 20th century;
- reaching new self-assertion and identity by reappraising the demographic state of the nation, its physical capacities, economic and technological potential, natural resources, social needs, institutions, political structures, national consciousness, ideas, the dangerously eroded standards of moral values, knowledge, tradition, habits, patriarchal and modern environments;

President Koštunica filled some of the vacated posts and appointed new members to the Commission on 28 October 2002. Among the newly appointed members were also several individuals from Montenegro, as well as those belonging to the Catholic and Muslim faiths.

Very little has been heard about the work of the Commission since the conference entitled “The Search for Truth and Responsibility – Towards a Democratic Future”, organized by Radio B92 in Belgrade from May 2001 to 21 January 2002. Then, its members announced that the Commission would start to work seriously in order to complete most of its projects, the most important of them being the creation of a “huge body of documentation on

events in the territory of the former Yugoslavia in the last fifty or more years”, and assembling evidence “of a huge number of persons – victims, witnesses, perpetrators – of all them related to dramatic events”. They stated that these testimonies “would be public”. Other Commission projects were presented as a study on the war of information and the use of ethnic stereotyping, as well as the publication of collections of documents related to the dissolution of the SFRY and on Kosovo and Metohija. These have never materialized.

No public hearing has ever been held by the Commission. Instead, the work of the Commission was discussed at a round-table organized by the Commission itself on 28 May 2002. As at the conference in 2001, some participants criticized the activities of the Commission, its composition, methods and programme. Within the Commission itself, divergence emerged between its new coordinator, Aleksandar Lojpur, and other members. Lojpur, while protesting against foreign pressures on the Commission to deal only with the responsibility of the Serbs, deplored the absence of any moral or political condemnation of crimes in Serbian society. In addition to critics of the Commission, invitees to the round-table included those who used this opportunity to attack those non-governmental organizations in Yugoslavia who had been advocating confrontation with the past and cooperation with the ICTY.

The statements of the Commission and of its members drew a degree of media response. The basic attitudes were probably best defined by the political philosopher Dušan Pavlović in his column in the periodical *Reporter*:<sup>2</sup>

“There are now two dominant approaches to war crimes ... The first has been advocated by the Commission ... the other by some non-governmental organizations. Roughly speaking, the followers of the former approach do not deny that Serbs have committed war crimes, but their principal aim is to demonstrate that the crimes of the one caused the crimes of the other, so that the responsibility for crimes is equally distributed among all nations. Neither does the other side deny that the respon-

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2 9 July 2003, p. 19.

sibility is shared, but emphasizes the fact that it is necessary to establish the guilt of the Serbs.”

In response, Mirjana Vasović, the new spokesperson of the Commission, published an article in the journal *Prizma* dealing with the issue of guilt and responsibility.<sup>3</sup> She believed that Serbs had been victims of a Manichean rhetoric of hatred, based on negative stereotypes created about them, and that those who bore the most responsibility for war had been those who created the fertile conditions for it, including the spread of such stereotypes. Pavlović asked why Manichaeism (a doctrine based on the struggle between eternal good and eternal evil) was controversial in the cases of Sarajevo, Srebrenica and Vukovar. “Did Sarajevans bomb themselves, were the wounded in the Vukovar hospital killed by Croats disguised in Yugoslav People’s Army uniforms, did the seven thousand inhabitants of Srebrenica commit suicide? A crime necessarily has a Manichean structure, because one side is guilty and the other not. If it is different, we are not dealing with crime...The Commission which was established by the Serbian State should nevertheless preoccupy itself with Serb crimes... What the Commission does not understand is that it is not there to pass judgment on anyone, but to make citizens face the truth ....”<sup>4</sup>

### 3. Conclusion.

The Commission established in the Federal Republic of Yugoslavia was a failure. It has disappeared quietly without leaving behind a single document relevant to its stated purpose. Now is probably the right time to diagnose the causes of this failure.

a. The Commission was established by the President of the FRY by his own Decree and without consultation with any other authority. The constitutional basis for the Commission has never been clear and has not been convincing to the public.

b. In spite of the fact that the bloody conflicts in Yugoslavia were inter-ethnic, inter-religious, and ultimately inter-state confrontations, the

Commission was composed only of citizens of the Federal Republic of Yugoslavia, among them predominantly Serbs. Originally, only Serbian-Orthodox clergymen were members of the Commission. Later efforts to appoint representatives of other ethnic groups and religions were weak and unconvincing.

c. The Commission had no practical powers, especially when compared to some more vigorous bodies of a similar nature. The Commission could not summon witnesses and compel them to testify. It relied only on voluntary statements by interested persons, most of them residents of Serbia and refugees from other parts of Yugoslavia.

d. The fundamental failing of the Commission was its very broad mandate. It wanted to concentrate on the widest possible causes of the conflicts in the former Yugoslavia, and also to go very far back into history. This may lead to the conclusion that the founder of the Commission and most of its active members had a hidden agenda. We may rightfully assume that their aim was to exonerate Serb excesses in the Yugoslav wars, to relativize the responsibility of the persons suspected to be war criminals by proving that history had not been on the Serbian side for much of history, so that the conflict had been prompted primarily by the grudges and prejudices of others against Serbs, and that Serbs had only been defending themselves.

e. The very deep historical mandate of the Commission and its practical work manifested a lack of interest in matters that are usually the centre of attention in such bodies. Aside from a very general consideration of the nature of conflicts and their deeper causes, there was no effort to study specific traumatic incidents – events which resulted in a massive loss of life and casualties – to clarify them and to apply to them the standards of humanitarian law.

### 4. New Initiatives.

The work of this Truth and Reconciliation Commission is completely forgotten ten years on. In terms of transitional justice the burden of confronting the past has been left to the International Criminal Tribunal for the Former Yugoslavia (ICTY) and, more recently to some national and hybrid courts in Serbia, Croatia and Bosnia and Herzegovina. Establishing the truth through court decisions has its disadvantages because the courts cannot fully grasp the whole environment in which the

3 “Pobornici ‘zvanicne verzije’”, *Prizma*, May 2002, p. 40. The article was reproduced in the daily *Danas*, 20 June 2003, p. 6. and 21 June 2003, p. 6

4 Professor Vasović, also engaged in a lively debate with Teofil Pancić, a columnist of the Belgrade weekly *Vreme*. He went so far as to call the Commission a body “to avoid truth, make responsibility relative and reconciliation ridiculous”. *Vreme*, 28 November 2002, p. 77. Previous instalments in their exchange can be found in *Vreme* on 14 and 21 November 2002.

offences were committed and enter into the deeper causes of conflicts.

As a consequence, there have been efforts to establish truth commissions, which take into account the complexities of the wars, bearing in mind that they included parties of different ethnic origin, religious persuasion, and historical background. A valiant effort to fill this gap comes from an association of non-governmental organizations, led by the Humanitarian Law Fund in Belgrade, which intends to organize a Regional Truth and Reconciliation Commission (REKOM). The organizers have sought and obtained support for this idea from several heads of state and government in the area of the former Yugoslavia, but this project still faces practical difficulties. In spite of this, there appears to be no other way of confronting the past than through an independent commission of respected and trusted individuals.

# When Politics Hinder Truth: Reflecting on the Legacy of the Commission for Truth and Friendship

Galuh Wandita<sup>1</sup>

In 2005, the governments of Indonesia and Timor-Leste announced the establishment of a bilateral truth commission, the Commission for Truth and Friendship (CTF), tasked with establishing “the conclusive truth” about the violence that took place during the referendum in East Timor in 1999. The CTF was formed as the activities of Timor-Leste’s own truth commission (CAVR) were winding down. The CAVR was mandated to seek the truth about the extent of and reasons for human rights violations committed between 1974 and 1999.

There was considerable overlap in the mandates of the CAVR and the CTF. In fact, the CTF’s Terms of Reference, agreed by the foreign ministries of the two countries, required that the Commission evaluate the work of the CAVR, the inquiry conducted by Indonesia’s national human rights commission (known under its acronym KPP HAM on East Timor), and the parallel trials held in Dili and Jakarta on the 1999 violence. Three commissioners from the CAVR joined the CTF, and some key personnel were also recruited within the executive team. During its three years of operation, civil society groups in the two countries criticized the CTF because its mandate included the possibility of recommending an amnesty for the perpetrators, and the public hearings organized by the CTF provided an uncontested forum in which Indonesian officials implicated in the violence could defend themselves. However, to the surprise of many, in 2008 the CTF submitted its findings to the two presidents of Indonesia and Timor-Leste, affirming that Indonesian security forces were

responsible for crimes against humanity committed in 1999. President Susilo Bambang Yudhono’s endorsement of this report was a breakthrough in Indonesia’s official stance in denying crimes of the past. However, a joint statement of regret by the two leaders was a weak substitute for a genuine apology. Four years later, very few of the key recommendations have been implemented. It is time to revisit the work of the commission, and attempt to understand its legacy.

## **Transitional Justice in Timor-Leste: A Brief Overview**

After the arrival of peacekeepers in East Timor in September 1999, the UN deployed a Commission of Inquiry that found evidence of crimes against humanity, and recommended the establishment of an international court. Ultimately, however, good will towards the newly elected Indonesian President Abdurrahman Wahid, and the fear that pushing Indonesia too much on justice might bring about violent repercussions, resulted in a compromise approach. This approach combined two elements: the establishment of a UN-supported serious crimes process in Timor-Leste to try members of the pro-Indonesia Timorese militia who committed serious crimes, and the establishment of a human rights court in Indonesia for officials and commanders complicit in the commission of these crimes.

In preparation for trials in Jakarta, a groundbreaking inquiry was conducted by Indonesia’s human rights commission, KPP HAM on East Timor, to investigate the crimes committed during the 1999 ballot. Members of the team examined the evidence rigorously, exhuming a mass grave in West Timor and questioning high-level military officials, and finally naming 29 individuals as the subject of further investigations.<sup>2</sup> The report was released to the public. This and international pressure pushed

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2 A prominent member of this team was human rights lawyer Munir, who was later fatally poisoned with arsenic during a flight from Jakarta to Europe in 2004.

the Attorney General's Office (AGO) to prosecute the case in the then newly-established ad-hoc human rights court in 2000.

However, by 2008, this brave venture into the realm of justice had all but stalled. Of the 18 persons indicted and tried in Jakarta's ad hoc court, only six were convicted at first instance. By the time the CTF had completed its mandate, all six convictions had been overturned on appeal. The last remaining person convicted for crimes against humanity, former militia leader Eurico Guterres, was freed in 2008. He lives in the Indonesian half of the island of Timor and is active in local politics, as a member of an Indonesian political party. There has been a similar outcome with other important cases adjudicated by the ad hoc and permanent human rights courts in Indonesia. To date there has been a 100% acquittal rate for all the serious crime cases that have gone through Indonesia's courts.

Justice has fared a little better in East Timor. In 1999, the Security Council established a UN mission with a broad mandate "to exercise all legislative and executive authority, including the administration of justice". The UN established a "hybrid court", adopting legal breakthroughs from the Rome Statute of the International Criminal Court and establishing a special panel within the Dili District Court with jurisdiction for genocide, war crimes and crimes against humanity, murder and sexual offences. The court convicted 84 persons, mostly low-level militia members, for crimes against humanity. However, by 2010 all of those convicted had been released having been pardoned by the President.

The CAVR, operating between 2002 and 2005, had three main aims: to uncover the truth about human rights violations that took place from 1974 to 1999; to support a community-based reconciliation process for former militias who committed minor crimes; and to assist victims in restoring their dignity. After collecting close to 8,000 testimonies, and conducting public hearings in Dili and other districts, the CAVR completed its final report in October 2005, and handed it over to the then President Xanana Gusmao. The report found that crimes against humanity and war crimes were committed by Indonesian security forces, and that Timorese parties also perpetrated war crimes during the brief civil war in 1975. The report

provided a comprehensive set of recommendations, including those covering the prosecution of serious crimes, reparations for victims, and reform. However, to date the Timorese parliament has yet to pass two draft laws on reparations and on the establishment of an "institute of memory" charged with managing the archives of the CAVR and CTF, and other documentation and research about the past.

The CTF conducted its work in a context in which international and domestic pressures for, and resistance against, accountability had already resulted in various mechanisms working in parallel. In fact, the CTF came into existence around the time the UN announced its intent to establish a commission of experts (CoE) to evaluate the performance of these mechanisms in respect of the serious crimes of 1999. The Indonesian government initially rejected the UN's request for the CoE to visit Indonesia, but later allowed the three members of the Commission to visit the country. The CoE submitted its report to the Security Council in July 2005, concluding that there was a need for a "comprehensive review" of the ad hoc court in Indonesia, and a renewed commitment from the international community to the work of the serious crimes panel in Timor-Leste. The CoE also recommended that the Security Council establish an ad hoc international court if no real progress had been made within six months.

### **The Legacy of the CTF?**

In 2007, I testified before the CTF on gender-based violence that had taken place in 1999. Drawing on my personal experience in Timor-Leste working with women survivors of rape around and after the time of the ballot, as well as the research conducted by CAVR, I spoke at a public hearing held in Jakarta, trying to describe the systematic nature of the violence I had observed. The experience was unsettling, as the majority of the audience seemed to be men who were either connected to the Indonesian security forces or former militia. Later on, a victim of rape, brought over from Timor-Leste, also testified. Her testimony was short and halting, and she was eclipsed by the testimonies of the high-ranking military officers who filled the room with their supporters. I sat with her afterwards in a small dining room at the hotel where the public hearing was held. A policewoman who was tasked with protecting her entered the room to ask for her written notes to hand over to an intelligence officer waiting outside.

After some heated discussion, the policewoman left the room empty-handed.

Despite its mandate to recommend amnesty, the CTF took a brave stance against it, stating that “(an) amnesty would not be congruent with its goals of restoring human dignity, creating the foundation for reconciliation between the two countries, and ensuring the non-recurrence of violence within a framework guaranteed by the rule of law.” The CTF was prevented by its mandate from recommending judicial processes, but affirmed the need to strengthen mechanisms for the investigation and prosecution of human rights violations as part of a reform of the security sector. The CTF also made recommendations on the establishment of a bilateral commission for the disappeared, as well as collective reparations. Despite this seemingly positive outcome, four years later many of the key recommendations have yet to be implemented. The CTF report, a valuable resource for those working on security sector reform and accountability, remains safely tucked away from public consciousness.

Although it cannot be attributed directly to the CTF, the pursuit of justice has taken many steps backwards since the report was handed over to the two presidents. In Indonesia, all six persons convicted at first instance by the ad hoc court have been released on appeal. In the Supreme Court’s decision to free the last prisoner, former militia commander Eurico Guterres, the Court does not describe the events in 1999 as crimes against humanity, but as an “altercation” between groups in conflict. In 2011, President Susilo Bambang Yudhoyon signed a presidential decree establishing a five-year plan for the implementation of the CTF recommendations, but victims and civil society groups have not been involved, and very little information has been shared with stakeholders and the general public.

In Timor-Leste, the impact of the CTF process on prosecutions of serious crimes in Timor-Leste is even more disturbing. When Maternus Bere, an Indonesian citizen and former militia commander, was indicted by the Serious Crimes Unit and arrested by the Timorese police when he crossed the border back to East Timor, Indonesia’s foreign minister intervened to free him. On 30 August 2009, the Timor-Leste government released him from pre-trial detention, allowing him to seek refuge at the Indonesian embassy before finally returning

to Indonesia. In 2010, the trial of another former militia member, Maubuti, indicted by the UN on charges of rape and murder as crimes against humanity, resulted in a conviction for ordinary murder. Maubuti had also been apprehended as he crossed the border. More recently, in October 2011, the serious crimes panel convicted a former militia member, Valentin Lavio, for crimes against humanity. However, court officials allowed him to return home after his conviction and he subsequently escaped back to West Timor. More disturbingly, a high-level official in Timor-Leste has called for the annulment of the UN indictments. These developments, together with the fact that all 84 persons convicted for crimes against humanity have been released after receiving a presidential pardon, paint a bleak picture of the pursuit of justice in Timor-Leste.

Despite efforts by Indonesia and Timor-Leste to push aside these issues, the past comes back to haunt us. It will be interesting to watch how the results of the recent elections in Timor-Leste, and the upcoming 2014 elections in Indonesia, will impact on the pursuit of justice. Without a doubt, work to unravel the legacy of decades of authoritarian rule in Indonesia and Timor-Leste will take a long time. In the meantime, victims of these violations continue to demand a committed and genuine effort to implement the recommendations of the two truth commissions.



# On Writing History and Forging Identity

Pierre Hazan<sup>1</sup>

From Burundi to the former Yugoslavia, from Nepal to Colombia, despite radical differences in context, the same concerns appear: How are we to manage the past so that it does not become an ideological weapon for rejecting other people? How can we fight against impunity - without having that legitimate fight become a tool for de-legitimizing the opponent and feeding the thirst for revenge?

Each of these countries has known - or is still experiencing - war and war's attendant atrocities. The overwhelming majority of casualties have been civilians, often singled out as targets because of their origins. Dead, they still have political value for the (ex)combatants who label them ideologically or ethnically: victims of terrorism, victims of paramilitary forces or of the army, Hutu or Tutsi victims, Bosnian, Serbian, Croatian or Albanian victims - all now pawns in the confrontation of commemoration. And, thus, follows the process of dehumanizing entire groups, keeping civil war smouldering in hearts and minds, when it does not flame into violence.

Tragically, as Bekim Blakaj notes in this volume, young people in Kosovo, Albania and Serbia are learning their history through textbooks that portray the other systematically as the aggressor, and oneself, as immaculate victim. In many parts of the globe, schoolbooks are little more than propaganda, strengthening prejudice and resentment in new generations.

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<sup>1</sup> Former fellow at Harvard Law School and at the Peace Institute in Washington D.C., Dr. Pierre Hazan is currently teaching in the Geneva Center for Education and Research in Humanitarian Action and in Neuchâtel University. Prior to that, he was a diplomatic correspondent to the U.N. with *Le Temps* (Geneva) and reported on numerous conflicts. He then served as special advisor to the U.N. Human Rights High Commissioner before working as Senior Media Analyst. Pierre is a founding member of the Human Rights International Film Festival (Geneva) and a member of the International Contact Group for the Basque Conflict, which initiated the October 2011 Peace Conference. He is the author of *Judging War, Judging History, Behind Truth and Reconciliation*, SUP, 2010, <http://www.sup.org/book.cgi?id=18259>

In such a situation, it is necessary to break the mould that forms these 'deadly identities'. To work out what the French sociologist Maurice Halbwachs has called "social frameworks of memory". In other words, to develop a more inclusive collective memory and identity, refusing the denial of memory as much as its manipulation. To act so that, as Luz Amparo Sánchez says in her contribution, the main victims of the Colombian conflict are no longer wiped from national memory.

In the following chapters, the reader can follow the paths taken by the different authors to move towards this just memory and the perils they have faced on the way. In Bosnia-Herzegovina, for example, Aleksandra Letic emphasizes the limits of judicial truth and other programs to manage the past where nationalism is so strong, and the crucial role allotted to education, the media and the political class so that society can finally claim the work of recognizing crimes committed. To reach the point, in other words, that duly established judicial truth also becomes societal truth.

It is this same awareness of the gap between institutions and social reality that guides the contributions, as different as they are, of Brother Emmanuel Ntakarutimana and Antoine Kaburahe. The two observers do agree on one essential point: their fear that the Truth Commission promised in the 2000 Peace Accords should materialize as an institution supported by the Western world that is disconnected from the reality of Burundian society. Indeed, they both make the case for further initiatives tailored to local realities. Based on their observations of events in Nepal, Mandira Sharma and Ram Kumar Bhandari both emphasize the fact that, politically manipulated, the tools of transitional justice can even be used to promote the impunity of perpetrators of international crimes.

Despite all the difficulties listed, initiatives have been launched, sometimes on an unprecedented scale, to deny the inevitability of a nationalist reading of

history. Thus, Bekim Blakaj defends the Recom project, that is, the idea to establish a regional commission to determine war crimes committed during the conflicts in the former Yugoslavia from 1991 to 2001. In nine weeks, over half a million citizens of Bosnia-Herzegovina, Croatia, Kosovo and Serbia signed a petition to that effect. But we need not wait for the end of a conflict to begin working on its memory, as Gonzalo Sanchez, in Colombia, notes. Rather, Sanchez shows that the development of a history of human rights violations can even help create an environment conducive to the peace process.

Each of these authors, confronted with the realities of his own society, invites us to shape history as a condition for liberating the present and the future.

# Colombia and the Victims of Violence and Armed Conflict

Luz Amparo Sánchez Medina<sup>1</sup>

This article presents the impact of the violence and armed conflict in Colombia over the past four decades, the contrast between the magnitude of the problem and the disregard of the victims and their rights in recent local development plans – their neglect, even, as subjects of development – and, finally, the overview of a search for the connection between peace-building, conflict transformation and local development.

In Colombia live men and women who are victims of exile, who have suffered dispossession of their property, threats, forced disappearances and human rights violations of all kinds. Orphanhood and widowhood mark the lives of approximately 5.2 million inhabitants who, if they remain in the country, have had to abandon the place where they believed they belonged or who, in other cases, have been forced to migrate to another country to save their lives. This fact, painfully, puts Colombia at “the top of the list of countries with a large number of internally displaced persons and refugees.”<sup>2</sup>

“Displaced people are the social group the most vulnerable among the vulnerable. They have been stripped of more than 5.5% million hectares, their level of poverty has increased from 50% before displacement to 97% afterwards, and their poverty indicators have increased from 23% to 80%. Only 5% live in decent housing. Over 80% are unaware of their rights as victims, only 13% have incomes

above the legal minimum wage and more than 50% report physical hunger.”<sup>3</sup>

Studies show that forced displacement brings a decline in the living conditions of people who, in many cases, suffered other forms of victimization even before displacement, thereby generating a multiple-victimization dynamic. The harsh reality of the victims’ lives reveals a deeper level of injustice: that hundreds of thousands of peasants and people belonging to Afro-Colombian and indigenous populations suffered, even before displacement, from historical conditions of poverty and exclusion and that this suffering was further exacerbated by expulsion from their land, their social networks and their way of life, thereby compromising even their culture itself.

## Is local development possible without recognizing the victims of violence?

Despite the magnitude of the situation and the social misery produced, victims and their rights are not clearly incorporated into local development plans, at least in the city of Medellín and the department of Antioquia, two representative areas of the country. In these places, the victims are not recognized as subjects of development, nor is collective compensation for the damage to infrastructure and the local economy included in government planning. Corporación Región (an NGO) took note of this in its recommendations to the proposed draft development plans (2012-2015) for the department of Antioquia and Medellín, drawing attention to the need for an explicit approach of positive action, as well as particular and preferential treatment for the victims.<sup>4</sup>

Additionally, Corporación Región supports the argument that the development plan for Antioquia should focus on compensation for victims,

1 Luz Amparo Sánchez Medina. Anthropologist of the University of Antioquia in Colombia and candidate for a Master in Contemporary Philosophy at the same university. Researcher of the Corporación Región in the city of Medellín. Co-author of various texts and author of articles in academic journals on fear and forced displacement. Reporter of the investigation on forced replacement in district 13 in Medellín. Member of the Historical Memory Group and of the Historical Memory Commission of the National Commission on Reparation and Reconciliation, 2011.

2 El Espectador. <http://www.elespectador.com/noticias/judicial/articulo-251341-colombia>

3 Commission for monitoring public policy for the displaced population, 2009:12

4 [www.region.org.co](http://www.region.org.co)

the territory and local development, matters of special concern in this discussion. It says:

“Restoration and redress for nearly 700,000 victims of forced displacement and other forms of victimization require an approach that goes beyond mere attention, to include measures of individual compensation and land restitution. Armed conflict and violence have not only robbed and exiled millions of people, but have also caused serious harm to collective infrastructure, the local economy and the autonomy of local governments, all of which must be repaired. The damage caused by armed conflict and violence demands collective compensation for the territory and implies a clear linkage with local and regional development.”<sup>5</sup>

Nor is this plan explicit concerning the participation of organizations as provided by the Victims Act, nor in issues related to regional development: the Departmental Development Plan, the Territorial Planning Councils, the panels for regional participation, among others.

In the draft Development Plan of Medellín, 2012-2015, there is no clear commitment on the issue of victims and comprehensive restoration and compensation are omitted. In particular, in the line on “Habitat and home”, the magnitude and reality of the displaced population - over 10% of the total city population - is not highlighted, nor does it emphasize a comprehensive measure to restore rights which should materialize in the guaranteed Right to the City.

In general there is a need to build and implement more inclusive Development Plans that strengthen the potential and capabilities of human beings and that highlight ways to transform the conditions of inequality and to remedy the vulnerability and exclusion suffered by many of the people of Medellín.

### **Peacebuilding, the transformation of armed conflict and local development: A local experience.**

The dilemma as to whether peace is a prerequisite for development or if development itself may open the way to the transformation of armed conflict and peace-building, was resolved by CONCIUDADANÍA, the corporation for public participation. CONCIUDADANÍA is determined

to contribute to “working within the local context, primarily with the victimized population, in building peace and reconciliation, in articulating this process from the outset in terms of land rights, citizen participation and local development”.

<sup>6</sup>The following account comes from community work in the municipality of San Francisco in the sub-region of Eastern Antioquia, regarding psychosocial care for victims and their role as agents of development in the area:

“One-tenth of the town’s inhabitants were killed during the years of violence. Although, at first glance, calm and peace seem to have returned to the people, the reality is quite different, for almost every family lost loved ones during the fighting and many people have been traumatized... The majority of the people attending the meeting... are the mothers, wives and grandmothers of those killed during the violence... Many of these people have agreed to train as counsellors. Counsellors work with the victims of violence to help them overcome their trauma and to build new prospects for life. Where possible, the institution promotes linking these processes with the land and local development.” (Pactemos, 2011:289)

According to the same source, this process has not been easy, for the demobilized soldiers and the victims are still unable to join together to meet the challenges of civil life concerning local development. This breach is an obvious concern, for it is difficult to work for peace without first having established truth and carried out justice.

It also means that in Colombia, technical people and policy makers are excluded from development planning for the victims and that the responsibility for their right to truth, justice and compensation goes unrecognized. This is indicative of a development concept in which the creation, broadening and expansion of human capabilities and the empowerment of individuals as agents of change are secondary issues.

There do exist, in civil society, some initiatives for conflict transformation and the promotion of

<sup>5</sup> *ibid*, 2012:5

<sup>6</sup> Pactemos, 2011 : 28

local development, but it is in a context of poverty, of renewed fear and victimization, and of a lack of comprehensive care for people who have suffered diverse forms of victimization.



# Historical Memory as a Means of Community Resistance

Gonzalo Sánchez Gómez<sup>1</sup>

Ordinarily, the task of reconstructing historical memory is carried out in post-conflict conditions. Indeed, most of the exercises in truth-building and historical memory, in very different places in the world, have occurred only once political and social conflict was over, as part of the accord between opponents or as part of the social reflection intended to break the cycle of hate. Symbolically, truth and commemoration “seal” the key agreements of societies in transition from conflict to peace. In this sense, the Colombian case is exceptional. Our country has experienced an ongoing process of social construction of commemoration, even in the midst of conflict. This article presents a synthesis of the highpoints of historical memory in Colombia, through the *Centro de Memoria Histórica – CMH* (Centre for Historical Commemoration), created by the new Law on Victims and Land Restitution (Law 1448 of 2011)

## Building truth and memory in Colombia

A first – and ambivalent – stage of the creation of memory occurred within the political field, specifically inside the Colombian parliament. Indeed, although we cannot speak of a systematic and institutional effort, there were major contributions in terms of clarification and political support that did contribute significantly to strengthening the dynamics of memory creation in other settings. Out of this came the first reports of criminal paramilitary networks anchored within the political structure, a process known colloquially as “parapolitics”. And from there, in 2011, came the adoption of the Law on Victims. But, through some of the court decisions taken, the direct relationship

between the criminals and dozens of parliamentarians and local and regional leaders was also made evident.

A second stage in the creation of memory involved the judiciary. The Attorney General’s Office and in particular, the National Union of Justice and Peace, brought forward voluntary figures in a process quite similar to South Africa’s Truth and Reconciliation Commission, but enriched with investigation as much into the actions as the structure and dynamics of the paramilitary.

However, far from the media spotlight and, also, from the institutions, the creation of commemoration had another phase, perhaps the most significant: the social scene. In Colombia, there are very many local experiences of the construction or recovery of the social memory of violence. Some processes have been undertaken by NGOs, others by the Catholic Church, and still others have developed “spontaneously” through exercises in community mourning or from social and political resistance brokered directly by the victims. This form of social creation came long before the recognition of the historical memory of conflict, first recognized by the Colombian state under the Law of Justice and Peace. These expressions of commemoration remain largely a question of social recognition and dignity for victims, but also serve as instruments for denouncing the facts and pressures of all kinds through the application of justice. These exercises have even taken place in the presence or under the power of criminals of various kinds, sometimes in open defiance of the silence that the powers in conflict wished to impose, sometimes, covertly, by rebuilding the social fabric or by simply monitoring daily life.

It is on the latter scenario which the Historical Commemoration Center, CMH (formerly the Historical Commemoration Group) focuses its efforts. The CMH’s work in terms of the present social structure basically follows two directions: first,

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to strengthen community dynamics in the areas of commemoration and reparations, and, second, to train commemoration managers. In the first, an instructive outcome is the Historical Commemoration Report "Trujillo: a tragedy that never ends." This report builds on the valuable community culture of truth and memory preservation that has been building in the municipality of the Department of the Valley over at least two decades, hand-in-hand with social organizations such as AFAVIT (Association of Relatives of the Victims of Trujillo). However, the CMH contributed to this report, launched by the community to honour its victims, with an investigation to reconstruct the facts and the logic by which the violent actions were committed, thereby giving meaning to the case in its connections with the dynamics of violence at the national level.

Amid the constant threat of violence, still ongoing, the commemoration community of Trujillo has become a school for memory, with an enormous capacity for preserving and disseminating the testimony of its traumatic experience. However, the case of the Trujillo massacre, with over 300 victims, is not the rule... There are many communities that require intervention to enable or contribute to the socialization of commemoration, usually relegated to private and individual acts, curtailed due to the fear of new victimization or unjust remarks about the victims, in a context of political polarization. This is the case of the Segovia and Remedios massacres, where the extermination of the dissident political group Patriotic Union began. But it was also true to a lesser extent in the massacres of El Salado (Bolívar) and El Placer (Putumayo), where the civilian population was wrongly accused of complicity with the insurgents and collectively victimized in public.... Thus, before deconstructing what led to the violence and to the prior conditions specific to the social and political environment, commemoration and, in particular, the work of the CMH have the potential to establish an axis for reconstructing the meaning of violence suffered by many of Colombia's local and regional communities. The CMH process has contributed to these communities by promoting, revitalizing and strengthening the organizational processes surrounding the creation of commemoration.

### **From the struggle for recognition to institutional recognition**

The framework of the Law on Victims and Land Restitution has emerged as an arena for government recognition of the armed conflict, its victims and their rights. Before, local communities had to devote great efforts to achieving any effective institutional support for the redress of damages from serious violations of human rights. Now, there is a policy framework for dealing with their demands, the actualization of their right to the truth, justice and reparations, and an institutional resource for demanding that officials at all levels of the State enforce the obligations that the law obliges them to incorporate into local and regional development plans and to support the investigation process and symbolic reparation, such as the construction of museums, monuments, parks and other initiatives of commemoration. Finally, it should be emphasized that the new institutional framework, designed as a platform for recognition of the diversity of community processes and the promotion and visibility of the victims, is bound by standards that explicitly prohibit the creation of an official truth. The State may encourage but it may not impose initiatives.

In this sense, the communities' current struggle is not simply recognition; rather, it seeks, above all, to achieve, in the context of the new institutional framework, effective group implementation of full compensation, as well as conditions to enhance the accumulated social memory built up in recent decades.

The challenge of the CMH as a platform for recognition and as a stimulus of commemoration efforts is to develop the institutional capacity necessary to meet the huge demand for social support of initiatives already created and to be created in the future. All of this is based on a fundamental observation, namely, that irregular development exists between communities and populations, not only in terms of organization but also in terms of the potential to generate and encourage expressions of commemoration.

### **In conclusion**

The distinctive local and historical factors outlined above concerning commemoration in Colombia, with special emphasis on local communities, points to a general aspect that should not be overlooked: Colombia is not in a post-conflict situation, unless it is open conflict, but is dominated by the themes and mechanisms typical of transitional justice: the construction of truth, the location of commemoration, the stages of recognition, the measures of satisfaction in the context of full compensation, all of which elements are, today, amply covered by the recent Law on Victims.

Finally, the draft Law on the Legal Framework for Peace<sup>2</sup> is now under discussion in Colombia, which is sure to place the CMH at the heart of the upcoming important discussions about how to resolve properly the judicial trials of the paramilitary and how to open a potential space for eventual negotiations with the insurgency. Truth and commemoration will be determining factors in any eventual peace process.

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2 Legislative act, by which legal instruments establishing transitional justice under article 22 of the Constitution of Colombia.



# How We Perceive the Past : Bosnia and Herzegovina, 17 Years On

Aleksandra Letic<sup>1</sup>

The Framework Peace Agreement from 1995<sup>2</sup> ended the war in Bosnia and Herzegovina, but it also institutionalized the ethnic divisions within the country which were created during the three-year-long armed conflict. The country is divided into two entities<sup>3</sup>, which in political terms exist more or less independently of each other, with a relatively weak central government. This political and social division along entity and ethnic lines has direct implications for the processes of dealing with the country's recent violent past. However, addressing the past remains one of the most significant steps the country can take towards establishing a stable and peaceful long-term future.

Different interpretations of the recent past, and mostly contradictory approaches to dealing with its shared violent heritage, continue to burden the ongoing social and political development of the country, and to widen the gap between new generations in Bosnia and Herzegovina. Furthermore, if we take a closer look at the transitional justice practised in Bosnia and Herzegovina after the war, the situation appears rather absurd. On the one hand, the country has pursued and continues to pursue a range of transitional justice activities. These include prosecuting war crimes, searching for missing persons, reparations to victims, and partial institutional reform. On the other hand, the denial of war crimes in Bosnia and Herzegovina has never been as obvious as it is in the current political and social climate. Reconciliation efforts within the BH society are still sporadic and largely confined to civil society.

There are diverse reasons for this obvious gap between insufficient, but still-used, transitional justice mechanisms and the lack of true reconciliation with the past. Most of these reasons can be traced to the fact that almost all transitional justice activities in Bosnia and Herzegovina were the result of heavy international pressure and/or involvement. This took the form of war crimes trials, the establishment of the Missing Persons Institute at state level, and the re-certification of police officers, etc. In most cases, these activities were not prompted by an internal, BH-owned acknowledgement of the real need for such activities, but more by the involvement of the international community.

It should not be forgotten, however, that although transitional justice mechanisms exist in Bosnia and Herzegovina, they are far from sufficient, neither are they professionally coordinated to ensure the necessary holistic approach. Dealing with the past requires more than just transitional justice. These processes need social consensus, common objectives, and shared values among those who are the primarily beneficiaries of the outcome of these processes, and at the same the main parties to them. Social reconstruction after widespread atrocities, and the healing process, would ideally include both: transitional justice mechanisms as part of a wider process of reconciliation which is the result of political and social will, and is broadly accepted.

Unfortunately, this is precisely what Bosnia and Herzegovina lacks. The current political and social situation in the country is far from the proper environment in which to address painful questions from the recent violent past, and provide an opportunity to heal the wounds within the country which suffered most during the wars in the former Yugoslavia during the 1990s. Furthermore, the current political and social situation in BH, with its deep divisions along ethnic and national lines, even fosters and legitimizes ethnic interpretations of the recent past, the denial of atrocities and

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2 Commonly known as the Dayton Peace Accords

3 The two BH entities are the predominantly Serb Republika Srpska and the predominantly Bosniak and Croat Federation of Bosnia and Herzegovina.

suffering, the further dehumanization of victims and the gradual radicalization of the younger generations born right before or during the war.

*The BH education system* systematically ignores the need to establish and respect a collective remembrance of the recent past beyond ethnic and national allegiances. Such a shared memory would be based on established facts and on the common desire to overcome the consequences of painful recent history. In fact, the education system is very often used and abused for teaching about the cultural and historical heritage of one ethnic and national community only – that which represents the majority in the BH territory concerned – while the other communities with which we share the country are almost entirely neglected and/or presented in a degrading and negative way.

A similar situation can be observed when it comes to dealing with crimes committed during the last war in BH. Although officially, recent history is still not being taught in BH schools in a comprehensive way, this does not mean that students are not receiving information about atrocities, suffering, war heroes and war enemies. The danger and possible damage here lies in the fact that, in almost all cases, the information given to students is not based on established facts on the events from the war, but represents more the subjective, personal and, of course, ethnically-coloured interpretation of the teacher. Very often, this becomes a dangerous scenario, while teachers are mostly unaware of the influence and negative long-term impact their behaviour might have upon their students and upon society as a whole.

We often find that war crimes committed by members of the teacher's own ethnic group are minimized. If not denied fully, they are at least downgraded to mere "incidents". A degree of self-preservation is at play here. It is not premeditated, but people are fearful for their own lives. Their own ethnic group is presented as the ultimate victim, entirely innocent and peaceful, yet attacked by the "others". War criminals from their own ethnic group are glorified as brave war heroes who protected the nation in its hour of need and made it possible for future generations to live freely and in peace.

We must bear in mind that the education system in BH is not a matter for the state, but rather under the authority of the two individual entities and, further, the individual administrative regions in the Federation of Bosnia and Herzegovina. We must also remember that the political entities and administrative regions are controlled by mono-ethnic and mono-national political structures. This, unfortunately, leads us to conclude that the schools in BH are gradually becoming the new battlefields, using sophisticated weapons with which to educate new generations on divisions, irrational hatred towards the "others", mistrust and fear of neighbours who differ from them only in the way in which they pray to their god. Regrettably, we are already seeing the results of this situation, in every demonstration and at every football match, where shirts bearing the faces of war criminals are worn by children who were not even born when the war began.

However, the education system in BH more or less follows the same pattern as other structures in the country. The influence of the *media* must not be neglected either, as it still has a major influence on the opinions of the ordinary citizen. The general media landscape in the country mostly reflects the ethnic divisions, while the number of truly independent media attempting to provide objective information is very low. Political parties control most of the media. This results in patchy, one-sided coverage, and the content which reaches the ordinary citizen is strictly controlled. Issues of the past, if dealt with at all in the newspapers or on TV screens, are again addressed through ethnic and national filters, depending on the ethnic and national affiliations of the target group. Once more, their own nation and ethnic community is presented as the ultimate victim of the recent war. Coverage focuses in detail on the terrible suffering of their "own" people under the attacks of the others, while war crimes trials against individuals from their own ethnic group are denounced as fabricated political proceedings against the entire ethnic community to which the war crimes suspect belongs. Stories about the sufferings of others, the facts established beyond reasonable doubt in war crimes trials, and positive stories of solidarity and humanity between the different ethnic groups during the war are rare indeed in the BH media at present.

In addition to the education system and the media in BH, which contribute significantly to the atmosphere of denial, mistrust, division and inter-ethnic and inter-religious fear, one important sector – if not the most important – must not be forgotten: *political leadership* at all levels of government. Political leadership in BH, which sticks to the modus operandi of political rhetoric based on national and ethnic divisions, is a strong factor and an advance for addressing the past in a one-sided, piecemeal way.

There is no doubt that the agendas of the political leaders in Bosnia and Herzegovina include issues from the recent violent past. This is particularly evident in election campaigns, which are generally constructed in such a way as to deepen the gap and mistrust between the different ethnic groups. In the absence of truly civic political parties, power in Bosnia and Herzegovina is shared between the national political parties, which represent the interests of only one national and ethnic group. These political parties can count on the support of the people, as they have carefully created irrational fear towards everything and everyone who does not share their own ethnicity. They have made the people believe that their own national and ethnic community can be protected by strong and determined national politicians who belong to that same ethnic group.

There is widespread political rejection of the need to deal with the past with such instruments as war crimes trials, truth-telling initiatives, reparations and memorials where they are proposed at the overall state level as a means of establishing the accountability of all ethnic and national groups in the country. Indeed, addressing the past in a fact-based and impartial way might deny the national politicians their strongest argument – that of systematic denial and unquestioned patriotism.

In the circumstances, it is very difficult to formulate a conclusion or to give a clear indication of what needs to be done in Bosnia and Herzegovina to stop the conflict – a conflict which is still going on between the different ethnic and national groups, but which now takes a more sophisticated and even more dangerous form. Yet there may be some directions which the country might take in order to give younger generations a genuine opportunity to build a stable and peaceful intercultural society.

It is unlikely that the political leadership in the country will change soon, and the media will most probably remain dependent – primarily financially – on the political parties, and will not be able to gain full independence, either.

That said, we have a chance if we focus our efforts on the education system, accepting realistically that some generations are “lost” already, and concentrating on laying the proper foundations for the generations to come. Education must be a tool for social development towards an acknowledgement of the past, and a shared Bosnian and Herzegovinian future based on peace, remembrance, acceptance of a common history and respect for the inter-cultural heritage of the country which we share. Young generations must to be educated on accountability, not for what happened in the 1990s, but for the way in which they relate to it – whether they continue to deny the past, or accept it, honour it and build a joint future. Making education a matter for the state as a whole might, in the long term, be the key to overcoming the crises which have plagued Bosnia and Herzegovina since the early 1990s.



# Regional Approach to Healing the Wounds of the Past

Bekim Blakaj<sup>1</sup>

## Human losses during the wars in former Yugoslavia

During the wars of the nineties when the process of the dissolution of Yugoslavia started, it is estimated that more than 140 thousand people lost their lives, thousands of women and girls were raped while the number of expelled persons in ethnic cleansing campaigns was even higher.

In Kosovo, according to the Humanitarian Law Center<sup>2</sup>, around 13,500 persons were killed or went missing in the period from 1 January 1998 to 31 December 2000. During 1998, more than 250,000 people were forced to abandon their homes as a consequence of armed conflict, while between the months of March and June 1999, it is estimated that around 800,000 residents were forced to leave their country. With the end of the conflict in June 1999, it is estimated that some 220,000 non Albanians left Kosovo<sup>3</sup>.

## Institutional failure to face with the past

At the same time, the countries emerging from the dissolution of former Yugoslavia have failed to face their pasts in an appropriate manner. Even today, the fate of more than 13,000 people reported missing is still not known. In Kosovo, 1,781 persons are still counted as missing according to the data of the International Committee of the Red Cross. Many family members of the victims of war have been denied their right to know the truth about the circumstances in which their beloved ones were killed or went missing. Another failure of the countries emerging from war is the re-establishment

of justice. The International Criminal Tribunal for former Yugoslavia (ICTY) has accused in total 161 persons<sup>4</sup> of war crimes in former Yugoslavia, 64 of them have been convicted by this Tribunal so far. National courts have processed a limited number of trials on war crimes. In Kosovo, 13 years after the end of the war, only 14 cases of war crimes have been concluded with final verdicts.

Even though in almost all countries emerging from the dissolution of former Yugoslavia laws have been promulgated providing for compensation for the victims of war and their families, the families of the victims of war are not satisfied with the compensation (reparations) they have received. It should be noted that there have been almost no symbolic reparations for the victims of war. Furthermore, except for reparations on the basis of law, reparations on the basis of court decisions have been rare. Due to the small number of trials for war crimes, the victims of war have not had the opportunity to file private claims for compensation for losses. Regarding the issue of lustration, none of the countries emerging from former Yugoslavia has any appropriate lustration programme. This is best seen in cases where those accused of war crimes by the ICTY were employees of state institutions and at the moment of publication of the indictment against them, they were saluted by The Hague as heroes and by a broad public in their respective countries, as well as by other representatives of institutions.

In conclusion, in each country emerging from the bloody wars of the nineties in former Yugoslavia, there has not been any serious initiative to address the past, not even a broad public debate regarding the victims of war crimes by the other side. The victims have either been denied or the number of victims has been manipulated. This has caused an increase in prejudices towards other nations

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2 [www.kosovomemorybook.org](http://www.kosovomemorybook.org)

3 <http://www.unhcr.org/412b5f904.html>

4 <http://www.icty.org/sections/TheCases/KeyFigures>

and the creation of myths regarding the recent past. The education systems in these countries have only contributed in creating wider gap between nations by compiling a curriculum of history books with unilateral data. In a recent analytical publication on the educational history texts of Kosovo, Albania and Serbia, it is stated: *School texts of these parties presents only the crimes of the other party by presenting itself as a victim and the other as an aggressor*<sup>5</sup>.

### **Initiative for RECOM**

The facts highlighted above have prompted some civil society organisations, including the Humanitarian Law Center in Serbia, Research Documentation Centre in Bosnia and Herzegovina, and Documenta in Croatia, to initiate a debate on mechanisms for finding and recounting facts about the past. This process started in September 2005 and was supported by the experts of the International Centre for Transitional Justice. Bearing in mind the focus of criminal processes on the accused, these three organisations have initiated regional debates on the instruments for finding and recounting facts about war crimes with a focus on the victims. The debate is structured as a series of regional, national and local debates, in smaller compositions (around 30 participants) with representatives of different civil society groups and political parties. Part of the process also became a forum for transitional justice with gatherings of more participants (240 – 350). At the beginning, the purpose of the consultative process was to create a public platform on the basis of which the victims and civil society representatives would present their needs regarding human rights violations and injustices committed in the past. The second purpose was to strengthen support for approval of the initiative for a regional approach to determining facts about war crimes so that it would be supported by the citizens and the governments of all countries of region.

After a large number of consultations at the local, national and regional levels, and after holding three regional forums on transitional justice, in May 2008, a proposal was made at regional consultations with the families of victims of war, in Podgorica (Montenegro), to establish a Regional Commission for establishing facts on war crimes

and other grave violations of human rights in former Yugoslavia in the period from 1991 (start of the war in Slovenia) to 2001 (conclusion of the last conflict in Macedonia). Since then the consultative process has had its own third purpose which is to build the model of a Regional Commission known as RECOM. In the fourth Regional forum on Transitional Justice, which was held on 28 and 29 October 2008 in Pristina (Kosovo), civil society organisations and individuals from all countries of former Yugoslavia established the Coalition for RECOM, a coalition that in the following years was to grow further and to date it counts around 1,900 organisations and individuals.

Since the beginning of the debate on mechanisms for finding and recounting facts about the past, to date a total of 127 consultations have been held at the local, national and regional levels, seven regional forums on transitional justice and one international forum on transitional justice. 6,187 activists from human rights organisations, youth organisations, associations of families of victims, former political prisoners, veterans/soldiers, artists, teachers, representatives of religious communities and other groups and civil society associations from all countries that emerged from the dissolution of former Yugoslavia participated in the consultations. Three phases characterise the consultative process. First, the needs and expectations of victims were discussed in relation to the difficult heritage of the past as well as non-judiciary mechanisms for establishing facts on war crimes. Second, participants bearing in mind the experience of other societies emerging from conflicts and post-totalitarian societies and specific wars in the territory of former Yugoslavia presented suggestions, opinions and recommendations regarding the Regional Commission for establishing facts on war crimes. In the third phase, from May 2010, participants discussed the draft statute of RECOM based on proposals, opinions and recommendations of the participants of the consultative process and the experiences of successful commissions compiled by the Group of Experts of the RECOM Initiative. On 26 March 2011, the Assembly of the Coalition for RECOM approved the RECOM draft statute.

Coalition for RECOM organised a media campaign to raise public awareness. The media campaign, entitled For RECOM, started on 1 June 2010 simul-

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5 Kosovo 1912-2000, author Shkëlzen Gashi.

taneously in Sarajevo, Banja Luka (BH), Belgrade (Serbia), Podgorica (Montenegro), Pristina (Kosovo) and Zagreb (Croatia). The message of the campaign was called *Facts of all war victims 1991-2001 in the territory of former Yugoslavia*. A television spot entitled Why RECOM was broadcast in the context of the campaign.

Coalition for RECOM has undertaken another campaign to collect one million signatures from citizens of countries that emerged from former Yugoslavia. The campaign was launched on 26 April 2011 simultaneously in Belgrade, Ljubljana, Zagreb, Sarajevo, Banja Luka, Pristina and Skopje. It lasted until 30 June 2011 and 543,870 signatures were collected in nine weeks in support for the establishment of RECOM, as follows: in Bosnia and Herzegovina, 122,540 signatures; in Croatia, 19,674; in Montenegro, 31,060; in Serbia, 254,625, in Kosovo, 100,566, in Slovenia, 5,346 and in Macedonia, 10,059 signatures. Even though the objective of the campaign, of gathering a million signatures, was not achieved, it still remains the biggest regional campaign for collecting signatures for any one initiative.

After the campaign for collecting signatures, the coalition for RECOM started the process of institutionalising RECOM. Previously, the representatives of Coalition for RECOM had met heads of main state institutions and representatives of the biggest political parties, from whom they received declarative support about RECOM. Then, representatives of Coalition for RECOM officially handed over the Initiative for the establishment of RECOM to the President of Montenegro, Mr. Filip Vujanović, to a member of the Presidency of Bosnia and Herzegovina, Mr. Željko Komsić, and lastly to the President of Croatia, Mr. Ivo Josipović. Coalition for RECOM is making efforts to enable the Initiative for the establishment of RECOM to be handed to the presidents of other countries that emerged from former Yugoslavia. In order to strengthen its work and to achieve the goal it has set, Coalition for RECOM has engaged, in all countries deriving from the dissolution of former Yugoslavia, a public advocate whose role is to plead the case for establishing RECOM to local decision-making institutions and diplomatic representations accredited to the respective countries. All advocates are distinguished public figures in their coun-

tries and in the region, people of high intellectual and credible level.

#### **Barriers and challenges in the process for RECOM**

Since the opening of the public debate regarding the establishing of the Regional Commission with a regional approach, a certain number of individuals have opposed this idea. In fact, almost all their arguments centre around the following two points: The first is that every country emerging from the dissolution of former Yugoslavia should create a national commission, i.e. to have national access in the process of facing the past; the second argument has more to do with unresolved issues between Serbia and Kosovo, and with the non-recognition of Kosovo by Serbia. Coalition for RECOM has arguments to support both these reasons.

Why should countries emerging from the dissolution of former Yugoslavia adopt a regional approach to dealing with the past? There are many arguments. First, different military units from other countries participated in many cases of massive killings or kidnappings. For example, the unit "Scorpion" participated in the Srebrenica massacre (Bosnia and Herzegovina) on 11 July 1995 and the same unit committed massive murders in Podujevo (Kosovo) on 28 March 1999. How can the facts for all the crimes committed by this unit be extracted without the participation of at least the three countries, Bosnia and Herzegovina, Kosovo and Serbia? Another argument for a regional approach is the issue of missing persons. Many mass graves have already been opened in which the mortal remains of citizens of neighbouring countries were found. It is believed that there are more unopened mass graves to be uncovered and there is a need for the involvement of at least two countries to be able to reveal these cases. Then, it is essential that all facts about the war crimes in question be made public and acknowledged in all countries, not only in the country to which the victims belong. This would create empathy also towards the victims of other nations and would pave the way to reconciliation.

Non-recognition of Kosovo by Serbia, and especially the approach of Serbia towards northern Kosovo has forced many opponents of the initiative for RECOM to argue that Kosovo should not create a joint commission with Serbia since Serbia still claims that Kosovo is part of it, that it does not

admit crimes it committed in Kosovo, and that it is not ready to apologise for crimes committed in Kosovo. All these concerns are reasonable but the manner on how to cope with these challenges may be different. We in Coalition for RECOM believe that the current problems between Kosovo and Serbia would be resolved much more easily, or at least highlighted, if RECOM were first established since this would reveal the facts about war crimes and this would lead to apologies for the crimes committed, which would in turn lead to a relaxation of relations between Kosovo and Serbia.

# Challenges in Dealing with the Past in Kosovo : From Territorial Administration to Supervised Independence and Beyond

Dr. Nora Refaail<sup>1</sup>

## 1. Mandate

The Special Adviser (SA) on Dealing with the Past (DwP) had the mandate to implement article 2.5 of the 2007 Comprehensive Proposal for a Status Settlement (CSP) which states:

*“Kosovo shall promote and fully respect a process of reconciliation among all its Communities and their members. Kosovo shall establish a comprehensive and gender-sensitive approach for dealing with its past, which shall include a broad range of transitional justice initiatives.”*

While peace accords regularly foresee rule of law provisions and increasingly the realization of truth-commissions to pave the way for a future reconciliation process,<sup>2</sup> a provision such as article 2.5 CSP requiring in such broad terms the establishment of a comprehensive approach for dealing with the past is truly unique.

The implementation of any transitional justice initiative has regularly to consider the cause and the course of the conflict which however shall not be the specific focus of this contribution. The following assessment aims to analyze the state of play of transitional justice endeavours in Kosovo since the end of the armed conflict and the contribution of the different stakeholders to its advancement. Therefore, the next chapter (2) sets the background against which the transitional justice state of play has to be viewed. Section 3 analyzes two main topics of DwP, namely war

crime prosecution and reparations. Before concluding (5), we shall look into a possible mechanism to advance DwP (4) in Kosovo which will acquire full independence in September 2012.

The following contribution is an account of my personal work experience in Kosovo underpinned by the facts as presented in various reports. It solely reflects my personal view and not the opinion of the International Civilian Office or the Swiss Federal Department of Foreign Affairs.

## 2. Background

### a) From International Administration to Supervised Independence

As a response to the conflict, the Security Council - under Chapter VII UN-Charter - established with Resolution 1244 an interim administration for Kosovo.<sup>3</sup>

The Security Council tasked the Office of the United Nations Interim Administration Mission in Kosovo (UNMIK) with state-building as well as status resolution, while the Organization for Security and Co-operation in Europe (OSCE) was mandated with democratization and institution building. The European Union (EU) was to take care of reconstruction and economic development of Kosovo.

In view of the territorial administration, UNMIK attributed to itself state-like public authority with executive, legislative and judicial authority.<sup>4</sup>

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2 See for example provision 2.3 of the 2005 Memorandum of Understanding between the Government of the Republic of Indonesia and the Free Aceh Movement.

3 S/Res/1244 (1999), Para. 10 The Security Council authorizes the Secretary-General, “with the assistance of relevant international organizations, to establish an international civil presence in Kosovo in order to provide an “interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo.”

4 UNMIK Regulation No. 1/1999 of 25 July 1999, amended by Regulation No. 54/2000.

The exercise of the administration was overshadowed by the unresolved status question which also had a huge impact on Kosovo's political and economic progress in the decade to come.<sup>5</sup>

In the meantime, the Special Envoy of the UN Secretary-General Martti Ahtisaari, tried to find a viable solution for Kosovo's status via negotiations between Belgrade and Pristina. How a future Kosovo should look is reflected in the CSP, which sets out the full range of provisions for a stable, viable and multi-ethnic Kosovo. In particular it sets out extensive provisions for non-majority communities including new arrangements for decentralization, community rights, the protection of religious and cultural heritage and economic matters.<sup>6</sup> The DwP provision cited above is just one article among the set of provisions. However, the Special Envoy could not overcome the deep rift between the parties: Belgrade continued to insist on Kosovo's autonomy within Serbia and Kosovo to request to be an independent and sovereign state.

The Special Envoy came to the conclusion that Kosovo's open status was an impediment to democratic development, accountability, economic recovery and inter-ethnic reconciliation and therefore must be resolved.<sup>7</sup> Since reintegration into Serbia was not a viable solution, he suggested independence for Kosovo. However, because Kosovo's institutional capacities were still weak at that time to deal with the challenges, its political and legal institutions needed to be further developed with international assistance and under international supervision. Once Kosovo has implemented the measures laid out in the CSP, the supervision by the international community should come to an end.<sup>8</sup>

The Secretary-General of the United Nations presented the Special Envoy's plan for the future of Kosovo to the UN Security Council members on 26 March 2007. While the UN Security Council did not follow the Special Envoy's proposal, the

Assembly of Kosovo declared its independence on 17 February 2008 and committed itself fully to implementation of the CSP. It invited the international presences including the International Civilian Office to supervise implementation.<sup>9</sup>

Following Kosovo's declaration of independence, the space in which UNMIK operated changed and the UN Special Representative faced increasing difficulties in exercising his mandate. While the Special Representative was and is still formally vested with executive authority under resolution 1244 (1999), he is unable to enforce these powers with Kosovo authorities questioning the authority of UNMIK in a Kosovo now being governed under the new Constitution.

The lack of acknowledgment can be attributed to the conflict between SC-Resolution 1244 which follows a so-called neutral policy regarding the status of Kosovo and the Kosovo Constitution, which does not take UNMIK into account.

As a consequence, the UN Secretary-General announced in June 2008 the reconfiguration of the structure and profile of the international civil presence in Kosovo. The European Union Rule of Law Mission in Kosovo (EULEX) assumed responsibilities in the areas of policing, justice and customs. The overall authority of the United Nations in accordance with resolution 1244 (1999) should however remain.<sup>10</sup>

This background clarifies that since the end of the conflict in June 1999, the international community - in form of territorial administration by UNMIK, rule of law mission by EULEX or supervision of independence by the ICO - has been directly or indirectly primarily responsible for setting the cornerstone for any transitional justice initia-

5 Carsten Stahn, *The Law and Practice of International Territorial Administration -Versailles to Iraq and Beyond*, Cambridge 2005, page 317f.

6 Report of the Special Envoy of the Secretary General on Kosovo's future status, UN Doc of 26 March 2007, S/2007/168 and S/2007/168 Add.1.

7 S/2007/168 and S/2007/168 Add.1.

8 S/2007/168 and S/2007/168 Add.1.

9 The provisions of the CSP are now enshrined in the Constitution of the Republic of Kosovo, adopted by the Kosovo Assembly on 9 April 2008, and in a succession of domestic laws. This Constitution was certified by the International Civilian Representative on 2 April and entered into force on 15 June 2008.

10 See Report of the Secretary-General of the United Nations Interim Administration Mission in Kosovo, S/2008/692, 24 November 2008, paragraph 23. Retrieved 23 April 2010 from <http://www.un.org/Docs/sc/sgrep08.htm> and then to the 24 November 2008 report. See also COUNCIL JOINT ACTION 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO.

tives such as war crime prosecutions, reparations, truth-seeking mechanisms, and local ownership.

### **b) Socio-Economic Aspects**

In February 2012, Kosovo celebrated its 4th anniversary of independence and more than a decade as passed since the end of the hostilities. Even though there is relative stability and security today, Kosovo is still struggling with many deep and entrenched human challenges which are mostly linked to poverty, lack of opportunity and lack of access to basic services (education, health). According to the UNDP Human Report these problems “spring from decades of social fractures, repression and power imbalances. They include gender discrimination, ethnic enclaves, corruption, nepotism, income inequalities and deep rural-urban divides.”<sup>11</sup>

Nearly half of the Kosovans live below the poverty line and one in four is unable to meet their critical daily needs. Deep ethnic divisions – which are perceived as tense and not improving<sup>12</sup> - exclude full participation in Kosovo’s school, work and political life. Further, young women still live a life full of constraints and limitations.<sup>13</sup>

Further, Kosovans perceive that the democratization process has stalled.<sup>14</sup> This process includes developing a functioning judiciary system, freedom of expression and media, the existence of a watchdog civil society, government based on priorities of citizens, a Constitution and Laws based on human rights and Kosovo’s public participation in political and civic life.<sup>15</sup>

This social context in Kosovo – especially the huge poverty, lack of opportunity and lack of basic services, lack of civic engagement, gender and ethnic divide - poses a significant challenge to measures intended to assist in dealing with the past. Top priorities are given to economic development and the EU accession, while transitional justice initiatives are mostly seen as a threat to the fragile stability and economic recovery.

### **c) Ongoing Conflict with Serbia**

The ongoing conflict with Serbia poses manifold challenges to properly dealing with the past in Kosovo: Politically, Serbia continues to resist any proper acknowledgment of the decades of discrimination policies applied in Kosovo as it does with regard to atrocities committed during the conflict in 1998/1999. Serbia maintains the rhetoric of “Kosovo and Methoija” which means that the entity still belongs to Serbia, ignoring the developments of the last decade and the independence of Kosovo.

Serbia’s stance is crucial for transitional justice measures such as war crime prosecution, reparations and truth-seeking. And as long as Serbia resists dealing with the past, it remains difficult for Kosovo to do so – unilaterally not only with regard to atrocities committed by Serbian forces but even more when it comes to crimes committed by the Albanian forces. Very often I was asked why the Albanians should deal with alleged crimes committed during the conflict by Albanians as long as Serbia constantly refuses to deal with crimes committed in the last decades.

## **3. Some Observations:**

### **a) War Crimes**

Since the end of the conflict, war crime prosecution has been solely the mandate of the international community:

The strategy of the ICTY Office of the Prosecution has been to focus on “high level, civilian, police and military leaders, of whichever party to the conflict who may be held responsible for crimes committed during the armed conflict in Kosovo”.<sup>16</sup> At the same time it was made clear that the primary investigative and prosecutorial responsibility would lie with

11 UNDP, Kosovo Human Development Report 2012, Private sector and employment, page 2

12 UNDP Kosovo, Public Pulse Report III, March 2012, page 9.

13 UNDP, Kosovo Human Development Report 2012, Private sector and employment, page 2 and 3

14 UNDP Kosovo, Public Pulse Report III, March 2012. According to the Report, “[t]he index is continuous measure which can range from 3 (maximum) meaning that all participants fully agreed that democratization is on good track, to 0 (min) meaning that all participants do not agree at all that democratization is on track.”

15 UNDP Kosovo, Public Pulse Report III, March 2012, defines Participation Index as “composite average based on the self-reported participation rate they have participated in active or passive manner in the following: public discussions, citizen initiatives, any project implemented by central or local governments, in NGOs activities and political parties”. The index’s measure range is again between 0 (minimum) and 3 (maximum).

16 Statement of 29 September 1999, paragraph 3, <http://www.icty.org/sid/7733/en>, last retrieved 28 June 2012.

UNMIK<sup>17</sup> until EULEX became operational early 2009. Then, according to its mandate it was EULEX's task to *"ensure that cases of war crimes, terrorism, organised crime, corruption, inter-ethnic crimes, financial/economic crimes and other serious crimes are properly investigated, prosecuted, adjudicated and enforced, according to the applicable law, including, where appropriate, by international investigators, prosecutors and judges jointly with Kosovo investigators, prosecutors and judges or independently, and by measures including, as appropriate, the creation of cooperation and coordination structures between police and prosecution authorities"*.<sup>18</sup>

When UNMIK started to work, it envisaged a special Kosovo War Crimes Court which was supposed to ensure impartial and neutral trials of politically sensitive cases. However, this option - because of budgetary limitations - was never realized. By December 2008, only over 40 war crime cases had been completed in Kosovo courts<sup>19</sup> while UNMIK handed over to EULEX approximately 1,187 acts of suspected war crimes arising from the conflict, with an additional 50 cases which had already been referred for indictment.<sup>20</sup> Today, EULEX seems to have around 700-750 open war crime cases subject to further investigations, since around 158 cases were closed due to lack of evidence or legal mistakes while others were merged.<sup>21</sup>

From a national and international perspective, there is a perception that today - 13 years after the conflict - the culture of impunity still prevails in Kosovo. There is a high number of unresolved war crime cases, crimes against humanity including rapes and enforced disappearances, as well as other inter-ethnic crimes, which lead to the conclusion by international observers that UNMIK has failed

to establish justice in Kosovo<sup>22</sup>. EULEX on the other hand has not (yet) presented a strategy for dealing with the remaining war crime cases and has not demonstrated that the fight against impunity is one of their priorities. Against this background, it is necessary to establish the underlying causes for the prevailing impunity.

The list of the possible reasons - as reflected by different institutions<sup>23</sup> - is long and includes: resolving war crime cases not being a priority, lack of political will, insufficient resources allocated to handling cases<sup>24</sup>, short term appointment of mission personnel without relevant experience, insufficient witness protection program (EULEX mandate), lack of cooperation with local stakeholders, lack of protection of local prosecutors and members of the judiciary, weak domestic justice system, interference by the executive, failure to deal with crimes against Serbs, Roma and members of other communities, failure to handle adequately cases of sexual crimes against women such as rape, legacy of incomplete documentation and lack of evidence.

In the following, I shall illustrate some of these concerns:

The Parliamentary Assembly (PA) of the European Council (CoE) reiterated in its latest report the crucial role of witness testimonies in contributing to justice and reconciliation since their evidence not only constitutes the foundation of the judgments but also reveals the truth about past crimes.<sup>25</sup>

In Serbia, the Deputy War Crimes Prosecutor in Serbia Bruno Vekaric told journalists that an insider

17 Statement of 29 September 1999, paragraph 6, <http://www.icty.org/sid/7733/en>, last retrieved 28 June 2012.

18 COUNCIL JOINT ACTION 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO, Article 3d

19 AI, Kosovo, Time for EULEX to Prioritize War Crimes, April 2012, p. 16.

20 Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2009/149, 17 March 2009, paragraph 19.

21 AI, Kosovo, Time for EULEX to Prioritize War Crimes, April 2012, p. 18.

22 AI, Kosovo, The Challenge to Fix a Failed UN Justice System, January 2008, <http://www.amnesty.org/en/news-and-updates/report/justice-failed-kosovo-20080130>

23 AI, Kosovo, Time for EULEX to Prioritize War Crimes, April 2012; Parliamentary Assembly, The protection of witnesses as a cornerstone for justice and reconciliation in the Balkans, 12 January 2011, Doc. 12144 rev.; OSCE Report on Independence of the Judiciary in Kosovo, Institutional and Functional Dimensions, January 2012; OSCE, Kosovo's War Crime Trials, A Review, September 2002; Kosovo's War Crime Trials: An Assessment Ten Years On 199-2009, May 2010.

24 The Special Prosecution Office of the Republic of Kosovo has dedicated 2 international and 2 national prosecutors to investigate and prosecute war crimes.

25 Parliamentary Assembly, The protection of witnesses as a cornerstone for justice and reconciliation in the Balkans, 12 January 2011, Doc. 12144 rev., page 1.

witness testimony describing atrocities against Kosovo Albanian civilians committed by Serb paramilitaries in 1999 constitutes a "brave and patriotic act." He reiterated: "It is patriotic to testify about the killings of women and children and other horrors which he saw with his own eyes."<sup>26</sup>

With regard to Kosovo, the PA of CoE stated that witnesses do not believe that they have "a moral or legal duty to testify as a witness in criminal cases".<sup>27</sup> Furthermore, the CoE notes that "[...] when a witness does come forward, there is a real threat of retaliation. This may not necessarily put them in direct danger, losing their job for example, but there are also examples of key witnesses being murdered. Some witnesses who had testified against, inter alia, Daut Haradinaj before the courts in Kosovo, have been murdered".<sup>28</sup>

This concern cannot be over emphasized when listening to the recent statement of the chairman of the KLA war veteran association. He warned all those who are thinking about testifying against the members of the KLA and cooperating with EULEX. In a TV show, he said:

*"As we have announced earlier, do not follow the example of witness X, we saw what happened to him. Do not cooperate with EULEX because they do not do proper justice. We do not recognize the mission."*<sup>29</sup>

Witness X was a prison guard at the Klecka prison and the main witness in the war crime prosecution case against a former Minister and Vice President of the ruling Party. He was found dead in a park in Germany, allegedly having committed suicide.<sup>30</sup> On 2 May 2012, a mixed panel of two EULEX judges and one local judge at Pristina District Court found the Minister and 4 other KLA fighters

not guilty of charges for war crimes against the civilian population and prisoners of war.<sup>31</sup> The court had ruled that because of procedural mistakes on the part of the prosecution, the extensive testimony the witness had given before he died as well as his diaries were inadmissible especially because the defence was not able to confront the witness in the proceeding.<sup>32</sup> Today, the Minister is still under investigation for corruption charges.

While the entire judiciary went through an internationally led vetting process and has been re-appointed, judicial independence remains a further concern.<sup>33</sup> While the inter-ethnic balance in the judiciary remains unachieved, there is still the risk of political interference in the reappointment of judges and prosecutors.<sup>34</sup> Further and especially in politically sensitive and high profile cases where the social pressure is great, there is the concern of „anticipatory obedience“<sup>35</sup> by the judges to external influences. In some cases such as those where the defendant has an influential position in the Kosovo government or is a former KLA member, there have been threats to the presiding judge, in which cases the local judiciary have refused to process the case.<sup>36</sup>

With regard to the prosecution, the Chief Prosecutor of Kosovo Ismet Kabashi stated to journalists "that the local prosecutors are ready to carry out investigations for which EULEX has the executive mandate, except cases of war crimes, which must be closed as soon as possible by EULEX".<sup>37</sup> In its latest report from April 2012, Amnesty International assessed that the continued presence of international investigators, prosecutors and judges remains crucial

26 Cuska - a "brave and patriotic" trial, Radio Netherlands International, 18 January 2012

27 Parliamentary Assembly, The protection of witnesses as a cornerstone for justice and reconciliation in the Balkans, 12 January 2011, Doc. 12144 rev., para. 129.

28 Parliamentary Assembly, The protection of witnesses as a cornerstone for justice and reconciliation in the Balkans, 12 January 2011, Doc. 12144 rev., para. 130.

29 TV show "INTERACTIVE" on KohaTV, 12 December 2011, retrieved 29 June 2012, <http://indeksonline.net/?FaqelD=2&LajmiD=12243>

30 Key protected witness in Limaj trial found dead in Germany, Setimes 29 September 2011, [http://setimes.com/cocoon/setimes/xhtml/en\\_GB/features/setimes/features/2011/09/29/feature-02](http://setimes.com/cocoon/setimes/xhtml/en_GB/features/setimes/features/2011/09/29/feature-02)

31 <http://www.eulex-kosovo.eu/en/pressreleases/0275.php>

32 <http://www.eulex-kosovo.eu/en/pressreleases/0248.php>

33 OSCE Report on Independence of the Judiciary in Kosovo, Institutional and Functional Dimensions, January 2012.

34 EULEX Programme Report 2011, Bolstering the Rule of Law in Kosovo: A Stock Take, p. 33.

35 OSCE Report on Independence of the Judiciary in Kosovo, Institutional and Functional Dimensions, January 2012, p. 22, see also Annual Report 2009 on the Judicial Activities of EULEX Judges, p. 7.

36 OSCE Report on Independence of the Judiciary in Kosovo, Institutional and Functional Dimensions, January 2012, p. 22, see also Annual Report 2009 on the Judicial Activities of EULEX Judges, p. 30; EULEX Programme Report 2011, Bolstering the Rule of Law in Kosovo: A Stock Take, p. 37.

37 The Rule of Law in Kosovo: Mission Impossible?, Balkan Insight 11 November 2011

in breaking the culture of impunity, especially where the cases involve high-profile/government defendants.<sup>38</sup>

Today, there is unanimous agreement to prioritize corruption and organized crime cases. This is the message that EULEX officially and publicly sends and to which it allocates the main resources.<sup>39</sup> And this is what the broad public requests and supports.<sup>40</sup> It seems almost as if the success or failure of the EULEX mission will be measured by whether it has successfully combated corruption. Confronted by a lack of resources and mismanagement on a daily basis, the population demands the fight against corruption while at the same time they are deeply disturbed by war crime prosecutions against their heroes. The link between powerful positions of some individuals during the armed conflict where they ruled over divided parts of the country and controlled access of goods and trade and their role in the politics of today is not made. There is no understanding that there might be a link between impunity for past human rights violations and weak institutions and corruption today as highlighted by the latest report of the UN SG on the rule of law and transitional justice.<sup>41</sup> Any endeavour to deal with past crimes committed by Albanians during the conflict is seen as an untenable attack against the legitimacy of the liberation war and its heroes.

The open war crime cases perpetuate despair, anger, bitterness, a sense of victimhood and undermine trust in the institutions and the international community. Not or not appropriately dealing with war crimes is a huge obstacle to dealing with the past and to inter-ethnic reconciliation. Recent examples show that Albanian families

oppose the return of Serbian refugees to their former villages because the returnees allegedly committed war crimes against the Albanian population. Sometimes buses with returnees are stoned to scare them away from returning for good. In Grabanica village of Klina municipality 140 families signed a petition detailing chronologically the systematic violence against the Albanian residents of the village and requested the Municipal Assembly not to accept the return of the Serb criminals who were allegedly responsible.<sup>42</sup>

A clear stance that the prosecution and trial of war crime cases is fundamental for dealing with and overcoming past atrocities and that all the war crimes must be handled equally irrespective of the ethnic background is fundamental. It has to be communicated openly and directly that all communities in Kosovo have been affected by war crimes. The equal handling of war crime cases also builds a crucial basis in other areas such as in the identification process of missing persons. The issue of missing persons is another very painful chapter of the past which leaves victims behind in despair. By the end of December 2011, the total number of Missing Persons in Kosovo stood at 1790, out of which 1299 are Kosovo-Albanians (1134 males, 165 females) and 499 Non-Albanians (393 males, 106 females).<sup>43</sup> The members of the families of the victims have requested the government and the international community to ascertain the fate of their loved ones. Recently, Albanian family members called on the Parliament to make any dialogue with Serbia dependent on the endeavours in this regard demonstrated by their former enemy. However, they vehemently deny that any possible progress in the identification process might also entail the handling of war crime cases, the encouragement that witnesses come forward and also report crimes committed by former KLA fighters and that KLA has also to reveal its own sources. These references are still taboo today and the majority of the families of the missing will dismiss these allegations vigorously.

38 Al, Kosovo, Time for EULEX to Prioritize War Crimes, April 2012

39 Annual Report on the Judicial Activities of EULEX Judges 2010, p. 4, 5 and 9. For the prosecution, EULEX states: "A new criminal policy has been set up in September 2010 with the objective to focus all prosecutorial capacity on the fight against corruption.", <http://www.eulex-kosovo.eu/en/justice/prosecution.php>; see also Al, Kosovo, Time for EULEX to Prioritize War Crimes, April 2012, p. 21.

40 Mary Martin/Stephanie Moser (ed.), *Exiting Conflict, Owning the Peace, Local Ownership and Peacebuilding Relationships in the Cases of Bosnia and Kosovo*, Friedrich Ebert Stiftung, June 2012, p. 18.

41 Report of the SG on the rule of law and transitional justice in conflict and post-conflict societies, 12 October 2011, S/2011/634.

42 Koha Ditore, 2 July 2012, page 5.

43 Department of Forensic Medicine EULEX-Kosovo, Annual Activities Report Missing Persons Operations, 9/12/2010 - 8/12/2011, 2012-DFM-005, p. 9

## b) Reparations

It is assumed that the number of the killed, fallen and missing persons in Kosovo in 1999 and 2000 is around 10,682 (8,871 Albanians, 1,811 Serbs). Further it is assumed that after the end of the conflict and for the period of 1 July 1999 until 31 December 1999, the number of Albanian victims is 150 and the number of Serb victims is 402. There is no breakdown of these numbers in civilian/non-civilian victims.

According to some institutions<sup>44</sup> there were around 20,000 women raped during the war. This number seems extremely high and is contested, as is almost every estimate of the numbers of victims of a conflict. In general, it seems to be very difficult to produce accurate numbers of civilian victims and especially identify the number of women who have suffered gender-based violence during the conflict. These women still suffer tremendously from the violations in the past, since the crimes committed against them is a taboo for the Government and society of Kosovo and therefore they are regularly subject to secondary victimization. In workshops conducted with women's organizations, they clearly expressed their disappointment in the international community for abandoning them by not dealing with "war crimes" and gender-based violence in the last decade and not having openly and publicly addressed this issue adequately.

In the last decade, not much has been done for the psychosocial rehabilitation of the victims. The Law on War Values (LWV)<sup>45</sup> in force since December 2011 foresees compensation for civilian victims of the war in principle. The legislation's primary aim is however to compensate the 'sacrifice and highest contributions in the liberation struggle of the KLA'. The LWV considers the following categories eligible for receiving benefits: national hero, national martyr, KLA invalid, veteran of KLA, member of KLA, war hostage, missing KLA soldier and civilian invalid/missing and victims of war. The benefits consist of a mixture of cash-based and non cash-based compensation depending on the grade of disability. However, the law treats KLA members differently than civilian victims, who

receive less benefits. Further, the law excludes three categories of civilian victims from being eligible to receive any compensation: a) civilian victims belonging to minority group (Serbian, Roma Ashkali and Egyptian communities, etc.), b) women victims of gender-based violence and c) collateral victims of the conflict.

In workshops with senior officials of the Government of Kosovo, there was a clear understanding that it is deeply unjust and a clear discrimination that the LWV does not consider rape and sexual violence. There was however no consensus on whether victims of minority communities should also be eligible for compensation. It was asserted that Serbia as the aggressor was the main instigator of the violence and first should pay reparations to the Albanians for all the crimes committed during the last decades and especially during the conflict. The Serbian victims of the recent conflict did not share this opinion.

The LWV mixes up social pension, welfare and insurance for disability dependent on the gravity of harm suffered and disability in percentages. Reparation however is given purely because of human rights abuses suffered, which cannot be measured in percentages. A separation of the reparations for civilian victims of the conflict for suffered human rights abuses from compensations earned for having fought a liberation war, as a member of the KLA seem necessary. A separate law on reparations for all civilian victims of the conflict, also addressing the needs of women and members of minority communities would give a strong message of acknowledgement, fairness, inclusion and integration by addressing the whole society.

## 4. End of Supervised Independence

Various workshops with NGOs, victim's and women's representatives and members of the families of victims have shown that the Albanian and Serbian communities expect exactly the same when it comes to overcoming the past<sup>46</sup>: Truth about the past, justice for committed crimes and reparations. The discussions have also confirmed

44 the For example Kosova Rehabilitation Center for Torture Victims.

45 The Law on War Values (LWV) is the common shorthand title of the Law on the Status and the Rights of the Heroes, Invalids, Veterans, Members of Kosova Liberation Army, Civilian Victims of War and their Families (Law No. 04/L-054).

46 They differ when defining the term "past" which for the Albanian Community also includes the decades of discrimination before the 1998/1999 conflict.

that dealing with the past is a process which Kosovo still has to implement.

With the closure of the ICO, the CSP and therefore also the basis for Art. 2.5 would cease to exist. With the end of supervised independence in sight, the question arose as to how ensure the process of DwP in Kosovo. In June 2012, the Government of Kosovo took the decision to establish an Inter-Ministerial Working Group (WG) on Dealing with the Past and Reconciliation with the mandate to establish a National Transitional Justice Strategy.<sup>47</sup> The Working Group is composed of members from different Ministries and civil society organizations demonstrating experience in the field. International institutions would assist the WG as experts in the form of observers.

Great attention has to be given to the process which has to meet the following criteria: a) Inclusiveness - The perspective of all the relevant stakeholders including the members of all the communities in Kosovo as well as all the victims of the conflict must be discussed and taken into consideration. These communities must participate in the process. b) Gender-sensitive approach - The special vulnerable position of women that suffered gender-based violence must be taken into consideration and their participation in the process must be guaranteed. c) Comprehensive approach - The comprehensive approach incorporates the full range of judicial and non-judicial measures, including, among others, individual prosecutions, reparations, truth-seeking, institutional reform, vetting of public employees and officials, or an appropriately conceived combination thereof. d) Consultative process - The Working Group should include the targeted population in the process, gathering the relevant facts and information from them, giving them a voice through consultations and recognizing them as equal interlocutors.

The WG which, at the time of this publication is about to be composed, will face some important challenges in the near future: Kosovo's involvement in the establishment of the regional truth-finding commission RECOM, end of the mandate of EULEX and the proper handling of war crimes by Kosovo institutions, reparations for all civilian victims of the conflict and adequately addressing

women's suffering from gender-based violence during the conflict are just some of the future tasks of the WG.

## 5. Conclusion

Article 2.5 CSP and the establishment of a comprehensive and gender-sensitive approach for dealing with the past is a statement that transitional justice today cannot be ignored if a just and lasting peace is to be achieved. The experience in Kosovo has shown that victims expect to learn the truth about the past, that the war criminals are brought to justice and that victims receive adequate reparations for human rights abuses suffered. Dealing with the past is first and foremost a national and local process. However, in situations with a strong international involvement in the form of territorial administration and / or rule of law mission it is the responsibility of the international institutions to re-establish the rule of law and justice. Likewise, it is the responsibility of the international community to initiate and support transitional justice initiatives.

In post-conflict Kosovo, UNMIK followed by EULEX was supposed to advance justice. These institutions were and still are today primarily and significantly involved in shaping Kosovo's institutions and legislations in the areas of war crime justice, treatment of victims and reparations. The EU constitutes the most powerful motor for reform and development. In the process of succession, it has the necessary leverage and bears the political responsibility to ensure that justice sustains stability.

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47 Decision Nr. 01/77, 4 June 2012.

# Setting up Mechanisms for Transitional Justice in Burundi : Between Hope and Fear

Brother Emmanuel Ntakarutimana<sup>1</sup>

## **By way of introduction: The story of a long adventure**

Burundi has known socio-political confrontation since its independence in 1962. The interminable peace talks between the various protagonists that concluded in Arusha on 28 August 2000 served as social therapy. But it has been a long road to get there. The Arusha recommendations proposing three mechanisms (the international judicial commission of inquiry, the National Commission for Truth and Reconciliation and the International Criminal Court, if applicable) were followed by an awkward negotiation between the United Nations and the government.

On the UN's side, Resolution 1606 (2005) called for negotiations with the government of Burundi and public consultations. The question of how to set up the mechanisms of transitional justice was the preserve of a small circle close to power, even though real ownership by the people is crucial to the success of such a process.

Having set up sufficient barriers to avoid renegotiating the terms, consultations with a small sample of the population finally took place in 2009 and the Committee released its report in April 2010. Election fever at the time prevented any action being taken; Burundians had to wait for the President of the Republic to reconsider the matter in his speech at the end of the year (2010) and in his New Year's speech (2011). In June 2012, the technical committee charged with setting up the Truth

and Reconciliation Commission (TRC) submitted its report with a proposed bill on the TRC's establishment and operation. The lack of enthusiastic follow-up is proof enough of how these delicate mechanisms continue to provoke hesitation and barriers.

## **Challenges to meet**

### **1. Structural challenges**

#### **The challenge of isolating a single mechanism**

Today, we speak of the truth and reconciliation commission. But we should keep in mind that this mechanism is only part of something that must work holistically within a constellation of four areas of human rights acting in synergy: the right to know the truth, the right to justice, the right to compensation and the right of non-repetition guaranteed in a series of institutional reforms.

Until today, various fora have focused on the right to know the truth, without putting enough emphasis on the other mechanisms. But the right to know the truth must be part of a much broader set of measures if it is to have even a minimum impact on healing our society. Our entire culture must be boosted at the national level.

#### **The challenge of political will.**

In questioning the rebirth of a national community, the fundamental issue remains that of the political will of the decision-makers. The process of setting up transitional justice mechanisms was planned in 2001, six months after the signing of the Arusha Accord for Peace and Reconciliation in Burundi. The delay that followed comes from the question of political will, acting on several levels: choices about objectives, methods, definition of mandates, and composition of the various technical teams. Added to these four are choices concerning the structure and operation of the commission. The use of the results of the consultation in terms of implementation and management of monitoring activities is also heavily dependent on the political will

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of those in power. The more that political will shows openness to a pluralism of ideas and respect for democratic values and principles, the more society progresses towards democracy.

### **The challenge of accountability and real citizen participation.**

In the history of this country, as we have noted, the temptation on different occasions to resort to techniques of consciousness-raising and manipulation have remained strong. An explanatory and injunctive approach does not guarantee enrichment and use of the objective and the results of consultations and dialogues. The filtering of issues and questions under embargo complicates this approach. Shortcuts (i.e., composing documents in the laboratories of power, followed by field-trips to explain decisions taken, with promises to integrate the people's comments into the final document) are no guarantee of national stability unless there is firm commitment to reshape the agenda profoundly to undertake genuine reforms leading to the rule of law, with a sense of fairness and social cohesion.

## **2. The cyclical challenges**

### **The security challenge.**

Disarmament of the civilian population has made little progress and considerable quantities of weapons remain uncontrolled. The resurgence of armed groups is not conducive to the peaceful environment needed for a truth and reconciliation commission. A TRC demands serenity at the national level, especially considering the delicate issue of protection for witnesses and victims.

### **The challenge of who receives the TRC's report.**

The challenge of who is to receive the report is not a minor one, as we realized during the public consultations held in 1991-1992. The report of the consultations' steering committee had first to go to the Central Committee of the single party and to the Military Committee for National Salvation and then to the Congress of the single party before being submitted to a popular referendum. Delivering the report to the President of the Republic is not necessarily the same thing as delivering it to the National Assembly or Senate.

### **The challenge to set-up mechanisms for monitoring and evaluation with indicators of success.**

Looking through various texts related to national consultations or the work of the commissions in Burundi's past, one readily finds the establishment of monitoring committees during the preparation of national debates or of committee work that are aware of their import. But, once the conclusive texts have been adopted, the monitoring mechanism seems to vanish. In 1991, the Committee for Democratization proposed provisions for monitoring, but these were not taken into account. In 1995, the technical committee charged with preparing the national debate on the country's fundamental problems suggested that, if the idea of a national body to manage national cohabitation should be accepted, the monitoring committees set up to conduct the debates could form the nucleus. Unfortunately, this recommendation was not implemented. Even the Arusha Accord, which issued provisions to guarantee implementation of the agreement in its Protocol V, has not been given rigorous and binding monitoring. This challenge runs throughout the history of Burundi. It is important that the truth and reconciliation commission innovate in this respect.

## **3. Two issues to consider for sustainable results**

### **a. The issue of national ownership of the process.**

Transitional justice mechanisms are highly technical concepts formulated according to their origins in the English language. The French language tries to adjust itself in the translation of these concepts. Unfortunately, only a tiny minority of Burundi's population have a good command of either French or English, so translating these technical concepts is a challenge. South Africa, for example, had to take on a massive job of translating the TRC's key concepts into its local languages.

Until we have a technical vocabulary that has been debated and finally agreed upon by our media and public opinion in general, do we not risk operating according to mechanisms adopted from the outside, subtly imposed and with no real ownership by the people? The challenge is somehow to create a new culture that is in the bones and mentality of our people.

## **b. International standards and the challenge of hybridism**

International standards give a preponderant role to formal institutions of justice, be they national or international. Their procedures are governed by laws whose mechanisms are punctilious concerning substance and form. These standards inevitably lead to lengthy procedures with relatively few findings. The impact of such reconciliation is not easy to measure. The use of traditional justice, however, is meant to be little procedural so as to focus on community empowerment mechanisms, discussion of the difficult past, and the sharing of history desired to benefit the community and its members. A certain degree of informality provides insights into life as it is lived. In all cases, the main challenge is that of effectively fighting against impunity to develop a culture of responsibility and accountability.

It is necessary to invent realistic approaches that make use of peoples' cultural heritage while still meeting the minimum international standards. Further research is needed in the creative use of formal and informal procedures - with references to appropriate international standards - in techniques that are locally significant.

### **In conclusion: Facing the difficulty of harmonizing two logics.**

As promoted, transitional justice mechanisms should lead to the creation of a new culture that respects human rights and that can be open to the dynamic of development. But, as we know, culture is not made in the laboratory. For a community, culture represents a work of communion in the same values. Culture should not only review the organization of social relations by defining the social positions of the collective subjects according to interests; it should also define social identities according to values. Ultimately, the mobilizing force can only spring from ownership arrangements based on what one seeks to value. Then, culture as a part of inner life, focused on perception and values, becomes unavoidable.

### **Current research around transitional justice mechanisms in Africa obviously focuses on a dialogue between two logics.**

On the one hand, there is a legalistic logic of international standards established in a normative approach and setting what is currently promoted

by the international community as the non-negotiable response to war crimes, crimes of genocide and crimes against humanity. The court becomes the standard reference, with predominant roles for the prosecutor and judge. Much more attention is given to the criminalization of the executioner than to the restoration of the victim.

On the other hand, is the focus on a realistic approach that reconciles interests according to the mechanisms of African tradition. In the latter approach, the search for truth and the imperative of compensation leads to the restoration of relationships and community healing. Here, the challenge is social therapy and the healing of memory. In 2004, Kofi Annan, Secretary General of the UN, in trying to reconcile these two approaches in his report to the Security Council, encouraged research on a subject that is complex and new in many ways.



# TESTIMONY: “My papa is there”

Antoine Kaburahe<sup>1</sup>

“Listen more often to  
Things than to Beings.  
The Voice of Fire can be heard,  
Listen to the Voice of Water.  
Hear in the Wind,  
The weeping Bush:  
It is the Breath of the ancestors.  
Those who are dead are never gone (...)  
The Dead are not beneath the Earth:  
They are in the Tree that trembles...”

*Birago Diop, Senegalese poet*

My driver and I are on the Bujumbura-Gitega road, returning from the interior of the country after a gruelling assignment covering the national consultations about setting up the Truth and Reconciliation Commission. It is a delicate subject.

I am feeling a bit frustrated because the consultation was yet another of those great to-dos of which Burundian officials are so fond, where one talks about everything but the essentials. The people, quiet and docile, had listened to the great men who arrived in dazzling four-wheel-drive vehicles. And, as our language allows for fine metaphors and clever euphemisms, by the end of the event, everyone appeared satisfied that duty had been served. The politicians can go back to the capital, per diem in pocket. And all is well in the best of all possible worlds.

## **We forget nothing**

On the drive home, I am thinking about the President of the Republic words on the radio a few hours before the end of 2011: “Let 2012 be a year of truth, of mutual forgiveness and reconciliation. The

year 2012 will be marked by the establishment of the Truth and Reconciliation Commission (TRC); different socio-political actors are called to give their views on the Report of the Technical Committee responsible for preparing the establishment of transitional justice mechanisms and, in particular, the draft law establishing the TRC so that this Commission may be beneficial for all.” Five months later, almost nothing has changed.

The car winds through the canyons. The road is a dangerous: one false move and we could go over the side. But I know that I am in good hands. A.H., my driver of several years, is a good driver: calm and, a moderate Muslim, he does not drink.

But, suddenly, A.H. has trouble handling a dangerous turn. We are on the brink of tumbling into a valley. I can't make out why A.H. has become so unnerved. And, then, he motions to a cornfield below the road and says, “My papa is there!”

And reality catches up with me at a bend in the road. I did know, vaguely, that in 1972 in this fertile valley, bulldozers had buried murdered Hutu notables of the town of Gitega. A.H.'s father was one of the men buried somewhere down there. In Burundi, we live with the wounds of the past. They do not heal, but we are a people of silence. From childhood, we have stoicism drummed into us: Take it and don't let it show. “The best word is the one that you hold inside”, teaches our ancestral wisdom.

And Burundians do keep silent. Perhaps this also explains why the establishment of the TRC has been stonewalled. The TRC disturbs many - the former military regimes, the rebels now in power - and everyone is playing for extra time. Is it a kind of “deal”? Some think so.

This (deliberate?) slowness is exasperating and Burundian civil society is disappointed. FORSC (Forum To Strengthen Civil Society) has made its

<sup>1</sup> Antoine Kaburahe is a journalist from Burundi. In 1992, taking advantage of democratisation, he founded an independent weekly together with a group of young journalists. The newspaper survived until its main founders went into exile after being threatened by extremists. In 2007 he returned to Burundi to launch an independent and respected weekly entitled *Iwacu*, of which he is editor.

positio clear: "The danger is that if this process of setting up mechanisms for transitional justice continues to be delayed, there is a risk of collision with the electoral process in 2015. People suspected of having committed the grave crimes which have devastated this country - and there are many - will once again get elected or remain in position, although, from the Arusha Accords of 2000, it was planned that the first elections in 2005 could not take place before the publication of the list of alleged perpetrators of serious crimes so that they would be excluded from the electoral race."

But in the circles of power, the problem is played down. "People shouldn't go after the people who will be elected in 2015; we don't know who they are yet," counters the President's spokesman. "It is for Burundians to decide on the steps and the timing. If we get to Election Day and see that the TRC has not yet completed its work, Burundians themselves may decide to curb the mission of the TRC so that the election comes first and, then, continue the Transitional Justice process afterwards," repeats Hatungimana Leonidas. It is a dialogue between the deaf.

Another point of contention is the International Criminal Tribunal for Burundi. "There is a blackout on the Special Tribunal for Burundi (STB), not even the smallest reference to justice in official speeches," says a FORSC member. Burundian civil society has always demanded that these two mechanisms of transitional justice (the TRC and the STB) be implemented simultaneously or that there is "at least a guarantee that this judicial mechanism will appear, but it seems that this body is not to become a reality," accuses Burundian civil society.

At Iwacu journal, we wanted, in our own way, to "push" Burundian public opinion towards debate. We devoted an issue to a "Journey to our places of memory": a journey, in other words, to identify known and unknown graves. On the eve of the establishment (let us remain optimistic) of the Truth and Reconciliation Commission, Martina Bacigalupo, an Italian photographer, and Roland Rugero, an Iwacu journalist, traveled throughout Burundi visiting these places of memory.

Their collaboration framed and made public these sites. Some are official, known and honoured; others are unknown, forgotten, "wild". But all are loaded with pain. Burundian history is littered

with dates that thud like bullets or slash like machetes: 1965, 1969, 1972, 1993...

This quest was a challenge. And we anxiously awaited the government's response. Would we not be accused of "interfering" with the work of the TRC in the making? In this country, it doesn't take much to get the maximum penalty. At the time of this writing, a colleague has just received a life sentence at a show-trial for having "met with the rebels"...

Strangely enough, the magazine was well received and widely read. Because, in spite of everything, Burundians want to know. The younger generation wants to understand. Because it is impossible to forget where our people were killed, discarded, buried without a grave. My driver almost drove us over a cliff because he was passing a green field of corn (pardon, a mass grave) where his papa lies.

### **Death denied**

In the Burundian tradition, one week after a death is held a "partial lifting of mourning". It is also called "get out the hoes". With death, all life stops. We do not cultivate; we "hang up the hoe" ("hoe", because there is no mechanized agriculture). The partial lifting one week later is an opportunity to get back to work, to get out the hoe: life must go on. A few months later, there is the "definitive lifting of mourning". This time, there is a big party. In speeches, we go over the life of the deceased, his career. Someone who owes a debt to the deceased is invited to appear before the assembly. On the other hand, if the deceased owed someone, it is an opportunity to say so to all the friends and family. The page must be turned.

This is a beautiful, solemn ceremony. No one weeps. Sometimes there are even comical scenes; for example, if the deceased, as they say here, had a "second office", it is the golden opportunity for the mistress to introduce herself and, sometimes, to show off half-sisters or half-brothers to the distraught family and to the secretly amused assembly.

With the war and the massacres, this ceremonial management of death disappeared. Thus, during the 1972 massacres against the Hutu elite, widows were not allowed to cry, to mourn. One cannot imagine the trauma.

In "Journey in our places of memory", which I consider in spite of everything a small contribution to the invisible TRC, we did not want to "investigate", to say who had done what, where, when, how and why. We just wanted to know and recognize these graves where lie our parents, our children, our brothers and sisters. It is a first step in the work of memory, to reconcile us in some way with our dead.

For my part, I'm afraid that we risk participating in the birth of a bureaucratic TRC, completely disconnected, which will be used to place a few activists in well-paid jobs. Burundians are specialists in developing high-sounding commissions, budget-consuming but completely lethargic. The "Bazungu" (white people) will fund it. This "political" commission will not have the courage to put the words and names on these crimes.

"Before you turn a page, it should be read," said an African sage. We need to read our history before claiming reconciliation. Certainly, all specialists agree, it is never easy, anywhere, to set up a TRC and each case is unique. It can only be more complicated in a country with a culture of repression and, most importantly, in a country where silence apparently suits the masters of yesterday and today. In the recent past, the world spoke of the "balance of terror" (i.e., mutually assured destruction). In Burundi, one could speak of "the balance of mass graves"...



# Transitional Justice Mechanisms to Address Impunity in Nepal

Mandira Sharma<sup>1</sup>

## Context

Between 1996 and 2006, Nepal suffered an armed conflict unprecedented in its history. The direct armed confrontation between the state security forces and the Maoists took more than 17,000 lives, leaving thousands tortured, sexually abused, disappeared and displaced. The armed conflict ended with the signing of the Comprehensive Peace Agreement (CPA) in 2006. The CPA is regarded as the blueprint for Nepal's peace process, and promises to address the legacy of past human rights abuses and impunity. It will also tackle many other reforms to end inequality in society, thereby opening up an opportunity to address some of the root causes of conflict. However, successive governments formed after the conflict have undermined the letter and spirit of the CPA. Each of them has denied justice to the victims, fostering and institutionalizing impunity by various means and thereby damaging the rule of law and the justice system. With their actions, they have prevented peace and democracy in Nepal from being sustained.

This paper discusses the deeply entrenched problem of impunity in Nepal, how it is destabilizing society, and how the transitional justice discourse is unfolding in the country. It counsels a degree of caution in framing transitional justice mechanisms in the country, and highlights the importance of addressing impunity to make peace and democracy last in Nepal.

## Institutionalized Impunity

Impunity is a long-standing tradition in Nepalese socio-political life. It dates back as far as the autocratic family regime of the Ranas, and was a prominent feature of the monarchical system. The autocratic rulers of the past held the country's sovereignty in their hands, allowing them to retain power and remain immune from any legal accountability for their actions. Even the restoration of democracy in 1990 failed to bring about significant reforms in establishing criminal accountability for the crimes committed by those in power. Failure on the government's part to act upon the report submitted by the Mallik Commission (named after Justice Janardan Mallik, the chair of the Commission) on the grave human rights violations perpetrated during the 1990 People's Movement was a major missed opportunity to deal with impunity. The same was repeated in the aftermath of the People's Movement of 2006. The failure of successive governments to put in place strong transitional justice mechanisms to address past crimes has brought the country to the brink of collapse, facing instability, civil unrest and poverty. In recent years resistance to accountability for human rights abuses and violence has risen significantly, which gives the sense that the state is not only tolerant of impunity, but also promotes it by different ways and means. Some illustrations of how the state is promoting impunity in Nepal are given below.

*Promoting impunity through immunity:* Several laws provide for immunity, allowing government officials to evade criminal accountability and thereby fostering the entrenched climate of impunity. Immunity provisions contained within national legislation allow government authorities the scope to argue that they do not fall within the ambit of a number of these laws, and are thus immune from prosecution. Providing immunity in law to state officials for any acts committed on duty and while acting in "good faith" guarantees impunity for state officials. In particular, laws governing security personnel, such as the Nepal Police Act,

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<sup>1</sup> Mandira Sharma founded the Advocacy Forum, a human rights organisation which conducted investigations and filed cases on behalf of thousands victims of Nepal's 10-year civil war, which began in the mid- 1990s. For her courage and tenacity, Mandira Sharma was given the Human Rights Watch award, one of the most prestigious honours in the field of human rights. Since the end of the civil war she has continued the fight impunity and for the rule of law. She received her BA in Law from Tribhuvan University in Kathmandu and her LL.M in International Human Rights from the University of Essex in Colchester, England.

Armed Police Force Act and Army Act, give wide powers to security personnel to use force, for instance. These powers are intended to be exercised “in good faith” but can be, have been and are being abused, resulting in grave human rights violations. Section 26 of the Armed Police Force Act and Section 22 of the Army Act contain these provisions. These were grossly abused during the conflict, leading to egregious instances of human rights violations perpetrated by security personnel. Other specific immunities afforded to national park officials have also resulted in human rights violations. Such violations continue to be reported. The murder of three unarmed women at the hands of army men in Bardiya National Park in 2010 serves as an example. So too do the multiple extrajudicial executions in the Terai region by the Nepal Police and Armed Police Force. None of the perpetrators has been brought to justice.

Given the prevailing systematic impunity, the “good faith” clauses have not been tested in the courts, as hardly any perpetrators of human rights abuses have been brought to justice before a civilian tribunal. Pending cases are not progressing as a result of non-cooperation by the Nepal Army, and the UCPN (Maoist) party especially. People thus feel that it is pointless to approach the justice system, which in itself further undermines the rule of law and people’s trust in the criminal justice system.

Promoting perpetrators: Shockingly, the government time and again protects the perpetrators rather than the victims. The government has even been promoting alleged human rights violators. For example, Maoist leader Agni Sapkota – against whom the police issued a summons for the killing of an unarmed civilian during the conflict – was made a minister rather than being handed over to the police for further investigation. In the same way, the army defied court orders to make Nirajan Basnet, one of four accused in the torture and killing of 15-year-old Maina Sunuwar, appear in the court, and sent him on a UN peacekeeping mission instead. Even after he was forced to return to Nepal he was not handed over to the court, as was required, and the army has continued to protect him. The government has also been protecting Balkrishna Dhugnel, a Maoist leader convicted by the Supreme Court of Nepal of the murder of a civilian. He has so far not been arrested to serve his sentence, but was a member of

parliament until parliament was dissolved, and still is still a member of the Maoists’ central committee. Kuber Sing Rana, accused of illegal arrest, disappearance and the extra-judicial killings of five youths in the Dhanusha district, was promoted to Assistant Inspector General of Police, despite a court order to investigate and prosecute him for murder. These are emblematic cases which test the government’s commitment to end impunity.

Withdrawing criminal cases: Governments of all colours have used executive power to withdraw several cases against political activists implicated in serious crimes, including homicide. In the post-conflict time itself, more than 1,000 cases – both related and unrelated to the conflict – were withdrawn.

Although Section 29 of the State Cases Act 1992 provides for case withdrawal under certain conditions, the government has been abusing this provision. Time and again, the Supreme Court has objected to this practice, arguing that it inter alia contravenes the victims’ right to justice, fosters impunity and creates instability in the society. In a number of cases such as *Nepal Government vs Devendra Mandal et al.*, *Nepal Government vs. Dil Bahadur Lama et al.* and *Nepal Government vs. Gagan Raya Yadav*, the highest court in the land has made it very clear that the state’s power to withdraw cases is in no way an arbitrary power, and it must be exercised for a good cause in good faith on the basis of valid reason and judicious grounds. Thus, it should not be ordered as a matter of course. In the *Gagan Raya Yadav* case, the court explained in no uncertain terms: “If the government keeps withdrawing cases without analysing the gravity of the case, and courts grant permission without testing the reason, the responsibility and accountability of the government to protect the life and property of individual will be eroded, destroying the very basic fabric of the rule of law.” Regardless, the state and cabinet have continued to decide to withdraw criminal cases, mostly against certain groups belonging to political parties represented in the government.

Clause 5.2.7 of the CPA provides for the withdrawal of political accusations, claims, complaints and cases. Some genuine political cases (such as those filed under the Terrorist and Disruptive Activities Act) have indeed been withdrawn on this basis. From the Maoists’ vantage point, the conflict was a special moment in the nation’s history and it

should be treated as such. This means that they broadly interpret this CPA clause to classify even the cases of serious human rights violations committed during the conflict as “political crimes”.

*Granting amnesty and pardon:* Along with case withdrawals, the practice of granting amnesties and pardons to convicted offenders is another factor that fosters impunity in Nepal. Article 151 of the Interim Constitution of Nepal provides for the grant of pardons. It states:

“The Council of Ministers may grant pardons, and suspend, commute or remit any sentence passed by any court, special court, military court or by any other judicial or quasi-judicial, or administrative authority or institution.”

This broad cabinet mandate has been abused to grant pardons to convicted offenders. On 8 September 2010, the Supreme Court upheld the conviction of lawmaker Balkrishna Dhungel for the murder of civilian Ujjan Kumar Shrestha during the conflict, as well as the sentence of life imprisonment and confiscation of property initially imposed by the district court. However, the incumbent government led by the UCPN (Maoist) party, of which Dhungel is a member, requested a presidential pardon, invoking Article 151. The Supreme Court issued a stay order and an injunction against the immediate implementation of this decision, but Dhungel has still not been arrested.

*Not enacting legislation as required by the court:* Some serious human rights violations such as torture, enforced disappearance, and the forced recruitment of children are not defined as a crime in Nepal. As a result, victims cannot make a complaint to the police. Furthermore, the absence of a legal framework to screen or vet potential holders of public office, or to suspend incumbents, is another way through which impunity is being fostered.

Similarly, the imposition of a 35-day limit within which a First Information Report (FIR, formal complaint to police which initiates a criminal investigation) on certain crimes has played a major part in depriving victims of justice. The police refuse to register an FIR for certain crimes, such as rape, if the 35-day period has expired. Nepal’s difficult geographical structure, the victims’ lack

of awareness and their need to recover from the trauma inflicted upon them make it difficult to report the crime within this limited period. This is another factor which enables the perpetrators to go scot free.

Despite repeated orders from the Supreme Court for the government to criminalize torture and enforced disappearances, and for the law providing a 35-day statute of limitations on rape to be changed, the government has not taking any initiative in this respect.

*Undermining the judiciary and national human rights institutions:* Blatant defiance of court orders is another way in which impunity is being promoted. As mentioned previously, court orders relating to the investigation and prosecution of human rights violations have regularly been defied. In addition, undermining the role of human rights institutions in the country has been part of the prevailing strategy to perpetuate impunity. With the United Nations Office of the High Commissioner for Human Rights asked to leave Nepal, and the National Human Rights Commission’s role severely reduced, no effective watchdog remains in the country to uphold human rights. The National Human Rights Commission (NHRC) Act passed by parliament in January 2012 curtails the powers and jurisdiction of the NHRC, rendering it merely an administrative wing of the state, rather than a constitutional body functioning as a watchdog to uphold human rights. While Article 11 of the old 1997 NHRC Act had granted it the same powers as a court, the new Act has cut this power altogether, which is a direct contradiction of the Paris Principles relating to the status of national institutions.

The Principles were adopted by the UN General Assembly in 1993. They demand a broad mandate for institutions to promote and protect human rights. However, their curtailment is clear from the very preamble of the new NHRC Act, in which the terms “independent” and “autonomous” have been omitted. They are mentioned almost in passing in Section 4(2). Furthermore, Paris Principle 3(b) states that national human rights institutions should promote and ensure the harmonization and implementation of international human rights instruments. The new Act completely avoids this. Another worrying aspect about the new statute

is that a time limit of six months to lodge a complaint has been introduced, thereby effectively preventing victims from lodging complaints about conflict-era cases. It is important that the Commission is afforded sufficient functional independence, as required by the Paris Principles. The NHRC should be able to recruit its own staff, including its Secretary. However, the new Act provides for the appointment of the Secretary by the government, allowing scope for political manoeuvring and calling the NHRC's independence seriously into question. The law is silent on the NHRC's jurisdiction when investigating all alleged human rights violations, including those of which army personnel have been accused. This potentially perpetuates the army's immunity from investigation and prosecution in grave instances of human rights violations during the conflict and in its aftermath.

### **The Transitional Justice Debate in Nepal**

The CPA provided for the establishment of a high-level Truth and Reconciliation Commission (TRC) and a Commission of Inquiry on Enforced Disappearances (COID) as transitional justice mechanisms. These commissions reflected the best practices adopted across the world in many post-conflict peace processes, and were a welcome development. However, ever since 2006 there have been a number of proposals to provide amnesty to wartime perpetrators. These have been made during the drafting of the laws to establish these transitional justice mechanisms. They seriously threatening to further entrench the culture of impunity. The Nepalese people have bitter past experience with commissions of inquiry in Nepal. These bodies were generally commissioned to deny victims' demands for justice rather than to forge measures to provide justice, ensure perpetrators are held accountable, and take action to prevent future violations. With this in mind, victims and human rights defenders in Nepal have been demanding that transitional justice mechanisms are established through laws, with a clear mandate. In order to prevent these mechanisms from further strengthening impunity, there are demands from all quarters for specific measures in law. Victims and human rights defenders are of the opinion that these mechanisms should address the entrenched culture of impunity which has long ailed the country. In their view, they should also ultimately ensure victims' rights to truth, justice and reparations, recommend measures to prevent

such violations recurring in the future, and prepare the ground for meaningful reconciliation in society. After persistent and coordinated activism from human rights defenders, victims' groups and international human rights organizations, the Ministry for Peace and Reconstruction (MoPR) initiated several rounds of consultations with different stakeholders to finalize the bills to establish these commissions. The MoPR tabled the bills to establish the TRC and COID in the legislative parliament, where they were the subject of discussion for more than two years. Despite heated debate and dispute over the bills, they remained pending before the parliament. Various parties, including that which had claimed to take arms to end injustice and inequality, wanted to have provisions of amnesty in these bills so that the commissions could recommend amnesty even for those involved in serious human rights violations. With parliament dissolved before it could deliver the new constitution in May 2012, the establishment of these transitional justice mechanisms remains in limbo.

The government has also been using these yet-to-be formed commissions as an excuse not to invoke the normal criminal justice system. Serious crimes such as the murder and rape of civilians committed during the conflict could be dealt by this existing criminal justice system. There are instances in which victims and family members have filed First Information Reports (FIR), along with the evidence of the crimes, demanding a criminal investigation. However, these FIRs have not been acted upon. The police have repeatedly used the same clichéd logic that the transitional justice mechanisms will deal with past violations to refrain from filing the complaint. Many victims have knocked on the door of the Supreme Court, seeking its intervention against the state's inaction. In a number of cases, the Supreme Court has ordered the police to launch investigations and prosecutors to try these cases, stating that the transitional justice mechanism cannot supersede the criminal justice system, and that the victims' rights to justice cannot be suspended using that pretext. With the exception of one case (Maina Sunuwar, see above), none of the other high-profile cases of human rights violations from the conflict period has been investigated or prosecuted. Even in the case of Maina Sunuwar, none of the perpetrators has been arrested, despite arrest warrants having been issued by the court as far back as January 2008.

*Interim relief:* Traditionally, the provision of ex gratia payments to victims of human rights violations or their relatives has been the most common way in which governments of Nepal have approached the state's obligations to provide redress and reparations. In the continuing absence of transitional justice mechanisms, there are concerns that the right to truth, justice and reparations will once again be denied to victims. The government seems to be focusing on providing economic assistance by way of "interim relief", while ignoring the need to provide wider reparation to the victims and their families. This is of pivotal importance if the country is to heal from the armed conflict. The state's acknowledgement of what has happened, and assurances that the same will not be repeated in the future, is the foundation for any reparation process. Such acknowledgements and assurances have been very much lacking so far, however.

While financial assistance is of crucial importance to the victims, the symbolic aspect of the reparation process cannot be underestimated. This aspect may comprise formal assurances that such incidents will not be repeated in the future, by prosecuting the perpetrators, setting up memorials recognizing the victims, and providing facilities to the families of the victims in recognition of the contribution and sacrifice of their loved ones. The current "interim relief" scheme administered by the MoPR does not address these issues, as its sole focus is the distribution of financial aid. In any event, the distribution of this economic assistance is neither uniform nor consistent, and discriminates against certain categories of victim, such as victims of torture and rape.

### **Conclusion**

Transitional justice is not a mechanism that should replace the criminal justice system and shield perpetrators. It is meant to strengthen the criminal justice system and pave the way to meaningful reconciliation in countries emerging from conflict. It should also be a tool with which to address the root causes of that conflict.

All parties in Nepal agree that injustice, impunity, inequality, social exclusion and the unequal distribution of power and wealth were the major causes of Nepal's conflict. Thus, any transitional justice mechanism should aim to address these issues.

Nepal needs to tackle impunity and social inequality. It is important to ensure that the rule of law prevails, to assert that no-one is above the law, and to ensure that the law protects everybody equally. Transitional justice mechanisms are tools to provide justice to victims, and should therefore form part of a process to strengthen the rule of law and democracy. The provisions by which they operate should not jeopardize the spirit of democracy and the supremacy of the law, and substitute them with the supremacy of an individual in power. Instead, they should devise a vision to strengthen the criminal justice system so that it becomes capable of dealing with cases of human rights violations and abuses. The international law and jurisprudence which has developed in recent years at the international level clearly prohibit amnesty for serious human right violations. Thus, the international community should take a consistent position on these issues and should not support and participate in any of the processes that provide amnesty and promote impunity for serious human rights violations and abuses. Transitional justice mechanisms should help the country to address the entrenched problem of impunity, rather than to promote it. Impunity perpetuates violence. It undermines the rule of law and propagates inequality. It lowers people's confidence in state systems. It defeats the rights of the victims, and poses a serious threat to peace and democracy in Nepal.



# Nepal: Better no Truth Commission than a Truth Commission Manipulated

Ram Kumar Bhandari<sup>1</sup>

Beginning in 1996, the People's War in Nepal lasted for ten years before a peace agreement was finally signed in 2006. This clash of state and Maoist forces caused extensive damage to the country and inflicted deep psychological trauma upon victims and their families. At the height of the conflict from 2001 to 2004, more than 1400 persons fell victim to enforced disappearances by both state and Maoist forces. Despite the peace agreement and constant pledges by both sides to provide information about their loved ones, families continue to wait. The families' desire to seek truth and justice has been ignored for the sake of political expediency, which has promoted a culture of impunity and thus made a mockery of the high ideals of the "New Nepal".

Nepal's decade-long armed conflict saw thousands of ordinary people become victims of both parties to the conflict, with thousands killed, wounded, tortured and displaced. Perhaps the most enduring legacy of conflict, however, are the missing and the disappeared. Their families still wait for information about the fate of their loved ones and for the chance, if they are dead, to retrieve their remains and ensure that the appropriate rituals are performed. Although the original ceasefire agreement, and many subsequent agreements, committed to addressing the issue of the disappeared, five years after the signing of the CPA no progress has been made. For the families of the missing, the conflict continues as long as the many impacts of their loved ones' disappearance remain unaddressed.

The country may have seen the end of the war, but the families of the disappeared are not at peace. The movement towards reconciliation has become fragmented, and the grief of hundreds of victims' families is being held hostage to vested political interests. Nepal's post-conflict period has seen the politicization and commodification of victims. The question of amnesty and the pseudo-debate on "reconciliation" have taken precedence over truth and justice. The political parties have succeeded in instrumentalizing the victims' agenda for their own political gain. On both sides of the political divide, there is a tendency to avoid rocking the boat and raking up the past. The major parties are distracted by their power struggle, and consider the war over and done with. Yet, for the relatives, the war has never ended. Each day is a painful reminder of their loss, and the silence of the state prolongs their hurt. Unless these grievances are addressed, revenge will fester and there is a danger of another, more virulent, conflict.

By trying to brush the dirt of the conflict under the carpet, through a general amnesty and by protecting those accused of war crimes, the state is rubbing salt into the wounds of the victims' families. One of the hallmarks of Nepali political culture is a fondness for "big picture" solutions that ignore the realities of people's everyday lives. Nepal's political leaders have failed to listen to victims and their need for truth, justice and community peace.

The political leaders and the state see the "logical" end of the peace process as confined to the integration of PLA combatants and the drafting of a new constitution. Over the past six years they have fought tooth-and-nail for power and, on achieving it, abused it. They have signed countless agreements and have been obsessed with their own concerns instead of addressing those of the people who suffered during the war that they waged. Ongoing self-centred political clashes ultimately prevented the political parties drafting a new constitution. The death of the Constitutive

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Assembly has created more tension, not only in Nepali politics but at the grass roots, as debates about the future and social justice continue. The process of creating transitional justice mechanisms and bringing about a broader peace has lost its way, and the Nepali people have also lost their hope and voice. There is no parliament, no constitution, and government institutions have ceased to function. The government itself is a caretaker administration, in which the perpetrators of social injustice are becoming more organized and undermining the victims' struggle for truth and justice. The political problem in Nepal is that an unrepresentative elite is using politics for itself and not the people. The same pattern is being repeated in civil society in Nepal.

Six years ago, it was the people who rose up and poured into the streets in a pro-democracy uprising that propelled the parties to power. The parties themselves mobilized the people's discontent and overwhelming desire for peace. Having gained power, however, politicians forgot about the individual sacrifices that had put them in office, devaluing popular feeling and dismissing the people's democratic aspirations. The euphoria of peace in 2006 has been succeeded by widespread disillusionment and cynicism about all politicians. Impunity is rife, accountability non-existent, and faith in politics and politicians is waning. The social injustice that lay at the root of the conflict continues, but has been all but forgotten by the political elite, as has the war's legacy of violence.

Survivors and victims are disheartened by the politics of compromise that ignores their concerns, and the false commitment to justice from the establishment. We victims will not support secret compromises made in Kathmandu that ignore grassroots realities.

Nepal's transitional justice system has emerged almost exclusively from the elite. There has been little, if any, engagement with the victims who are most affected by the violations that the process purports to address. From the Comprehensive Peace Agreement assembled by the political parties with international input, to the series of "relief" payments that successive governments have equated with reparations, victims of the conflict – most of whom live in rural areas – have been marginalized by the process. The debate

on the transitional justice system over the past six years has been between a government advocating impunity, and a human rights community advancing a global discourse of "truth, justice and reparation" that is not informed by the everyday lives and suffering of victims. The disempowered and the marginalized – women, untouchables, and the Madhesi and Janajati ethnic minorities – are over-represented in this group. They have been excluded from the peace and justice process as effectively as they have always been excluded from social and political life.

**Case 1: A family situation – how a woman in a rural village copes with hardships of everyday life**

Maiya Basnet, who lives in a rural village in western Nepal, was pregnant when her husband was arrested by a joint security force patrol during the conflict. Her husband was a schoolteacher and not affiliated with any political party. After a few months of his illegal detention, Maiya gave birth to a baby boy, their ninth child after eight daughters. The boy is 12 years old now. He has never seen his father, and continues to wait for an answer as to where he is. Maiya has experienced various problems in her community, and finds it difficult to feed and educate her children. She still hopes that her husband will come back one day, and often cries when her son asks about his father. After six years of the peace process, the state has not addressed such issues, and justice seems a distant prospect. Maiya's children want to take revenge and ask their mother to provide them with a gun. They don't see a future for a peaceful society. To them, there is no peace and they have no faith that they will ever know justice or the truth. Maiya has been socially stigmatized and economically marginalized. She struggles every day to maintain her personal dignity, her family and her place in society.

Known perpetrators openly walk the streets and even pose for TV cameras in the company of senior government ministers, thereby completely discrediting the peace process. The party of rebels that started the conflict sits in power, and does its best to ensure a general amnesty with the acquiescence of its erstwhile enemies. It is hard to imagine that the kidnappings, disappearances, extrajudicial killings, rape and torture will ever be investigated.

When victim groups who suffered from the actions of both sides visit the leaders of the political parties, there are platitudes and assurances, but nothing ever happens. Under intense international pressure, two commissions on truth and disappearances are being set up, but there are still loopholes that will allow the guilty to walk away unpunished.

Truth without justice and reconciliation without accountability are unacceptable.

Victims and their surviving families realize that there is no suitable transitional justice environment in Nepal, and it would be better to have no commission at all than a commission created to fail. It would be better to have no Truth Commission at all than a toothless commission, where the transition is governed by the perpetrators of injustice and politically led.

A recent compromise by the political parties has removed the amnesty clause for serious crimes. They have also agreed to appoint commissioners on the basis of political consensus, but this remains a dangerous game. The Commission would be a committee of the political parties rather than an independent commission. This would likely replicate the flaw in earlier bodies, such as the National Human Rights Commission, the National Women's Commission and the State Restructuring Commission. There is no political will to assist a victim-centric process. Instead, the issue has become entirely politicized. The victims' agendas have been hijacked and commodified under different banners. Political manipulation by either the state or other parties has meant that the victims' plight has never been formally addressed. This is particularly true of the Kathmandu-led top-down process. The 2006 CPA contained provisions on transitional justice mechanisms, but the victims have not experienced any significant progress.

Commissioner selection is the key to making any proposed commission truly independent. However, few politically-motivated lobbies of "human rights activists" would pursue the political path to become future commissioners, because serious concerns still exist about the form and function of the proposed commissions themselves. This is frustrating in a campaign that seeks to serve human rights. Noted victim rights advocates and

human rights defenders are still receiving threats, and impunity is becoming more deeply rooted. In this environment, who would stand up for the hundreds of voiceless victims and speak out without any judicial safeguards for either them or the victims? The proposed bills are silent on this issue. With the departure of the OHCHR, the weaker role of the NHRC, and the divided role of human rights lobbies, the international community should be watching this process carefully. It has an enormous part to play in the peace process, but it is becoming increasingly ineffective. The role of the Nepal Peace Trust Fund (NPTF) – a source of substantial finance for the peace process – should be transparent, and oriented towards peace and justice, otherwise its legacy will always be questioned.

Human rights organizations and donors should also be sensitive to the priorities of victims when they support transitional justice mechanisms. The survivors and victims of conflict are now ready to boycott this process if the Nepali government adopts general amnesty provisions.

Unlike many wars, neither side won Nepal's conflict and neither side lost. The losers have been the Nepali people, and they continue to suffer because the warring parties refuse to address the issues of transitional justice and war crimes. Among the victims, those whose relatives disappeared are still living in limbo, still ignored and still grieving. Their patience is wearing thin and frustration is giving way to a desire for vengeance. This is not good news for a society which needs to heal itself after years of war. There is no sense in discussing justice and human rights in this chaotic environment, where perpetrators of injustice lead the transition, and where the victims do not feel secure enough to speak out, remaining excluded from the process as a result.

The rulers in Kathmandu have completely forgotten one of the most painful episodes in Nepal's history. To them, it is just a stage in the struggle for power. Nepal has already paid the heavy price of over 16,000 lives, and the uncertainty over more than 1,400 disappeared. The price will be even higher if those in charge refuse to face up to the realities. And who will then bear the cost?



# Spain and the Basque Conflict: From one Model of Transition to Another

Pierre Hazan<sup>1</sup>

With the Basque conflict at last moving towards resolution, an intense debate has begun on how to remember it. And, once again, Spain is confronted with choosing the way it manages its past. More profoundly, this debate shows how and in what a problematic way, memory, legitimacy and democracy are now linked.

After decades of violence and some one thousand dead, the Basque Country is now experiencing gradual normalization. This return to calm, marked by the Aieté Peace Conference held in October 2011, has led to the emergence of intense debate about the responsibilities of all protagonists in Western Europe's final conflict. Who is responsible for the conflict? Who are the victims? Analyses made by the protagonists differ significantly, as shown here in the writings of Gorka Landaburu, journalist and victim of an ETA attack which nearly cost him his life, and Joxean Agirre, who purged 18 years in prison for his actions within the ETA armed group. Still, both men agree with Gorka Espiau, participant in a previous peace process, on the need to maintain dialogue that is both frank and exacting. Dialogue, they agree, is the prerequisite for turning the page of violence. Some, like Joxean Agirre, even say that a truth commission should be set up.

The Basque Country's gradual normalization and the debate about how it manages memory is also having its effect on neighboring France, as shown in the article by Jean-Pierre Massias. This evolution

also reflects our society's change of attitude about dealing with the past. For example, the famous French lawyer Louis Joinet has pointed out how his work changed in the late 1980s: whereas previously he had intervened to demand amnesty for political prisoners, he was now commissioned by the UN to develop principles for the fight against impunity, the focus having shifted from the release of political prisoners to the punishment of the guilty. Even the name of the famous human rights advocacy organization Amnesty International, founded in 1961, still carries the sign of a bygone era. In the post-Cold War world, dealing with the past, not judicial/social amnesty and amnesia, is considered more promising for the future and for reconciliation. Switzerland also took this approach when, in 1996, it created the Independent Commission of Historians to investigate Swiss policy during World War II. But it is especially in countries in transition where examination of the past is today seen as a tool to rebuild broken trust between opposing groups or between institutions and the society they once repressed.

For a long time, Spain was held up as a counter-example: here is a country which, in 1975, carried out an almost seamless transition to democracy with very little examination of its past. The Basque conflict, whose roots were, in part, in the Civil War and the violent repression under Franco, was never subject to institutional review. Neither trial nor truth commission took place, while Spanish memories of the Civil War were the subject of intense public debate. This amnesty policy coupled with official silence about the past ended in 2007, when at the instigation of the Zapatero government, parliament adopted the law on "historical memory", officially recognizing the victims of the Civil War and Franco's dictatorship, authorizing the opening of mass graves and withdrawing Francoist symbols. With this law, Spain symbolically turned the page on the way it had traditionally dealt with the past (i.e., amnesty and institutional oblivion)

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to adopt the global trend at the end of the 20th Century of remembrance.

New questions were raised, questions that come up again and again in many post-conflict societies. Let us mention three. First, how should we arbitrate between amnesty granted in the past and the application of new international standards? The virulent controversy sparked by the will of Judge Garzon to investigate those responsible for the disappearance of civilians under Franco, what Garzon called "crimes against humanity" and, therefore, subject to no statute of limitations, showed that passions were still alive. Another question that divided society, even within the victims' families: should the authorities carry out exhumations of bodies buried in mass graves? And, a related and equally difficult question: how far should a society devote its energy and scientific progress to identifying the remains of tens of thousands of victims?

These questions and many others raise issues that are ethical as much as legal. Reflecting on the commemoration debate in Spain, José-María Ridao's contribution to this volume questions the merits of this evolution, at the end of which commemoration tends to become a stamp of legitimacy and democracy. It is an issue from which no country can now escape.

# Moving to a new Social Truth

Gorka Espiau<sup>1</sup>

On 20 October 2011, the Basque separatist group Euskadi Ta Askatasuna (or ETA, Basque Country and Freedom) declared a unilateral end to its campaign of violence after more than 40 years of bloody history. This announcement has created the most significant window of opportunity for a truth and reconciliation process since the Spanish transition to democracy in 1978.

## The suffering

Since its inception, ETA has caused more than 800 deaths, left hundreds of people wounded, executed multiple kidnappings, and made innumerable attacks and threats against various sectors of the population, including political representatives, security forces, businessmen, judges, journalists, and academics.

Most of the associations and families that represent this suffering feel that their voices are not being heard sufficiently in the emerging discussions about the end of ETA's violence. According to these groups, the discussion participants are inattentive to the concerns of their families, and proposals for the inclusion of these victims groups into the process have been met with considerable hostility, thereby denigrating the victims' memories and adding to their families' suffering.

More than 200 families have also lost a relative since 1968 due to abuses conducted by police or paramilitary groups associated with the Spanish state, and hundreds more have been physically and psychologically affected by the conflict. Other

examples of Human Rights violations include the reported cases of poor treatment and torture of imprisoned ETA members. Further, most of the 700 ETA prisoners in Spain and France are serving sentences in prisons that are hundreds of miles away from the Basque area and are, therefore, isolated from their families.

During the past decade, several organizations and political parties associated with the pro-independence movement were banned and relevant mass media outlets were closed down, having been accused of collaborating in terrorist activities. These judicial processes were highly criticized by Human Rights Watch and Amnesty International, and their consequences are still present today. At a time when visionary political leaders from all sides are needed, the exclusion of one of the principal parties and its leaders from any peace process presents a major obstacle to a truth and reconciliation process.

## The social truth

During the last few years, the Basque and broader Spanish publics have clearly come to demand an end to the violence. Contrary to other peace processes in which political leaders must struggle to bring their constituencies with them, 73 percent of the Basque population actively favours a comprehensive peace agreement. Further, pacifist groups already enjoy wide-scale and active support on both sides.

The governments and political parties involved in the peace process face two key challenges: building confidence in the process and identifying the possible contents of a new agreement. Taking into account the current level of self-governance in the Basque areas and the demands of each party, the key issues to be negotiated lie in the areas of reconciliation, sovereignty, and territorial relations.

The negotiating parties and governments should apply the reconciliation principles that have successfully guided peace negotiations in other

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parts of the world to the Basque process. Functionally speaking, the key parties in the process should make an unequivocal commitment to exclusively peaceful means of defending political ideas, honour the memory of all the victims, allow the truth to emerge, guarantee the participation of all political traditions in the process, and address concerns about the situation of ETA prisoners.

### **The political reconciliation**

The Basque conflict is transitioning from a destructive cycle of violence to a cycle of political dialogue, reconciliation, and highly promising mediation initiatives for peace. As in any period of transition, the patterns of behaviour of the past and the nascent processes of the future are interacting in complex and contradictory ways. The old ways have not died out completely, and the new ways have yet to take hold. At present, a series of initiatives are underway to set up processes of political dialogue.

Recent opinion polls also show that a majority of the population in the Basque Autonomous Community still believe that the Basque people have the right to determine the type of relations they maintain with the Spanish state, i.e., whether the future relationship is to involve a continuation of the status quo, more autonomy, a confederal arrangement, or full independence.

A significant minority, meanwhile, believes that Spanish society as a whole should decide on any possible modification to the political status quo. Additionally, 36 percent of the population demands a profound reform of the 1978 Statute of Autonomy and 16 percent rejects the current autonomous system altogether. Only 12 percent of the population sees the need for a change, while 27 percent advocate minor changes to the current law, such as transferring the negotiated powers that have not yet been turned over to Basque institutions.

As these polls demonstrate, two competing visions are still clashing within the Basque community. There are those who want Spain to remain the only sovereign entity within the Basque provinces and those who want a new sovereignty status to be agreed upon between Spanish and Basque institutions.

Madrid considers this nationalistic approach to be an unrealistic, limited, and negative reading of the

current political system. Yet this perceived limitation remains a fundamental issue that must be creatively addressed because it will not vanish as a consequence of ETA's renunciation of violence.

### **Prisoners**

After the hunger strikes of the 1980s (which caused the death of Bobby Sands and another ten members of the IRA), most of the prisoners related to the "troubles" were grouped together in prisons in Northern Ireland. In the years of key political negotiation, the most important prisoners were located in the Maze prison, only a few kilometres away from Belfast. The charismatic representative of the British Government in Northern Ireland, Mo Mowlan, used to highlight the relevance of the role played by paramilitary groups in supporting the political process. Instead of making dialogue more difficult, they publicly supported the negotiations and the agreements reached. The "Maze University", as the prison outside Belfast became known, was the place where many republican and loyalist militants made their personal transition towards a non-violent and democratic strategy. In practical terms, the existence of two large groups of prisoners from opposing sides (nationalists and unionists) balanced out the situation and made it easier to implement amnesty measures in Northern Ireland.

Learning from similar experiences, the situation of ETA prisoners must be addressed. Current Spanish treatment of ETA prisoners not only violates the fundamental rights of the prisoners, but also impedes further necessary steps by ETA to fulfil a completely unarmed political strategy.

### **Learning from the Spanish civil war**

The current situation in the Basque area should also reflect on positive and negative decisions taken in the past, especially when the memory of the civil war mistakes made during the transition to democracy is more present than ever in Spanish politics.

For the first time since the restoration of democracy, the Spanish Congress passed a law in 2007 to "recover the historic memory" of the civil war. Thanks to this initiative, the victims of the dictatorship have publicly been honoured. The Spanish Government will take responsibility for locating and identifying mass graves and all fascist symbols are being removed from public buildings

and streets. Some 30 years after the end of the Franco dictatorship, the necessary discussion on how to deal with the memory of the past has just started.

Interestingly, the Basque city of Guernica represents a unique approach for dealing with this past. Guernica was brutally bombed and destroyed by Nazi airplanes sent by Franco during the civil war, but there is no major physical representation of this suffering on the streets. The citizens of Guernica decided not to be projected in the world as another martyr city, like Hiroshima or Auschwitz, but as a symbol of reconciliation. Every year the relatives of the bombing victims meet with soldiers and relatives that conducted the first massive attack against civilians.

Today, the challenge is how to connect the future with our recent past, Guernica and the memory of the civil war. As numerous international experiences teach us, constructive participation of all victims' groups from the beginning of talks would be a significant contribution to alleviating some post-conflict challenges, but current authorities seem to be reluctant to lead this process.

### **Confronting narratives**

Despite the positive developments currently being witnessed, the situation in the Basque Country remains volatile. Reconciliation and Human Rights issues must be creatively and comprehensively addressed before and during any peace process to neutralize the most destructive elements of Basque and Spanish politics.

Positive formulas should be developed that allow for the participation of the victims and their relatives in the process. The public acknowledgment of their suffering would both enrich the discussions and honour the victims' memories. Granting non-partisan support for concrete initiatives, such as a project for collecting testimonies, would also contribute significantly to the healing process and would help all political narratives to be expressed democratically.

Once the ETA has declared the definitive end of violence, there is no reason to impede any and all narratives from being recorded and disseminated to reach as wide an audience as possible. Such a massive storytelling exercise would undoubt-

edly provide much needed and deserved psychological support to those who have suffered losses. The Basque society is urged to discuss how to represent a new social truth - whether physically or not - and how to integrate all existing narratives. By doing so, a shared narrative would not be imposed, but could rather be allowed to emerge.



# Peace and Coexistence

Gorka Landaburu<sup>1</sup>

Only eight months ago, in a statement longed for by many for years, the terrorist organization ETA announced that it would give up armed action, after more than 30 years of violence and harassment across many sectors of Basque and Spanish society.

This significant change in tactics by the armed faction is due more to necessity than conviction. Long discredited by the vast majority of the Basque population, ETA is now rejected even by many of the separatists who have, for many years (too many years), supported and applauded most of their actions.

Police and judicial harassment, as well as cooperation from France, have clearly helped to isolate and undermine the entire organization that for over three decades held the majority of Basque and Spanish public institutions in checkmate. But the decline of ETA cannot be explained without taking into consideration the growing reaction of Basque public opinion, including almost all Basque political parties, demanding the disappearance and dissolution of this terrorist organization.

It is true that for months now the Basque country has been experiencing a new era where threats and coercion have disappeared. It is also true that this "time of hope" is still replete with great uncertainty. But a setback or reversal appears unlikely: ETA's decision seems irreversible and the "farewell to arms" has been accepted not only by the organization but also by its political wing, the national-

ist left. Still, ETA itself has not been dissolved and doing so seems unlikely while a solution is sought for the more than 700 prisoners of the armed gang serving sentences in French and Spanish prisons. It would be truly catastrophic if Euskadi saw renewed attacks.

The end of terrorist violence and the promise of better times ahead oblige all of us to make deep reflection. Not to make a "clean slate" or to forget the stigma, violence and persecution of the Basque Country's recent past. Nor to remain stuck in the past, wallowing in the pain and suffering caused by the terror. Hatred and bitterness lead nowhere. Nevertheless, every victim should be respected, because his pain is personal and non-transferable. Many people are already talking about "reconciliation". For my part, for now, I prefer to limit myself to seeking "coexistence", to allow us to begin to heal wounds that are, in many cases, still raw.

The Basque Country is a small land where almost everyone knows everybody. There is virtually no family that has not suffered violence at the hands of the state and para-police forces, the "Dirty War", the GAL, including the worst kinds of abuse and torture at police stations. But the crudest and most persistent violence did come from ETA, with more than 800 fatalities and tens of thousands of people killed or persecuted. Coexistence, then, is a complicated approach that requires conviction and effort from both sides. Deeds and behavior, not grand, bombastic speeches, will open the way for it.

If we wish to engage the future, we must recover our memory and analyze everything that has happened. Turn the page, yes, of course. But first we must read that page to recount what has happened - above all, so that the events that have shocked and maddened much of our society never again occur.

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<sup>1</sup> Gorka Landaburu, 60, born in Paris because my parents had been in exile since the Spanish Civil War. I have been a Basque journalist since 1977 and have worked with numerous Spanish and French media. For 20 years I was the Radio France correspondent in the Basque country. I am now director of the weekly magazine *Cambio16* and of the Basque language magazine *Aldaketa Amasei*. On 15 May 2001, I was the victim of a letter bomb assassination attempt by ETA in my home and suffered serious injuries. Since 2002, I have been a member of the *Fundacion Víctimas del Terrorismo*. My main concern has always been to see the end of terrorism and the establishment of peace in my country. It seems that this has been achieved...

As the professor of Ethics at the University of Deusto has said, "Memory is the foundation of our identity. He who does not remember his past does not know who he is. And is helpless to face the future." Commemoration, justice and compensation are the keys to our future. They are the key points in addressing a peaceful coexistence that allows us to face the future with hope. Social commemoration within justice and compensation will be the best basis on which to found the pursuit of a just and fruitful coexistence.

Haste is not a good counselor. Radicals are demanding that the Spanish government move quickly to transfer the prisoners to Basque prisons and to release the sick and those who have already served three quarters of their sentences. All of these measures are legal and Prime Minister Mariano Rajoy could take them.

But let us remind ETA and the world that it has only been eight months since the armed group decided to lay down arms. It is clear that we must move forward but, as the Spanish proverb says, let it be "without haste but without pause".

In the meantime, the terrorist organization should be required to disband and, at least, adopt the principle of self-criticism and acknowledge the harm done. The nationalist left should also, some day, explain why it took more than 30 years to cut the cord with violence and bet on the democratic way.

Acknowledging one's mistakes is no easy task; so let us monitor the policy itself on a daily basis, asking not for self-flagellation or the surrender of weapons in the town square, but to initiate a process of reflection that leads them to recognize the harm done.

A few months ago, a number of ETA prisoners, belonging to the so-called "Nanclares Path" that was expelled from the organization for self-criticism and for acknowledging the damage caused, requested an interview with me in Vitoria prison. Among these prisoners were some of the leaders of the armed group in the 80s and 90s, such as Urrusolo, Carmen Guisasola and Pikabea Kepa, together sentenced to hundreds of years in prison for multiple bombings and killings, especially by the Madrid command. This interview, lasting more than two hours in the Alavesa jail, took place on

30 November 2011. I have to admit that I was surprised by their request for an interview, but I did not hesitate a moment to meet with the former ETA leaders. Without doubt, my instincts as a journalist overcame my feelings as a victim of terrorism and, so, I went to Nanclares prison.

In addition to being interesting, the meeting was very satisfying for me. The conversation took place in total freedom. I talked about my exile, with my parents, during the Franco regime, about meeting in Paris, over 40 years ago, the first exiles of ETA and about how this organization had, over time, turned into a real monster. With Urrusolo taking the lead, the prisoners recognized their mistakes and how they had descended into the spiral of violence. We then talked about Basque society's perception of the violence. I explained that the majority, the vast majority, of Basque public opinion was calling for ETA to disappear and that the new generation would never again support armed groups and violence. We concluded that terrorism had brought only pain and suffering to both sides.

It is true that this minority group labelled the "the Nanclares Path" has been isolated, but it has the great merit of having taken a step forward, opting for reintegration. They must now travel the road to reintegration and this road must pass through recognition of the harm they have caused.

The ETA prisoners, of whom 500 are imprisoned in Spain and 150 in France, have always been a group, a monolith, fully controlled by the organization and following instructions and guidelines set by ETA. However, given the new political situation, these people must now take the initiative to seek solutions that will no longer be collective but individual.

This is no easy task. Nor will they willingly acknowledge that the violence they advocated and practiced for so many years has been for nothing. In Basque society there has been much fear, indifference and even some rationalizing of the horror. But Basque society has evolved in its recognition of the victims: we began by recognizing the victims of ETA; then, those of other terrorist groups; and, at last, by recognizing the victims of illegitimate actions of the State in its fight against terrorism. Clearly, we have made

progress, even if there is still a long way to go. For my part, I consider that the path of peace is inevitable and that the coming months will definitely allow us to strengthen peace. ETA's change of strategy is due more to necessity than to conviction and also because, for the first time in its history, the political arm has overcome the military arm.

While we must look to the future with certain optimism and set the stage so that violence and terror never re-emerge, we all feel frustrated for not having managed to lock up the weapons before, and for all the lives shattered and the lost time that has hurt all Basques.

All ideas, including the independence movement, can be defended in a democracy, without resorting to guns or bombs. I often use an analogy taken from ordinary life: to drive a car correctly, you have to look at the road; but you cannot drive correctly without a rearview mirror. The mirror we now need is called Memory, Justice and Reparation.



# EUSKAL MEMORIA: Recovering the memories of a rejected people

Joxean Agirre<sup>1</sup>

The Basque Country and its people have received the account of their history from the chroniclers of the states that have rejected their identity. Spanish and French chroniclers have been writing the reports of our past, and thus some events have been washed off, some others have been faked, or even disguised in lies. Why? The grounds and the reasons for the conflict we are witnessing, the essence of our identity, lie in the past. The destruction of our roots has been sought with the aim of making the Basque Country vanish, as if the loss of the knowledge of the past would embed the loss of our identity.

The past, hidden to all of us for decades, has provoked pain. Then there are the violations of rights that the Basque people have suffered. Overwhelming. Murdered, arrested, tortured, executed, exiled. This is why they want the truth of our past to remain in the dark: all those violations have guilty people and criminal objectives. Repression policies of the states have caused a double punishment to Basque people. On the one hand, they have promoted suffering; on the other hand, the concealing of that suffering and the lack of such recognition. Our history is full of unrecognized victims.

In fact, Euskal Memoria Fundazioa was created to give response to this situation. To recover the memory that indeed has been rejected to us. To entrust the account of our own history to following generations. Eventually, to shape Basque memory.

With this aim, first of all, it is essential to do research into the happenings. Comprehended as

a collective exercise, we will dive into research on historical memory: that is our prime commitment. But in other ways, it is our objective to disclose all that is reported and constructed and thus, we identify our other commitment as the popularization of these findings. This is to say, we were born to form the means to make Basque people owners of their past and we have taken our first steps in that direction. As humble as it is important.

## **The importance of knowing the whole truth**

Since November 2009, when the promoters of Euskal Memoria Fundazioa made our commitment known, our people have witnessed a political turning point. We are on the threshold of new times. Important steps are being taken in order to overcome the political conflict, and this has empowered and accelerated the urgency of our task.

The move into a new political era has increased the need of establishing a sole and unique account of the last decades. Those who have had all the mechanisms to conceal the past to Basque people have wanted to impose a certain account of the consequences of the conflict. They want to establish who the winners and the losers are, and with this, to condition the solution to the conflict, making the grounds and roots of the conflict disappear.

However, it is time for solutions in our land. And this demands that we learn the whole truth and become aware of all the consequences of the conflict without exception, taking into account and recognizing all the elements. And the whole truth can hardly be put together with one and only imposed account. Above the account of those who want to impose the official history, above the state-perspective, which rejects the grounds of the conflict, the account of the Basque Country is to be formed, because the consequences caused by the outrages and the violations of rights have not yet been recorded. We will have to record all the accounts

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so that we learn the whole truth and prepare the ground to construct a new future.

And this retelling which is not completed yet, requires constituent elements: voices, testimonies of the victims, and images and data are required. And indeed, here lies the contribution of Euskal Memoria Fundazioa today. We are collecting all the outrages caused by the states, busy as bees, from town to town, from voice to voice, from file to file... since this compilation is not yet complete. And because we have to share all of this.

### **Sharing and documenting popular memory**

Our main tool with the aim of reconstructing historical memory is people. Euskal Memoria is a people's project, as they are the supporters and defenders of this initiative, linked with the perspective and philosophy they have regarding the reconstruction of memory. The data, testimonies, images and documents have been provided by citizens. Only popular networks can recover from the dark what has been rejected by officials. Thousands of volunteers are delving into memory, so that it does not get lost.

In any case, we compile these findings, this history we are forming, in order to bring such to light, to disclose what has been concealed. And we are creating means with this purpose, through a monograph published annually and magazines. We also distribute these in the net of Euskal Memoria. A popular network to report and share.

Even if we are gradually taking steps regarding our commitment to circulate our work, it is essential to create permanent tools for the compilations and dissemination; in fact, those tools, useful to citizens, should be available to all. We are arranging a permanent Documentation Centre, the next meaningful phase of our project will be to launch it. We are preparing a popular tool to digitalize, file and make handy the testimonies collected, so that all the traces of our past are accessible to all citizens.

### **"The offspring of Guernica", repression of the last decades**

Therefore, the circulating work of Euskal Memoria has primarily focused on the issues concealed, manipulated and faked in the past. That is why we have dedicated the first book to the wide compilation of the consequences of the repression

over the last 50 years. A mosaic consisting of the data, images and testimonies collected from town to town, which is the first attempt on reporting all the outrages committed against the Basque population (there are still many to compile), yet the most complete one to date. Regions from all over the Basque Country are the starting point in the attempt of compiling and sharing a list consisting of reported murders, tortures, wounds and anything caused by the dirty war of the Spanish and French states from the 1960's to 2010.

The work coordinated by Joxe Agirre has received the title "The off-spring of Guernica" ("Gernikako seme-alabak" in the original). The descendants of the bombing in Guernica (75 years now) are the ones that state violence has killed, made disappear, wounded, offended... as the terror of repression comes from the same source. We have granted that those forgotten victims were given an identity, a voice, and were brought to light through this publication. We have brought this account before those who acclaim that this reality does not exist.

We have recovered those 475 people killed in conflict and repression-related situations by putting them together thanks to the recompilation. From these, half were just ordinary citizens, they were part of neither political nor military initiatives. Almost half of them were killed by Spanish Police forces and another 15% by right-wing armed groups. And penitentiary as well as the dispersion of political prisoners has killed 40 in the last 50 years. All of this should be taken into account, essentially when talking about all the consequences of the conflict, with the target of constructing the whole truth.

In these decades, from the last days of the Franco regime to almost nowadays, over 7,000 people have been imprisoned. 50,000 people have been arrested due to political reasons. 10,000 people have been tortured in detention. And all of this in this land of less than 3 million citizens. The traces of this bitterness are very deep and this is how we would like to portray them. For this reason, we are holding on to the traces of torture, so as to compile and publish the collective as well as the individual fates provoked in our land.

### **The Franco regime in the Basque Country, from the dark to the light**

The subject of the second monograph is the whole era of the Franco regime. Indeed, the dictatorship imposed silence, prohibitions and revenge, while imposing general repression measures.

The wars won by Francoists and the following decades left behind thousands of executed, killed in the battle fields, exiled, imprisoned... Repression was extended to all people from all over the political levels. Francoists imposed by force all kinds of means to make the Basque Country disappear, starting from the language, to the social rights, so that rejection became the order of the day.

Beyond the predominating oblivion coming from the fear and the pain, research and the contribution of citizens has made possible Iñaki Egaña's publication (historian and president of our foundation). An attempt to offer at least the truth to those who lack recognition and justice.

### **Memory, a tool for the future**

Now that ETA's armed struggle is over, Spain's main task will be to give a direct account of history. And it should do so unreservedly, particularly as the conflict that afflicts the Basque Country will become one of the prime issues, and because they have few arguments against the Basque proclamation. This account longs for winners and losers, good and bad ones.

After the Peace Conference in Donostia, what Antonio Basagoiti, from the Popular party, told Jonathan Powel in a letter of protest can be seen as an example of this previously agreed attempt to impose agendas and categories: according to the Spanish leader, the Basque Country and Ireland cannot be compared, since victims were from both sides. In the latter, the IRA caused 2,056 victims, whereas the paramilitary 1,020. And here, the ETA has caused 857 and the forces that defend the unity of Spain have caused 0 victims as a matter of fact. This is the picture of the past. Obvious.

Above all lies, the Basque Country needs the whole truth. In such a search, the Truth Commission is a basic tool. So that its work is efficient and it helps democratic co-existence, it will have to be formed as an independent commission, taking the whole Basque Country as reference, and

comprehending all the happenings since the pro-Franco military revolt. The criteria related to human rights, described by transitional justice or justice for settlement and international law, will lay down the grounds for this. Euskal Memoria wishes to bring this truth into such a framework, and the dissemination and documentation work will take place in accordance.

Eventually, the political solution will have to be constructed among all the leaders and institutions that represent the Basque society. Our contributions make sense in the sense of promoting the process, since collective memory or popular memory, is an essential tool to learn the whole truth. We defend this idea and we will work on behalf of it, as we believe that this is the only warranty for injustice and pain not to happen again. The political agreement will define a fair and shared solution. The ensuing democratic co-existence will allow peace.



# France and the Resolution of the Basque conflict

Jean-Pierre Massias<sup>1</sup>

France has a complex and contradictory relationship with the Basque conflict. The more a majority of observers acknowledge that France is involved in the conflict – and despite the arrival of a new governing majority – the more the French government's official position is to maintain that this is a specifically Spanish affair. Thus, the new Interior Minister Manuel Valls has recently reiterated what he said in May 2012 at the meeting of French, Spanish, German, British, Italian and Polish interior ministers, namely that his policy towards the Basque conflict would be a continuation of his predecessors' and that all French decisions would be based on France's alignment with Spain. According to Valls, "The position adopted by the Spanish authorities will be the same as the French government's."

However, the real situation is more complex and calls for a more nuanced reinterpretation. While Manuel Valls has declared that in light of recent developments "it is up to the Spanish government alone to provide the answers it deems useful", the final document published at the end of the Aiete conference in September 2011, which was signed by senior international leaders, called on ETA to make a public declaration of the definitive cessation of all armed action and on the Spanish and French governments to "welcome [such a declaration] and agree to talks exclusively to deal with the consequences of the conflict."

Beyond its political symbolism, this appeal to France (even Pierre Joxe, former French interior minister in the 1980s, was one of the signatories of the declaration) was all the more important because it testified to an inescapable reality that is often ignored in analyses of the Basque conflict: France's deep involvement in the conflict and the necessity of its participation in all processes that aim to find a resolution.

## I. France, a major actor in the Basque conflict

Although nearly all ETA activities take place on Spanish territory, France should in fact be regarded as a major actor in this conflict.

Three reasons support this assertion.

First of all, violence has also been visited upon the French territory, where a number of people have been injured or killed as a result of actions taken by the Spanish security forces or ETA militants: A notable example, on the one hand, are the 26 victims of the GAL group (whose activities were funded and organised by the Spanish government, leading to the conviction by a Spanish court of two members of the Spanish government and a high-ranking officer of the Civil Guard); on the other hand, one can cite the example of the two Civil Guard officers who were killed by an ETA commando in Capbreton in 2010, or the French police officer who was killed in 2011 while trying to make an arrest in Dannemarie-les-lys.

France must also be considered a stakeholder in the conflict between ETA and the Spanish government because of its counterterrorism policy, which is specifically designed to fight ETA and which has prompted the French and Spanish governments to collaborate particularly closely. Franco-Spanish cooperation to combat ETA began in the 1980s, under François Mitterrand's first term as president, as the "French doctrine" evolved. The French government was initially rather inclined to grant political asylum to Basque militants on French

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territory, but in consideration of the achievements of the Spanish transition to democracy and in response to demands made by Prime Minister Felipe Gonzales, it agreed to extradite the refugees claimed by Madrid, and went on to gradually forge ever closer cooperation. This cooperation has been further strengthened in recent years by the adoption of specific European Union provisions such as the European Arrest Warrant and anti-terrorist lists.

Lastly, an aspect that should not be neglected is that France is obviously affected by this conflict because part of the Basque territory is located within the borders of the French Republic and because in this region, as in the South Basque Country, there are claims for recognition of Basque specificity – claims that in the 1990s resulted in a number of expressions of violence quite distinct from ETA's actions. The political and cultural porosity of the Franco-Spanish border finds expression in strong links between political forces that support these claims north and south of the border, and even in the presence of a political grouping (Batasuna) that has been active on both sides of the border.

## II. France, an actor in the resolution of the Basque conflict

Therefore, as was logically asserted in Aiete, being a "major actor in the conflict", France must become "a major actor in its resolution." Seen from Paris, France's involvement would seem to be at the same time materially indispensable, legally legitimate and politically advantageous.

France's involvement is first of all materially necessary to reduce to bring about a direct reduction in violence and to deal with the consequences of the conflict.

Following ETA's announcement on 20 October 2011 that it had "decided on the definitive cessation of its armed activity", questions relating to the surrender of the Basque organisation's weapons and the fate of 700 ETA prisoners have become fundamental to **building the peace process** and to anchoring it lastingly in a social framework in which the most immediate manifestations of violence are tackled and progressively reduced. France is very directly involved in both these areas and a number of decisions fall within its exclusive sovereignty. The first question the French government faces is what to do about ETA prisoners. Two figures illustrate this

reality: Of the 700 persons who are currently in prison because of their association with ETA, nearly one fifth are in French prisons and serving sentences imposed by French courts. Moreover, more than thirty French citizens are currently incarcerated in Spanish prisons. Consequently, any comprehensive approach to tackle the issue of prisoners can only be based on joint Franco-Spanish decision-making and is to a significant extent **the responsibility of the French government.**

Concerning the surrender of weapons stockpiles, the International Verification Commission (coordinated by Fleur Ravensbergen and reconvened in January 2012 following the Aiete conference, during which ETA announced that it was ending the use of violence) found that: "ETA remains a clandestine and armed organisation. As such, it continues to commit illegal acts such as the falsifying of documents and the maintenance of arms caches." It also noted that it had informed ETA that "the continued possession of arms and explosives, especially if it involves the carrying of personal weapons, can give rise to potentially dangerous situations." This issue – whose importance was reiterated by the new Interior Minister Manuel Valls on 18 May 2012, on the occasion of a European Union meeting – requires the direct intervention of France because at least one significant part of these weapons caches is located on French territory, as is evident from the high number of recent weapons seizures by the French police. Therefore, no matter what mechanism is chosen to monitor the surrender of all weapons stockpiles, France will again be involved in the process.

Over and above these imperatives, this operational dimension is not the only argument for France's participation in the process to resolve the Basque conflict. France's involvement is not only technically necessary, but should also make it possible to put an end to a number of legal and political contradictions arising directly from the conflict which only compound the paradoxes of the current situation. For in the wake of recent developments and the end of the use of violence, a number of decisions handed down by Spanish and European courts – which have been increasingly at odds with statements made by the Spanish authorities – have underscored the limits of anti-terrorism legislation applicable in Spain. Despite restrictive legislation on political parties that

resulted in the outlawing of Batasuna, after the Spanish Constitutional Court's ruling allowing the Bildu separatist coalition to run in local elections in the autumn of 2011 and more recently the establishment of a new political party ("Sortu") in July 2012, the European Court of Human Rights (ECHR) ruled that Spain must pay EUR 30,000 in damages to an ETA member because of the retroactive nature of her sentence and also ordered her release. This ECHA ruling – which challenges the application of the "Parot doctrine" (a narrow interpretation by the Spanish Constitutional Court of provisions concerning the commutation of sentences of Basque prisoners) and which was handed down after a number of other judgements condemning the Spanish government for the use of torture – may pave the way for a multiplication of judgements against Spain and could also have consequences for the jurisdictions of neighbouring states. For example, the Crown Prosecution Service in London has advised the Spanish National Court either to withdraw the arrest warrant issued against Antton Troitiño or to grant him an interim release awaiting the final and binding judgement of the ECHR on the "Parot doctrine" which allows the Spanish judiciary to keep in prison individuals who have served their sentences. The Crown Prosecution Service in London bases itself on the recent ECHR decision ordering the release of Inés del Río on the grounds that **the application of the Parot doctrine was a violation of fundamental human rights.**

In both cases, it was the actual content of anti-terrorism rules that proved to be legally inadequate to contemporary realities. France had, moreover, faced these contradictions in 2011. Aurore Martin, a French activist of the Batasuna party (which was outlawed in Spain but legal in France), had been the subject of a European arrest warrant that had been approved by a French court and was therefore to be surrendered by the French authorities to Spain.

Despite France's legal obligation to extradite Martin, political and social opposition made it impossible to surrender her to Spain. A rally that drew demonstrators well beyond the confines of the Basque sovereignty movement, including most notably numerous elected officials from France's conservative majority, underlined the limits of the political applicability of Spain's hard-line policy. Exacerbated by various events in the autumn of 2011, as well as by the indisputable electoral

successes achieved by the Sortu and subsequently by the Amaiur coalitions in the Spanish legislative elections in 2012, these legal contradictions are likely to increase and consequently – for reasons of consistency and respect for the founding principles of the rule of law – to entail a political response to the Basque conflict.

Lastly, France's involvement would seem to be necessary for reasons of domestic politics. In fact, the Basque question has long given rise to specific debates and internal divisions within French political parties. The most recent developments appear to confirm a trend that has been gradually gaining momentum. Even as France supported the Spanish authorities' positions and pursued a very repressive policy against pro-independence organisations operating in the French Basque country and therefore falling under French sovereignty (such as Iparretarrak) and opposed the main pro-independence claims concerning the status of the territory or the official position of the Basque language, it also put in place more conciliatory policies to try to promote peaceful coexistence. The effects of these policies – particularly in the linguistic sphere following the establishment of the Public Office for the Basque Language, whose most recent directors have been able to restore a climate of dialogue and trust among all stakeholders – as well as the involvement in the Aiete process of a certain number of political actors from across the political spectrum show that there is now within the French political class a level of support for a political settlement of the Basque question which transcends traditional divisions. At a time when parliamentarians are calling for Basque prisoners to be moved to prisons nearer their families and when, in response to positions taken by civil society representatives, the Council of Elected Representatives of the Basque Country is considering the creation of a new Basque territorial authority, the new political majority that has come to power following the election of François Hollande does not appear to be able to ignore these aspirations.



# Democracy and the Past

José María Ridaó<sup>1</sup>

The rise in the number of associations calling on the democratic powers to “recover historical memory” - a reference to the repression carried out by the Franco side after the civil war in 1936 and the imminent end of terrorism in the Basque country - has played a part in making the legacy of the past one of the main topics of political discussion in Spain in recent years. Whether arguing for or against, presenting interpretations of this past or merely describing it in order to give it irresistible emotional force, the front pages of Spanish newspapers, along with films and TV series produced in the country, books of history and fiction and even literary works containing elements of both have ensured that these issues remain a centre of topical interest. These are issues that in different circumstances would have been matters of personal memory or even of historiography. However, there is nothing strange about the fact that the insistence in recent years on an institutional response to the past, regardless of the connection with franquismo or with terrorism, has faded in the face of other urgent problems requiring the intervention of democratic institutions, for example the deepening international economic crisis and its increasingly devastating effects on Spain. Since the collapse of Lehman Brothers and the start of the Euro crisis, the more recent or the more remote past has had to take second place to the acute problems of the present in the political debate.

The reason for this change of priorities is not that some are more important or more real than others. It has to do with the political nature of these

issues and the fact that, precisely because of their political nature, they are trying to set the priorities for the actions of democratic institutions and to determine their agendas. Those who called for justice for the victims of the past, whether they were victims of Franquismo or of terrorism, achieved partial victories in the form of laws or initiatives supported or promoted by the authorities. In turn the advocates of justice for victims had to be aware of the obstacles and the resistances determining the agenda of the democratic institutions in order to impose their own priorities as unchallenged priorities. Given that their demands were political demands articulated in a democratic context, they found themselves in a tension and conflict of interest and they encountered political demands going in the opposite direction within the same context. Now that the economic crisis has arrived, this tension and this conflict of interests have not diminished, nor have they been resolved, but they have moved into the background on the agenda of political institutions. The party focusing on the past remained at the point it had reached but the party as a whole had begun to lose the ability to mobilise those who considered themselves the heirs of the conflicting groups during the period of Franquismo or the leaden years of terrorism; between the sectors that consider themselves schematically as progressive or as conservative, as left-wing or as right wing in relation to the political treatment of the past that they defend.

Different explanations have been put forward to explain the increasing prominence of the demands by associations calling on the democratic institutions to recover the past. The first of these was generational, pointing out that there is a tendency halfway between psychology and sociology that grandchildren feel closer to the causes defended by their grandparents than those of their parents and that political demands relating to the past arise every time a new generation wishes to take over the leadership from the preceding one. Apart from the fact that this explanation, which appeals to supposed

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generational laws of history, is highly deterministic in nature, its inadequacy is underlined by the fact that the recovery of historical memory in Spain mobilised citizens of all ages, regardless of whether they were direct or indirect protagonists, whether their parents or closest relatives suffered or whether their only knowledge of the events comes from accounts by others. There is another reason why this generational explanation is insufficient. It is connected with the paradox identified by Spanish writer and editor Miguel Aguilar. He points out that it is paradoxical that today's grandchildren are more proud of their grandparents who fought a war than of their parents who constructed the democratic system. Advocating the generational argument is equivalent to stating that the younger generations identify with a scale of values in which the preference between democracy and war is nuanced, to say the least.

The second explanation for the rise of associations calling for the recovery of historical memory is that since its full establishment in 1978 the Spanish democratic system has attained a level of majority sufficient for it to be able to confront certain aspects of the past which had been neglected probably out of fear of the reaction of an army inherited from Franquism or as a result of the confusion between amnesty and amnesia. The shadow of military power undoubtedly made itself felt at the beginning of the Spanish democratic transition, in which extremist groups attempted various coups, such as that which almost succeeded on 23 February 1981. However, the decision to leave the civil war and the brutal repression triggered by Franquism out of the political debate, but not out of the social or historical debate, was not due to pressure by the army but the will of the parties, endorsed by the citizens, to create an institutional democratic space in which the victors and vanquished, as well as those who did not participate but considered themselves the heirs of one or the other group, could live together. A similar error is found in the criticism that the Spanish democratic transition confused amnesty with amnesia. The amnesty was a political decision taken in order to cancel criminal responsibility, not to prevent knowledge of the facts or to forbid the study of the facts, as is shown by the hundreds and thousands of monographs and newspaper articles on the crimes of Franquism published between 1977 and today. The vast majority of the criminal offences cancelled

resulted from the simple exercise of the political freedoms and freedom of opinion that were persecuted by Franquism. By contrast, responsibility was also cancelled for crimes of murder perpetrated on a terrifying scale by the Franco regime and for terrorist acts committed since the 1960s, notably those by ETA. Despite this flagrant disproportion between the crimes involved, the amnesty was a demand by progressive and left-wing elements, many of whose leaders and activists were in prison after the death of the dictator. It was not a demand by the Franquists, who opposed this concession at all times.

When they encountered the first obstacles to their attempts to determine the political agenda of the democratic institutions, the discourse of the associations calling for the recovery of historical memory underwent a subtle but decisive transformation. Instead of arguing that the democratic system had reached a level of maturity sufficient to deal with certain aspects of the past that had remained in the margin, they stated that there was a lack of legitimacy and even a lack of democracy because there had been no justice for the victims of Franquism. This change of discourse implicitly meant that the associations were claiming a monopoly in deciding when the regime was legitimate and when it was democratic or not. The effort to determine the agenda of the democratic institutions and the defence of certain legitimate political interests which collided with other interests that were equally legitimate was transformed into something radically different: a debate on the nature of the Spanish political regime and on the real scope of its democratic character. For the associations defending the recovery of historical memory, if democratic institutions did not accept their demands it was not because they had adopted other political priorities or were following a different agenda but simply because they were not authentically democratic. This reasoning was not different from that of other social and political groups for whom the cause that they were defending was much more than one cause among many others. It was the yardstick, the infallible measure of the democratic nature of the Spanish political system. If this system did not engage with the demands of the associations defending the recovery of historical memory or those of groups calling for the independence of parts of the country, it was because in their opinion there was perfect continuity between

Franquism and the institutions established by the 1978 Constitution.

The position of some associations of victims of terrorism was sometimes characterised by the same kind of reasoning, when they claimed for example that the Socialist government of Rodríguez Zapatero was acting as an accomplice of ETA and had therefore ceased in their eyes to be a democratic government. As it was the Zapatero government that approved the Historical Memory Act demanded by progressive and left-wing sectors, some observers stressed what they considered to be the flagrant contradiction that was dividing Spanish society. Some associations of victims of terrorism close to the Conservatives rejected the recovery of memory of the victims of Franquism but demanded it for victims of terrorism. In reality the problem was and is infinitely deeper and has to do with the reasoning shared by the associations defending the recovery of historical memory and the associations of the victims of terrorism, a reasoning also shared by social and political groups calling for the independence of a part of the country. In a democratic system, can associations or social groups claim that their cause, whatever it may be, is an infallible yardstick for the democratic nature of the system? The answer to this question transcends the schematic division between those who have come to be identified as progressives and conservatives, between left and right, between those calling for one or the other method of dealing with the past, be it the repression carried out by Franquism or the leaden years of terrorism.

