Nouvelles études Pénales

La Justice transitionnelle
Transitional Justice

Actes du 2e Symposium des Jeunes Pénalistes
Proceedings of the 2nd Symposium
of the Young Penalists
La Rochelle (France)
29 septembre - 1er octobre 2011

Ahmed F. KHALIFA (ed.)

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ACKNOWLEDGEMENTS BY THE EDITOR

The Young Penalists' section of the AIDP is a relatively new organ of our respectful beloved Association. It is meant to regroup young scholars and practitioners in the fields of criminal law or international criminal law who have less than 35 years old. Our main aim is to participate actively to the scientific debate and to the work of the AIDP. Moreover, the Young Penalists thought that it will be useful to contribute to the advancement of the academic dialogue by organizing, with the support of the AIDP, their own scientific events. Not only this will provide a forum for young penalists to elaborate their views and exchange ideas on contemporary issues of criminal law but also it will provide the chance for disseminating this knowledge through publishing the acts of these events. To that effect, this publication is the fruit of the works of the Second Young Penalists' Symposium organized at the University of La Rochelle in France in September 2011*.

The organization of this symposium has been the result of the efforts of several persons to whom I address my sincere gratitude. Particularly, I would like to thank Professor André Giudicelli, Dean of the Faculty of Law, Political Science and Management of La Rochelle. Professor Giudicelli was not only a member of the scientific committee of the symposium, but also he was involved personally with us in all the details of the organization, and I would say that without his help and support, it would have been almost impossible to hold this symposium. My gratitude extends also to Professor Michel Massé and Professor Jean Cédras who accepted to be a part of the scientific committee aside with my colleague Layal Abou Daher and myself. They have contributed a great deal of their time and effort to the realization of this event.

The symposium succeeded to get together about 60 young penalists from almost 20 countries to discuss different issues and experiences of "Transitional Justice". This volume contains most of, and due to space limits unfortunately not all, the contributions presented during the symposium. This publication was possible by the generous support of La Rochelle University

* The First Young Penalists' Symposium was held in Tübingen, Germany, in April 2008 and the proceedings were published in 2010 by Kluwer.

and the AIDP. In that regard, a special note of appreciation goes to Professor Reynald Ottenhof for his valuable help during the publication process. By the same token, Alice Pinepinto deserves special recognition for her efforts in the final proof reading of the English texts in that volume.

Hoping that you will find useful the valuable contributions in this volume, the Young Penalists' Committee aims at perpetuating this tradition of having regular Young Penalists' Symposia that continue to enrich the legal debate worldwide.

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Member of the Young Penalists' Committee of the AIDP

PREFACE

JUDGE WOLFGANG SCHOMBURG*

Criminal law is reactive. International Criminal Law is reactive to heinous events committed in armed conflicts of the past. There is no reset button like in computer games. All penalists can do is to apply means of retribution hoping that a guilty verdict and consequent adequate penalties will have a general deterrent effect for the future.

Thus it is an extraordinary event when the Young Penalists of the International Association of Penal Law (AIDP) get together and not only think about reactions to events in the past, but also strive for solutions how best to come to terms with the needs of post-conflict societies. The basic common idea is to assist these societies in achieving a more peaceful future by law in general.

Criminal law and transitional law do not exclude each other. On the contrary, brought together they shall have a synergetic effect.

Additionally criminal law must not necessarily be reactive only. As we know from the Anti-Genocide Convention of 1948 already the direct and public incitement to commit genocide deserves an immediate response by criminal law. Hopefully this possibility of early intervention by criminal law will soon find its expression as well in the upcoming Convention for Crimes against Humanity[1]. Expeditious intervention by the judiciary must stop these crimes before they arrive at a stage in which we can only count the victims of foreseeable crimes with frustration – again too late[2]. It is therefore that we need to fight already instigations to commit these most serious crimes as inchoate crimes, without any delay and without any politically motivated reservations.

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[1] Cf. Whitney R. Harris World Law Institute, Washington University School of Law, amended as of May 2012, http://crimesagainsthumanity.wustl.edu

[2] Interventions – A life in war and peace, Kofi Annan with Nader Mousavizadeh, London, 2012, p. 47-79

It is our responsibility to protect[3] by law and, if necessary, by force.

It is with gratitude to see reflected the ideas promoted in the framework of this intensive workshop organized by the Young Penalists of AIDP, held in the premises of The University of La Rochelle, compiled, condensed and updated in this volume. You can breathe a spirit of hope - hope of the younger generation for a better future, an attitude hardly to be seen in these days.

It would be counterproductive to add something to these fresh ideas. All I will do is to repeat my introductory ten theses presented in my opening keynote in La Rochelle:

Ten Theses

1. *Non est justitia* - There is no justice. But we have to fight for justice. If you want peace, work for justice[4].

2. There is no final definition yet of transitional justice. It encompasses both post-armed- conflict justice and justice emanating from a long peaceful process towards a society governed by the rule of Law.

3. The fair and proper administration of laws is the final goal in each emerging new state.

4. Those are the fundamental elements of post-conflict justice in countries emerging from long periods of authoritarian rule which often must confront a legacy of gross human rights abuses or the "mere" absence of the Rule of law, observed over many years:

"*Human suffering and the demand for justice*

Violations of human rights and humanitarian law produce complex harm, suffering, and loss, and states should address the demands for justice arising from these acts.

Grounding in international law

International human rights and humanitarian law outline basic standards and key obligations that provide the foundation for efforts to combat impunity and support accountability for past violations.

Accountability, peace, and democracy

Peace, democracy, and political stability following conflict and authoritarian rule are served when states and societies address past violations.

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[3] R2P – an unfortunate abbreviation in the spirit of our modern times.

[4] Pope John Paul VI.

Victim-centered approach[5]

Policies that seek justice for past violations should be victim-centered and should address victims' rights to remedies and reparations.

Context-specific strategies

Specific strategies that address past violations should be designed and implemented with great sensitivity to social, cultural, historical, and political context.

Interdisciplinary nature and long-term commitment

Addressing past violations of human rights and humanitarian law is a complex, multi-faceted, interdisciplinary process that requires broad vision and long-term commitment.[6]"

5. "Each country facing a past of human rights violations has its own cultural and political history. Each has to find its own unique path to reconciliation and peace."[7]

6. A clear distinction has to be made between the applications of criminal law on the one hand, aiming at bringing impunity to an end and restorative justice on the other. Criminal justice must not be overburdened. In principle alternative delinquency sanctions focus on repairing the harm done, meeting the victims' needs, and holding the offender also financially responsible for their actions. Merging both procedures might be confusing or even resulting in a legal chaos[8]. The historical development from criminal proceedings conducted by the harmed party to the invention of public prosecutor's office was developed for good reasons. Granting a victim the role of an additional party versus the alleged offender is a solution ignoring legal history and experience, duplicating the role of the prosecutor and rendering criminal

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[5] Author's note: See however thesis 6 below.

[6] "The Chicago Principles on Post-Conflict Justice" edited 2008 by the International Human Rights Law Institute in co-operation *inter alia* with AIDP, predominantly by its Honorary President and father of the main international Tribunals of today, Prof. *M. Cherif Bassiouni*.

[7] *Richard J. Goldstone*, former Justice of the Constitutional Court of South Africa and former First Chief Prosecutor of the UN International Criminal Tribunals for the former Yugoslavia and Rwanda.

[8] I am afraid that the first ever handed down judgment by the permanent ICC provides ample evidence for this thesis. How can the presumption of innocence of the accused be maintained when witnesses, allegedly having suffered from crimes under scrutiny, have to be presumed victims at the same time - *Prosecutor v. Thomas Lubanga Dylo*, ICC – 01/04-01/06 of 14 March 2012, in particular with a view to Judge Benito's separate observations?

proceedings asymmetric, may be even unfair, if not impossible. Thus, if possible, the question of restoration should be resolved in different proceedings, be they of administrative or civil nature.

7. The principles of complementarity and subsidiarity serve best the interest of an effective criminal justice system and will only provide for justice seen to be done:

- What can be done on the level of a State concerned, has to be done at this level. If need may be, the courts shall be supported by judges from other states of the international community, preferably – if possible – from neighboring states or states of the same continent.

- If criminal justice cannot be granted on a domestic level there should be no gap making it necessary to active immediately courts on a global level. Filling this gap a regional court should intervene (e.g. a European Criminal Court for transnational crimes committed in Europe, an African Criminal Court for transnational crimes committed in Africa). This hitherto neglected intermediate system between domestic courts and global courts is one way to better express sensivity to local needs and engagement with the particular nature of the conflict. Already this regional level may serve as a firm commitment to establishing domestic security if there is a safe environment relatively free from political instability, uncertainty, threat, and violence. A regional criminal court also serves for at better understanding of the cultural backdrop against which a former society has to be seen. Specific attention has also to be given to avoid any kind of discriminatory influence based on economic, social, cultural, and religious intent or interests.

- A global criminal court, applying criminal law – *per se* already assessed as *ultima ratio* – against the main alleged perpetrators is only the *ultimissima ratio,* however inevitable when all attempts to bring justice on a domestic or regional level have failed and the crime has a dimension calling for intrusive measures by the global community.

8. As regards the applicable criminal law, the fundamental legal principles in the area have to be respected as far as possible. Any kind of imposition of foreign legal systems on the occasion of granting transitional justice has to be omitted. This holds true for substantive and procedural criminal law, both reflecting traditions and culture of a state that deserve to be maintained if not in contrast to general principles of law.

9. Human Rights, in particular the ICCPR and its regional brothers and sisters, have to be promoted by transitional justice.

10. Not only Transitional Justice but "[t]he world rests on three pillars: on truth, on justice, and on peace[9]". Consequently, there shall never be any kind of bargaining with truth or justice.

Berlin in May 2013

[9] The Talmud.

PART ONE
TRANSITIONAL JUSTICE: THEORETICAL CONSIDERATIONS
PREMIÈRE PARTIE
LA JUSTICE TRANSITIONNELLE : DES CONSIDÉRATIONS THÉORIQUES

POUR UN DÉPASSEMENT DE LA DICHOTOMIE PAIX OU JUSTICE

FEHIMA ISSA*

ABSTRACT

The issue of the responsibility of perpetrators is considered in each country handling a heavy burden of constant Human rights violations. The agreement between previous members of political authorities and the transitional actors are barely at the sole benefit of the first ones. These peace agreements contain some judicial clauses in order to obtain the end of weapons noises and to guarantee a less violent transition. The conflict negotiators and the human rights militants are sharing a common goal of ending hostilities but their views differ on the means. In which manner does the treatment of misdeed from the Past impact on the peace perspectives and on the stability of a State, since Justice can lead to Peace and also since conflicts between Peace and Justice can also appear. Are those two main goals really in contradiction? From the opposed opinion that Justice can participate to set up a stable and democratic situation in countries with a violent History, to the opinion that there is a confrontation between the aims of Justice and the interests of Peace, it can be deducted that this contradiction has to be overtaken.

> *« On nous dit que, parfois, la justice doit céder le pas devant les intérêts de la paix. Il est vrai que la justice ne peut fonctionner que lorsque la paix et l'ordre social sont assurés. Néanmoins, nous savons désormais que l'inverse est également vrai : sans justice, il ne peut y avoir de paix durable»*[1].

La question de la justice après une transition où il faut « *regarder la bête de l'Apocalypse droit dans les yeux* »[2] s'est posée dans tous les pays qui ont connu une période de changement politique. Pourtant, « *On ne connaît*

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[1] Communiqué de presse du Secrétaire général de l'ONU, « *Kofi Annan exhorte les juges de la Cour pénale internationale à rendre des jugements qui suscitent le respect de tous pour la justice internationale et la force du droit »,* SG/SM/8628, L/3027 du 11 mars 2003. Disponible sur le site http://www.un.org/News/fr-press/docs/2003/SGSM8628.doc.htm (consulté le 12/12/2012).

[2] D. Tutu, *Il n'y a pas d'avenir sans pardon*, Paris, Albin Michel, 2000, p. 35.

dans l'histoire aucun exemple de solution correcte à ce problème »[3]**.** Et cela pour plusieurs raisons : Tous n'ont pas la même conception de la justice, tous n'ont pas les mêmes moyens de faire face à l'injustice et tous n'ont pas connu les mêmes situations, mais *« S'il n'y avait pas d'injustice, on ignorerait jusqu'au nom de la justice »*[4].

Savoir de ce qu'il convient de faire, ce qu'il est souhaitable de faire ou ce qui est possible de faire face aux crimes commis à grande échelle dans le passé récent n'est pas chose aisée. Les poursuites judiciaires peuvent empêcher les parties au conflit de déposer les armes par crainte de celles-ci et/ou parce qu'il n'en va pas de leurs intérêts. La résolution d'un conflit, les pourparlers de paix, puis les accords de paix passent par des négociations entre les parties qui ont des objectifs différents et qui impliquent des compromis notamment en ce qui concerne les questions d'impunités. Pourtant, les normes internationales relatives aux droits de l'homme et au droit humanitaire imposent des obligations particulières aux États. Les auteurs des violations les plus graves doivent rendre des comptes par le biais d'enquêtes et de poursuites en justice.

Kofi Annan, l'ancien Secrétaire général des Nations unies souligne parfaitement le dilemme qui peut se poser entre rétablir la paix et faire respecter la justice : *« la recherche inexorable de la justice peut parfois constituer un obstacle à la paix [...] Dans certains cas, il nous faudra peut-être accepter une justice quelque peu imparfaite […] Parfois aussi, nous devrons peut-être accepter, pour le court terme, un certain niveau de risque pour la paix, en espérant ainsi mieux garantir cette paix pour le long terme »*[5]**.** Il ajoute en s'adressant aux membres du Conseil de sécurité des Nations unies qu'*« il ne saurait y avoir de véritable paix sans justice (…) la justice est à la base de la paix véritable »*[6]**.** L'ONU considère que la paix « *n'est pas simplement l'absence de conflits, mais est un processus positif,*

[3] M.A. Garreton, Amérique latine : La démocratie entre deux époques dans *« Situations de la démocratie »*, Paris, Gallimard/Le Seuil, 1993, p. 140.

[4] J. Voilquin, *Les penseurs grecs avant Socrate, de Thalès de Milet à Prodicos*, n°31, Paris, Garnier-Flammarion, 1964, p. 75.

[5] Déclaration de Koffi Annan, Secrétaire général des Nations Unies, le 24 septembre 2003 à New York devant le Conseil de sécurité des Nations Unies. Disponible sur le site http://www.aidh.org/Justice/just_etatdroit.htm (consulté le 12/12/2012).

[6] *Ibid.*

dynamique, participatif qui favorise le dialogue et le règlement des conflits dans un esprit de compréhension mutuelle et de coopération »[7].

Certains font état d'un affrontement ou d'une incompatibilité entre les visées de la justice et les intérêts de la paix. Il y a ceux qui considèrent qu'il ne peut y avoir de paix sans justice (position des idéalistes) et ceux pour qui la recherche de la justice est une menace aux efforts de paix (position les réalistes)[8]**.** Effectivement, on peut penser qu'une paix incertaine dans une situation fragile du fait d'un passé violent, conflictuel ou autoritaire peut-être perturbée par des exigences de la justice et de l'imputabilité d'une responsabilité pour ce passé (I). On peut aussi estimer qu'il est illusoire de penser qu'une paix durable puisse être établie sans que la justice soit faite (II). Finalement, paix et justice doivent être des objectifs ultimes après une période répressive ou autoritaire (III).

I- LA PRÉÉMINENCE DE L'ÉTABLISSEMENT DE LA PAIX AU DÉTRIMENT DE LA JUSTICE

Fabrice Weissman considère que la formule « pas de paix sans justice » ne traduit pas une observation historique[9]. Selon cet auteur, « *toute l'histoire de l'humanité dément l'assertion selon laquelle le jugement des criminels de guerre est une condition nécessaire à la paix* »[10]. À l'appui de cet argument, l'auteur prend en exemple le cas du Mozambique[11], de l'Irlande du Nord, du Pays basque, de l'Angola et de l'Afrique du Sud pour considérer que ce sont des politiques d'amnistie, de pardon ou d'oubli qui ont accompagné les sorties de guerre et non pas les poursuites ou les jugements des criminels. Weissman observe que si Slobodan Milosevic ou Charles Taylor ont finalement été traduits devant des tribunaux, c'est au terme d'opérations militaires internationales ayant contribué à les chasser du pouvoir. Selon lui, une théorie de la paix par la justice est avant tout une théorie de la guerre juste[12]. L'auteur conclut qu'« *en pratique, l'exercice de la justice pénale*

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[7] Résolution adoptée par l'Assemblée générale des Nations Unies, *Déclaration et Programme d'action sur une culture de la paix,* A/RES/53/243 du 6 octobre 1999.

[8] Cf. GJ. Bass, Gary Jonathan, *Stay the hand of vengeance : the politics of war crimes tribunals,* Princeton, Princeton University Press, 2000, p. 285.

[9] F. Weissman, *Humanitaire et justice : les raisons d'un divorce, secourir les victimes ou collaborer avec la CPI,* disponible sur le site http://www.grotius.fr/node/411 (consulté le 12/12/2012)

[10] *Ibid*.

[11] Une amnistie générale a été décrétée en 1992 au Mozambique.

[12] Cf. M. Walzer, *Guerres justes et injustes : argumentation morale avec exemples historiques*, Paris, Gallimard, 2006 ; F. Weissman et Médecins Sans Frontières, *À*

internationale en temps de guerre tend plus à la radicalisation des conflits qu'à leur pacification […] *"Pas de paix sans justice" n'est donc pas un slogan pacificateur, mais un appel à la guerre* ». L'auteur exprime cette position suite à l'expulsion de treize ONG au Soudan après le lancement d'un mandat d'arrêt international contre Omar el-Béchir.

Un auteur anonyme, mais qui a écrit un article bien connu dans la revue Human Rights Quaterly et pour qui poursuivre les criminels est une chose, faire la paix en est une autre, constate que :

La quête de justice pour les victimes d'atrocités d'hier ne doit pas faire vivants d'aujourd'hui les morts de demain. Telle est une des leçons que la communauté des droits de l'homme a pu tirer de l'ex-Yougoslavie. Il y a eu des milliers de morts, qui devraient aujourd'hui être vivants, parce que les moralistes recherchaient une paix parfaite. Malheureusement, une paix parfaite est quasiment inatteignable dans le contrecoup d'un conflit sanguinaire[13].

Ce même auteur pose une question : « *Que faudrait-il faire si la quête de la justice et du châtiment entrave la recherche de la paix, en prolongeant ainsi une guerre et en augmentant le nombre de morts, des destructions et la souffrance humaine ? La quête du châtiment ou d'une paix parfaite peut s'ensuivre dans une longue guerre. Est-ce que c'est défendable ?* »[14].

Les réalistes considèrent ainsi que la recherche de la justice, notamment lors des négociations de paix ou lors de la conclusion des accords de paix, est un obstacle à la recherche de la paix. Il leur semble peu certain que les personnes impliquées dans les violations des droits humains prennent part aux négociations de paix si ces derniers sont inquiétés de leur sort par la justice. De ce fait, ces personnes peuvent vouloir continuer les combats plutôt que de déposer des armes.

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l'ombre des guerres justes : l'ordre international cannibale et l'action humanitaire, Paris, Flammarion, 2003 ; S. Halimi ; D. Vidal et H. Maler, *« L'opinion ça se travaille…»*, *les medias et les guerres justes : Kosovo, Afghanistan, Irak*, Marseille, Agone, 2006.

[13] « Human Rights in Peace Negotiations » dans *Human Rights Quarterly*, vol. 18, n° 2, 1996, p. 257 ; Cf. aussi F.D Gaer, « UN-Anonymous : Reflections on Human Rights in Peace Negotiations », *ibid*., vol. 19, n° 1, 1997, p.1-8.

[14] *Ibid*.

Les arguments de ceux qui privilégient la recherche de la paix avant tout, y compris avant la justice, sont nombreux[15] :

Un des premiers postulats selon les réalistes est que, le fait de faire pression en faveur de la mise en œuvre de l'obligation de rendre des comptes par le biais d'enquêtes, de poursuites judiciaires et par l'application de peines peut empêcher la signature d'un accord ou rompre un cessez-le-feu et rallumer le conflit. C'est ainsi que l'auteur anonyme de l'article paru dans *Human Rights Quaterly* déjà cité, relève que la guerre en ex-Yougoslavie a été prolongée parce que les négociateurs tenaient à inclure dans les accords proposés des exigences en matière de justice et notamment que chaque projet de plan de paix devait examiner s'il cautionnait ou non l'agression et la purification ethnique. Les « experts » en droits humains et les négociateurs ont été accusés d'avoir rejeté des accords qui, avec le recul, étaient aussi bons sinon meilleurs que l'accord finalement conclu[16]. Les accords de Dayton[17], signés à Paris le 14 décembre 1995 et rédigés sur la base militaire de Dayton, dans l'Ohio, un mois plus tôt, mettent fin à trois ans et demi de conflits entre Serbes, Bosniaques et Croates.

Le cas de l'Ouganda est un autre exemple qui illustre le dilemme entre la justice et la paix. Le conflit qui oppose depuis vingt ans dans le nord de l'Ouganda[18] les forces de la LRA[19] et celles de la UPDF[20] a fait des milliers de victimes parmi les populations civiles et s'est traduit par de graves violations des droits humains, commises tant par les agents de l'État que par des agents non gouvernementaux. Le 16 décembre 2003, le président ougandais Yoweri Museveni a pris la décision de déférer la situation dans le nord du pays au procureur de la CPI. Le 29 juillet 2004, le procureur de la Cour pénale internationale a annoncé l'ouverture d'une enquête sur les crimes contre l'humanité et les crimes de guerre commis dans le nord de l'Ouganda. Le 8 juillet 2005, la Chambre préliminaire II de la CPI a émis cinq

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[15] Conseil International sur les Politiques des Droits Humains, *Négocier la justice ? Droits humains et accords de paix,* Versoix, Conseil International sur les Politiques des Droits Humains, 2007.

[16] "Human Rights in Peace Negotiations." o*p. cit.*

[17] Cf. les Accords de paix de Dayton, disponible sur le site http://www.ena.lu/accords-paix-dayton-paris-21-novembre-1995-010302520.html (consulté le 12/12/2012).

[18] Pour une description chronologique du conflit en Ouganda, voir J.O. Latigo, « Nord de l'Ouganda : pratiques traditionnelles dans la région acholi », dans *Justice traditionnelle et réconciliation après un conflit violent : La richesse des expériences africaines*, Stockholm, International IDEA, 2008, p. 90-131.

[19] Lord's Resistance Army.

[20] Uganda People's Defence Forces.

mandats d'arrêt à l'encontre de cinq membres de l'Armée de résistance du Seigneur. Ils sont accusés de crimes contre l'humanité et de crimes de guerre. Le gouvernement ougandais a fait savoir début septembre 2006 que les poursuites de la CPI seraient maintenues jusqu'à la signature d'un accord de paix définitif. En revanche, il a admis que dans l'éventualité d'un tel accord, il négocierait une « solution alternative » avec la Cour. Le mandat d'arrêt international contre les dirigeants de la LRA semble être le principal obstacle[21] à la signature d'un accord de paix global puisqu'ici et là, on entend des oui à la paix, mais sans la CPI[22] ou « *la paix d'abord, la justice ensuite* »[23]. De même, concernant l'inculpation en mars 2009[24] du président el-Béchir au Soudan par la CPI pour crimes contre l'humanité et crimes de guerre au Darfour, nombreuses ont été les voix qui se sont élevées[25] contre cette décision, notamment parce que ces derniers estiment que la décision d'inculper le président soudanais n'était pas une solution pour obtenir la paix ou parce que le moment choisi pour lancer le mandat d'arrêt était inapproprié. Ainsi, pour Jean Ping, président de la Commission de l'Union africaine, le mandat d'arrêt de la CPI « *menace la paix au Soudan* »[26]. Cette opinion est partagée par le président sénégalais Abdoulaye Wade qui regrette que la CPI ne poursuive « *que des Africains* »[27]. L'Éthiopie, voisine du Soudan, estime que la décision « *n'aide pas à la résolution de la crise au*

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[21] C.Mburu, « Ouganda », dans *La justice transitionnelle dans le monde francophone: état des lieux*, Bern, 2007.

[22] *Ouganda : les rebelles « prêts à faire la paix », mais sans la CPI,* Disponible sur le site http://www.afrik.com/article12852.html.(consulté le 12/12/2012) ; E.K. Baines, « The Haunting of Alice : Local Approaches to Justice and Reconciliation in Northern Uganda », dans *The International Journal of Transitional Justice*, vol. 1, n° 1, 2007, p. 101-102.

[23] Refugee Law Project, *Peace first, justice later : Traditional justice in Northern Uganda,* Kampala, Uganda, Disponible sur le site http://www.refugeelawproject.org/working_papers/RLP.WP17.pdf. (consulté le 12/12/2012).

[24] *Affaire Le Procureur c/ Omar Hassan Ahmad Al Bashir,* CPI*,* Disponible sur le site http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc02050109/icc02050109, (consulté le 12/12/2012).

[25] *Les réactions après l'inculpation d'Omar Al-Bachir pour crimes contre l'humanité au Darfour,* Disponible sur le site http://www.aidh.org/Justice/02enqu-darfour07b.htm., (consulté le 12/12/2012).

[26] *Ibid.*

[27] *Ibid.*

Darfour »[28]**.** Le ministre des Affaires étrangères ougandais a déclaré « *nous pensons que le mandat d'arrêt peut être suspendu pour trouver un juste milieu entre une levée de l'impunité et une paix durable* »[29]. De même, l'Égypte a appelé la CPI à retarder l'inculpation du président soudanais. En représailles probablement, mais pour d'autres motifs officiellement, le président soudanais a pris la décision d'expulser 13 ONG actives au Darfour immédiatement après le lancement du mandat d'arrêt par la CPI alors même que la population avait besoin de leur présence.

En second lieu, les réalistes avancent l'idée que la nature particulière des crimes commis au cours d'un conflit soulève de très nombreuses questions sur l'équité de procédures judiciaires extrêmement difficiles, questions qui ne pourraient être réglées de manière adéquate, surtout par des démocraties fragiles. Les procès et procédures visant à faire face aux atteintes aux droits de l'homme commises dans le passé sont confrontés à des questions d'équité des procédures judiciaires particulièrement délicates, telles que : le principe *nulla poena sine lege*, celui de la non-rétroactivité, de la responsabilité individuelle, de l'âge minimum pour les poursuites, du défaut de pertinence de la qualité officielle, de l'imprescriptibilité et de l'intention coupable.

Et enfin, les réalistes soutiennent l'idée que les formes juridiques traditionnelles de mise en œuvre de l'obligation de rendre des comptes peuvent ne pas toujours être appropriées à la situation de conflit, à la culture ou aux objectifs poursuivis par le processus. Le Mozambique est souvent cité comme l'exemple d'une situation dans laquelle la paix a été durablement rétablie sans que l'on ait fait face formellement au passé. De fait alors, il peut être préférable de se contenter d'« *un certain degré d'établissement de la vérité et de reconnaissance que des atteintes aux droits humains ont été perpétrées, tout en ouvrant la voie à un nouveau départ en permettant à l'ensemble des parties de prendre part au travail qui doit être accompli* »[30]**.**

Jean-Pierre Colin affirme que « *Son histoire doctrinale, son développement positif, ses perfectionnements contemporains, tout atteste que le but profond*

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[28] *Ibid*.

[29] *Ibid.*

[30] R.L. Siegel, « Transitional Justice: A Decade of Debate and Experience », dans *Human Rights Quarterly n°* 20, 1998, p. 431-439.

du droit international est de maintenir la paix entre les États, non de faire régner la justice dans le monde »[31].

Et à raison. La situation qui a engendré les crimes commis en ex-Yougoslavie et au Rwanda sera qualifiée de menace à la paix et à la sécurité internationale, conformément à l'article 39 de la Charte. Cette situation donnera lieu à la création par le Conseil de sécurité, sur la base des articles 29 et 41 de la Charte, en 1993, au Tribunal pénal international pour l'ex-Yougoslavie[32], en 1994 au Tribunal pénal international pour le Rwanda[33] et en 2000 au Tribunal spécial pour la Sierra Leone[34]. Ainsi si ces juridictions ont été mises en place, ce n'est pas forcément par amour de la justice et pour rendre justice aux centaines de milliers de victimes, mais parce que la situation dans ces pays constituait une menace à la paix et à la sécurité internationale.

II - L'UTOPIQUE RECHERCHE DE LA PAIX SANS LA MISE EN ŒUVRE DE LA JUSTICE

Aux arguments des réalistes, les libéraux répondent que l'idée d'une paix sans justice est inconcevable sinon utopique.

L'ancien procureur du TPIY puis du TPIR, Richard Goldstone affirme qu' : « *une paix qui serait téléguidée par des criminels de guerre, malfaisants et méprisants toutes les règles ou normes fondamentales du droit international, et soucieux de protéger leurs intérêts, ne saurait être ni viable, ni durable* »[35]. Mô Bleeker ajoute que « *L'impunité est plus qu'un manquement, qu'une violation, c'est une culture, c'est un système. La violence et la terreur*

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[31] J-P. Colin, « Variations sur la justice internationale » dans *Annuaire français de relations internationales*, vol. VIII, 2007, p. 68.

[32] Résolution 827 (1993) adoptée par le Conseil de sécurité lors de sa 3217e séance, le 25 mai 1993. [sur la création du Tribunal pénal international pour l'ex-Yougoslavie], S/RES/827 .

[33] Résolution 955 (1994) adoptée par le Conseil de sécurité lors de sa 3453e séance, le 8 novembre 1994. [sur la création d'un Tribunal international pour le Rwanda et l'adoption des statuts de ce tribunal] S/RES/955.

[34] Résolution 1315 (2000) adoptée par le Conseil de sécurité lors de sa 4186e séance, 14 août 2000l. [sur la création d'un Tribunal spécial pour la Sierra Léone] S/RES/1315.

[35] R. Goldstone, « Bringing war criminals to justice during an ongoing war », dans *Hard Choices, Moral Dilemmas in Humanitarian Intervention*, Rowman and Littlefield Publishers, 1998, cité par P. Hazan, *Juger la guerre, juger l'histoire*, Paris, PUF, 2007, p. 205.

sont un système »[36]**.** Madeleine Albright soutient que la justice est « *essentielle pour adoucir l'amertume des familles de victimes, écarter des obstacles à la coopération entre les partis, établir un modèle de résolution des différences ethniques par la force de la loi et non par la loi de la force* »[37]. Dans le premier rapport du président du TPIY devant l'Assemblée générale de l'ONU, Antonio Cassese, à propos de la crainte que l'établissement du Tribunal ne risque de compromettre le processus de paix note que : « *On ne saurait exagérer le rôle du Tribunal. Loin d'être un instrument de vengeance, c'est un moyen d'encourager la réconciliation et de rétablir une paix digne de ce nom* »[38].

Les arguments des promoteurs de la justice sont tout aussi nombreux que ceux des partisans de la paix[39].

En premier lieu, la justice et les décisions qui en découlent ont un effet dissuasif et limitent pour l'avenir les risques de répétition des crimes commis. Elle permet aussi de prévenir la vengeance et de réduire le recours à la justice privée. Ensuite, la justice assure l'individualisation de la culpabilité et l'assignation des responsabilités individuelles. Cela entraine une diminution de mise en écart d'un groupe ethnique ou national et réduit de désir de vengeance. La justice participe ainsi à la réconciliation. De plus, la justice permet l'établissement des faits et de la vérité pour notamment lutter contre le déni et le négationnisme. La justice permet d'établir les faits par les moyens qu'elle met en œuvre pour parvenir à connaitre la vérité à propos du passé.

On ajoute que l'obligation de rendre des comptes est un élément essentiel des réformes institutionnelles visant à établir l'état de droit et un préalable à toute forme d'assainissement de la fonction publique. On joint à cela le fait qu'il existe des mécanismes pour garantir les intérêts de la paix quand il y a un affrontement avec la justice. L'article 16 du Statut de Rome permet au Conseil de sécurité de mettre en attente des enquêtes pour 12 mois si

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[36] M. Bleeker, « Justice transitionnelle et construction d'une paix durable : des agendas complémentaires » dans *La justice transitionnelle dans le monde francophone : Etat des lieux*, *op. cit.*, p. 75.

[37] Déclaration de M. Albright au TPIY le 28 mai 1997, citée dans Bass, *Stay the hand of vengeance : the politics of war crimes tribunals*., *op. cit*., p. 284.

[38] *Rapport du président du TPIY devant l'Assemblée génèrale de l'ONU,* A/49/342, S/1994/1007 du 29 août 1994, par. 16.

[39] R. Goldstone, *Justice as a Tool for Peace-Making : Truth Commissions and International Criminal Tribunals*, New York, University Journal of International Law and Politics, vol. 28, n° 3, 1996, p. 485-504.

nécessaire par exemple. De plus, la capacité d'accorder une amnistie aux pires criminels est limitée par des normes internationales qui s'opposent à de telles mesures.

Ces arguments ont été avancés ou repris lors de la mise en place des TPI et de la CPI.

La Résolution S/RES/827[40] du Conseil de sécurité de l'ONU établit le TPIY pour « *juger les personnes présumées responsables de violations graves du droit humanitaire international* »[41] commis sur le territoire de l'ex-Yougoslavie. Agissant en vertu du Chapitre VII de la Charte (menace à la paix et à la sécurité internationale), le Conseil de sécurité est convaincu que, dans les circonstances particulières qui prévalent dans l'ex-Yougoslavie, la création d'un tribunal international, en tant que mesure spéciale prise par lui, et l'engagement de poursuites contre les personnes présumées responsables de violations graves du droit humanitaire international « *permettraient de mettre fin à la commission de tels crimes* »[42] et « *contribueraient à la restauration et au maintien de la paix* »[43]. De même, la Résolution S/RES/955[44] du Conseil de sécurité qui établit le TPIR pour « *juger les personnes présumées responsables d'actes de génocide ou d'autres violations graves du droit international humanitaire commis sur le territoire du Rwanda* »[45] estime que des poursuites « contribueraient au processus de réconciliation nationale ainsi qu'au rétablissement et au maintien de la paix ». La création d'un tribunal international pour juger les personnes présumées responsables de tels actes ou violations « *contribuera à les faire cesser et à en réparer dûment les effets* »[46]. On retrouve les mêmes idées dans le préambule du Statut de la CPI qui précise que les États Parties sont « *déterminés à mettre un terme à l'impunité des*

[40] Résolution 827 (1993) / adoptée par le Conseil de sécurité lors de sa 3217e séance, le 25 mai 1993. [sur la création du Tribunal pénal international pour l'ex-Yougoslavie].
[41] *Ibid*.
[42] *Ibi*d.
[43] *Ibid.*
[44] Résolution 955 (1994) adoptée par le Conseil de sécurité lors de sa 3453e séance, le 8 novembre 1994. [sur la création d'un Tribunal international pour le Rwanda et l'adoption des statuts de ce tribunal] S/RES/955.
[45] *Ibid*.
[46] *Ibid*.

auteurs de ces *crimes et à concourir ainsi à la prévention de nouveaux crimes* »[47].

III - L'INJUSTIFIABLE DICHOTOMIE PAIX OU JUSTICE

Au vu des différentes idées et thèses avancées par les idéalistes et par les réalistes, on peut tout aussi bien soutenir l'idée que dans les sociétés qui se trouvent confrontées à un passé violent, la composante de la justice est primordiale pour faire face aux violations des droits de la personne et participer à la reconstruction du lien social (idéaliste). À cette affirmation, il peut-être objecté que la recherche de la justice et l'exercice de la justice ne sont pas toujours possibles ou souhaitables parce que d'autres objectifs, notamment des attentes en matière d'établissement ou de rétablissement de la paix doivent être satisfaites au préalable (réalistes).

La position des réalistes et celle des idéalistes n'est pas toujours vérifiées dans les faits puisque la réalité de certains évènements contredit les arguments des uns et des autres.

Par exemple, à propos de l'ex-Yougoslavie, les poursuites à l'encontre de Karadzic ont aidé Holbrooke, artisan de l'accord de paix de Dayton du 14 décembre 1995 qui a mis fin à la guerre interethnique dans l'ex-Yougoslavie, à le mettre à l'écart dans les négociations de paix. De même, l'inculpation de Milosevic le 24 mai 1999 pour crimes contre l'humanité et violations des lois et coutumes de la guerre au Kosovo n'a pas empêché un accord conclu le 9 juin 1999 entre l'OTAN et la République fédérale de Yougoslavie concernant le retrait des forces yougoslaves du Kosovo[48]. Inversement, l'instauration du TPIY n'a pas empêché le massacre de près de 8000 musulmans bosniaques à Srebrenica en juillet 1995. Elle n'a pas non plus empêché, entre janvier 1999 et juin 1999, les forces militaires de la RFY et les forces de police de la Serbie de mener une campagne de terreur et de violence dirigée contre les civils albanais du Kosovo, conduisant à l'expulsion d'environ 800 000 civils albanais du Kosovo, avec pillages et destructions de leurs maisons. Aucune clause concernant les amnisties pour les crimes de guerre, les crimes contre l'humanité et le crime de génocide ne figure dans les accords de paix en République démocratique du Congo. Pourtant, de nombreuses personnes avaient craint que le non-octroi d'une

[47] Statut de la Cour pénale internationale du 17 Juillet 1998.

[48] Bass, *Stay the hand of vengeance : the politics of war crimes tribunals*, *op. cit.*, épilogue.

amnistie totale pour les crimes commis dans le passé entraine l'échec des négociations[49].

Dans son rapport de 2004, Kofi Annan note que « *La justice et la paix ne sont pas des objectifs antagonistes ; au contraire, convenablement mises en œuvre, elles se renforcent l'une l'autre. La question n'est donc en aucun cas de savoir s'il convient de promouvoir la justice et d'établir les responsabilités, mais bien de décider quand et comment le faire* »[50].

La question de la priorité des attentes des pays qui sortent d'un conflit se pose. Un nombre croissant d'auteurs s'accordent à dire que l'engagement de l'action publique après une guerre doit se concentrer sur trois dimensions: la légitimation de l'État, l'élaboration d'un cadre institutionnel assurant la primauté du droit et instaurant une gouvernance économique, et le rétablissement de la sécurité des personnes et des biens[51]. Ce choix peut-être discutable notamment pour les partisans de la justice. L'OCDE fait remarquer que « *les expériences comparées donnent à penser que si la justice de transition peut être légèrement différée, la restauration d'une gouvernance légitime ne peut l'être* »[52]. L'Organisation poursuit en précisant que dans certains cas, le processus d'une justice de transition fait partie intégrante de la manière dont l'État en situation post-conflictuelle se légitime, mais lorsque cela n'est pas possible, l'analyse comparative de la mise en œuvre de la paix suggère de donner la priorité, du moins en terme de séquence, à la gouvernance, à la sécurité et à la primauté du droit plutôt qu'à une justice de transition[53]. Il est certain que l'on ne peut mettre en place quelques projets que ce soit tant qu'un système de gouvernance n'est pas mis en place et qu'un minimum de sécurité n'est pas assuré. Un exemple pertinent est fourni par la République Démocratique du Congo[54], où une commission de vérité a été créée dans le contexte du conflit et sous la

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[49] L. Davis, et P. Hayner, *Difficult Peace, Limited Justice: Ten Years of Peacemaking in the DRC,* Disponible sur le site http://ictj.org/publication/difficult-peace-limited-justice-ten-years-peacemaking-drc (consulté le 12/12/2012).

[50] Rapport su Secrétaire général de L'ONU, *Rétablissement de l'Etat de droit et administration de la justice pendant la période de transition dans les sociétés en proie à un conflit ou sortant d'un conflit,* S/2004/616 du 23 août 2004, par. 21.

[51] Cf. Note de réflexion de L'OCDE, *Concepts et dilemmes pour le renforcement de l'État dans les situations de fragilité, de la fragilité à la résilience*, Paris, OCDE, 2008, p. 34.

[52] *Ibid*.

[53] *Ibid*.

[54] Cf. D.D. Mpongola, « République Démocratique du Congo », dans *La justice transitionnelle dans le monde francophone : Etat des lieux*, *op. cit.*

pression des partisans de la paix[55]**.** Chacune des parties au conflit y est représentée. Selon la Loi n° 04/018 du 30 juillet 2004[56] qui régit son organisation et son fonctionnement, la commission a pour mission de rétablir la vérité et de promouvoir la paix, la justice, la réparation, le pardon et la réconciliation, en vue de consolider l'unité nationale. Pour diverses raisons, et notamment par manque de volonté politique gouvernementale et l'insécurité à l'Est du pays, cette commission n'est pas parvenue à atteindre un minimum significatif de ses objectifs.

En matière de paix et de justice, faut-il alors adopter une approche séquentielle ou faut-il privilégier une approche progressive de ces priorités ? Selon l'OCDE[57], la prépondérance des éléments de preuve suggère une approche progressive c'est-à-dire l'évolution simultanée de ces deux composantes. Pierre Hazan considère qu'une formulation consensuelle prévaut aujourd'hui et parle d'une « approche séquentielle » de la justice et de la paix, signifiant qu'on ne peut mener simultanément la recherche de ces deux objectifs. Il ajoute qu'« e*n réalité, cette approche séquentielle ne résout rien : signifie-t-elle la paix maintenant et la justice plus tard ? Il serait d'une grande arrogance de croire que l'on peut gérer de manière juridico-technocratique des questions aussi complexes que la recherche de la justice et de la paix dans des conflits ayant chacun leur propre dynamique* »[58].

Les accords de paix établissent une donne qui a des implications majeures pour la société dans la perspective d'une stabilisation de la situation politique[59]. Et effectivement, on peut supposer qu'une justice mal négociée peut constituer un obstacle à la paix. Le Rapport Brahimi[60] indique que les parties locales signent des accords de paix pour des raisons très diverses, qui ne sont pas toutes propices à la paix. Des « fauteurs de troubles »[61] se

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[55] Cf. par exemple FIDH, *Programme de coopération juridique et judiciaire République démocratique du Congo La justice sacrifiée sur l'autel de la transition,* disponible sur le site www.fidh.org/IMG/pdf/rdc387f.pdf, (consulté le 12/12/2012).

[56] Article 5 de la Loi n° 04/018 du 30 juillet 2004.

[57] Note de réflexion de l'OCDE, *Concepts et dilemmes pour le renforcement de l'État dans les situations de fragilité, de la fragilité à la résilience*, *op.cit*., p. 34.

[58] P. Hazan, "Les dilemmes de la justice transitionnelle", dans *Mouvements*, vol. 53, n° 1, 2008, p. 46.

[59] Cf. SJ Stedman, ; DS. Rothchild, EM. Cousens, *Ending civil wars : the implementation of peace agreements,* Boulder, Lynne Rienner, 2002.

[60] Du nom du président du Groupe d'étude dont est issu le "Rapport du Groupe d'étude sur les opérations de paix de l'Organisation des Nations Unies ».

[61] Des groupes y compris des signataires qui renient leurs engagements ou cherchent par d'autres moyens à saper un accord de paix.

sont opposés à la mise en œuvre des accords de paix au Cambodge, ont plongé l'Angola, la Somalie et la Sierra Leone à nouveau dans la guerre civile et orchestré le massacre de pas moins de 800 000 personnes au Rwanda[62]**.** Le rapport note aussi que la complexité du processus de négociation et de mise en œuvre de la paix tend à être proportionnelle au nombre de partis et au degré de divergences des objectifs poursuivis.[63]

Dans la pratique, lors de la rédaction de l'accord de paix, le débat se focalise souvent autour de la question de savoir quels mécanismes d'obligation de rendre des comptes doivent être envisagés. Il est peu probable que les partis mettent un terme aux combats et rendent le pouvoir, si elles pensent que cela entraînera immédiatement leur arrestation et détention[64]. Les négociations de paix se mènent avec ceux qui sont à l'origine des exactions graves des droits de l'homme. En Bosnie, les négociations ont exclu Karadzic et Mladic, deux dirigeants serbes accusés d'exactions graves mais elles ont inclus Milosevic et Tudjman. En Sierra Leone et en Afrique du Sud, les auteurs d'atteintes aux droits humains ont été partis dans les négociations. Certains pays, à l'exemple de l'Afrique du Sud, ont choisi de mettre en place des mécanismes de réconciliation, d'autres ont opté pour le silence avec par exemple des lois d'amnisties. Il faut toutefois ajouter à cela que, toute nouvelle démocratie doit inévitablement régler les questions de son passé autoritaire ou répressif.

Il existe un grand nombre d'institutions et de procédures de gestion du passé, allant d'organes judiciaires nationaux et/ou internationaux ou hybrides à des procédures non judiciaires tels que les commissions de vérité qui peuvent être gérées par des nationaux ou par des nationaux et des internationaux, simultanément ou alternativement avec des procédures judiciaires ou encore des formes locales usuelles[65] ou tout simplement des lois d'amnisties. Chaque pays a adopté une approche différente pour faire face à ce qui « *a été peu affecté par des considérations morales ou*

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[62] *Rapport du Groupe d'étude sur les opérations de paix de l'Organisation des Nations Unies, op. cit*., par. 21.

[63] *Ibid*., par. 24. Par exemple, certains peuvent préconiser l'unité, et d'autres la séparation.

[64] Conseil International sur les Politiques des Droits Humains, *Négocier la justice ? Droits humains et accords de paix , op. cit*., p. 13.

[65] À l'exemple de l'institution traditionnelle des *« Bashingatahe »* au Burundi, des esprits *« Magamba »* du Mozambique, du recours aux rites du *« Mato oput »* en Ouganda ou encore le *« Nyono tong gweno »* en Sierra Leone.

légales »[66] dans le passé. De fait, il apparait comme nécessaire d'« *adapter la justice à la diversité des situations* »[67]. Quoi qu'il en soit, le jugement des pires criminels ne sera toujours que symbolique. Nombreux seront ceux qui seront exonérés de rendre des comptes du fait d'exigences autres que juridiques. N'en demeure pas moins que : « *l'injustice sociale est souvent à la racine des conflits qui dégénèrent en pogromes, génocides et autres violences massives manipulées par quelques-uns* »[68]. La logique légaliste des nouvelles normes en matière de justice internationale relative aux crimes internationaux écarte la possibilité de l'inaction des pays qui doivent gérer les violations massives des droits de l'homme.

[66] SP. Huntington, *The third wave : democratization in the late twentieth century,* Norman, University of Oklahoma Press, 1991, p. 211.
[67] A. Garapon, *Des crimes qu'on ne peut ni punir ni pardonner : Pour une justice internationale*, Paris, Odile Jacob, 2002, p. 271.
[68] M. Doucin, « Allocution liminaire » dans *La justice transitionnelle dans le monde francophone : état des lieux, op. cit.*, p. 167.

A RESPONSE TO TRANSITIONAL SOCIETIES: THE BALANCE BETWEEN RESTORATIVE AND RETRIBUTIVE JUSTICE IN THE ROLE OF THE INTERNATIONAL CRIMINAL COURT

RENA TATSUDA*

RÉSUMÉ

La Cour pénale internationale (CPI) intervient auprès d'une société, ayant souffert des crimes les plus graves, arrivée à une étape transitionnelle qui l'amène de la violence et répression vers la stabilité sociétale d'après-conflit. Cet exercice de justice s'inscrit à un tournant de l'histoire de la société. Cependant, elle n'a pas souvent de la perception commune de justice sociale, et affronte la complexité de distinguer clairement les victimes des auteurs de crimes, comme par exemple dans les cas des enfants soldats qui ne peuvent pas souvent réussir à réintégrer dans la société.

Bien que les principaux responsables (organisateurs) des crimes les plus graves soient jugés devant la CPI, il est peu probable que les populations y ayant participé à tout niveau à ces crimes aient ensuite à faire face aux juridictions nationales. La justice réparatrice, émergeant en tant qu'élément essentiel de la justice transitionnelle et dont l'approche est une composante primordiale du système de la CPI, à l'ambition de permettre aux victimes et auteurs de crimes de trouver le chemin de la coexistence en dépassant l'impunité *de facto* dans la société transitionnelle. Le processus de production d'une paix durable, fragile tout au long de son déroulement, vise à reconstruire la société et à rétablir l'État de droit et la paix durable, objectifs inatteignables sans la coopération des victimes, des auteurs de crimes et de la société entière. La justice réparatrice, dans son approche, ne refuse pas toutes les mesures punitives associées à la justice répressive au côté de laquelle elle devra trouver sa place. Elle doit reconnaitre l'importance de définir un processus répondant aux besoins locaux, appuyé sur l'expérience des gens ordinaires et sur les étapes par lesquelles, selon eux, la situation pourrait être normalisée. En revanche, l'investigation et les poursuites engagées par la CPI sont parfois pointées du doigt pour le risque

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qu'elles présentent de saper les efforts locaux de paix et de réconciliation. En effet, le système de la CPI, très formalisé, éprouve des difficultés à adapter ses méthodes aux pratiques locales et à développer les aspects essentiels de justice et de réparation que les victimes et la société attendent.

La question est d'évaluer jusqu'à quel point la CPI peut entreprendre une « intervention judiciaire internationale » pour répondre aux besoins des victimes et de la société, contribuer à l'établissement de la culture des droits de l'homme, et asseoir une nouvelles légitimité morale dans laquelle la justice doit d'abord être considérée comme la production de paix et harmonie avant d'être perçue comme l'identification de la culpabilité et le désir de la vengeance. Le rôle de la CPI d'arbitre de la justice transitionnelle au niveau des relations spécifiques entre victimes et auteurs de crimes et dans la promotion de la réconciliation doit être souligné. Si un développement harmonisé des dimensions réparatrices et répressives de la justice peut être mené à bien à la CPI, cela renforcera la légitimité de la justice pénale internationale et accroitra son potentiel en tant que moteur de la gouvernance mondiale.

INTRODUCTION

It is hardly possible to mention the foundation of the International Criminal Court (ICC) without first discussing the original motivation of the fight against impunity for grave violations of human rights, which have taken place in genocides, war crimes and crimes against humanity. Since the experience of the Nuremberg and Tokyo trials and the establishment of the Nuremberg Principles by the International Law Commission of the United Nations after World War II, the international community has upheld its commitment to prosecuting and trying the individuals responsible for the most serious crimes[1].

Along with the progression of retributive aspects of the international criminal justice system, we have also observed the development of both international humanitarian law and international human rights law, which strive to protect the lives, health and dignity of individuals in the international community. This development has led to growing recognition of the significance of protecting victims' rights and interests through the criminal justice system at both national and international levels.

[1] R. Lipscomb, « Restructuring the ICC Framework to Advance Transitional Justice: A Search for a Permanent Solution in Sudan », *Columbia Law Review*, Vol. 106, No. 1, January 2006, p. 182-212

The social movement towards the improvement of the status of victims and the protection of their rights has been spreading globally since the 1970s, when the conception and practice of restorative justice began to develop in the criminal justice system. In conjunction with the victim-oriented approach, which has drawn increasing international attention in recent years, restorative justice is a significant component of an ICC scheme.

When the ICC dispenses justice, a society that has suffered crimes often reaches a transitional stage, moving from violence and repression towards a post-conflict societal stability. Such societies emerging from a period of intense turmoil face a challenge of how to respond to a legacy of grave crimes[2]. The balance of restorative and retributive justice is important in terms of responding to this challenge in the ICC framework.

In defining the role of restorative justice in the ICC, two questions arise. How and to what extent can restorative justice schemes be applied in the ICC, and through harmonization with retributive justice schemes? And how can the ICC respond to transitional societies through the process of healing and reparation?

In the first part of this paper, the definition and important elements of restorative justice, and its paradigm in an ICC scheme will be reviewed. Then, the argument on the ICC's role in transitional societies will be developed. In the second part, we will examine the first ever ICC trial, which involves Thomas Lubanga Dyilo, in terms of various issues arising in dealing with victims' participation and reparation, and their implications for a society in transition.

1. General Review: Restorative Justice, the ICC, and Transitional Society

1.1. Definition and Important Elements of Restorative Justice

Termed "a new focus for crimes and justice" by Howard Zehr, a growing movement towards restorative justice has been observed in recent years[3]. From a restorative justice point of view, crime is not seen merely as an action injurious to the public welfare or morals or to the interests of the state, but as an act causing injuries to all parties involved in a crime – victim, community and also the offender. That is, not only an offender but also a

[2] D. Dukic, « Transitional Justice and the International Criminal Court – in "The Interests of Justice" ? », *International Review of the Red Cross*, Vol. 89, No. 867, September 2007, p. 691 - 718

[3] Z. Howard, *Changing Lenses: A New Focus for Crime and Justice*, PA, Herald Press, 1990

victim and a community play an important role as independent actors in the criminal justice system.

Providing reparations in a broad sense, including healing victims and meeting their needs, restorative justice aims to provide a constructive solution to all of the parties involved in the crime through a bottom-up, impartial and holistic approach. Within this framework, all parties are expected to find a way to come together to collaboratively resolve their issues. Victims are no longer passive participants but instead play an important role as independent actors in the criminal justice system. This new approach, emphasising the subjectivity of all of the parties, takes into account broader issues at the individual and social levels.

As we have observed in the conflicting opinions of the purist model and maximalist model, the definition of restorative justice has been controversial. Although the significance of restorative measures has been recognised more recently even in the international criminal justice system, reaching universal agreement on its definition has been difficult.

Nonetheless, commitment towards the standardisation of restorative justice, suggested by the United Nations (UN), is today widely shared in the international community. The UN has promoted restorative justice policies, procedures and programmes in order to improve the interests of victims and the rehabilitation of offenders through, for example, resolutions of the UN Economic and Social Council in 1999 and 2000; Vienna Declaration on Crime and Justice in 2000; Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters in 2002; and Bangkok Declaration on Synergies and Responses in 2005. In 2006, the Handbook on Restorative Justice Programmes was also published by the UN Office on Drugs and Crime for the purpose of the substantiation of the Basic Principles.

In “The Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters”, restorative justice has been defined as:

“Any process in which the victims, the offender and/or any other individuals or community members affected by a crime participate actively together in the resolution of matters arising from the crime”.

Aspects of a restorative approach should include a recognition of the significance of locally driven and community-based processes, and a need to focus on “bottom-up” processes. Both objectives are founded in the experiences of victims and communities and concerned with taking the steps required to strengthen society and its values. This cohesiveness is what a

society needs in the process of transition after the mass violation of human rights.

Inspired by theoretical analysts of restorative justice, such as Daniel Van Ness, Gerry Johnstone and Karen Heetderks Strong, the following five key elements of restorative justice for a transitional society are suggested[4].

Encounter: to set up the opportunities for victims, offenders and community members to present their views and opinions, and discuss the crime and its consequences

Reparation: to restore the damages caused by the crime

Reintegration: to find a way to accept victims and offenders as members of society

Inclusion: to give the opportunities to all of the parties concerned to take part in resolving the matters arising from the crime

Transformation: to change the social structure underlying the causes of a crime

While a dichotomy and opposition between restorative and retributive justice has often been argued, restorative justice does not necessarily exclude or reject all the punitive measures associated with retributive justice, but rather, they share common ground and requirements to establish responsibility for criminal harm[5]. Both punitive and restorative accountability schemes aim at resolving the problems in the aftermath of conflict-torn societies by acknowledging and accepting responsibility for crimes and wounds inflicted on the victims. A development and repositioning of restorative and retributive aspects in international criminal justice should concentrate on outcomes in common purpose, as well as enabling new atmospheres of moral legitimacy in which justice should be viewed as the production of peace and harmony alongside the identification of guilt and the desire for vengeance.

1.2. RESTORATIVE JUSTICE IN THE ICC SCHEME

Evolving a restorative justice approach is a significant component of an ICC scheme founded on prosecuting individuals for the most serious crimes. A basic philosophy of the balance between restorative and retributive justice in the ICC scheme is cited as follows:

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[4] D. W. Van Ness and K. H. Strong, *Restoring Justice: An Introduction to Restorative Justice*, OH, Anderson (2010)

[5] M. Findlay and R.Henham, Transforming International Criminal Justice : Retributive and Restorative Justice in the Trial Process, Cullompton, UK,Willan Publishing, 2005

"The victim-based provisions within the Rome Statute provide victims with the opportunity to have their voices heard and to obtain, where appropriate, some form of reparation for their suffering. It is this balance between retributive and restorative justice that will enable the ICC to not only bring criminals to justice but also to help the victims themselves rebuild their lives.[6]"

By introducing the restorative justice regime into the ICC, the trial processes can be made more legitimate through the wider inclusion of victims and communities, and trial outcomes more appropriate for the parties whose rights are at issue. Principles of restorative justice in their broad application can assist in the process of fact-finding, crucial for trial decision-making on sentencing and reparations.

The Rome Statute and the Rules of Procedure and Evidence grant a series of rights to victims at various stages of proceedings. Victims are particularly interested in the truth-seeking process and the outcome of the trial. Their participation is important because it makes it possible for victims to ask for reparations, and provides them an opportunity to tell their stories and have their voices heard before the Court. Under law, victims have the chance to present their views and observations under article 68, and to demand reparations before the Court under article 75 and rules 94 to 99.

Although there are still difficulties in interpreting provisions relating to victims' participation and reparation due to insufficient details, it is obvious that the ICC scheme tries to include the two first elements of restorative justice mentioned in 1.1: Encounter and Reparation. Especially, article 75 (1) requires the Court to "establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation". The ICC's decision involving reparations can strengthen the existing recognition of the right to reparations, acknowledged by the international community through the Basic Principles and Guidelines on the Right to a Remedy and Reparation, adopted by the UN General Assembly in 2005[7].

Regarding the balance between the victims' and offender's rights, article 68 (1) clarifies that the measures to protect the victims and witnesses and their participation in the trial proceedings should "not be prejudicial to or

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[6] Victims and witnesses, Structure of the Court, ICC: http://www.icc-cpi.int/EN_Menus/ICC/Structure%20of%20the%20Court/Victims /Pages/ victims%20and%20witnesses.aspx

[7] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law

inconsistent with the rights of the accused and a fair and impartial trial". In other words, guaranteeing the rights of victims and their trial participation should not unduly limit those of the accused, which are established under article 55 and 67. Without doubt, questions remain whether such a balance in the Statute would function in an effective way in practice and whether the interests of victims and witnesses merely compete with those of an offender because while the former attempt to establish the substantive evidence of the crime and its seriousness, the latter tries to provide counterarguments.

Yet, as article 21 (3) rules "[t]he application and interpretation of law […] must be consistent with internationally recognised human rights", and thus it is the established principle that victims and the offender should not undermine each other with regard to their own rights. The establishment of the rights and protection of victims and witnesses should not be *per se* inconsistent with the right to evidence disclosure and the principle of equality of arms, which have to be guaranteed for the accused and defence. The need to balance the protection of rights and satisfaction of needs between both parties is the reason why the balance between restorative and retributive justice has to be pursued.

Nonetheless, the victims' participation and reparation in legal proceedings are merely a part of the restorative dimensions. Restorative justice has also emerged as an essential ingredient of transitional justice, centred on Reintegration, Inclusion and Transformation, the remaining important elements mentioned above. We may be able to comprehend these elements as a part of reparations issues in which the ICC needs to make further elaborations beyond what is stipulated in the Statute.

As the Lubanga Trial exposed, when we think about the case of reparations to child soldiers, we cannot help taking into account the fact that many fail to reintegrate themselves into society and even their families. Having committed atrocities in conflicts, they are considered criminals as well as victims. A number of child soldiers are traumatised by their terrible experiences, so they are at higher risk of developing post-traumatic stress disorder (PTSD), which may influence the rest of their lives.

From the point of view of restorative justice, not only the victims but also the surrounding community have been affected by the actions of the offenders. Thus, the reparation process concerns not only individual victims, but also communities and entire societies. This is especially true when a crime is committed in a conflict-torn society or community. The offenders' obligation is thus to make amends with both the victims and the involved community. The most important process of restorative justice is the concept of healing

and reparation. For the people and communities involved in the crime, the long-term and multiple consequences arising from the violations, including the psychological impacts, need to be taken into account in such a process.

In the ICC scheme, a restorative justice paradigm considers reparations as a form of punishment, traditionally associated with retributive justice. The ICC is expected, in the reparation process, to respond to a transitional society in the same way that the process of victim healing and reconciliation in a community undergoing transitions and reconstruction in the wake of war and gross human rights' violations is to be implemented.

Especially, the Trust Fund for Victim (TFV) plays an important role in the restorative justice approach and the victim and community support in the ICC scheme. The fund has two mandates: the first is to implement Court-ordered reparations awards against a convicted person when directed by the Court to do so; the other is general assistance, using voluntary contributions from donors to provide victims and their families in situations where the ICC is active with physical rehabilitation, material support, and/or psychological rehabilitation[8].

In collaboration with the NGOs, community groups, governments and UN agencies, the TFV works on projects, many of which support vulnerable victims such as women, children, the elderly, and victims of sexual and gender-based violence. Whether in the form of reparations ordered by the Court or general assistance, the TFV offers key advantages for promoting lasting peace, reconciliation, and well-being in conflict-torn societies[9]. In this process of rebuilding people's lives in a society in transition, the focus should be on local ownership and leadership, and the empowerment of victims.

1.3. ICC AND TRANSITIONAL SOCIETY

A society that reaches a transitional stage, moving towards a post-conflict societal stability, often lacks a shared perception of social justice. During the conflicts, the society is so confused that people are divided into friends and foes that kill each other. This results in wavering social norms even in peacetime. Lack of shared perception of social justice may create complex challenges in attempting to distinguish between offenders and victims.

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[8] Trust Fund for Victims welcomes first ICC reparations decision, ready to engage, The Trust Fund for Victims, 8 August 2012
http://www.trustfundforvictims.org/sites/default/files/media_library/TFV_Lubanga_reparations_press_statement.pdf

[9] Ibid.

Just how to meet the needs of survivors of massive collective trauma is an equally complex problem intertwined with that of political transition. Similar to the example of child soldiers, the answer to the question of who are the victims that require social reparation, shared mourning, and shared memory is often not as clear as it is with regard to the victims of gross human rights' violations[10].

In addition, even though the most responsible criminal leaders may be tried before the ICC, many perpetrators or low ranking officers serving oppressive regimes are not always prosecuted before their national courts. In these cases, offenders and victims continue living side-by-side in the same community.

Nevertheless, under such circumstances, reconciliation efforts in local terms are made in post-conflict situations. We have observed in the past, for example, the establishment of the Truth and Reconciliation Commission in South Africa and the Gacaca in Rwanda. The tension between peace and justice during or in the immediate aftermath of conflict has been discussed in the context of amnesties and pardons, which some researchers consider a form of restorative justice.

Some point out that the ICC statute is in effect silent on the purposes and principles that govern the rules on sentencing. Inconsistencies that are likely to emerge from the ratification and application of the ICC laws will inevitably become apparent. This depends on how the ICC Treaty is being implemented into national laws, as well as on whether national laws provide for amnesties and pardons. However, it is obvious that the new international normative framework emerging in recent decades makes it clear that amnesty will not shield from justice those who have committed serious crimes.

On the other hand, initiating ICC investigations and prosecutions may risk undermining local peace and reconciliation efforts in transitional societies. This is because the ICC system is seen as a highly formalised regime, and may have difficulty dealing with local issues in local terms. Especially, much of the tension between the pursuits of justice and peace plays out in the dynamics between the ICC prosecutor and mediator in the short-term resolution of conflicts.

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[10] Y. Danieli, « Essential elements of healing after massive trauma: Complex needs voiced by victims/survivors », dans *Handbook of Restorative Justice: A Global Perspective*, NY, Routledge, 2006, p. 343-354

However, international prosecution is expected to provide significant long-term benefits. In transitional societies, it is important to reconstruct a social justice system that people can accept. Pursuing justice in transitional societies requires a set of ethical values and a political-legal initiative that is flexible enough to meet the needs associated with nation or social building.

This process is not necessarily contrary to ICC operations, and rather should involve complementary components. The ICC has a mandate to investigate and try alleged crimes committed in the course of on-going conflicts. The ICC operations, therefore, have to ensure that the pursuit of justice is to the extent possible compatible with the pursuit of peace. Its restorative justice regime is expected to create a path of coexistence for victims and offenders beyond de facto impunity from prosecution.

A restorative justice approach will result in achieving one of the common principal aims of justice and peace: to reconstruct lives of people, communities or societies having been involved in grave violations of human rights in the process of reparation, and to deter future violations of human rights within the same communities or societies.

It is essential for the court to review transitional justice mechanisms established in a number of post-conflict societies in which reparations programmes, truth-seeking processes, and domestic prosecutions have offered victims moral recognition, material help and legal redress.

2. CASE REVIEW: LUBANGA TRIAL

Thomas Lubanga Dyilo

- Charges: Enlisting, conscripting and using of children under the age of 15 years in the context of an international armed conflict from early September 2002 to 2 June 2003 (punishable under *Art. 8(2)(b)(xxvi)*) and a non-international armed conflict from 2 June 2003 to 13 August 2003 (punishable under *Art. 8(2)(e)(vii)*)
- Decision on the confirmation of charges: 29 January 2007
- Commencement of trial: 26 January 2009

On 14 March 2012, Thomas Lubanga Dyilo, a former leader of the Union of Congolese Patriots (UPC) from the Democratic Republic of the Congo (DRC), became the first person ever convicted by the Trial Chamber I of "conscripting, enlisting and using children under the age of 15 years" in the context of both international and non-international armed conflicts in 2002 and 2003.

Although Lubanga's crimes constituted only a small part of mass atrocities committed between 1993 and 2003, as reported by the UN[11], the conviction against him is a milestone for the international criminal justice system, and may make an important contribution to a response to a transitional society by developing and defining the right to reparations to victims and communities.

Lubanga was sentenced to 14 years of imprisonment on 10 July and the ICC's first decision on the principles for victims' reparations was issued on 7 August. From the nature of the counts against Lubanga, most of the victims participating in the trial were former child soldiers or their families. Female child soldiers who were subject to sexual violence were also included. Eight councils represented 93 victims at the beginning of the trial, but 129 victims (34 female and 95 male) were in the end involved in the trial proceeding and participation[12]. Among them, 28 were children under the age of 18 at the time. While many of the victims were granted protective measures because of their vulnerable position living in areas of the conflict, 23 of 129 victims were subject to the disclosure of identity in the proceedings[13]. According to the TFV, the ICC has received over 8,000 applications for reparations overall. In the Lubanga case, 85 victims have applied for reparations, while many more may be eligible[14].

In the context of gross violations of human rights, children are always among the victims. While children are victims alongside the rest of the civilian population, they often suffer more than others because of their vulnerability. In addition, girls and boys, because of their specific vulnerabilities, are also sometimes directly targeted for abduction, enslavement, recruitment as child soldiers, rape and sexual violence[15]. For all these reasons, children's concerns and interests should be considered in responding to a society transitioning from the aftermath of conflict. In that sense, the Lubanga case has provided us with a valuable indication of how reparation and reintegration issues of child soldiers should be addressed in the international criminal justice framework established by the ICC.

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[11] The Democratic Republic of the Congo 1993-2003 UN Mapping Report

[12] ICC Trial Chamber I, Situation in the Democratic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo, Judgment Pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842,14 March 2012 (hereinafter "Lubanga Judgment"), para 15 and note 51.

[13] Lubanga Judgment, para 18

[14] *Op.cit.*,The Trust Fund for Victims, 8 August 2012

[15] *Children and Transitional Justice*, United States Institute of Peace, 25 January 2011 http://www.usip.org/events/children-and-transitional-justice

2.1. VULNERABILITIES OF CHILD SOLDIERS AND VICTIMS OF SEXUAL VIOLENCE

Since the 1970s, a number of international conventions have come into effect that try to limit the participation of children in armed conflicts. The UN Convention on the Rights of the Child, article 38 (1989) proclaimed "State parties shall take all feasible measures to ensure that persons who have not attained the age of 15 years do not take a direct pat in hostilities". However, minors who are over the age of 15 but still remain under the age of 18 are still voluntarily able to take part in combat as soldiers.

Disregarding the conventions, the use of children in military forces and the active participation of children in armed conflicts are widespread. According to Human Rights Watch, an estimated 200,000 to 300,000 children are serving as soldiers for both rebel groups and government forces in current armed conflicts all over the world[16].

Lubanga is convicted of forcibly recruiting hundreds of child soldiers between 2002 and 2003, but in DRC, thousands of children serve in the military as well as the various rebel militias. According to UNICEF, as many as 30,000 Congolese children were fighting or living with armed forces or militia groups, and between 30% and 40% are female[17].

Children, often at the age of 7 to 15, were abducted or recruited either by force or voluntarily. Children are most likely to become child soldiers if they are poor, separated from their families, displaced from their homes, living in areas of conflict or have limited access to education. Otherwise, they join armed groups because of economic and social pressure, or because the group will offer food or security for themselves and their families[18].

They are trained to carry out military tasks, to kill and cause violence and atrocities, even in their own villages. The use of marijuana is very common and in some cases, an obligation. Most of the time they sleep outside in the cold and do not have enough to eat or wear, nor medical treatment when they fall sick. The environment where they live, in the military camps, is a hostile one to a childhood. They lack the parental affection that any child

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[16] Child Solders Edition, *Rights Sites News: Promoting Human Rights Education in the Classroom*, Vol. 4, Issue 2, Spring 2008
http://discoverhumanrights.org/uploads/issue_13_-_child_soldiers_for_pdf_2.pdf

[17] Katy Glassborow, *Appel à l'inclusion du viol dans les charges contreLubanga*, Institute for War & Peace Reporting, 30 May 2008
http://iwpr.net/fr/report-news/appel-à-linclusion-du-viol-dans-les-charges-contre-lubanga . Democratic Republic of Congo, *Martin Bell Reports on Children Caught in War*, Child Alert, UNICEF http://www.unicef.org/childalert/drc/childsoldiers.php

[18] *Facts About Child Soldiers*, Human Rights Watch, 3 December 2008

needs. The conditions under which these children live affect their future, and in many cases, these experiences leave physical and psychological scars. Not only are children affected but also their families and the whole community. These adverse conditions make the reintegration of the children very difficult.

In announcing the sentence against Lubanga on 10 July 2012, presiding Judge Adrian Fulford stated that the recruitment and use of child soldiers are "undoubtedly very serious crimes that affected the international community as a whole"[19]. He noted that the "vulnerability of children means that they need to be afforded particular protection" from the risks associated with warfare, including the psychological trauma for child soldiers who have been exposed to violence, separated from their families, and deprived of an education[20].

Additionally, among child soldiers, many have been subjected to sexual violence. Especially girl soldiers were sexual slaves as well as were used for household tasks as caretakers on a daily basis. Boy soldiers were often forced to rape women as a part of their training, and were ordered to abduct and bring women to the camp. The TFV also recognised the prevalence of gender-based crimes against child soldiers during their conscription, enlistment and/or participation in its First Report on Reparations[21]. According to the TFV, the interviews carried out in 2010 revealed that over 48% of former child soldiers (of whom 66.7% were girls and 32.2% boys) indicated they had been subject to sexual violence and 35% of former boy soldiers indicated they had been forced to commit sexual violence[22].

Charges of gender-based crimes in the case against Lubanga were absent, but extensive evidence on sexual violence was heard throughout the trial proceedings. In fact, a significant amount of direct testimony on sexual violence from prosecution witnesses was given. While not all of this testimony was relied on in convicting Lubanga, the crimes described were representative of the experiences of child soldiers within the UPC.

Over the years, rape has frequently been described as a "weapon of war" and is perpetrated with total impunity. In fact, DRC is known to have one of the highest rates of sexual violence in the world. Prolonged violence,

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[19] *Thomas LubangaDyilo sentenced to 14 years of imprisonment*, ICC-CPI-20120710-PR824, 10 July 2012; and ICC-01/04-01/06-2901, 10 July 2012

[20] *ICC: Congolese Rebel Leader Gets 14 Years*, Human Rights Watch, 10 July 2012 http://www.hrw.org/news/2012/07/10/icc-congolese-rebel-leader-gets-14-years-0

[21] ICC-01/04-01/06-2803-Red

[22]ICC-01/04-01/06-2803, para 163

impunity, and a proliferation of armed groups may all contribute to the extremely widespread and violent forms of rape seen in DRC. As a result, rape has become trivialised while it increases throughout the country, even in areas where conditions are relatively stable. At the height of the fighting, sexual violence is used to terrorise entire communities, forcing populations to take possession of their territory, to control communities, and to punish individuals and entire groups for their alleged support of enemy forces. In times of relative stability, rape is perpetrated alongside pillaging. These crimes are not only characterised by their scale but also by their brutality. While it is impossible to make a precise estimate of the number of victims of sexual violence in DRC, the UN estimates that at least 200,000 cases of sexual violence have been reported since the conflict started in the DRC, which is thought to be a significantly low estimate[23].

Whether evidence of sexual violence ought to be taken into account for the purposes of sentencing and reparations was controversial. While at an earlier stage of the proceedings, the prosecution had argued that sexual violence should be taken into account in sentencing, it was not clear whether such violence can be considered an aggravating factor for the purposes of sentencing under the statutory framework[24]. On the other hand, the Second Report of the Registry on Reparations considers sexual violence as a type of harm caused as a result of child conscription, taking into account some cases in which girl soldiers may have had a child as a result of being raped, experiencing stigmatisation as a result[25].

2.2. Psychological Impact of Child Soldiers

Most of the witnesses at the trial are former child soldiers traumatised by terrible brutalities, such as sexual offences and brutal punishments. Recalling such moments could cause great suffering and psychological disorders. According to "The Psychological Impact of Child Soldiering", a report by Elisabeth Schauer, exposure to repeated traumatic experiences could lead to psychological and developmental problems that can last throughout the child's lifetime and even affect generations to come[26]. Many

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[23] *Secretary-General Calls Attention to Scourge of Sexual Violence in DRC*, United Nations Population Fund, 2009

[24] *Democratic Republic of the Congo – Lubanga case: Trial Chamber I issues first trial Judgement of the ICC – Analysis of sexual violence in the Judgement*, Special Issue No.1, Women's Initiatives for Gender Justice, May 2012
http://www.iccwomen.org/news/docs/WI-LegalEye5-12-FULL/LegalEye5-12.html#2

[25] ICC-01/04-01/06-2806, para 6 and 88

[26] E. Schauer, *The Psychological Impact of Child Soldiering*, Vivo, 25 February 2009

studies have concluded that child soldiers are at a much higher risk of developing PTSD, which could not only interfere with the ability to testify in Court but also raise issues of reparations to victims afterwards.

In fact, at the Lubanga trial, the defence lawyers attacked the testimony of some child soldiers as unreliable, emphasising inconsistencies and memory gaps because they had difficulty answering questions or providing consistent evidence when cross-examined on details in their testimony[27]. Such an issue is a challenge also for judges who will be required to evaluate the credibility of the witnesses and their testimony, especially when making decisions on the scope of injury, damages and loss caused by crime and the scope of reparations for victims. However, Schauer's report has made the contribution of encouraging judges to recognise the specific difficulties that child soldiers may encounter during testimony and better understand and interpret their evidence[28]. It also provides recommendations using "a therapeutic testimonial process" and "supportive companion" in order for child witnesses to recall events in a more clear, complete, and chronological order, as well as reduce the stress of narrating traumatic events.

Taking care of psychological impacts from the trial stage is important for vulnerable victims such as children and victims of sexual violence to independently rebuild their lives in a society after mass violations of human rights. Additionally, since a variety of long-term mental health problems may be caused by a crime, the special care and treatment for vulnerable victims should be taken into account as a measure to mitigate or reduce the risk of secondary victimisation especially under cross-examination.

2.3. Reparations and Transitional Society

Although the Statute makes it possible to have collective reparations as well as individual reparations, the Court decided that in the Lubanga case, reparations would be implemented through the TFV, which tends to be collective with a focus on community-based approaches rather than individual reparations. It was suggested that victims who had already submitted an individual application for reparations might benefit from collective reparation measures provided by the TFV.

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http://www.icc-cpi.int/iccdocs/doc/doc636752.pdf

[27] J. Easterday, *Expert Reports on the Psychological Impact of Child Soldiering*, Lubanga Trial, Open Society Foundations, 19 May 2009
http://www.lubangatrial.org/2009/05/15/expert-reports-on-the-psychological-impact-of-child-soldiering/

[28] Ibid.

Regarding the form of reparations, the Court specified as follows[29]:

Restitution: to restore the victim to his or her circumstances before the crime was committed, including return to his or her family, education and previous employment, or returning lost or stolen property

Compensation: to award economic relief, on a gender-inclusive basis, encompassing all forms of damage, loss and injury; such as physical harm, moral and non-material damage, material damage, lost opportunities and costs such as legal experts, medical services or social assistance

Rehabilitation: to make the provision, on a non-discriminatory and gender-inclusive basis, of medical services, psychological, psychiatric, social assistance, any relevant legal and social services

Especially, as a form of rehabilitation, specific measures should be adopted to rehabilitate and reintegrate child soldiers, such as the provision of education and sustainable work opportunities[30]. This concerns how children will be able to start their new life in a transitional society.

However, as the SOS Grand Lacs, a non-governmental agency funded by the UNICEF reported, it is often observed that child soldiers have failed to reintegrate themselves into their families and communities[31]. Child soldiers are often viewed with intense negativity, putting them at significant risk of being rejected from their own family or community. Family rejection means that they are told they can no longer stay in the home of their family. In the case of community rejection, they are ostracised by peers to such a degree they feel forced to leave the community. This rejection is because former child soldiers have committed atrocities and thus are considered criminals as well as victims. In other cases, child soldiers belong to the community of the offender, and their families gain "insurance" for the future by having their children in militia groups. Either way, the families and communities may be unreceptive to their returning. If this is the case, children are likely to re-join the militia groups of their own will.

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[29] Lubanga Case – Q&A on ICC Landmark Decision on Reparations for Victims, Victims' Rights Working Group, 14 August 2012
http://www.vrwg.org/home/home/post/36-lubanga-case---q--a-on-icc-landmark-decision-on-reparations-for-victims

[30] Ibid.

[31] W. Wakabi, *WitnessSaysFamiliesReject Child Soldiers*, Lubanga Trial, Open Society Foundations, 7 May 2009
http://www.lubangatrial.org/2009/05/07/witness-says-families-reject-child-soldiers/

Reintegration issues also concern victims of sexual and gender-based violence. Rape results not only in physical and psychological trauma, but can destroy family and community structures. Women face significant obstacles in seeking services after rape. Interventions offering long-term solutions for vulnerable women are vital but lacking. Reintegration programmes on sexual and gender-based violence for women, men, and communities are also needed.

According to a survey conducted by Conflict and Health with 225 female victims of sexual violence, 44.6 % polled waited a year or more before seeking specific medical treatment services[32] while 55 % stated it took them more than a day to travel to the service locations, and only 4.2 % received the services within 72 hours of the attack, which is a medically important window of time to receive prophylaxis of sexually transmitted infections and HIV. The survey noted that victims who have not come forward to seek services are among the most vulnerable and disadvantaged and are unable to access care because of insecurity or the inability to travel due to distance or poverty.

Reparations should elaborate on the effects of being child soldiers and subject to sexual violence on victims' livelihoods and future. Even if they are not rejected from their families or communities, significant problems remain to be dealt with on a community and social basis, which may cause pains to victims.

More work needs to be done to understand how the ICC's intervention can facilitate social reintegration for vulnerable populations and community-level post-conflict recovery through its proceedings, which enable victims to have their voice heard regarding their needs and perceptions of remedies and reparations available to them.

CONCLUSION

Article 68 (3) of the Rome Statute says that when the personal interests of victims are concerned, the Court shall permit the views and concerns of victims to be heard in a manner which is not prejudicial toward or contrary to the interest of the accused and a fair trial. However, in the Statute and the Rule of Procedure and Evidence, there are very few provisions that deal with their participation and reparation, and most of these are insufficiently

[32] J. T. Kelly, T.S. Betancourt, D. Mukwege, R. Lipton, and M. J. VanRooyen, *Experiences of female survivors of sexual violence in eastern Democratic Republic of the Congo: a mixed-methods study*, Conflict and Health, 2011 http://www.conflictandhealth.com/content/5/1/25

detailed. As a result, “the personal interests of victims” and “the interest of the accused” in this article may be interpreted at the discretion of each chamber, which is at risk for inconsistency. If this is the case, the provisions can be favourable or unfavourable, according to the interpretations of the chambers.

Another issue of interpretation is whether the notion of victims should be interpreted narrowly or broadly. The narrow interpretation means “victims” are limited to ones that participate in proceedings before the Court. However, in the broad sense, victims may include the whole community or society as part of a reparation procedure, according to decisions of the Trust Fund for Victims. From the viewpoint of transitional justice, collective reparations may be seen as favourable since the whole of society has to move forward to achieve peace and stability. However, it does not mean that individual victims’ application for reparations should be disregarded or replaced by collective reparations. It should be ensured that individual victims participating in the Court will be able to benefit from collective reparations if it is ordered. However, at the same time, we also have to recognize that there are a number of victims who cannot gain the status of “victims” before the ICC for administration reasons, so the effort of the inclusion of unidentified victims should be made in a transitional society.

There are enormous difficulties in achieving acknowledgement and truth, providing reparation, and establishing reconciliation in transitional societies rebounding from mass atrocities and trauma. If the harmonious development of restorative and retributive dimensions in the ICC regime can be achieved without diminution of either, and access and rights concerns are enhanced, this will generate a significant force for legitimation in international criminal justice at large, and in turn, increase the potency of justice as a driver of global governance.

Nevertheless, the ICC scheme does not represent the totality of possible responses where serious crimes have been committed in the course of a conflict. The ICC scheme should not be seen as the monopoly institution in international criminal regulation but as one element in a continuum of international and local conflict resolution devices and mechanisms. The possibility of an ICC prosecution merely represents one component of possible ways of dealing with some of the actions of some of the parties to a conflict. Peace building requires tremendous individual, collective and institutional will and energy, a commitment to meeting the essential reparative needs of victims and survivors, and a change in consciousness in the human community to support initiatives of social justice.

Transitional justice does not favour one model. Justice, accountability, reconciliation and reparation can involve different elements in diverse contexts. There is not only one resolution or only one way forward. Instead there are specific priorities and principles that need to be adapted to local factors and situations. At the same time, there must be consistency and coherence when applying these principles and other international standards at the national level[33].

Healing in the aftermath of massive trauma and establishing truth and reconciliation in a society in transition from traumatic experiences are very complex and fragile processes. These processes have to be followed in different measures, in different situations and cultures, and at different points in time, in accordance with the participation and choices of victims and survivors. The peace and justice debates should focus more concretely on the central issues that will affect the lives of victims and affected societies, rather than seeking solely to resolve geopolitical or national power dynamics.

[33] S. Parmar, M. J. Roseman, S. Siegrist, T. Sowa, *Children and Transitional Justice: Truth-Telling, Accountability and Reconciliation*, UNICEF, March 2010 http://www.unicef-irc.org/publications/pdf/ti_publication.eng.pdf

LA RECHERCHE DE LA VÉRITÉ PAR LES COMMISSIONS VÉRITÉ ET RÉCONCILIATION

BORIS SARCY*

ABSTRACT

The following study aims at demonstrating the ambivalence and the juridical incongruity of this kind of commission. True alternative to the criminal proceedings, the Truth and Reconciliation commissions (TRC) – generic name inflected by the states according to their needs- is created for the necessities of the population's reunification previously devised by a political break. This will of harmonization is understandable trough the search for truth. One of the main challenges of this kind of commission rests on that term. In fact, the TRC need to transcend the simple search for juridical truth which in itself is limited to the search of guilt or innocence of all the involved protagonists with absolute truth as main objective. So, the commission members should choose hermeneutic processes as much in juridical field as in historical field. Furthermore, there is a lot of critic generated by the creation of this kind of commission. Indeed, instituted by the new government, these authorities, under cover of the objective search for truth, are depicted as political byways tending to establish the legitimacy of the new leaders. In that way, the integrity of the commission itself is denounced by being compared with a "weapon" used by the current government for propaganda.

Les commissions « *vérité et réconciliation* » ont pour objectif de permettre à un pays de ramener l'équilibre au sein de la société. Ce type de commission intervient dans l'hypothèse d'une situation de crise politique au sein d'un État. Elles sont mises en place lorsqu'ont été commises des violations graves des Droits de l'Homme. Ces commissions sont une voie médiane entre les poursuites pénales et l'absence d'intervention. A bien y réfléchir, aucune de ces deux solutions ne permettrait la réunification du pays. Les poursuites pénales sclérosent la situation en figeant les parties dans un rôle : les uns sont auteurs ; les autres sont victimes. L'absence

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d'intervention, quant à elle, impose l'oubli niant les souffrances subies. Les commissions « *vérité et réconciliation* » n'oublient pas, ne pardonnent pas[1]. Elles recherchent la vérité et l'exposent au public pour que personne ne puisse dire : « *Je ne sais pas ce qu'il s'est passé* »[2]. La recherche de la vérité est alors placée au centre du processus de retour à la stabilité. Les commissions « *vérité et réconciliation* » sont toutes fondées sur la recherche de la vérité. D'ailleurs, l'ordonnance du 13 juillet 2011 portant création, attributions, organisation et fonctionnement de la commission dialogue, vérité et réconciliation en Côte d'Ivoire prévoit dans son article 5 que la commission devra « *rechercher la vérité et situer les responsabilités sur les événements sociopolitiques nationaux passés et récents* ». Si la recherche de la vérité est bien au cœur des objectifs à atteindre par ce type de commission, on peut se demander quelle(s) vérité(s) rechercher et comment la/les rechercher ?

En effet, « *La vérité est une sorte d'être sartrien dont l'existence précède l'essence : elle est sans cesse invoquée et utilisée, sans qu'on sache toujours bien ce qu'elle recouvre* »[3]. Dès lors, comment trouver quand on ne sait pas vraiment ce que l'on recherche ? Quelle que soit la forme de la vérité recherchée, celle-ci est par nature relative. Cet axiome est reconnu depuis longtemps comme en atteste la phrase de St Thomas d'Aquin « *aucune vérité n'est éternelle* »[4]. Cette relativité provient du fait que la vérité n'existe qu'au travers du regard humain, regard nécessairement subjectif. Mais quand la vérité a des fonctions prédéfinies, le degré de subjectivité semble être au plus haut. Or, dans le domaine de la commission « *vérité et réconciliation* », la vérité a pour vocation de réconcilier les différentes communautés qui se sont opposées. Elle doit permettre le repentir nécessaire au pardon. Ainsi, la commission « *vérité et réconciliation* » doit permettre une recherche orientée de la vérité (I) pour permettre à cette vérité de réaliser des fonctions prédéterminées (II).

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[1] W. A. SCHABAS, « La commission vérité et réconciliation de Sierra Leone », *Droits fondamentaux*, 2003, p. 113.

[2] K. AVRUCH, B. VEJARANO, « Truth and Reconciliation Commissions: A Review Essay and Annotated Bibliography », *The Online Journal of Peace and Conflict Resolution, 2002,* p. 39, www.trinstitute.org/ojpcr/4_2recon.pdf ; E. BRAHM, « Uncovering the Truth : Examining Truth Commission Success and Impact », *International Studies Perspectives*, n° 8, 2007, p. 21.

[3] J.-C. BILLIER, « Vérité et vérité judiciaire », *les cahiers de la justice,* n°2, 2007, p. 201.

[4] SAINT THOMAS D'AQUIN, *la somme théologique*, trad. Abbé DRIOUX, Paris, 1851, p. 172. L'auteur fait une exception pour la vérité divine qui est éternelle par nature.

I. LA RECHERCHE ORIENTÉE DE LA VÉRITÉ PAR LA COMMISSION « VÉRITÉ ET RÉCONCILIATION »

Quelle vérité doit rechercher une commission « vérité et réconciliation » ? D'ailleurs, ces commissions doivent-elles rechercher vraiment une seule forme de vérité ? Il est fort probable que non. Il ne faut pas oublier que ces commissions sont un moyen extra juridique d'assurer l'exécution de la justice transitionnelle. Il serait donc inconcevable que ces commissions ne retiennent la notion de vérité que dans son acception judiciaire. Au sein des commissions « vérité et conciliation », la vérité est polyforme. Le premier stade de l'étude doit alors être de définir les formes de vérités à rechercher A). La détermination préalable des différentes formes de vérité est indispensable. Elle indique les points sur lesquels les commissions « vérité et réconciliation » doivent focaliser leur attention. Pour répondre à ces attentes, la recherche de la vérité doit utiliser des moyens précis. Ces moyens sont prévus par les statuts créant ce type de commission. Les moyens offerts aux commissions pour rechercher la vérité sont alors la façon la plus efficace d'orienter la recherche de certaines formes de vérité. Au second stade de l'étude, il faudra évaluer les moyens qui leur sont accordés pour mener à bien leur travail. Autrement dit, il faudra recenser les techniques de collecte de l'information B).

A) LES DIFFÉRENTES FORMES DE VÉRITÉ

Pour le juriste, la vérité s'apparente avant tout à la vérité judiciaire. La notion de vérité a toujours été inséparable de celle justice alors même qu'elle n'est jamais accessible à celle-ci. La vérité judiciaire n'est pas la vérité[5]. Elle n'est qu'une « *solution apportée au litige* ». C'est une vérité d'apparence. Elle existe uniquement quand le juge l'a reconnue. Cette vérité est celle du juriste, celle sur laquelle il fonde son analyse du droit. Mais, cette forme de vérité n'est pas suffisante pour les commissions « *vérité et réconciliation* ». Elle ne saurait pleinement permettre aux commissions « *vérité et réconciliation* » de remplir leur quête de vérité. Pour autant, il ne faudrait pas tomber dans l'excès inverse et affirmer que la vérité recherchée par les commissions « *vérité et réconciliation* » n'est pas une vérité judiciaire. La vérité doit toujours rester une priorité. Le processus de réconciliation ne doit jamais devenir un substitut à la recherche de la vérité judiciaire[6]. En effet, « *l'établissement d'une vérité historique, c'est-à-dire une interprétation*

[5] A. FABBRI, C. GUERY, « La vérité dans le procès pénal ou l'air du catalogue », *Rev. sc. crim.,* 2009, p. 343 et svt.

[6] A. GOGORZA, « Compétence universelle et réconciliation sociale », *Rev. sc. crim.,* 2010, p. 363.

sociale des violations commises, peut refléter les revendications des collectifs de victimes, mais pas les revendications plus simples de leurs familles, qui demandent la vérité judiciaire »[7]. D'ailleurs, il est possible de démontrer la volonté de laisser à ce type de commission une capacité d'intervention dans le système judiciaire. Il en est notamment ainsi dans le mémorandum du CNDD-FDD pour la CVR au Burundi, mémorandum qui affirme dans son paragraphe 35 que « *seule la Commission vérité et Réconciliation devrait avoir la qualité de saisir le Tribunal et de déterminer les crimes à soumettre à sa compétence* »[8]. Cette position est cependant restreinte. Elle permet simplement de qualifier les faits et de saisir le tribunal. La commission ne donne ici aucune vérité judiciaire. Elle émet une hypothèse sur la responsabilité d'un individu dans le cadre des agissements pour lesquelles elle a été saisie. La vérité judiciaire n'existera véritablement que lorsque le tribunal aura rendu une décision. Voici qui démontre une recherche limitée d'une vérité judiciaire ou, à proprement dit, une simple implication secondaire des commissions « *vérité et réconciliation* » dans la recherche de cette forme de vérité.

Pour autant, il est évident que la vérité judiciaire ne saurait suffire à combler les attentes du gouvernement émergeant. En effet, il est souvent demandé à la commission d'établir une vérité historique qui sera ensuite transmise pour créer une histoire officielle du pays[9]. La vérité judiciaire et la vérité historique ont une utilité sociale commune. Elles permettent d' « *accéder à l'oubli* »[10]. Ce travail ne peut être laissé au simple juge. Ce dernier est dans l'impossibilité de dire la vérité, « *il ne peut dire qu'une vérité judiciaire, celle qui émerge des éléments et des seuls éléments du dossier soumis* »[11]. Les commissions « *vérité et réconciliation* » peuvent assurer cette recherche.

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[7] E. G. CUEVA, « Commissions de vérité : mythes et leçons apprises », *La justice transitionnelle dans le monde francophone : état des lieux*, 2007, p. 18, http://www.cnudhd.org/rapportjustice.pdf

[8] Mémorandum CNDD-FDD §35, cité par VANDEGINSTE (S.), « Le processus de justice transitionnelle au Burundi à l'épreuve du son contexte politique », *Droit et société*, n° 73, 2009, p. 600. Sur ce point, l'ONU a marqué son opposition en demandant l'indépendance du procureur du Tribunal spécial du Burundi.

[9] G. GIUDICELLI-DELAGE, « Poursuivre et juger selon « les intérêts de la justice », *Rev. sc. crim.,* 2007, p. 473 et svt.

[10] A. DEPERCHIN, « Rapport de Synthèse », *dans Vérité Historique, Vérité Judiciaire à travers les grands procès issus de la Seconde Guerre Mondiale*, http://www.afhj.fr/ressources/verite_hist_jud_deperchin.pdf , p. 2

[11] A. FABBRI, C. GUERY, « La vérité dans le procès pénal ou l'air du catalogue », *Rev. sc. crim.,* 2009, p. 343 et svt.

Pour certains, cette recherche de la vérité historique est d'ailleurs leur but principal[12]. En ce sens, l'accord d'ARUSHA pour la paix et la réconciliation au Burundi avait pour but de clarifier les situations du passé pour « *réécrire l'histoire du Burundi afin de permettre aux Burundais d'en avoir une même lecture* »[13]. Ainsi, les commissions « *vérité et réconciliation* » devraient alors adopter les moyens de l'historien lorsqu'il recherche la vérité. Elles devraient prendre le temps du débat et accepter que l'histoire puisse se construire dans les divergences et dans les oppositions. Or, ces commissions polissent la vérité historique pour un souci de réconciliation et d'unification la population[14]. Cette écriture orientée de l'histoire est un des points de critique majeur des commissions « *vérité et réconciliation* ». Celles-ci ne créent pas une vérité narrative uniforme, mais des vérités issues d'interprétations différentes de l'histoire[15]. En réalité, la recherche d'une vérité historique transcende donc la recherche de la vérité juridique et se subdivise elle-même en trois catégories nommées : la vérité sociale[16], la vérité narrative[17] et la vérité de réconciliation[18]. La vérité historique intègre donc différents aspects répondant à des fonctions différentes qui seront étudiées ultérieurement.

Pour pouvoir être découvertes, ces différentes catégories de vérité imposent que soient utilisées différentes techniques de collecte de l'information. Chaque système de collecte de l'information a nécessairement une incidence sur la recherche d'une vérité qui se veut théoriquement la plus objective possible.

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[12] A. CASSESE, « La justice pénale internationale », *D.,* 2001, p. 2758.

[13] S. VANDEGINSTE, « Le processus de justice transitionnelle au Burundi à l'épreuve du son contexte politique », *Droit et société*, n°73, 2009, p. 594

[14] J.-C. MARTIN, « La démarche historique face à la vérité judiciaire. Juges et historiens », *Droit et société*, n° 38, 1998, pp. 13-20, spéc. p. 17 ; Dans le même sens pour la vérité judiciaire, R. MARTIN, « De la contradiction à la vérité judiciaire », *Gaz. Pal.,* 1981, 1, doctr., p. 209 ; Sur les différentes catégories de vérité : Cf. K. AVRUCH, B. VEJARANO, « Truth and reconciliation commissions : a review essay and annoted bibliography », *The Online Journal of Peace and Conflict Resolution,* 2002, pp. 37-76, www.trinstitute.org/ojpcr/4_2recon.pdf, p. 40.

[15] J. SNYDER, L. VINJAMURI, « Trials and Errors: Principle and Pragmatismin Strategies of International Justice. », *International Security,* 28:5-44, 2003.

[16] Issue du dialogue entre les parties au conflit.

[17] Issue du récit. Cette forme de vérité est principalement perçue par le témoignage des victimes.

[18] Elle replace les faits dans le contexte sociologique et sociétal dans lesquels ils ont pris place. Elle permet aux différentes parties au conflit de comprendre l'ensemble des tenants et des aboutissants de la situation.

B) LES TECHNIQUES DE COLLECTE DE L'INFORMATION

Lorsqu'elle est instaurée, une commission « *vérité et réconciliation* » se voit pourvue de certains moyens pour mener à bien sa quête de vérité. Elle peut notamment diligenter des enquêtes et doit recueillir tous les témoignages permettant de mettre en lumière la vérité.

Tout d'abord, les Commissions « *vérité et réconciliation* » ont la possibilité de diligenter des enquêtes. Ainsi, l'Ordonnance du 13 juillet 2011 portant création, attributions, organisation et fonctionnement de la Commission dialogue, vérité et réconciliation en Côte d'Ivoire affirme-t-elle que la commission « *peut procéder à toutes mesures d`instruction, notamment entendre tout expert et tout sachant et se faire communiquer tout document conformément aux textes en vigueur* »[19]. En théorie, cette technique devrait avoir un impact positif sur la recherche de la vérité. La Commission de la Sierra Léone affirme d'ailleurs que c'est en matière de droit à la vérité que les commissions « *vérité et réconciliation* » obtiennent les meilleurs résultats[20]. Elle ajoute que ce type de commission « *peut répondre aux besoins de la recherche de la vérité mieux que les solutions alternatives, telles que les poursuites pénales* ». L'enquête permet surtout le recueil de documents nécessaires à l'apparition de la vérité. Face à cette tâche souvent fastidieuse, certaines commissions peuvent faire appel à des personnes privées[21].

Certes, l'Organisation des Nations unies a affirmé que « *la vérité apparaît comme un droit inaliénable qui a une valeur intrinsèque qui n'admet aucune*

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[19] Ordonnance du 13 juillet 2011 portant création, attributions, organisation et fonctionnement de la Commission dialogue, vérité et réconciliation en Côte d'Ivoire, Art. 22, http://www.abidjan.net/gouv/p.asp?id=11 .

[20] Commission vérité et réconciliation de la Sierra Leone, *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission*, 2004, Vol. 1, p. 44-45, paragraphe 77, http://www.sierra-leone.org/Other-Conflict/TRCVolume1.pdf
Version originale : « *In the context of the right to the truth, Joinet recognises the special role of extrajudicial commissions of inquiry', of which truth and reconciliation commissions are certainly the most significant manifestations… Indeed, they can generally respond to the needs of truth-seeking better than the alternatives, such as criminal prosecutions. »*

[21] La Commission vérité et réconciliation du Canada a mandaté une firme d'experts-conseils pour l'aider à recueillir les documents nécessaires. *Commission vérité et réconciliation du Canada : Rapport intermédiaire*, 2012, http://www.attendancemarketing.com/~attmk/TRC_jd/Interim_report_French_electronic_copy.pdf, p. 16

dérogation et ne doit être soumise à aucune limitation »[22]. Mais, aussi pur soit l'idéal qu'elle renferme, elle est surtout profondément utopique. Tout d'abord, l'enquête est parfois rendue difficile par la rétention d'informations exercées par ceux qui les détiennent. Il n'est donc pas toujours possible pour une commission d'obtenir tous les documents dont elle aurait besoin pour établir la vérité[23]. Ensuite, il faut reconnaître l'impossibilité technique pour ce genre de commission de contraindre des personnes à témoigner[24]. En effet, la recherche de la vérité la plus complète possible est nécessairement limitée par le mandat accordé à la commission. Or, ce mandat n'octroie généralement aucun pouvoir de sanction en cas de refus pour un individu de participer à la manifestation de la vérité. Enfin, et au-delà de ces points techniques, il ne faut pas oublier non plus l'emprise du pouvoir politique sur les commissions « *vérité et réconciliation* ». C'est le pouvoir politique qui crée ce type de commission et qui lui octroie un mandat. Le pouvoir politique peut moduler le mandat pour orienter la recherche de la vérité. Plus radicalement, le pouvoir en place peut tout simplement s'opposer à la création d'une commission. Ainsi, les autorités rwandaises se sont-elles opposées à la création d'une Commission « *vérité et réconciliation* » qui aurait été en charge d'enquêter sur les violences commises par les troupes du FPR au pouvoir au Kigali sur les populations locales lors de la reconquête du pays[25]. Il ne faut jamais oublier que la recherche de la vérité est orientée. Lorsqu'un pouvoir politique décide de créer une telle commission, c'est avant tout pour légitimer le gouvernement émergeant. Il faut s'assurer *a minima* que la vérité issue des recherches de la commission aille dans ce sens. N'oublions pas que le statut de victime est prédéfini par les commissions « *vérité et réconciliation* ». Il y a donc une autocréation de la vérité[26] dès le début du travail d'enquête des

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[22] Cité par E. JAUDEL, *Justice sans châtiment : les commissions Vérité-Réconciliation,* Paris, Odile Jacob, 2009, p. 101.

[23] La Commission vérité et réconciliation du Canada a mandaté une firme d'experts-conseils pour l'aider à recueillir les documents nécessaires. *Commission vérité et réconciliation du Canada : Rapport intermédiaire*, 2012, http://www.attendancemarketing.com/~attmk/TRC_jd/Interim_report_French_electronic_copy.pdf, p. 17.

[24] A.-J. BULLIER, « La commission vérité et réconciliation d'Afrique du Sud : La preuve des quatre vérités ? », *petites affiches,* n° 243, 1999, p. 19.

[25] E. JAUDEL, *Justice sans châtiment les commissions : Vérité-Réconciliation,* Paris, Odile Jacob, 2009, p. 103.

[26] K. ANDRIEU, « Afrique du Sud : La réconciliation au prix de la justice ? », *les cahiers de la justice*, n°3, 2010, p. 105.

commissions « *vérité et réconciliation* ». Cette autodétermination préalable à l'enquête est une nécessité. Elle permet d'évincer tout degré de relativité dans la vérité émergente. Ceci est indispensable dans le cadre d'une volonté de légitimation d'un renouveau sociétal. Tout doute sur le passé créera forcément un doute sur le caractère justifié de l'action entreprise. Pourtant, il est un domaine où la commission n'a que peu de contrôle sur l'apparition de la vérité. Il s'agit du recueil des témoignages.

Avec le recueil des témoignages, nous entrons dans le domaine de la vérité-récit. On atteint alors la plus grande subjectivité et par conséquent, la plus grande variabilité dans la recherche de la vérité. Quand un individu témoigne auprès d'une commission « *vérité et réconciliation* », il n'est en mesure de dire la vérité que tel qu'il l'a perçue au moment des faits[27]. Il n'est pas question ici d'aborder les allégations mensongères, mais simplement d'affirmer que la vérité issue du témoignage est une vérité de ressentie. Dans ce cas, il est impératif de considérer que tout témoignage est une vérité à part entière. Dès lors, la vérité d'une seule personne ou d'une seule catégorie de personne ne saurait être satisfaisante. Or, comment pourrait-il en être autrement ?

Par exemple, la commission canadienne affirme qu'elle « *est résolue à offrir à chaque ancien pensionnaire et à chaque personne dont la vie a été touchée par le système des pensionnats indiens l'occasion de créer un dossier historique sur cette expérience* »[28]. Mais, cela représente 80 000 auditions. Dès lors, on peut se demander comment réaliser l'ensemble de ces auditions et comment traiter les informations issues de ces témoignages. Le traitement de l'information est une obligation. Le simple recensement n'aurait d'intérêt que pour celui qui témoigne[29]. C'est le traitement du témoignage et son recoupement avec d'autres qui permettent de créer une vérité d'intérêt général. Ajoutons encore que la majorité des témoignages proviennent des victimes. La parole leur est prioritairement donnée. C'est donc la vérité de ces victimes qui est principalement recherchée. Cette prééminence du témoignage de la victime nuit à la recherche de la vérité quelle que soit sa nature. Il faut alors convenir que la

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[27] J.-C. BILLIER, « Vérité et vérité judiciaire », *les cahiers de la justice*, n°2, 2007, p. 195.

[28] *Commission vérité et réconciliation du Canada : Rapport intermédiaire*, 2012, http://www.attendancemarketing.com/~attmk/TRC_jd/Interim_report_French_electronic_copy.pdf, p. 13

[29] On pense notamment à l'intérêt thérapeutique de la verbalisation publique de la souffrance.

vérité obtenue par le système des témoignages est partielle et partiale[30]. Ceci est renforcé par le fait que la parole du témoin est admise sans utilisation du système contradictoire. Les Commissions « *vérité et réconciliation* » ne font pas systématiquement subir des contre-interrogatoires aux victimes.

Par pure logique, les commissions « *vérité et réconciliation* », du fait des situations qu'elles traitent et du nombre de témoignages reçus, devraient être dans l'incapacité de pouvoir faire émerger une seule vérité. Or, ce n'est pas le cas. Les rapports des commissions « *vérité et réconciliation* » ne font pas état d'alternatives dans la vérité énoncée. Ils donnent à l'histoire l'apparence d'une vérité monolithique. Cette recherche d'une vérité unique et absolue rappelle les attributs de la vérité divine. On peut d'ailleurs observer ce parallélisme dans la forme que prend parfois la procédure de témoignage. Dans sa quête de vérité, une commission «*vérité et réconciliation* » se rapproche de la quête de vérité telle qu'elle est conçue dans la justice naturelle. Certaines procédures de témoignage nous ramènent à la notion de « *preuve juratoire* ». Par exemple, on pense la ritualisation des témoignages devant la Commission « *vérité et réconciliation* » en Afrique du Sud. Les audiences étaient rythmées par des prières et des remerciements venant comme une réponse aux confessions des auteurs[31]. En ce cas, il semble ici que la commission recherche une vérité qui va au-delà de la vérité humaine.

En somme, les différents moyens de rechercher la vérité sont complémentaires et imparfaits. Ils permettent d'obtenir différents types de vérités plus ou moins objectives. Pourtant, quelles que soient les vérités obtenues, celles-ci auront une importance. Si différentes vérités existent, c'est parce que chaque vérité a une fonction qui lui est propre (II).

II. LES FONCTIONS PRÉDÉTERMINÉES DE LA VÉRITÉ

Une commission « *vérité et réconciliation* » a pour vocation le dépassement des tensions et des rancoeurs pour permettre à une population divisée de se réunifier et de poursuivre la vie en communauté. La recherche de la vérité est au cœur de ce processus. La recherche et l'obtention de la vérité dans le cadre des commissions « *vérité et réconciliation* » ont deux fonctions importantes. Tout d'abord, la vérité a une fonction libératrice (A). Mais, cette

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30 M. FREEMAN, *Truth commissions and procedural fairness*, Cambridge, Cambridge University Press, 2006, p. 39, note 141.

31 K. ANDRIEU, « Afrique du Sud : La réconciliation au prix de la justice ? », *les cahiers de la justice*, n°3, 2010, p. 101.

fonction primaire n'est que la fonction immédiate de la recherche de la vérité. Ensuite, la fonction finaliste de la vérité est de concourir à la réconciliation des différentes communautés (B).

A) LA VÉRITÉ, SOURCE DE LIBÉRATION

La vérité libère les victimes. Elle libère également les auteurs des actes commis. Mais, il est certain que le terme « *libération* » n'est pas utilisé de la même façon à l'égard des victimes et des auteurs.

Pour les victimes, les commissions « *vérité et réconciliation* » sont une tribune d'expression totalement libre[32]. Dans le processus de ces commissions, les victimes ont une place centrale qui ne leur serait jamais accordée dans le cadre du procès pénal. L'absence de toute remise en question du témoignage de la victime donne la possibilité à celles-ci de présenter l'histoire telle que ressentie. En ce sens, les commissions « *vérité et réconciliation* » apparaissent alors comme une « *thérapie collective* »[33]. La libération est alors une libération psychologique[34]. Tout d'abord, elle aide directement les victimes qui peuvent venir s'exprimer librement et publiquement sur leurs souffrances. Elles peuvent alors avoir un sentiment de catharsis. Par exemple, « *après avoir demandé à un homme rendu aveugle par la police durant le régime de l'Apartheid ce qu'il avait pensé de son témoignage, celui-ci a répondu : « Je ressens que - que cela m'a rendu la vue, ma vue est revenue ici et raconte l'histoire. Mais je ressens que - que ce qui m'a rendu malade durant tout ce temps, c'était le fait de ne pas pouvoir raconter mon histoire. Mais maintenant, je – c'est comme si la vue m'était revenue en venant ici et en racontant mon histoire.* »[35].

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[32] *Id*., p. 100.

[33] A.-J. BULLIER, « La commission vérité et réconciliation d'Afrique du Sud : la preuve des quatre vérités ? », *petites affiches,* n° 243, 1999, p. 19.

[34] B. HAMBER, « Does the Truth Heal? A Psychological Perspective on Political Strategies for Dealing with the Legacy of Political Violence » *dans Burying the Past: Making Peace and Doing Justice after Civil Conflict*, Dir. N. BIGGAR. Washington, DC: Georgetown University Press, 2001, pp. 155-174.

[35] O. LE FORT, *The politics of amnisty*, thèse Mc Gill University, Montréal, 2005, p. 47. Version originale « *After being asked how he felt about testifying, a man blinded by a police officer during the apartheid regime responded: "I feel what - what has brought my sight back, my eyesight back is to come back here and tell the story. But I feel what has been making me sick all this time is the fact that I couldn't tell my story. But now I - it feels like I got my sight back by coming here and telling my story.* ».
Version internet : *digitool.library.mcgill.ca/thesisfile83955.pdf*

Cependant, le caractère libérateur de la vérité ne fonctionne pas pour toutes les victimes. Certains vivent cette extériorisation de la vérité comme un véritable traumatisme[36]. D'ailleurs, la Commission « *vérité et réconciliation* » du Canada, pleinement consciente de ce risque, offre *« la possibilité d'un travailleur de soutien de la santé, d'un travailleur de soutien culturel ou d'un thérapeute professionnel qui assiste à la séance. Ces auxiliaires de santé s'assurent que les témoins sont en mesure de parler à quelqu'un qui peut les aider, s'il y a lieu, avant et après leur témoignage* »[37].

Le caractère libérateur à l'égard de la victime peut également provenir de la vérité révélée par les auteurs[38]. Pour certains, la connaissance des faits commis permet de mieux appréhender le réel, de le comprendre. Par exemple, entendre les auteurs expliquer les exactions commises permet à une victime de lever des doutes sur ce qu'ont vécu ses proches. Elle peut ainsi véritablement entamer son travail de deuil ou de reconstruction psychologique. Car « *Certes la vérité blesse, mais le silence tue* » soulignait la Commission vérité et réconciliation de l'Afrique du Sud[39].

Le caractère libérateur de la vérité issue de l'auteur n'existe pas uniquement pour les victimes. En racontant, les auteurs d'exactions peuvent se libérer eux-mêmes. Pour obtenir la vérité de la part des auteurs, les commissions « *vérité et réconciliation* » prévoient régulièrement que l'auteur qui témoigne doit être amnistié. Le terme « *libération* » est donc ici à comprendre au sens d'une échappatoire à d'éventuelles poursuites pénales. Ce pouvoir d'amnistie est en accord avec l'un des buts des commissions « *vérité et réconciliation* » qui doivent « *obtenir la repentance des coupables et le pardon des victimes* »[40]. Par exemple, concernant la Commission vérité et réconciliation d'Afrique du Sud, *The Promotion of National Unity and Reconciliation Act* de 1995 précise que la commission a pour but de faciliter

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[36] E. BRAHM, « Uncovering the Truth : Examining Truth Commission Success and Impact », *International Studies Perspectives*, n° 8, 2007, p. 21.

[37] *Commission vérité et réconciliation du Canada : Rapport intermédiaire*,2012, http://www.attendancemarketing.com/~attmk/TRC_jd/Interim_report_French_electronic_copy.pdf, p. 13.

[38] La connaissance comme moyen d'être libre est un principe reconnu depuis longtemps. « *Vous connaîtrez la vérité et la vérité vous libèrera* », *La Bible, évangile selon Saint Jean,* (8 : 31).

[39] Cité par R. CARIO, *Justice restaurative : principes et promesses,* éd. 2ème, 2010, L'Harmattan, p. 120 ; « Justice restaurative », R*ep. dr. pén*. 2011, n° 53.

[40] *Afrique infos*, le Vendredi 10 juin 2011.

l'amnistie en cas de révélation des actes commis[41]. Concernant ces révélations, il est intéressant de souligner que l'absence de récit complet pourrait justifier le refus de l'amnistie. Ce point de détail est intéressant puisqu'il pose la question de l'utilité véritable du témoignage de l'auteur. En effet, si l'on sait que le récit n'est pas complet, c'est que l'on connaît déjà l'intégralité du récit. L'utilité du témoignage n'est donc plus dans la quête de vérité. Elle existe plutôt dans l'expiation publique de ses fautes[42]. On rejoint alors le concept de ritualisation du témoignage étudié précédemment.

L'expiation publique est la première étape du pardon. Pour être pardonné, il faut avouer ses fautes. Or, si le pardon est le premier pas vers la réconciliation, l'obtention de la vérité devient un préalable indispensable à toute réconciliation. L'obtention de la vérité doit donc tendre également vers ce besoin de réconciliation. Seule la combinaison de ces deux processus permet à l'ensemble de la population d'entrer dans un processus de catharsis[43].

B) LA VÉRITÉ, PRÉALABLE À LA RÉCONCILIATION

Le cheminement est visible dans le nom même des commissions. Il faut connaître la vérité pour obtenir le pardon et aboutir à la réconciliation[44]. Ces

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[41] « Promotion of national unity and reconciliation Act », 26 juil. 1995, Chap. II, 3 (1), (b), http://www.fas.org/irp/world/rsa/act95_034.htm : Version originale : « *facilitating the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective and comply with the requirements of this Act* ». Traduction : « *en facilitant l'octroi de l'amnistie aux personnes qui font des révélations complètes de tous faits pertinents touchant aux actes associés à l'objectif politique et respectant les conditions de cette Loi.* »

[42] S. LEMAN-LANGLOIS, « La vérité réparatrice dans la Commission vérité et réconciliation d'Afrique du Sud », *les cahiers de la justice*, n°1, 2006, pp. 209-218.

[43] Dans ses propos concernant la commission vérité et réconciliation de Sierra-Leone, l'Attorney Général Solomon Berewa énonce l'idée d'une « *catharsis nationale* ». Cf. S. BEREWA, « Adressing impunity using divergent approches : The Truth and the Reconciliation Commission and the special court » *dans Truth and Reconciliation in Sierra Leone*, UNAMSIL : Freetown, 2001, pp. 55-60, spéc. p. 59 : Version originale « *The process has been likened to a national cartharsis, involving truth telling, respectful listening and above all, compensation for victims in deverving cases.* ». Traduction : « *Le processus a été lié à une catharsis nationale, incluant le récit de la vérité, l'écoute respectueuse et par-dessus tout, la réparation des dommages subis par les victimes dans ces affaires* ».

[44] *Guatemala memory of silence, report of the Commission for Historical*, prologue Clarification http://shr.aaas.org/guatemala/ceh/report/english/prologue.html : « *Knowing the truth of what happened will make it easier to achieve national reconciliation, so that in the future Guatemalans may live in an authentic*

commissions doivent permettre de réconcilier une population divisée pour permettre de vivre ensemble. Or, la vérité « *pleine et entière* » peut stigmatiser certains individus. Ainsi, ne permet-elle pas toujours d'obtenir une réconciliation effective. L'amnistie est alors un moyen qui, sans faire disparaître la vérité, supprime les conséquences issues de la connaissance de cette vérité. La possibilité d'amnistie prend tout son sens en s'analysant alors comme un pardon sans oubli accordé par la société[45]. Le terme « *pardon* » apparaît clairement dans l'exemple burundais puisqu'en 2006, la commission a changé d'appellation et est dénommée « *commission vérité, pardon et réconciliation* »[46].

Pourtant, *« La loi portant création de la Commission de vérité et réconciliation d'Indonésie est un exemple clair des conséquences négatives de l'imitation sans aucun questionnement de l'expérience sud-africaine : selon cette loi, la commission est une instance par le biais de laquelle les victimes et les tortionnaires devraient « régler leurs comptes » directement, face à face. Si le tortionnaire admet son crime et que la victime pardonne, la commission recommande une amnistie pour le tortionnaire et une réparation pour la victime. Si la victime ne pardonne pas, le tortionnaire peut de toute façon recevoir une amnistie, mais la victime n'obtient pas la réparation »*[47]. Il y a là un pardon automatique qui frustre plus qu'il ne rapproche. D'ailleurs, ce pardon accordé est généralement mal perçu par les victimes. Elles préfèreraient l'exécution d'une peine[48]. L'amnistie en limitant la portée de la vérité paraît obligatoirement aller à l'encontre du droit des victimes. Pour autant, d'après les experts-sociologues, cette atteinte est une nécessité pour

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democracy... ». Traduction : « *Connaître la vérité sur ce qu'il s'est passé sera le meilleur moyen de réaliser la réconciliation nationale, pour que les futurs guatémaltèques puissent vivre dans une démocratie authentique*…».

[45] W. A. SCHABAS, « La commission vérité et réconciliation de Sierra Leone », *Droits fondamentaux*, 2003, p. 113

[46] Sur le concept de pardon dans les commissions vérité et réconciliation, G. COURTOIS, « Le pardon et la Commission Vérité et Réconciliation » , *Droit et Cultures*, n° 50, 2005-2, pp. 123-133 ; I. K. SOUARÉ, « Le dilemme de la justice transitionnelle et la réconciliation dans les sociétés postguerre civile : les cas du Libéria, de la Sierra Leone et de l'Ougand », *Etudes internationales*, Vol. 39, n°2, 2008, p. 208.

[47] E. G. CUEVA, « Commissions de vérité : mythes et leçons apprises », *La justice transitionnelle dans le monde francophone : état des lieux*, 2007, note 12, http://www.cnudhd.org/rapportjustice.pdf.

[48] *Id.,* p. 18.

permettre la réconciliation et « *endiguer toute nouvelle violence* »[49]. Mais, ne doit-on pas craindre que cette vérité obtenue par un « jeu de la carotte et du bâton » ; que cette vérité ne devant pas gêner la légitimation des nouvelles autorités politiques, soit le fondement même d'un discours négationniste?[50] Les Commissions « *vérité et réconciliation* » sacrifient la justice pénale au nom de la réconciliation[51]. Il n'est donc pas certain que ce pardon qui s'oppose à l'action primaire de la vérité soit des plus efficaces.

Plus adéquat est le pardon qui provient de la simple décristallisation des statuts d'auteur et de victime. En effet, concernant la commission « *vérité et réconciliation* » d'Afrique du Sud, il a été affirmé qu'« *exposer la réalité des atrocités peut rendre certains moins enclins à pardonner. Mais, la CVR a aussi montré des exactions commises par toutes les parties dans la lutte pour l'apartheid, rendant moins certains de nombreux Sud-Africains de la pureté de leur côté et forçant les gens à reconnaître que « l'autre camp » a aussi été une victime. La reconnaissance de la légitimité des réclamations de ses adversaires sur des violations des droits de l'homme peut être une condition nécessaire pour la réconciliation. Partager la responsabilité, la faute et le sentiment de victimisation crée une identité commune qui peut fournir une base pour le dialogue. Si les individus ne sont plus dogmatiquement attachés à une vision de la lutte du « bien contre le mal», alors peut-être que s'ouvre un espace pour la réconciliation* »[52].

En conclusion, la vérité est une force permettant aux commissions « *vérité et réconciliation* » d'atteindre leur objectif de réconciliation. Elles modulent la recherche de cette vérité selon les différentes phases de leur travail et selon

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[49] K. ANDRIEU, « Afrique du Sud : La réconciliation au prix de la justice ? », *les cahiers de la justice*, n° 3, 2010, p. 100.

[50] S. LEMAN-LANGLOIS, « Le modèle « Vérité et réconciliation » victimes, bourreaux et institutionnalisation du pardon », *Informations Sociales*, n° 127, 2005.

[51] *Ibid.*

[52] J. L. GIBSON, « The contribution of Truth to reconciliation, Lessons from South Africa », *Journal of conflict resolution*, 2006, vol. 50, p. 414 : Version originale « *Truth exposed atrocities, perhaps making some people less likely to reconcile. But the TRC also documented atrocities by all parties in the struggle over apartheid, making many South Africans less certain about the purity of their side and forcing people to acknowledge that the « other side » was also unfairly victimized. Recognizing the legitimacy of one's opponents' claims to human rights abuses may be a necessary condition for reconciliation.*

Sharing responsibility, blame, and victimhood creates a common identity, which can provide a basis for dialogue. If people are no longer dogmatically attached to a « good versus evil » view of the struggle, then perhaps a space for reconciliation is opened. »

leurs interlocuteurs. Même s'il est prévu une indépendance de la commission, la vérité est instrumentalisée par les nouveaux dirigeants politiques. Elle permet ainsi de justifier la politique actuelle du pays en marquant le contraste avec les faits révélés[53], elle permet par sa publication la création d'une histoire unifiée qui servira à l'éducation des générations futures. Certes, tout nous ramène à l'idée que la vérité est orientée. On ressent alors une prédominance du but sur le moyen. La vérité doit s'adapter aux conséquences qu'on lui prévoit. Ceci ne peut que heurter le juriste. Ce dernier est habitué à déduire les conséquences d'une vérité judiciaire qu'il obtient par ses recherches et non pas à rechercher une vérité judiciaire en fonction du but qu'il s'est préalablement fixé. Mais, comme un auteur l'a fait remarquer, cette crainte est peut-être due à notre conception occidentale qui ne nous permet pas d'assimiler correctement cette forme de justice dont « *le but recherché n'est pas le châtiment…, les préoccupations premières sont la réparation des dégâts…la réhabilitation de la victime, mais aussi celle du coupable auquel il faut offrir la possibilité de réintégrer la communauté à laquelle son délit ou son crime ont porté atteinte* »[54].

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[53] S. LEMAN-LANGLOIS, « La vérité réparatrice dans la Commission vérité et réconciliation d'Afrique du Sud », *Les cahiers de la justice*, n° 1, 2006, pp. 209-218.

[54] D. TURU, *Il n'y a pas d'avenir sans pardon. Comment se réconcilier après l'apartheid?,* Paris, Albin Michel, 2000, p. 59 et svt. ; Dans le même sens, M. VOGLIOTTI, « Mutations dans le champ pénal contemporain, Vers un droit pénal en réseau ? », *Rev. sc. crim.*, 2002, pp. 721 et svt, spéc. note 64.

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COMPLEMENTARY APPROACH TO TRANSITIONAL JUSTICE? COMPARISON OF THE CASES OF SIERRA LEONE AND TIMOR-LESTE AND LESSONS LEARNED

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RÉSUMÉ

En raison des différences dans la nature du conflit, le type et la dimension des violations, les besoins des victimes, la situation politique, les ressources disponibles, et les capacités nationales, notamment dans les secteurs de la sécurité et de la justice, les programmes de la justice transitionnelle sont toujours uniques et spécifiques au contexte. Donc la conception et la réalisation du programme devrait être basée sur une analyse approfondie de ces facteurs et inclure la participation des victimes et des organisations de la société civile.

L'expérience a confirmé que des stratégies efficaces de la justice transitionnelle doivent équilibrer beaucoup d'intérêts interdépendants, y compris restaurer la paix, assurer la responsabilité pénale, faciliter la réconciliation, et établir la vérité et l'état de droit. Ainsi une approche compréhensive intègre une combinaison des mécanismes de la justice transitionnelle. Selon les circonstances, les mécanismes peuvent être mis en œuvre au niveau international, national et local. Afin d'augmenter la durabilité et de renforcer les capacités nationales, le processus devrait être réalisé - autant que possible - par les acteurs nationaux et locaux, avec l'assistance internationale s'il y a besoin.

Les cas récents de la Sierra Leone et du Timor-Leste sont des exemples intéressants concernant la combinaison des mécanismes de la justice transitionnelle judiciaires et extra-judiciaires parce que là les commissions de la vérité ont travaillé simultanément avec le Tribunal Spécial pour la Sierra Leone et l'Unité des Crimes Graves au Timor Leste respectivement. Malgré certaines similitudes quant à leur mise en œuvre et au contexte général, leur contribution à la réalisation de responsabilité pénale et de réconciliation dans les pays respectifs variaient considérablement. Ainsi ce document explore les possibilités et les limites d'une approche

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complémentaire à la justice transitionnelle en comparant le cas de la Sierra Leone et du Timor-Leste et en tirant les leçons de leurs réussites et leurs inconvénients.

En particulier, les études de cas soulignent la nécessité d'un équilibre adéquat entre l'aide internationale et l'appropriation nationale, ainsi que l'importance d'une solution régionale de la justice transitionnelle pour des conflits transfrontaliers. Par ailleurs, les études de cas montrent les problèmes d'un effort d'assurer la responsabilité pénale pour tous les criminels.

1. INTRODUCTION

Due to the differences in the nature of the conflict, the type and scale of the violations, the needs of the victims, the political situation, the resources available, and the national capacity, especially in the security and justice sectors, transitional justice programmes are always unique and context-specific. The design and implementation of the programme should, thus, be based on a thorough analysis of these factors and include participation of victims and civil society organizations.

Experience has confirmed that effective transitional justice strategies ought to balance various, interrelated interests, including restoring peace, ensuring accountability, achieving reconciliation, and establishing the truth and the rule of law. Hence, a comprehensive approach integrates an appropriate combination of transitional justice mechanisms. Depending on the circumstances, the mechanisms can be implemented at the international, national, and local level. In order to increase the sustainability and strengthen the national capacity the processes should be – to the greatest extent possible – carried out by national and local actors, with international assistance if need be.

The recent cases of Sierra Leone and Timor-Leste provide interesting examples of combining judicial and extra-judicial transitional justice mechanisms as the truth commissions there worked simultaneously with the Special Court of Sierra Leone and the Special Crimes Unit in Timor-Leste respectively. Despite some similarities regarding their implementation and the general context, their contribution to achieving accountability and reconciliation in the respective countries varied greatly. Thus, this paper explores possibilities and limitations of a complementary approach to transitional justice by comparing the cases of Sierra Leone and Timor-Leste and drawing lessons from their achievements and drawbacks.

2. THE CASE OF SIERRA LEONE

2.1 BRIEF HISTORY OF THE CONFLICT AND INTERVENTION BY THE UN IN SIERRA LEONE

Sierra Leone became independent in 1961 after more than 150 years of British colonial rule. The colonial government had divided the country into two nations which it developed unequally. This bred ethnic and regional resentment and sparked a long-lasting struggle over primacy. During the post-colonial period, bad government and corruption led to institutional collapse and further fragmentation. People had lost faith in the political system and in the rule of law. The desire for revolution and the potential for violence were high when civil war broke out in March 1991 with the incursion of the Revolutionary United Front (RUF) in Sierra Leone, supported by forces of Charles Taylor's National Patriotic Front of Liberia (NPFL).[1] Despite widely held belief, the exploitation of diamonds was not a direct cause of the conflict, but rather a fuelling factor as most of the fighting factions financed their war efforts through diamond trafficking.[2]

After the Sierra Leone Army (SLA) managed to repel the RUF to a confined area at the Liberian border in 1993, the rebels launched a strategy based on 'guerrilla' warfare. Atrocious acts of civilian killings, mutilation, sexual violence, forced recruitment of boys and young men as combatants, and destruction of property were committed. In 1996 a civilian government was elected which installed the Civilian Defence Forces (CDF) as an alternative State security force. Despite the 1996 Abidjan Peace Accord,[3] the peace process collapsed and hostilities recommenced. While the CDF played an important role in defending Sierra Leone from the brutal acts of the rebel forces, it was itself responsible for gross violations of human rights. A bloody military coup was staged in 1997 by the Armed Forces Revolutionary Council (AFRC) formed by a group of resentful SLA officers. The AFRC allied with the RUF and took over Freetown in 1999. The capital was

[1] See TRC-SL, *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission* (2004), Vol. 2, Chap. 2, paras. 39-74.
[2] Ibid., para. 560.
[3] Peace Agreement between the Government of the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone, signed in Abidjan on 30 Nov. 1996 (hereinafter Abidjan Peace Accord).

liberated by the forceful intervention of ECOMOG[4], West African 'peacekeeping' troops acting as a surrogate national army.[5]

Following extensive diplomatic efforts, the RUF and the Government signed the Lomé Peace Agreement[6] in July 1999 which envisaged the disarmament of combatants and a power-sharing agreement. However, neither of the two sides complied in full with its terms and fighting erupted again. Pursuant to the peace agreement, the UN established the UN Mission to Sierra Leone (UNAMSIL) in October 1999 to assist in the implementation of the disarmament, demobilization, and reintegration plan.[7] UNAMSIL replaced the much smaller UN Observer Mission to Sierra Leone (UNOMSIL) which had been monitoring and advising efforts to disarm combatants and restructure the nation's security forces since June 1998.[8]

Finally in January 2002, after more than a decade of horrendous atrocities, the Sierra Leone civil war was officially declared ended. The conflict had caused more than 75,000 deaths and the displacement of up to 2,000,000 people.[9]

After UNAMSIL completed its mandate in December 2005, the UN Integrated Office for Sierra Leone (UNIOSIL) was established to assist the Government of Sierra Leone in building the capacity of State institutions and in strengthening the rule of law and the security sector.[10] In 2008 it was

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[4] ECOMOG was the ceasefire monitoring group of the Economic Community of West African States (ECOWAS).

[5] For detailed information on the military and political history of the conflict see TRC-SL, *supra* n. 1, Vol. 2, Chap. 2, paras. 115-405.

[6] Peace Agreement between the Government of the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone, signed in Lomé, Togo on 7 July 1999 (hereinafter Lomé Peace Agreement).

[7] UN Security Council Resolutions, UN Docs. S/RES/1270 (1999), S/RES/1289 (2000), and S/RES/1346 (2001).

[8] UN Security Council Resolution, UN Doc. S/RES/1181 (1998).

[9] Cf. ICTJ, 'Sierra Leone: Submission to the Universal Periodic Review of the UN Human Rights Council, 11th Session: May 2011', 1 Nov. 2010, para. 2; Government of Sierra Leone, 'Sierra Leone Vision 2025: "Sweet Salone" – Strategies for National Transformation', National Long Term Perspective Studies 2003, p. 32; E. Evenson, 'Truth and Justice in Sierra Leone: Coordination between Commission and Court', (2004) 104 *Colum. L. Rev.* 730, p. 733; Office of the UN High Commissioner for Refugees (UNHCR), 'UNHCR's Operational Experience With Internally Displaced Persons' (1994), para. 134.

[10] UN Security Council Resolutions, UN Docs. S/RES/1620 (2005), S/RES/1734 (2006), and S/RES/1793 (2007).

replaced with the UN Integrated Peacebuilding Office in Sierra Leone (UNIPSIL). UNIPSIL is mandated to support the Government in monitoring and promoting human rights and consolidating good governance reforms (at least) until September 2012.[11]

2.2 Accountability and reconciliation processes in Sierra Leone

2.2.1 The Truth and Reconciliation Commission of Sierra Leone

The 1999 Lomé Peace Agreement provided for the establishment of a truth and reconciliation commission (TRC) as one of the measures for '*national reconciliation and consolidation of peace*'.[12] The TRC should '*address impunity, break the cycle of violence, provide a forum for both the victims and perpetrators of human rights violations to tell their story, and get a clear picture of the past in order to facilitate genuine healing and reconciliation*.'[13] With a view to achieving a ceasefire and peace,[14] the Peace Agreement granted blanket amnesties to all combatants and collaborators of the armed conflict.[15] Hence, contrary to the South African TRC which granted conditional amnesties to perpetrators, the TRC of Sierra Leone (TRC-SL) could not offer a comparative incentive for cooperation. In light of the total amnesty, it was not foreseen that the TRC would work alongside a criminal court in respect of crimes committed during the civil war.

Following broad consultations with the civil society,[16] the Sierra Leonean Parliament passed the TRC Act 2000 to formally establish the Commission.[17] While the TRC-SL was a national institution, the UN was

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[11] UN Security Council Resolutions, UN Docs. S/RES/1829 (2008), S/RES/1886 (2009), S/RES/1941 (2010), and S/RES/2005 (2011).

[12] Art. 5(2)(ix) Lomé Peace Agreement, *supra* n. 6.

[13] Ibid., Art. 26(1).

[14] Cf. letter dated 12 June 2000 by the former President of Sierra Leone, Ahmad Tejan Kabbah, to the UN Security Council, noting that the granting of total amnesty was 'the price' for peace (annex to the letter dated 9 August 2000 from the Permanent Representative of Sierra Leone to the UN addressed to the President of the Security Council, UN Doc. S/2000/786 (2000), p. 2).

[15] Art. 9 Lomé Peace Agreement, *supra* n. 6. The Abidjan Peace Accord (*supra* n. 3) in contrast, granted amnesty only to the members of the RUF (Art. 14) and did not provide for the establishment of the TRC.

[16] Cf. P. Hayner, 'The Sierra Leone Truth and Reconciliation Commission: Reviewing the First Year', ICTJ – *Case Studies Series* 2004, p. 2.

[17] TRC Act 2000, supplement to the Sierra Leone Gazette Vol. CXXXI, No. 9, 10 Feb. 2000.

involved in its establishment.[18] The TRC's primary mandate was to create an historical record of the causes, nature, and extent of the violations of human rights law and IHL related to the armed conflict, from the beginning of the conflict in 1991 to the signing of the Lomé Peace Agreement.[19] In addition to this truth-seeking function, the Commission – as indicated by its name – was tasked with a reconciliatory function. Reconciliation should be promoted, *inter alia*, by providing victims and perpetrators the opportunity to relate and interchange their experiences.[20]

To fulfil its mandate, the Commission had far-reaching powers which included compelling the attendance of any person to appear and answer questions, requiring that statements be given under oath, issuing summonses and subpoenas, and even receiving police assistance if needed for enforcing its powers.[21] Failure to respond to such a summons or subpoena or the intentional provision of false information could be deemed equivalent to contempt of court and referred to the High Court for trial and punishment.[22]

The TRC-SL became operational in 2002 when the seven Commissioners were formally sworn in. The Commission collected a total of 7,706 statements[23] and issued its final report in October 2004. The report examines the causes of the conflict and contains an historical record of the violations. It concludes that the conflict represented '*an extraordinary failure of leadership on the part of all those involved in government, public life, and civil society*'[24] and recommends more than 200 measures to address the underlying causes of the conflict and to remedy wrongs against specific groups.[25] In this respect, extensive reparations are recommended in the form

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[18] The UN High Commissioner for Human Rights assisted in the consultation and drafting process for the TRC and selected the three non-national commissioners; the Special Representative of the Secretary-General of the UN to Sierra Leone oversaw the selection process of the four national commissioners (cf. TRC-SL, *supra* n. 1, Vol. 1, Chap. 1, para. 29).

[19] Sects. 6(1) and 6(2)(a) TRC Act 2000, *supra* n. 17.

[20] Ibid., Sect. 6(2)(b).

[21] Ibid., Sect. 8(1).

[22] Ibid., Sect. 8(2).

[23] R. Conibere et al., 'Statistical Appendix to the Report of the Truth and Reconciliation Commission of Sierra Leone A Report by the Benetech Human Rights Data Analysis Group to the Commission on Reception, Truth and Reconciliation of Sierra Leone' (2004), 1.

[24] TRC-SL, *supra* n. 1, Vol. 2, Chap. 2, para. 12.

[25] Ibid., Vol. 2, Chap. 3.

of health care and pension programmes, education and skills training, granting of micro credits, as well as community and symbolic reparations.

The Government of Sierra Leone is obliged to '*faithfully and timeously*' implement the recommendations.[26] Hence, with a view to protecting and promoting human rights, some of them, such as the establishment of the National Human Rights Commission and the National Electoral Commission have been implemented. Furthermore, the National Commission for Social Action (NaCSA), was designated in 2007 as the agency implementing reparations. In the course of its 'Year One Project', starting in August 2008, it registered and verified almost 30,000 victims and offered an interim relief package to support 20,000 beneficiaries. Yet, the implementation came to a standstill in the following year due to the lack of funds.[27] Moreover, the implementation of other recommendations, such as separation of the offices of the Attorney-General and the Minister of Justice, a constitutional review, and the abolition of the death penalty, have also posed a challenge.[28] Thus, a follow-up committee to monitor and facilitate the implementation of the TRC's recommendations as provided for by the TRC Act[29] ought to be established as soon as possible.

2.2.2 THE SPECIAL COURT FOR SIERRA LEONE

Despite the Lomé Peace Agreement, hostilities re-erupted in 2000. The then President of Sierra Leone, Ahmad Tejan Kabbah, pleaded the UN to support the establishment of a '*special court*' to try RUF members who had committed crimes during the conflict.[30] The President thus departed from the position that all combatants would be granted an unconditional amnesty as provided for in the Peace Agreement.[31] Consequently, the UN Security

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[26] Sect. 17 TRC Act 2000, *supra* n. 17.

[27] See ICTJ, *supra* n. 9, paras. 11-14; see also M. Suma and C. Correa, 'Report and Proposals for the Implementation of Reparations in Sierra Leone' (ICTJ, 2009) for an analysis of the Year One Project.

[28] Cf. UN Secretary-General, 'Sixth Report of the Secretary-General on the United Nations Integrated Peacebuilding Office in Sierra Leone', UN Doc. S/2011/119 (2011), para. 38.

[29] Sect. 18 TRC Act 2000, *supra* n. 17.

[30] Cf. letter from the former President of Sierra Leone to the UN Security Council, *supra* n. 14.

[31] Art. 9 Lomé Peace Agreement, *supra* n. 6. The UN had already objected the blanket amnesty at the time of the signing of the Peace Agreement by means of appending a disclaimer of the Special Representative of the Secretary-General for Sierra Leone on behalf of the UN to the effect that the amnesty provision '*shall not apply to international crimes of genocide, crimes against humanity, war crimes, and*

Council requested the Secretary-General to negotiate an agreement with the Government of Sierra Leone to that effect.[32] However, it, recommended that such a court should have jurisdiction over '*persons who bear the greatest responsibility for the commission of the crimes*', irrespective of the party to the conflict to which they had belonged. Such an agreement between the Government and the UN on the establishment of the SCSL in Freetown was signed in 2002.[33] It was then implemented into Sierra Leonean domestic law by the Parliament.[34]

The SCSL is mandated to try those who bear the greatest responsibility for serious violations of IHL and certain provisions of Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.[35] The temporal jurisdiction is thus shorter than the one of the TRC which investigated atrocities committed from the start of the war in 1991 and even some triggering incidents dating further back.[36] Moreover, while the Court focuses exclusively on individual criminal responsibility,[37] the TRC also and particularly looked into the responsibility of the Government and of groups involved in the violations.[38] As regards the amnesties granted by the Lomé Peace Agreement, the Statute of the Court made it clear that they would not be a bar to prosecutions with respect to persons falling within its jurisdiction.[39]

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other serious violations of international humanitarian law' (cf. UN Secretary-General, 'Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone', UN Doc. S/2000/915 (2000), para. 23). This reservation was recalled by the Security Council (UN Doc. S/RES/1315 (2000), Preamble, para. 5).

[32] UN Security Council Resolution, UN Doc. S/RES/1315 (2000).

[33] Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 16 Jan. 2002, UN Doc. S/2002/246 (2002), Appendix II.

[34] Special Court Agreement 2002 (Ratification) Act 2002, supplement to the Sierra Leone Gazette Vol. CXXXIII, No. 22, 25 April 2002.

[35] Art. 1 Agreement on the Establishment of a SCSL, *supra* n. 33. The beginning date of the Court's temporal jurisdiction which refers to the signing of the Abidjan Peace Accord (*supra* n. 3) was chosen for financial considerations (cf. W. Schabas, 'The Relationship between Truth Commissions and International Courts: The Case of Sierra Leone', (2003) 25/4 *Hum. Rts. Q.* 1035, p. 1041-1042).

[36] TRC-SL, *supra* n. 1, Vol. 1, Chap. 1, paras. 69-71.

[37] Art. 6 Statute of the SCSL, 16 Jan. 2002, UN Doc. S/2002/246 (2002), Appendix II.

[38] Cf. Sect. 6(2) TRC Act 2000, *supra* n. 17.

[39] Art. 10 Statute of the SCSL, *supra* n. 37.

Contrary to the ICTY and the ICTR, the SCSL is not part of the UN system. This entails that other States are not obliged to cooperate with the SCSL and that the Court is not financed by the UN. Hence, the SCSL has to conduct its own fundraising which proved to be problematic throughout its whole operation.[40] The Court, which is not part of the judicial system of Sierra Leone has primacy over national courts.[41] Another distinct feature of the hybrid court is that it has international and (a minority of) national judges.

The Prosecutor of the SCSL issued 13 indictments in 2003 of which two were withdrawn a few months later because of the decease of the accused. In the light of the limited prosecutorial mandate (those bearing the greatest responsibility), the indictees encompassed the senior leaders of all three factions involved in the conflict, namely the RUF, the AFRC, and the CDF. All trials and appeals, apart from the one of former Liberian President Charles Taylor and the one of the only remaining indictee still at large, Johnny Paul Koroma, have been completed in Freetown. For security reasons the Taylor trial is being held in The Hague. Thus far, all of the accused have been convicted, with sentences of imprisonment ranging from 15 to 52 years. Taylor was sentenced to a term of 50 years of prison by the Trial Chamber,[42] and the judgment of the Appeals Chamber is expected before the end of 2013. Significantly, in the course of his trial the Court reaffirmed that there is no immunity for heads of States who allegely committed core international crimes.[43]

By holding ten (to date) of the most responsible for the atrocities in Sierra Leone responsible, the Court contributed to achieving justice and to creating an historical record of the war in Sierra Leone. Furthermore, its jurisprudence contributed to the development of international criminal law, in particular as regards the crimes of recruitment of child soldiers,[44] forced marriage,[45] and the rejection of the justification of fighting for a 'just cause'[46].

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[40] Cf. SCSL, 'Seventh Annual Report of the President of the Special Court for Sierra Leone, June 2009 to May 2010' (2010), p. 11.

[41] Art. 8(2) Statute of the SCSL, *supra* n. 37.

[42] SCSL, *Prosecutor* v. *Taylor*, Sentencing Judgment of 30 May 2012, Case No. SCSL-03–01-T-1285.

[43] SCSL, *Prosecutor* v. *Taylor*, Decision on Immunity from Jurisdiction, Case No. SCSL-03–01-I, Appeals Chamber, 31 May 2004.

[44] Cf. in particular SCSL, *Prosecutor* v. *Brima et al*., Judgment of 20 June 2007, Case No. SCSL-04-16-T.

[45] Cf. in particular SCSL, *Prosecutor* v. *Brima et al*., Judgment of 22 Feb. 2008, Case No. SCSL-04-16-A, Appeals Chamber.

A further innovative achievement was its institutionalization of a Defence Office as counterbalance to the Office of the Prosecutor (OTP). While this improved the equality of arms and fairness to some extent, the Defence Office's contribution in providing substantive legal support to the defence teams was rather limited.[47] Finally, the SCSL put considerable effort into its outreach programmes which enhanced access to the trials by the affected population.

On the other hand, many expectations in terms of the Court's contribution to a lasting impact on the Sierra Leonean legal system remain unfulfilled. While the hopes were partly unrealistic considering the limited resources, the SCSL could have become more involved with domestic courts from the outset.[48]

Upon closure of the Special Court, a Residual Special Court will be established in the Netherlands. Its mandate will include trying the remaining fugitive, Paul Koroma, providing continued protection to witnesses and victims, supervising the enforcement of sentences, and reviewing convictions.[49] While a public copy remained in Sierra Leone, the original records of the SCSL were transferred to the Dutch national archives. The Court's site in Freetown will be used as a peace museum which provides information on the civil war and access to the Court's jurisprudence.[50]

3. THE CASE OF TIMOR-LESTE

3.1 BRIEF HISTORY OF THE CONFLICT AND INTERVENTION OF THE UN IN TIMOR-LESTE

Since the 16th century Timor-Leste was under the colonial rule of the Portuguese. In 1975, shortly after Timor-Leste declared its independence

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[46] Cf. in particular SCSL, *Prosecutor* v. *Fofana and Kondewa*, Judgment of 28 May 2008, Case No. SCSL-04-14-A, Appeals Chamber.

[47] See, e.g., A. Cassese, 'Report on the Special Court for Sierra Leone – Submitted by the Independent Expert Antonio Cassese' (2006), paras. 52-53 <http://www.sc-sl.org/LinkClick.aspx?fileticket=VTDHyrHasLc=&> (accessed 15 Aug. 2012).

[48] Cf., e.g., T. Perriello and M. Wierda, 'The Special Court for Sierra Leone under Scrutiny', ICTJ – *Prosecutions Case Studies Series* 2006, p. 39-40; and Cruvellier, 'From the Taylor Trial to a Lasting Legacy: Putting the Special Court Model to the Test', ICTJ – *Prosecution Case Studies Series* 2009, p. 28-37.

[49] Cf. UN Secretary-General, 'Fifth Report of the Secretary-General on the United Nations Integrated Peacebuilding Office in Sierra Leone', UN Doc. S/2010/471 (2010), paras. 57-58.

[50] Cf. UN Secretary-General, *supra* n. 28, paras. 50-51.

from Portugal, neighbouring Indonesia, which considered the internal conflict over authority in Timor-Leste a security threat, invaded and occupied the country for the following 24 years.[51] Indonesia's annexation of Timor-Leste as its 27th province was never acknowledged by the UN.[52] However, in light of the growing power of Communism in South-East Asia, the United States and other Western nations supported the annexation.[53] During this period, the brutal conflict between the Timorese resistance and the Indonesian military and police, assisted by a Timorese minority, caused more than 100,000 deaths. Over 80,000 of these deaths were from hunger and illness, a direct result of the conflict.[54] Despite widespread awareness of the conflict and human rights violations, the international community did not intervene. In August 1999, about one year after the end of the regime of former dictator Suharto in Indonesia, the UN administered a referendum in Timor-Leste on independence.[55] Seventy-eight percent of the Timorese voted in favour thereof.

However, shortly after the ballot, anti-independence Timorese militias, orchestrated by the Indonesian military and police,[56] reacted with a violent 'scorched earth campaign'. The attack caused over 1,000 deaths, the displacement of more than 400,000 people, and vast destruction of the

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[51] For detailed information on the Timorese history see, e.g., J. Taylor, *Indonesia's Forgotten War: The Hidden History of East Timor* (1991).

[52] The UN Security Council called upon all States to respect the territorial integrity of Timor-Leste and on Indonesia to withdraw its forces from the territory of Timor-Leste (UN Docs. S/RES/384 (1975) and S/RES/389 (1976)). Also the UN General Assembly rejected Indonesia's claim that Timor-Leste had been integrated into its territory (UN Doc. A/RES/31/53 (1976)).

[53] See e.g. J. Sforza, 'The Timor Gap Dispute: The Validity of the Timor Gap Treaty, Self-Determination, and Decolonization', (1998-1999) 22 *Suffolk Transnat'l L. Rev*. 481, p. 488-489.

[54] CAVR, *Chega! The Report of the Commission for Reception, Truth, and Reconciliation in Timor-Leste* (2005), Part 6, paras. 8 and 49. For an exhaustive report on human rights violations in Timor-Leste cf. R. Silva and P. Ball, *The Profile of Human Rights Violations in Timor-Leste, 1974-1999, A Report by the Benetech Human Rights Data Analysis Group to the Commission on Reception, Truth, and Reconciliation of Timor-Leste* (2006).

[55] The popular consultation was organized and conducted by the UN Mission in East Timor (UNAMET) which was established by the UN Security Council (UN Doc. S/RES/1246 (1999)).

[56] UN Security Council, 'Report of the Security Council Mission to Jakarta and Dili, 8 to 12 September 1999', UN Doc. S/1999/976 (1999), para. 14.

infrastructure in Timor-Leste.[57] These atrocities finally stopped due to the intervention of the UN International Force in East Timor (INTERFET)[58] in September 1999.

In October 1999, after Indonesia had withdrawn, the UN Transitional Administration in East Timor (UNTAET) was established by the Security Council as a peacekeeping operation with complete administrative authority over Timor-Leste during its transition to independence.[59] Its mandate included the maintenance of law and order, the establishment of an effective administration, assistance in the capacity-building for self-government, and development of civil and social services. UNTAET was authorized to take all necessary measures to fulfil its broad mandate. It acted in lieu of and gradually partly with Timor-Leste's Government until the country's full independence in May 2002. The new Government was handed authority over judicial matters and UNTAET was replaced by a smaller peacekeeping mission, the UN Mission of Support in East Timor (UNMISET). It had the mandate to provide assistance to the Timorese authorities in executing their new responsibilities.[60] In May 2005 UNMISET was downsized and transformed into a political mission, the UN Office in Timor-Leste (UNOTIL). Its mandate was to support the development of the police and other State institutions and to provide training in observance of human rights and democratic governance.[61] In August 2006, after a political, humanitarian, and security crisis, UNOTIL was replaced by UN Integrated Mission in Timor-Leste (UNMIT) with the task of supporting the Government and relevant institutions, in particular the national police efforts and the judicial system until (at least) December 2012.[62]

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[57] UN Special Rapporteurs, 'Report on the Joint Mission to East Timor by the Special Rapporteur of the Commission on Human Rights on Extrajudicial, Summary, or Arbitrary Executions, the Special Rapporteur of the Commission on the Question of Torture and the Special Rapporteur of the Commission on Violence Against Women, Its Causes and Consequences', UN Doc. A/54/660 (1999), paras. 20, 37, and 38.

[58] INTERFER was authorized by the UN Security Council and mandated to restore peace and security in Timor-Leste (UN Doc. S/RES/1264 (1999), para. 3).

[59] UN Security Council Resolution, UN Doc. S/RES/1272 (1999).

[60] UN Security Council Resolution, UN Doc. S/RES/1410 (2002).

[61] UN Security Council Resolution, UN Doc. S/RES/1599 (2005).

[62] UN Security Council Resolutions, UN Docs. S/RES/1704 (2006), S/RES/1802 (2008), S/RES/1867 (2009), S/RES/1912 (2010), S/RES/1969 (2011), and S/RES/2037 (2012).

3.2 Accountability and reconciliation processes in respect of the atrocities of 1999 in Timor-Leste

3.2.1 The Indonesian Ad Hoc Human Rights Court

In Indonesia, a National Commission of Inquiry on Human Rights Violations in East Timor (KPP HAM) was set up by the Indonesian Commission on Human Rights (Komnas HAM) in September 1999. The commission of inquiry had the mandate to investigate the gross human rights violations committed in Timor-Leste between the Indonesian Government's January 1999 announcement to hold a popular consultation and the withdrawal of its forces in September 1999. It was a political decision that the commission would not carry out investigations of the far greater number of crimes committed in the prior 24 years. The commission's report discloses that the violations in 1999 were conducted systematically and indicates a close link between the Indonesian military and police with the militia groups that had committed the majority of the crimes.[63] The names of 32 officials and militia leaders were cited as allegedly responsible.

In response to the report, the Ad Hoc Human Rights Court on East Timor was established in 2001 within the national court system. Undoubtedly, international pressure and Indonesia's intention to avoid the creation of an international court influenced this decision. The Ad Hoc Court had the mandate to try Indonesians and Timorese responsible for the atrocities committed in Timor-Leste in April and September 1999. In January 2002, indictments were issued against 18 suspects, none of whom was a senior Indonesian officials.[64] Of the 18 people tried, six were convicted at first instance. Five of the six were subsequently acquitted on appeal. Eurico Guterres, a former militia leader, was the only person whose conviction was upheld by the Appeals Court and Supreme Court. However, in March 2008, the Supreme Court reversed the decision it had made two years earlier and acquitted him.[65] The selection of indictments and the final outcome of not a single conviction reflect the political unwillingness in Indonesia to bring the persons responsible for the crimes in 1999 to justice. Furthermore, the Ad Hoc Court was strongly criticized for its limited temporal and geographic

[63] KPP HAM, *Report of the Indonesian Commission for Human Rights Violations in East Timor* (2000).

[64] Only four out of the 13 cases mentioned in the KPP HAM report were taken up by the prosecutors of the Ad Hoc Court. Most notably General Wiranto, former commander in chief of the Indonesian army and Minister of Defence, was not indicted.

[65] For further information see, e.g., ICTJ, 'Overview of the Indonesian Supreme Court's Decision in the Eurico Guterres Case' (2008).

jurisdiction, its selection of only Indonesian judges not all of whom were qualified, the lack of independence and the poor performance of the prosecution, insufficient victim and witness protection, and an intimidating courtroom atmosphere.[66] In contrast to the investigations of the commission of inquiry,[67] the proceedings of the Ad Hoc Court were conducted neither independently nor impartially, despite the Security Council's call for Indonesia to '*institute a swift, comprehensive, effective, and transparent legal process, in conformity with international standards of justice and due process of law*.'[68] Ultimately, the Indonesian proceedings did not help achieve accountability and justice,[69] but rather seemed an ineffectual attempt to appease the international community.

3.2.2. THE SERIOUS CRIMES PROCESS IN TIMOR-LESTE

A commission of inquiry was also set up in Timor-Leste. The Commission of Inquiry on East Timor was established by the Secretary-General on the recommendation of the Human Rights Commission.[70] Unlike the commission in Indonesia, it was an international commission. It had the mandate to investigate possible human rights violations and breaches of IHL committed in Timor-Leste since January 1999. The Commission cooperated with the joint mission of the UN Special Rapporteurs of the Commission on Human Rights to East Timor. The reports of both the Commission of Inquiry and the Special Rapporteurs revealed a pattern of serious violations of human rights

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[66] See, e.g., Human Rights Watch, 'Justice Denied for East Timor Indonesia's Sham Prosecutions, the Need to Strengthen the Trial Process in East Timor, and the Imperative of U.N. Action' (2003); OHCHR, 'United Nations High Commissioner for Human Rights Voices Concerns Following Verdict in Indonesia Tribunal', Press Release HR/4622, 14 Aug. 2002; Amnesty International and Judicial System Monitoring Programme, 'Indonesia and Timor-Leste. Justice for Timor-Leste: The Way Forward' (2004), AI Index ASA 21/006/2004.

[67] The UN Commission of Experts found the report produced by KPP HAM to be '*a genuine and impartial*
effort to inquire into serious human rights violations, reflecting the firm commitment of its members to establish the facts' ('Report to the Secretary-General of the Commission of Experts to Review the Prosecution of Serious Violations of Human Rights in Timor-Leste (then East Timor) in 1999', UN Doc. S/2005/458 (2005), Annex II, para. 167).

[68] See UN Security Council, letter dated 18 Feb. 2000 from the President of the Security Council addressed to the Secretary-General, UN Doc. S/2000/137 (2000).

[69] See UN Commission of Experts, *supra* n. 67, paras. 370-375.

[70] UN Commission on Human Rights, 'Situation of Human Rights in East Timor', Resolution, UN Doc. E/CN.4./RES/1999/S-4/1 (1999).

and IHL in Timor-Leste.[71] Consequently, the Commission of Inquiry called for the establishment of an international independent investigation and prosecution body and an international human rights tribunal.[72] Moreover, the Special Rapporteurs recommended the establishment of an international criminal tribunal '*unless, in a matter of months, the steps taken by the government of Indonesia to investigate TNI* [Indonesian National Armed Forces] *involvement in the past year's violence bear fruit, both in the way of credible clarification of the facts and the bringing to justice of the perpetrators*.'[73]

Despite these recommendations, the Security Council decided not to establish another ad hoc international criminal tribunal like the – certainly very costly – ones for the former Yugoslavia and Rwanda. While addressing human rights violations adequately was a major concern of the international community, the UN and especially the United States did not want to jeopardize their friendly relations with Indonesia, a powerful State with the world's largest Muslim population, and even more so given the beginning of the 'war on terror'.[74] Therefore, Indonesia's assurance of its determination to bring individuals in Indonesia to justice through the national judicial mechanism[75] was accepted.

Instead of establishing an international ad hoc tribunal, UNTAET, acting as interim government in Timor-Leste, created Timorese district courts and a court of appeal in March 2000.[76] Special panels with exclusive jurisdiction over so called 'serious criminal offences' were established within the Dili District Court and the Court of Appeal.[77] These offenses included genocide, war crimes, and crimes against humanity committed at any time, as well as murder, sexual offences, and torture committed between 1 January and 25

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[71] OHCHR, 'Report of the International Commission of Inquiry on East Timor to the Secretary-General', UN Doc. A/54/726 (2000), para. 142. UN Special Rapporteurs, *supra* n. 57, para. 71.

[72] OHCHR, *supra* n. 71, paras. 152 and 153.

[73] UN Special Rapporteurs, *supra* n. 57, para. 74(6).

[74] Cf. D. Cohen, 'Seeking Justice on the Cheap: Is the East Timor Tribunal Really a Model for the Future?', (2002) *61 Asia Pacific Issues* 1, p. 4.

[75] See letter dated 26 Jan. 2000 from the Minister for Foreign Affairs of Indonesia to the Secretary-General, UN Docs. S/2000/65 (2000) and A/54/727 (2000).

[76] UNTAET Regulation No. 2000/11 on the Organization of Courts in East Timor, UN Doc. UNTAET/REG/2000/11 (2000), in particular Sects. 7 and 14.

[77] Sects. 1.1 and 1.2, UNTAET Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, UN Doc. UNTAET/REG/2000/15 (2000).

October 1999.[78] These Special Panels for Serious Crimes (SPSC) were composed of two international judges and one national judge.[79] Unlike the internationalized courts in Sierra Leone and Cambodia which were established through contracts between the UN and the respective governments, UNTAET made these decisions on its own as there was no national government at that time to contract with. The review and endorsement of the National Council of Timor-Leste Resistance (CNRT) was of a rather superficial nature.[80]

In June 2000, UNTAET also established a Public Prosecution Service for Timor-Leste with an Ordinary Crimes Unit (OCU) and a Serious Crimes Unit (SCU).[81] The principal official for the investigation and prosecution of serious crimes and therefore the effective head of the SCU was the Deputy General Prosecutor for Serious Crimes (DGPSC).[82]

In accordance with Security Council resolutions 1543 (2004) and 1573 (2004), the serious crimes process was terminated in May 2005. By then, the SCU had indicted 392 persons in 95 indictments.[83] In default of a clear mandate on the question of who should be prosecuted, the SCU's prosecution strategy was ambiguous and changed over time. While in the beginning of its work the SCU mainly indicted Timorese militia members for simple murder, from 2002 on it focused more on charging high-level military officers and political leaders in Timor-Leste and Indonesia with crimes against humanity. Most outstanding was the indictment of General Wiranto, former Minister of Defence and Commander of the Armed Forces, in February 2003.[84] Regrettably, both the UN and the Timorese Government distanced themselves from his indictment[85] and no further steps were taken.

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[78] Sects. 10.1 and 10.2, UNTAET Regulation No. 2000/11, *supra* n. 76.

[79] Sects. 22.1 and 22.1, UNTAET Regulation No. 2000/15, *supra* n. 77.

[80] See E. Handl, 'East Timor's Transitional Justice Process under Scrutiny', in H. Eberhard, K. Lachmayer, and G. Thallinger (eds.), *Transitional Constitutionalism* (2007), p. 103 at p. 111; C. Reiger and M. Wierda, 'The Serious Crimes Process in Timor-Leste: In Retrospect', ICTJ – *Prosecutions Case Studies Series* 2006, p. 13.

[81] Sect. 14.6, UNTAET Regulation No. 2000/16 on the Organization of the Public Prosecution Service in East Timor, UN Doc. UNTAET/REG/2000/16 (2000).

[82] Ibid., Sect. 14.3.

[83] Office of the DGPSC Timor-Leste, 'Serious Crimes Unit Update', 4 Feb. 2005 (wrongly dated 4 Feb. 2004), p. 2.

[84] SPSC, *Deputy General Prosecutor* v. *Wiranto et al.*, Indictment, Case No. 5/2003, 24 Feb. 2003.

[85] See UNMISET Press Release, 'Serious Crimes Process in Timor-Leste', 25 Feb. 2003; former President Kay Rala Xanana Gusmão, 'Statement on the Indictment by

Within the five years of its existence, the SPSC conducted 55 trials against 87 accused, of whom 85 were convicted.[86] While this is a respectable number for a short period of time, the quality of procedures and the judgments, especially of the earlier decisions, has been justly criticized.[87] As the mandates of SCU und SPSC only applied to serious crimes committed in 1999, the atrocities which occurred between 1975 and 1998 were not dealt with. The high discrepancy between the number of persons indicted and those who actually faced trial derives to a great extent from the fact that the SPSC was dependent on the cooperation of other States regarding the execution of arrest warrants and extradition of accused persons located in the territory of a foreign State. Many of the indictees were in Indonesia, which refused to cooperate despite an agreement it had signed with UNTAET.[88] As a consequence, those convicted by the SPSC were perpetrators of rather low-level crimes, while those who bore the greatest responsibility did not face justice.

While it is comprehensible that Timor-Leste was not in a position to pressure Indonesia, the international community could have intervened. One possibility would have been a Security Council Resolution demanding Indonesia's cooperation.[89] It seems that political considerations in terms of keeping friendly relations with Indonesia were ranked higher.[90]

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the DGPSC of Indonesian Officers for Events in Timor-Leste during 1999', 28 Feb. 2003
http://www.jsmp.minihub.org/Reports/otherresources/xgonscu28feb03jr01mar03.htm (accessed 15 Aug. 2012).

[86] UN Secretary-General, 'Report of the Secretary-General on Justice and Reconciliation for Timor-Leste', UN Doc. S/2006/580 (2006), para. 9.

[87] See, for example, S. de Bertodano, 'Current Developments in Internationalized Courts', (2003) 1 *JICJ* 226, p. 232-233; and L. von Braun, *Internationalisierte Strafgerichte – Eine Analyse der Strafverfolgung schwerer Menschenrechtsverletzungen in Osttimor, Sierra Leone und Bosnien*-Herzegowina (2008), p. 188-189.

[88] Memorandum of Understanding between the Republic of Indonesia and the United Nations Transitional Administration in East Timor Regarding Cooperation in Legal, Judicial, and Human Rights Related Matters, 6 April 2000, especially Sects. 2 (c) and 9.

[89] The UN Security Council had done so in the case of Kosovo when it demanded the full cooperation of the Federal Republic of Yugoslavia (UN Doc. S/RES/1244 (1999)).

[90] See also K. Lanegran, 'Truth Commissions, Human Rights Trials, and the Politics of Memory', (2005) 25/1 *Duke U. Press* 111, p. 115; M. Hirst and H. Varney, 'Justice Abandoned? An Assessment of the Serious Crimes Process in East Timor', ICTJ – *Occasional Paper Series* 2005, p. 25.

Moreover, the work of the SPSC and the SCU was hampered by its very limited resources. The shortage of funds became manifest in various areas, *inter alia* in the lack of qualified legal services for the accused. Before the Defence Lawyers Unit (DLU) was established in September 2002 by UNMISET, the rights to adequate representation and equality of arms[91] were clearly infringed upon. However, even after its creation, the DLU could not fully safeguard these rights due to the deficit of expertise and experience of some of its lawyers.[92] Other problems resulting from the lack of resources include the inadequate translation and interpretation services as well as the severe shortcomings with respect to witness and victim protection and support.[93]

Furthermore, there was no comprehensive plan providing for capacity building of the local justice system. Apart from having a Timorese judge on each panel, the SPSC did not engage in further efforts with the objective of disseminating expertise. In 2002 the SCU, composed of international staff except for the Timorese translators, began to conduct training programmes for a small number of national investigators, prosecutors, police officers, and supporting staff. Most of the former SCU trainee prosecutors subsequently worked at the OCU.[94] These capacity building efforts on part of the SCU were certainly important measures, but still a lot more could have been done if there had been strategic planning and necessary funding from the outset.[95]

Of course, all these drawbacks have to be seen in the light of the difficult circumstances in which the SPSC and the SCU were operating. When UNTAET took over its mandate in 1999 after the withdrawal of the Indonesian troops and all judicial officers, no justice system existed and there were practically no legal professionals. Thus, a new court system with an internationalized court within a national court had to be built from scratch. SCU and SPSC issued a decent number of indictments and judgments. In

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[91] The principle 'equality of arms' requires that defence and prosecution are given a reasonable opportunity to present their cases without placing any party at a substantial disadvantage *vis-à-vis* the opponent.

[92] See also P. Burgess, 'Justice and Reconciliation in East Timor. The Relationship between the Commission for Reception, Truth and Reconciliation and the Courts', (2004) 15 *Crim. L. Forum* 135, p. 140.

[93] See Hirst and Varney, *supra* n. 90, p. 22; Reiger and Wierda, *supra* n. 80, p. 29 and 39.

[94] Office of the DGPSC Timor-Leste, *supra* n. 83, p. 7; Office of the DGPSC Timor-Leste, 'Serious Crimes Unit Update', 22 Dec. 2003, p. 2.

[95] See also Hirst and Varney, *supra* n. 90, p. 24-25; Reiger and Wierda, *supra* n. 80, p. 35-36.

doing so, they helped establish an historical record of many of the atrocities which took place in Timor-Leste in 1999 and of the context in which they were committed. Besides, the substantive legal provisions of the Rome Statute of the ICC, which had been copied nearly verbatim by UNTAET, were applied for the very first time worldwide.[96]

As the SCU was obliged to close before it had concluded its work, leaving hundreds of murder cases and other serious crimes without investigation, in February 2008 the Serious Crimes Investigation Team (SCIT) was created. It is mandated to assist the Office of the General-Prosecutor (OGP) in completing the investigations into unsettled cases of serious crimes committed in Timor-Leste in 1999. The international staff members of the SCIT also have the task of providing training to their national counterparts working in the team and to other organizations and offices such as the national police.[97] Unlike the SCU, the SCIT only conducts investigations and makes recommendations. Filing of indictments and prosecuting the alleged perpetrators lie within the exclusive mandate of the Timorese OPG. By January 2012, SCIT with assistance of the UNMIT police had concluded investigations in 250 out of 396 outstanding cases.[98]

3.2.3 THE COMMISSION FOR RECEPTION, TRUTH, AND RECONCILIATION IN TIMOR-LESTE

In order to complement the prosecutorial tasks of the serious crimes regime, UNTAET also established a truth finding and reconciliation mechanism: the Commission for Reception, Truth, and Reconciliation (*Comissao de Acolhimento, Verdade e Reconciliacao de Timor-Leste*, CAVR).[99] The CAVR was created after extensive consultation with the Timorese society and with

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[96] See S. de Bertodano, 'East Timor: Trials and Tribulations', in ., C. Romano, A. Nollkaemper, and J. Kleffner (eds.), *Internationalized Criminal Courts and Tribunals: Sierra Leone, East Timor, Kosovo, and Cambodia* (2004), p. 79 at p. 86.

[97] Sect. 2 Agreement between the United Nations and the Democratic Republic of Timor-Leste Concerning Assistance to the Office of the Prosecutor-General of Timor-Leste, signed by the Deputy Special Representative of the Secretary-General and the Prosecutor-General of Timor-Leste on 12 Feb. 2008, in accordance with para. 4(i) of the UN Security Council Resolution 1704 (UN Doc. S/RES/1704 (2006)).

[98] UN Secretary-General, 'Report of the Secretary-General on the United Nations Integrated Mission in Timor-Leste (for the Period from 20 September 2011 to 6 January 2012)', UN Doc. S/2012/43 (2012), para. 34.

[99] UNTAET Regulation No. 2001/10 on the Establishment of a Commission for Reception, Truth, and Reconciliation in East Timor, UN Doc. UNTAET/REG/2001/10 (2001).

approval of the CNRT as an independent Timorese institution.[100] The CAVR had the mandate to establish the truth regarding human rights violations which took place in the context of the political conflicts in Timor-Leste between 1974 and 1999. Thus, in contrast to the serious crimes process, the Commission did not deal exclusively with crimes perpetrated in 1999. Significantly, the CAVR was not only tasked with identifying the factors that led to such violations and those involved in committing them, but also with referring cases of human rights violations to the OGP with recommendations for the prosecutions. Moreover, the Commission was mandated to promote reconciliation, assist in restoring the human dignity of victims, and support the reception and reintegration of individuals who committed minor criminal offences through community-based reconciliation mechanisms.[101]

In order to assist the reception and reintegration of people into their communities, the CAVR conducted Community Reconciliation Processes (CRP) by which criminal and civil immunity was granted to offenders of crimes not considered serious if they performed certain acts of reconciliation.[102] Deponents wishing to participate in the CRP had to submit a statement to the Commission describing the acts they had committed.[103] If the acts did not constitute a serious crime, CRP hearings were conducted by a local panel in a traditional manner.[104] After the hearing, the panel would decide upon the act of reconciliation which it considered most appropriate for the deponent. Such an act could include community service, reparation, public apology, and/or another act of contrition.[105] If the deponent consented to undertake the act of reconciliation, this agreement, the so called Community Reconciliation Agreement (CRA), was issued as an order of the District Courts following their approval.[106]

In less than two years the CRP managed to successfully complete the cases of 1371[107] perpetrators of minor crimes such as theft, minor assault, and arson which did not result in death or injury. As the processes were conducted in and by the local communities, the sense of ownership was

[100] See CAVR, *supra* n. 54, Part 1, Sect. 1.2.
[101] Sects. 3.1 and 13.1(a)(iii) UNTAET Regulation No. 2001/10, *supra* n. 99.
[102] Ibid., Sects. 22 and 32.
[103] Ibid., Sect. 23.1.
[104] See CAVR, *supra* n. 54, Part 9, Sect. 9.3.6.
[105] Sect. 27 UNTAET Regulation No. 2001/10, *supra* n. 99.
[106] Ibid., Sect. 28.
[107] CAVR, *supra* n. 54, Part 9, para 102.

strong.[108] Offering victims and perpetrators an open forum where they could express sorrow, give explanations, and ask forgiveness helped improve their relationship, which in return facilitated the reintegration of the deponents into the communities.[109] In fact, the CRP became so popular that it could not handle the cases of all those wishing to participate.[110]

In October 2005, the CAVR submitted a report of more than 2500 pages on its findings and recommendations to the then President Gusmão who thereon handed it over to the Timorese Parliament and the UN. The Commission found that the Government of Indonesia was responsible for massive human rights violations and that members of the Indonesian security forces had committed crimes against humanity and war crimes.[111]

In October 2010, the CAVR's final report was also published in the Indonesian language by a subsidiary of Indonesia's largest publishing house. This was an essential step to increase awareness of Indonesia's role in the Timorese conflict and enhance understanding, primarily by scholars, politicians, the media, the Commission on Human Rights, and in turn by the general public.

3.2.4. THE COMMISSION OF TRUTH AND FRIENDSHIP

In December 2004, the Presidents of Timor-Leste and Indonesia jointly declared their intention to create a Commission of Truth and Friendship (CTF). The terms of reference (TOR) of the CTF were agreed upon and made public in March 2005.[112] While the CAVR had operated as a national institution with a broad temporal mandate, the CTF was an intergovernmental entity with the objective of establishing the conclusive truth in regard to the events of 1999 with a view to promoting reconciliation and friendship.[113] The first-ever truth commission by two countries was composed of half Indonesian and half Timorese commissioners.

Contrary to the CAVR, the CTF was established not as a complement, but as an alternative to prosecutions. The leaders of Indonesia and Timor-Leste had decided to promote their bilateral relations by means of reducing

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[108] Ibid., para. 159.
[109] Ibid., paras. 118-119.
[110] Ibid., para. 167.
[111] CAVR, *supra* n. 54, Part 8, p. 5-8.
[112] Terms of Reference for the Commission of Truth and Friendship Established by the Republic of Indonesia and the Democratic Republic of Timor-Leste, 10 March 2005.
[113] Ibid., Art. 12.

prosecutorial processes.[114] Thus, the CTF was tasked to emphasize institutional responsibilities and excluded from recommending the establishment of any new judicial body.[115] Moreover, unlike the CAVR, but similar to the South African Truth and Reconciliation Commission, the CTF's mandate included the power to recommend amnesties for perpetrators of human rights violations who cooperated fully in revealing the truth and rehabilitation measures for those wrongly accused of human rights violations.[116] As this was not further specified, it would comprise recommending amnesties for perpetrators of crimes against humanity and war crimes. On this account the TOR were much criticized by civil society and human rights organisations and the UN even denied its cooperation with the CTF.[117]

In order to reveal the truth with regard to the atrocities of 1999, the CTF reviewed materials documented by the KPP HAM, the Ad Hoc Human Rights Court on East Timor in Jakarta, the SPSC and the SCU, and the CAVR. In addition to its document review and research, the Commission conducted six public hearings. These were, however, strongly criticized, in particular because of their failure to procure the truth und to treat victims adequately.[118]

The CTF submitted its final report in July 2008.[119] The Commission concluded that widespread and systematic attacks against the civilian population in the form of murder, rape, torture, deportation, and other inhumane acts were committed in Timor-Leste in 1999.[120] Members of the militia, the Indonesian military, and the Indonesian civilian Government were found responsible for these crimes against humanity.[121] The CTF also

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114 Cf., Art. 10 TOR, *supra* n. 112.
115 Ibid., Art. 13(c) and (e).
116 Ibid., Art. 14 (c)(i) and (ii).
117 UN News Service, 'Timor-Leste: UN to Boycott Truth Panel Unless it Bars Amnesty for Gross Abuses', 26 July 2007. This was in accordance with the advice of the UN Commission of Experts, *supra* n. 67, paras. 353 and 355.
118 For a detailed study of the public hearings see M. Hirst, 'Too Much Friendship, Too Little Truth – Monitoring Report on the Commission of Truth and Friendship in Indonesia and Timor-Leste' (ICTJ, 2008), p. 23-39.
119 For a thorough analysis of the CTR final report see M. Hirst, 'An Unfinished Truth: An Analysis of the Commission of Truth and Friendship's Final Report on the 1999 Atrocities in East Timor', ICTJ – *Occasional Paper Series* 2009.
120 CTF, *Per Memoriam Ad Spem: Final Report of the Commission of Truth and Friendship* (2008), p. 283.
121 Ibid., p. 271-272.

maintained that pro-independence groups systematically captured and illegally detained people, although due to the lack of evidence the precise nature and extent of these crimes could not be finally determined.[122]

Ultimately, the CTF refrained from recommending amnesties because that '*would not be in accordance 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*'.[123] In fact, it recommended improving institutions which investigate and prosecute human rights violations.[124] However, the wording of its final report seems to reflect the diplomatic intention which implies that these mechanisms should deal with future violations rather than with those of 1999.

The findings and recommendations of the final report were endorsed by both heads of State at the ceremony in July 2008. Since then, several Senior Officials Meetings (SOM) between the two States have taken place to discuss the implementation of the CTF's recommendations and in particular of a Joint Plan of Action with short and long term programmes. However, the plan focuses on programme delivery in Timor-Leste rather than in Indonesia, which reflects how Indonesia apprehends its role in the process. Thus, Indonesia has enhanced its cooperation and support in the social, economic, and security sectors.[125] In January 2010, the Timorese Office of the Provedor (Ombudsman) for Human Rights and Justice and the Indonesian Commission on Human Rights signed a memorandum of understanding on the implementation of the recommendations of the reports of the CAVR and the CTF.[126] Yet, the recommendations relating more directly to the conflict in 1999, such as establishing a commission for disappeared persons and a documentation and conflict resolution centre are still to be implemented.[127] Furthermore, progress is slow in implementing the long-term recommendations on promoting institutional reforms which enhance the

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[122] Ibid., p. 275.
[123] Ibid., p. 297.
[124] Ibid., p. 298.
[125] See SOM delegation, 'Joint Press Statement 4th Senior Officials' Meeting between the Republic of Indonesia and the Democratic Republic of Timor-Leste', 22 Jan. 2010.
[126] UN Secretary-General, 'Report of the Secretary-General on the United Nations Integrated Mission in Timor-Leste (for the Period from 21 January to 20 September 2010)', UN Doc. S/2010/522 (2010), para. 35.
[127] See also UN Human Rights Council, 'Report of the Working Group on Enforced or Involuntary Disappearances, Addendum, Mission to Timor-Leste', UN Doc. A/HRC/19/58/Add.1 (2011), para. 55.

authority and effectiveness of institutions charged with the investigation and prosecution of human rights violations.

4. Comparison of the cases of Sierra Leone and Timor-Leste and lessons learned

The cases of Sierra Leone and Timor-Leste provide valuable examples of combining judicial and extra-judicial transitional justice mechanisms. The truth commission in each country worked simultaneously with an internationalized court, the SCSL and the SPSC respectively. Certainly, the backgrounds were different: While Timor-Leste – after decades of suppression – was undergoing an international armed conflict with Indonesia in 1999 in its struggle for independence, in Sierra Leone bad governance and economic inequalities led to a civil war which lasted from 1991 until 2002. In both conflicts UN military intervention was decisive in ending the atrocities.

4.1. Comparison of the judicial mechanisms

In Sierra Leone the Government specifically asked the UN to assist it in the prosecution of international crimes. This led to an agreement between the UN and the Government on the establishment of the SCSL. In Timor-Leste, in contrast, there was no functioning government. Hence, UNTAET, acting as the interim government with complete administrative authority over Timor-Leste during its transition to independence, established the SPSC and the SCU. In this respect, the SCSL enjoyed more democratic legitimacy than the SPSC.[128]

Another decisive difference is that the SCSL was not part of the Sierra Leone court system, while the SPSC were established within the Timorese judiciary. Hence, while both the SCSL and the SPSC are referred to as internationalized or hybrid courts, the SCSL had a much stronger international component and therefore considered itself a truly international criminal court.[129] The SPSC, on the other hand, were integrated into domestic courts and perceived as a national initiative, even if they were working with international assistance. Regarding their establishment, the SCSL are thus comparable to the Extraordinary Chambers in the Courts of Cambodia and the SPSC to the 'Regulation 64' Panels in the Courts of Kosovo. In contrast, the Ad Hoc Human Rights Court on East Timor in

[128] Cf. Handl, *supra* n. 80, p. 111.
[129] Cf. SCSL, *Prosecutor* v. *Taylor*, Decision on Immunity from Jurisdiction, *supra* n. 43, paras. 37-42.

Indonesia which was sought to supplement the SPSC's efforts was established as purely national court, without international assistance.

While both the SCSL and the SPSC worked with very limited resources, in light of UNTAET's broad mandate even fewer resources were dedicated to the judicial processes in Timor-Leste. So much the worse, in Timor-Leste a judicial system had to be built from scratch which posed great additional challenges. In Sierra Leone, on the other hand, the judicial processes could be based on the country's legal tradition and – at least to some extent – they had resort to qualified lawyers. Additionally, English being the official language in Sierra Leone, the SCSL did not face the immense translation problems the SPSC had to cope with.

Moreover, there were great differences regarding their prosecutorial strategies. The Prosecutor of the SCSL followed a highly selective and limited accountability model: he indicted a symbolic number of only 13 individuals who were considered to be the most responsible perpetrators and focused on very specific charges in the indictments which could be proved without considerable difficulties.[130] All other perpetrators benefited from the general amnesty granted by the 1999 Lomé Peace Agreement. The SCU, on the other hand, lacked a clear mandate in this respect. Initially it focused on rather low-level Timorese militia members and only later did it go on to indict high-ranking Indonesian military officers. In general, the aim in Timor-Leste was to achieve full accountability for the atrocities committed: perpetrators of serious crimes were to be tried by the SPSC and the Indonesian Ad Hoc Human Rights Court; perpetrators of crimes not considered serious should undergo the CRP of the CAVR. This ambitious endeavour stemmed mainly from the immense 'hunger' for justice within the Timorese population and was highlighted by the impressive number of 392 persons indicted by the SCU.

4.2. COMPARISON OF THE TRUTH COMMISSIONS

The CAVR and the TRC-SL were both established as independent national institutions following extensive consultations with the respective societies, albeit with considerable international assistance. Their mandates were similar as regards their truth-finding mission. The CAVR, however, was commissioned to investigate human rights violations which were committed between 1974 and 1999, while the TRC-SL's temporal jurisdiction was 'only'

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[130] David Crane, the Prosecutor of the SCSL, referred to this strategy as 'representational charging' ('Hybrid Tribunals – Internationalized National Prosecutions', (2006) 25 *Penn State Int'l Law Rev*. 803, p. 810).

from 1991 until 1999. Both commissions had similar far reaching investigatory powers which included compelling people to testify. As with the courts, the international involvement in the TRC-SL was stronger with three out of seven commissioners being international. In contrast all 36 commissioners of the CAVR were nationals. The CTF, in turn, was distinct in being an intergovernmental entity which was composed of half Indonesian and half Timorese Commissioners. In light of its objective to promote reconciliation and friendship between Indonesia and Timor-Leste, it was explicitly excluded from recommending the establishment of any new judicial body.

While in the past, truth commissions were usually always linked with the granting of amnesties, neither the TRC in Sierra Leone nor the CAVR granted amnesties to perpetrators of core international crimes. In fact, in light of the general amnesty provided by the Lomé Peace Agreement which was only withdrawn in respect to the perpetrators whom the SCSL indicted, i.e. those bearing the greatest responsibility, the TRC-SL did not grant amnesties at all. In Timor-Leste, on the other hand, there was no comparable amnesty law. Thus, with a view to assisting the reception and reintegration of people into their communities, offenders of crimes not considered serious were granted criminal and civil immunity through the CRP of the CAVR on the condition that they perform certain acts of reconciliation. Notwithstanding the CTF's power to recommend amnesties for perpetrators of human rights violations who cooperated fully in revealing the truth, it decided to refrain from doing so.

4.3. COMPARISON OF THE RELATIONSHIP BETWEEN THE DIFFERENT MECHANISMS

The relationship between the justice and alternative-justice mechanisms in Sierra Leone and Timor-Leste was strongly influenced by the entire context and the way of their establishment. In Timor-Leste where achieving justice and promoting respect for the rule of law were the underlying primary considerations, the CAVR was established in order to complement the work of the SPSC as part of a comprehensive strategy. Thus, their relationship and in particular the exchange of information was unambiguously regulated in UNTAET Regulation No. 2010/10. Additionally, with a view to promoting cooperation and ensuring a mutually beneficial and efficient interplay, a memorandum of understanding was agreed upon between the CAVR and the OGP of the SCU.[131]

[131] Memorandum of Understanding between the Office of the General Prosecutor (OGP) and the Commission for Reception, Truth and Reconciliation (CAVR)

In Sierra Leone, on the other hand, the simultaneous operation of the SCSL and the TRC-SL was not foreseen from the outset. Even after this was decided upon, the interplay of the two institutions was not officially regulated despite several discussions and proposals. In fact, the regulations in their founding documents on the question of whether the TRC-SL could be compelled to disclose confidential information to the SCSL were contradictory.[132] Fortunately, the controversy was solved by the practicable approach of the Prosecutor who publicly declared that he would not use the information of the TRC for his prosecutions.[133] Nevertheless, a binding agreement between the two institutions would have facilitated the situation for all parties concerned by providing clarity and certainty *ab initio*.

Under these circumstances, it comes as no surprise that the CAVR focused on cooperating with the judicial mechanisms to a much greater extent than its counterpart in Sierra Leone. Most significantly, the CAVR referred all statements of deponents requesting to participate in the CRP together with recommendations for prosecutions of offenders, where appropriate, to the OGP of the SCU. Howsoever, in spite of the fact that the SCSL and the TRC-SL worked simultaneously more 'by accident' than 'by design', the relationship worked relatively well for the most part in their overlapping operation, as both institutions tried to fulfill their functions without interfering with the other one.

Unfortunately, the dispute over the question of whether detainees of the SCSL would be allowed to testify before the TRC-SL, which was finally denied by the SCSL,[134] tainted their relationship, especially for the TRC.[135] In Timor-Leste this situation did not arise. The CAVR understood the investigation of those most responsible as a clear responsibility of the SCU

Regarding the Working Relationship and Exchange of Information between the Two Institutions, 4 June 2002.

[132] Sect. 7(3) TRC Act 2000, *supra* n. 17, vs. Art. 21(2) Special Court Agreement Act 2002, *supra* n. 34.

[133] D. Crane, 'Special Court for Sierra Leone', Speech by Prosecutor D. Crane on the International Human Rights Day, Freetown, Standard Times (Freetown), 11 Dec. 2002, <http://www.globalpolicy.org/intljustice/tribunals/sierra/2002/1216si.htm> (accessed 15 Aug. 2012).

[134] Cf. SCSL, *Prosecutor* v. *Norman*, Decision on Appeal by the Truth and Reconciliation Commission for Sierra Leone and Chief Samuel Hinga Norman Against the Decision of His Lordship, Mr Justice Bankole Thompson Delivered on 30 Oct. 2003 to Deny the TRC's Request to Hold a Public Hearing With Chief Samuel Hinga Norman, Case No. SCSL-03-08-PT, 28 Nov. 2003.

[135] Cf. TRC-SL, *supra* n. 1, Vol. 3B, Chap. 6, paras. 176-219.

which had the necessary expertise and resources for this task.[136] As a consequence, the CAVR had to accept the fact that 'its truth' did not include 'the truth of perpetrators of serious crimes.' In order to somewhat compensate this, CAVR conducted 15 interviews with key national figures.[137] Finally, the TFC, which was established as an alternative to prosecutions, strictly refrained from cooperating with any court or special panels. The furthest it dared to go was to recommend the improvement of institutions which would investigate and prosecute future human rights violations.

4.4. TABULAR COMPARISON OF THE MECHANISMS AND THEIR RELATIONSHIP

	SIERRA LEONE	**TIMOR-LESTE**
General context		
Type of conflict	Civil war	International armed conflict
Mechanisms	**Simultaneous operation of internationalized criminal court and TRC(s)**	
Amnesties	General amnesty withdrawn in respect of those bearing the greatest responsibility for core international crimes	Offenders of non-serious crimes could be granted criminal and civil immunity by the CAVR
Judicial mechanisms	**SCSL**	**SPSC and SCU**
Legal foundation	Agreement between the Government and the UN	UNTAET Regulations
Integration	Outside national court system	Within national court system
Prosecutorial strategy	Highly selective: only those bearing the greatest responsibility	Initial endeavor to achieve full accountability
Result	Only perpetrators most responsible faced accountability	Only low-level perpetrators faced accountability

[136] See CAVR, *supra* n. 54, Part 2, paras. 29-30.

[137] These 15 key national figures were not indicted at the time at which the CAVR operated but some of them were later listed in the Report of the UN Independent Special Commission of Inquiry for Timor-Leste ('Report of the United Nations Independent Special Commission of Inquiry for Timor-Leste' (2006)).

TRCs	TRC-SL	CAVR	CTF
Legal foundation	Lomé Peace Agreement, incorporated into national law by TRC Act 2000	UNTAET Regulation	Agreement between Timor-Leste and Indonesia
Mandate	Investigate crimes committed 1991-1999, foster reconciliation	Investigate crimes committed 1974-1999, refer cases of human rights violations to the OGP, foster reconciliation and reinte-gration (CRP)	Investigate crimes committed 1999, promote reconciliation and friendship
Follow-up	Some recommendations implemented, implementation of reparation programmes advancing slowly	Slow progress on implementation of recommendations, no reparations yet	

Relationship		
Context	SCSL and TRC-SL 'by accident', relationship not regulated	SPSC and CAVR 'by design', regulations on relationship
Information sharing	'Firewall model'	'Free access model'
Respect of confidential information of the TRC	Contradicting regulations (TRC Act: grant of confidential information; Special Court Agreement Act: comply with orders)	No guarantee of confidentiality: OGP could request information from CAVR

4.5. COMPARISON OF THE IMPACTS AND LESSONS LEARNED

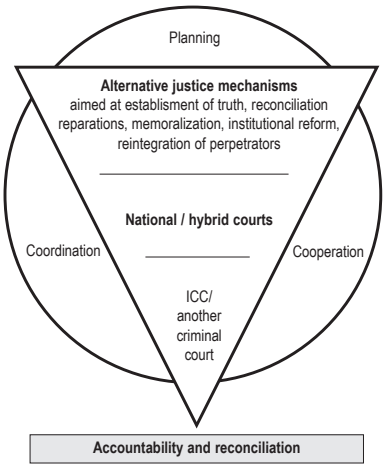
In Sierra Leone eight of the most responsible perpetrators were tried and convicted and soon also the trial against Charles Taylor will be concluded. Despite this low, representational number, the SCSL was generally perceived to have conducted fair trials and thus to have contributed to achieving justice and accountability. In this respect, it was important that those indicted encompassed the senior leaders of all three factions involved in the conflict and that the SCSL put considerable effort into its outreach programmes which enhanced access to the trials by the affected population.

In light of the general amnesty in Sierra Leone regarding all other perpetrators, including some with a high level of responsibility, the question

remains whether the accountability efforts of the SCSL should have been – or should still be – complemented by efforts of a national court, perhaps with some international assistance. Such a court could have been/could be tasked with the prosecution of other high-level and intermediate-level perpetrators. However, such a question can only be answered with regard to the particular context. In Sierra Leone at the time of the negotiations of the Lomé Peace Agreement, achieving a ceasefire and peace were more pressing interests than achieving accountability. Also for the time being, the desire for further prosecutions of those responsible for the atrocities seems rather low in view of basic problems, such as dire poverty and unemployment. Hence, the limited level of accountability achieved seems to be generally accepted and further trials are unrealistic.

In contrast to the low number of trials in Sierra Leone, in Timor-Leste 87 persons were tried, of whom 85 were convicted. While the quality of the trials of the SPSC were rightly criticized, the far greater problem was that those most responsible for the atrocities 'escaped' facing justice. This resulted mainly from the lack of cooperation from Indonesia to extradite indicted persons to Timor-Leste and – as demonstrated by the flawed trials of the Ad Hoc Court in Indonesia – its resistance to genuinely trying the perpetrators itself. Further drivers were the UN's decision not to establish an international criminal court in the first place and the diminishing political will in Timor-Leste to foster prosecutions. This, along with the fact that the crimes committed between 1974 and 1998 were not addressed at all by any judicial mechanism, resulted in general dissatisfaction with the judicial institutions as accountability had not been achieved.

The limited impact of the serious crimes processes in Timor-Leste compared with the results in Sierra Leone suggests that the endeavour to achieve full accountability in Timor-Leste in light of the restricted resources was too ambitious and that the SPSC were 'too national'. It seems that a more international mechanism with the power to prosecute those most responsible for atrocities committed – like the SCSL – would have been needed in Timor-Leste. At the same time, Sierra Leone could have achieved a higher level of accountability if there had been national courts or special panels – perhaps like the SPSC – to complement the work of the SCSL. Hence, the two cases confirm the amenities of a comprehensive approach encompassing mechanisms at various levels, including an inter-, trans-, or national court capable of prosecuting the most responsible, national courts for the other high and intermediate-level perpetrators, and mechanisms establishing the truth and fostering reconciliation. The simplified model below illustrates such a comprehensive approach to transitional justice.



Focus:
- *Victims and society as a whole*
- *Low-level perpetrators*
- *Intermediate-level perpetrators*
- *Perpetrators bearing the greatest responsibility*

On a more operational level, both the SCSL and the SPSC could have significantly enhanced their impact in the respective countries by effectively contributing to strengthening the domestic judiciary and thus to a valuable legacy. While they engaged in some efforts to disseminate expertise and capacity building activities such as in the field of court administration, these measures came at a late stage and were rather isolated initiatives of motivated individuals than part of a strategic plan. Of course, such an approach requires more international commitment and assistance in the form of adequate financial and human resources from the outset.

Regarding the TRC-SL, the CAVR, and the TFC, all meaningfully contributed to establishing an historical record about the human rights violations and their causes, albeit the quality and impartiality of their investigations and the final reports, in particular of the TFC, were partly criticized. While all provided victims and perpetrators the opportunity to relate and exchange their experiences to some extent, the CRP of the CAVR stood out due to their emphasis on grassroots reconciliation and reintegration of offenders of non-serious crimes. All truth commissions made several recommendations on necessary reforms in the justice, social, economic, and security sectors addressed to the respective governments, including Indonesia, and partly to the international community as a whole.

Whether the truth commissions effectively contributed to achieving reconciliation will strongly depend on the extent and length of time in which their recommendations, in particular concerning reparations to victims and affected communities, will be implemented. For the time being, only few of

the recommendations have been put into practice. Hence, further international monitoring and assistance are extremely important. With respect to reconciliation, Timor-Leste faces a peculiar challenge because as long as the victims there do not see justice being done, true reconciliation is impeded.

As regards the interplay between the different accountability and reconciliation mechanisms, Sierra Leone lacked a coordinated, cooperative approach. The institutions could have contributed in achieving the common goals and profited to a much greater extent from synergies from their simultaneous operation if there had been clear regulations and a better understanding of the other institution's mandate. In Timor-Leste, on the other hand, the implementation of complementary transitional justice mechanisms was well designed and regulated from the outset. While coordination and collaboration between the CAVR and the SPSC could have been better in areas such as outreach and victim's support, the institutions, especially the CRP and the SCU, generally cooperated closely. Unfortunately, other factors – as outlined above – led to the disappointing final result that accountability and reconciliation were only achieved to a very limited degree.

Finally, both cases highlight the need of planning an effective regional transitional justice solution for cross-border conflicts. The lack of such an approach brought about the unsatisfying outcome that Taylor is being prosecuted for his alleged responsibility for crimes in Sierra Leone, but not for crimes he allegedly committed in Liberia. Regarding the atrocities committed in Timor-Leste, courts and alternative justice mechanisms were established in Timor-Leste and Indonesia. However, the model reflected how the failure of one institution impacts the success of the others.

TRANSITIONAL JUSTICE IN ISLAMIC SETTINGS: A PRELIMINARY STUDY

ALICE PANEPINTO*

RÉSUMÉ

Une rétrospective des expériences de justice transitionnelle révèle que ces mécanismes sont nécessairement influencés par les milieux sociaux, culturels et religieux à partir desquels ils émergent. Par conséquent, dans le contexte après le « printemps arabe », il semble approprié de contextualiser la justice transitionnelle en considérant d'une part le droit international, le droit pénal international et les droits de l'Homme, et d'autre part la contribution normative locale.

Les processus de justice transitionnelle qui jouissent d'une légitimité culturelle et d'une résonance locale sont considérés comme plus efficaces que des processus imposés de l'étranger. Ainsi, des systèmes normatifs façonnés par des traditions religieuses pourraient offrir un cadre complémentaire qui contribuerait à modeler des modèles justice transitionnelle contextualisés.

Cet essai évalue le potentiel du droit musulman à soutenir les mécanismes de justice transitionnelle. L'argument clé est que le droit musulman pourrait consolider par une approche ascendante (bottom-up) ce que le droit international définit par une approche descendante (top-down). Ce faisant, il vise à apporter une nouvelle application de justice transitionnelle.

En reconnaissant que le droit international et le droit musulman peuvent être réconciliés, il serait possible d'introduire dans la justice transitionnelle une perspective compatible avec le droit islamique, là où cela aurait un apport constructif.

I- INTRODUCTION

In 1995, Schmitter suggested that transitologists with experiences and expertise of political transitions in Southern Europe and Latin America would be able to travel safely to the Middle East and North Africa (MENA), "if and

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when transitions from autocracy [did] begin to take hold seriously".[1] In 2011 the moment he envisaged seemed to have arrived.

In the wake of the so-called Arab Spring, which is shaking the foundations of authoritarian models of governance and offering a real possibility of radical political transformation for the populations involved, transitologists of all persuasions and disciplines not only have the opportunity to engage in the study of a new wave of change but they can do so from an improved vantage point. Today the MENA region can be examined in the light of additional transitional justice experiences accumulated in former-Communist Eastern Europe and various African and Asian settings, as well as with the help of the recent leaps forward in International Human Rights and International Criminal Law.

This paper replies *carpe diem* to Schmitter and seeks to examine some of the issues arising from the application of the discipline of transitional justice in the context of the Muslim-majority MENA region. Firstly, this essay will look at some definitions of transitional justice and expand on the fundamental rule-of-law dilemmas of transitional jurisprudence. The second part of this essay will address the possibilities and scope for transitional justice in Islamic settings and present a summary comparative analysis of some key issues of relevant Criminal Law. As this paper is a work in progress extracted from my current doctoral thesis, it should be interpreted as part of an on-going study.

II- Defining and Refining Transitional Justice

Defining transitional justice is no easy task. Numerous suggestions have been put forward by different organisations and commentators. The former tend to prefer a 'policy' definition of transitional justice, placing an emphasis on the mosaic of mechanisms that can be devised, selected and deployed as part of the transitional process; conversely, academic commentators favour a deeper, more theory-laden, meaning of transitional justice. This section provides some examples of these divergent understandings of transitional justice – which are not necessarily opposed to each other but may be interpreted as complementary. It will then focus on the jurisprudence of transitional justice, and the debates around the rule of law dilemmas.

[1] P. C. Schmitter, "Is it safe for transitologists and consolidologists to travel to the Middle East and North Africa?" in *Political Transitions in the Arab World*, 1995.

A. TRANSITIONAL JUSTICE AS AN UMBRELLA TERM

The International Centre for Transitional Justice (ICTJ), one of the leading non-governmental organisations working on these issues, provides the following definition:

Transitional justice is a response to systematic or widespread violations of human rights. It seeks recognition for victims and promotion of possibilities for peace, reconciliation and democracy. Transitional justice is not a special form of justice but justice adapted to societies transforming themselves after a period of pervasive human rights abuse. In some cases, these transformations happen suddenly; in others, they may take place over many decades.[2]

What is noteworthy about this definition is the way it highlights the responsive nature of transitional justice, as well as naming the set of aims it strives towards (peace, reconciliation and democracy). The transformative element of societies adopting various transitional justice processes is also a key feature of this definition. Going into the specific mechanisms of transitional justice, the ICTJ states that:

Transitional justice refers to the set of judicial and non-judicial measures that have been implemented by different countries in order to redress the legacies of massive human rights abuses. These measures include criminal prosecutions, truth commissions, reparations programs, and various kinds of institutional reforms.[3]

Whilst not a conclusive definition of what is commonly meant by transitional justice, this fluid (and open) list suggests that the common understanding of this this issue is based on a basket of policies that can be selected and implemented in connection to a transitional period for the purposes outlined above. Similar approaches can be found in other organisations and institutions, such as Chatham House (UK)[4] and the United States Institute of Peace,[5] and most notably the UN.

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[2] International Centre for Transitional Justice, *What is Transitional Justice? (Factsheet*), available at http://ictj.org/about/transitional-justice (accessed 15 January 2013).

[3] *Ibid*.

[4] Chatham House, *Meeting Summary: Transitional Justice and the Arab Spring*, 1 February 2012: "Transitional justice, broadly speaking, denotes the various policies and strategies implemented by societies in transition that are aimed at addressing gross human rights violations committed in a specific context and at a specific time",

1. UN Definition of Transitional Justice

To date, the 2004 Report of the Secretary General on *The rule of law and transitional justice in conflict and post-conflict societies*, read in conjunction with related follow-up documents, provides the institutional framework of reference in matters concerning transitional justice.[6] At the outset, these texts seek to clarify the meanings of certain phrases the UN adopts. Thus, 'transitional justice' is defined as:

The full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include judicial and non-judicial mechanisms, with different levels of national involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.[7]

In an attempt to clarify the principles that underlie this definition, the document also provides a description of 'rule and law' and 'justice'. These concepts play a crucial role in informing, framing and justifying transitional justice endeavours, and must be taken into account. 'Rule of law' is described as:

Principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights standards;[8]

And the notion of 'justice' is presented as the

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available at http://www.chathamhouse.org/publications/papers/view/182300 (accessed 15 January 2013).

[5] United States Institute of Peace, *Transitional Justice: Information Handbook*, September 2008: "The process of acknowledging, prosecuting, compensating for and forgiving past crimes during a period of rebuilding after conflict is commonly referred to as "transitional justice."

[6] United Nations Security Council, *The rule of law and transitional justice in conflict and post-conflict situations: Report of the Secretary General,* S/2004/616, 23 August 2004; United Nations Secretary General, *Guidance Note of the Secretary General: UN Approach to Rule of Law Assistance*, 14 April 2008; United Nations Secretary General, *Guidance Note of the Secretary General: UN Approach to Transitional Justice*, 10 March 2010.

[7] United Nations Security Council, *The rule of law and transitional justice in conflict and post-conflict situations: Report of the Secretary General,* at 4.

[8] *Ibid*.

Ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs. Justice implies regard for the rights of the accused, for the interests of victims and for the well-being of society at large. It is a concept rooted in all cultures and traditions (…).[9]

On the basis of the above, transitional justice is understood as the process through which a society tries to address the reality and consequences of large-scale, serious past abuses through a variety of judicial and non-judicial mechanisms. Thus, the UN recognises that it does not amount to a static moment or act, but a dynamic, on-going process originating from a society's willingness to confront egregious past violations of rights. This process comprises three specific and mutually reinforcing aims: ensuring accountability, serving justice and achieving reconciliation. The definition leaves the question of levels of international involvement open and in conclusion provides a list of employable mechanisms, alone or in conjunction with each other (individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals) that may be suitable for a given context.

The UN definition appears to limit itself to a two-dimensional approach: on the one hand it recognises the dynamic process of transitional justice, while on the other, it groups together a basket of policies which are linked to transitions. In this way, it uses "transitional justice" as an umbrella term to encompass the 'full range of processes and mechanisms' in use during post-conflict periods.

However, the existence of a 'deeper meaning' for transitional justice has been explored by academic commentators, giving rise to what can be termed a 'jurisprudence', as initially posited by Ruti Teitel.[10]

B. TRANSITIONAL JUSTICE'S DEEPER MEANING

The selection of policies linked to transitional justice processes delineated above constitutes only part of the picture. If transitional justice is merely an umbrella term inclusive of a series of mechanisms, then why is this discipline growing as an independent subject of enquiry, informed, yet separate, from various doctrines of positive law and legal theory? Ruti Teitel recognises normative shifts as one of the defining features of transitions, whereby "legal practices bridge a persistent struggle between two points: adherence to established convention and radical transformation".[11] Consequently, the

[9] *Ibid*.
[10] R. G. Teitel, *Transitional Justice*, OUP, 2000, at 215.
[11] *Ibid*.

theoretical component of transitional justice is quintessentially characteristic of what we mean by transitional justice and should necessarily inform our application in practice of it.

1. THE JURISPRUDENCE OF TRANSITIONAL JUSTICE

According to Ruti Teitel, transitional justice today can be understood as a "self-conscious construction of a distinctive conception of justice associated with periods of radical political change following past oppressive rule",[12] or more simply, as the "conception of justice associated with periods of political change".[13] It is precisely political circumstances that inform and characterise the legal element of the transition.[14] However, the law itself is also used to advance the transformation, thus contributing to shaping the political outcome.[15]

In Teitel's view, the peculiarity of transitional justice is related to its scope, spanning between the past regime, and the future (liberal) shift.[16] More specifically, this type of law is "caught between the past and the future, between backward-looking and forward-looking, between retrospective and prospective, between the individual and the collective".[17] As a result of this paradox, the relationship between transitional justice and the rule of law is peculiar to this context, as it needs to be more fluid in order to serve the specific needs of such situations.[18]

2. THE "RULE OF LAW DILEMMA"

In her seminal work Ruti Teitel identifies the "rule of law dilemma" as one of the core problems of transitional justice.[19] With reference to successor justice, she poses the following question:

To what extent does bringing the ancien regime to trial imply an inherent conflict between predecessor and successor visions of justice?[20]

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[12] R. G. Teitel, 'Editorial Note-Transitional Justice Globalized', *International Journal of Transitional Justice,* Vol. 2, 1, 2008, 1, at 1.
[13] R. G. Teitel, *Transitional Justice*, at 3.
[14] R. G. Teitel,' Editorial Note-Transitional Justice Globalized', at 2. Also, Ruti G. Teitel, *Transitional Justice*, at 4.
[15] R. G. Teitel, 'Transitional Justice: post war legacies' in *27 Cardozo Law Review* 1625, 2005-2006, at 1616 *et seq.*
[16] R. G. Teitel, *Transitional Justice*, at 5-6.
[17] *Ibid*. at 6.
[18] *Ibid.* at 6 *et seq*.
[19] *Ibid.* at 12 *et seq*.
[20] *Ibid*.

More specifically, she asks whether "such criminal justice [is] compatible with the rule of law",[21] although it is apparent that the question is by no means limited in scope to criminal justice. In subsequent work she explains the perils of this dilemma, with reference to the consequences for criminal trials:

In fledgling democracies, where the administration of punishment can pose acute rule-of-law dilemmas, the contradictions to the uses of the law may become too great. These profound dilemmas were recognized in the deliberations preceding the decisions in many countries to forego prosecutions in favor of alternative methods for truth-seeking and accountability.[22]

By reviewing components of the jurisprudential debate between Lon Fuller and H.L.A. Hart, Teitel attempts to answer this question by distinguishing between the positivist and the natural law approaches, whereby, the former attaches special value to procedural regularity (in breaking with the past) while the latter focuses instead on the substantive justice element.[23] Contextually, she construes that positivists would concede to politics in solving the dilemma, whereas proponents of natural law arguments highlight the "transformative role of law", whereby the previous "putative law (…) lacked morality and hence did not constitute a valid legal regime".[24] Teitel concludes that "in these extraordinary periods [of radical political transition], rule-of-law norms do not constitute universals"; instead, "the rule of law is defined in relation to past politics".[25] With reference to critical legal perspectives, she highlights the "challenge posed by the boundedness of law's political action".[26]

In contrast to Teitel's approach, the various ways in which the rule of law can be understood in relation to the peculiarities of political transitions are discussed by Eric Posner and Adrian Vermeule in their study of 'Transitional Justice as Ordinary Justice'.[27] This work refines our grasp of the complexities of the rule of law dilemma as introduced by Teitel, and offers an interpretative lens to approach instances of potential conflict. They classify

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[21] *Ibid*.
[22] R. G. Teitel, 'Transitional Justice Genealogy' in 16 *Harvard Human Rights Journal* 69, 2003, at 77.
[23] R. G. Teitel*, Transitional Justice,* at 14.
[24] *Ibid*.
[25] *Ibid* at 25.
[26] *Ibid*.
[27] E. Posner and A. Vermeule, 'Transitional Justice as Ordinary Justice', 117 *Harvard Law Review* 762, 2004.

the law applicable to transitional justice in four categories: (1) new law, applied retroactively; (2) old law, which was never enforced; (3) old law, which was not enforced against the perpetrators from the old regime; and (4) international law.[28] The last three types of laws applicable in transitional settings are rooted in and flow from a pre-existing normative framework and culture (be it domestic or international). Thus, they pose little formal concerns for rule of law purposes, as long as the official procedures for adoption under the laws existing at the time have been satisfied (reflecting the positivist approach illustrated by Teitel and discussed *supra*). However, the substantive validity of these three categories of laws may be flawed or questionable, in the context of the political renegotiation of the content of laws which is characteristic of transitional justice experiences.

The remaining category of law identified by Posner and Vermeule, that of new law applied retroactively, raises *prima facie* concerns of procedural validity,[29] especially from a positivist standpoint, in addition to posing questions of substantive validity of content. The principle of legality, expressed by the maxim *nullum crimen nulla poena sine lege*, applicable to criminal matters,[30] does in fact ban all forms of backward-looking justice, thus including certain instances of transitional justice. Nonetheless, Posner and Vermeulen argue that this dilemma can be circumvented through various techniques, which enable retroactive law applied in transitional justice endeavours to be brought back to an existing legal framework.[31]

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[28] *Ibid*, at 767.

[29] *Ibid*. at 791 *et seq*.

[30] This principle is crystallised in numerous international law instruments, *inter alia*: International Human Rights Law: Art. 11 *Universal Declaration of Human Rights* (1948); Article 15(1) *International Covenant on Civil and Political Rights* (1966); Article 7(1) *European Convention for the Protection of Human Rights and Fundamental Freedoms* (1950); Article 7(2) *African Charter on Human and Peoples' Rights* (1981); International Humanitarian Law: Article 67 *IV Geneva Convention* (1949); Article 75(4)(c) *Additional Protocol I to the Geneva Conventions* (1977); International Criminal Law: Article 22(1) *Rome Statute of the International Criminal Court* (1998). The principle of legality also constitutes a customary rule under IHL, identified by the ICRC as customary law (Customary IHL Rule 101) applicable to international and non-international armed conflicts and recognised in most national laws and military manuals (http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule101, accessed 7 January 2013).

[31] E. Posner and A. Vermeule, 'Transitional Justice as Ordinary Justice', at 793 *et seq*.

The first mechanism used is the appeal to a higher pre-existing law, for instance constitutional law, international law or the norms of *jus cogens*.[32] Alternatively, existing norms from the previous regime, which were not enforced, could be applied.[33] An additional method could involve the enactment of interpretative statutes, giving a new meaning to the previous regime's positive law.[34] Finally, by adjusting the time limits of statutes of limitations, the new order can prosecute old crimes.[35]

The techniques described by Posner and Vermeule are used to anchor transitional justice law – including new, retroactive norms – to existing, ordinary (i.e. non-transitional) normative provisions. This analysis thus seems to achieve its proposed objective of considering transitional justice as a development and part of ordinary justice, and not an extraordinary type of justice. However, it does not seem to fully resolve the problems posed by the rule of law dilemma with reference to the principle of legality.

Conversely to Posner and Vermeulen, David Gray argues that transitional justice constitutes an extraordinary form of justice, and as such its laws may be divorced from the preceding legal order, which emanated from what he terms an 'abusive public face of the law'.[36] He contends that said 'abusive public face of the law' determines the paradox of the rule of law, noting that different courts facing this dilemma have come to different conclusions.[37] For instance, some courts may hold that "the revolutionary role of law as an agent of change could not trump the principles of predictability international to the rule of law" (i.e. the principle of legality and non-retroactivity discussed

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[32] *Ibid*. at 793 *et seq*.
[33] *Ibid*. at 794.
[34] *Ibid*. at 795.
[35] *Ibid*.
[36] D. Gray, 'What's so special about transitional justice? Prolegomenon for an excuse-centred approach to transitional justice' in *Proceedings of the annual meeting (American Society of International Law)*, Vol. 100, 147, 2006, and the longer piece by D. Gray, 'An Excuse-Centered Approach to Transitional Justice' 74 *Fordham Law Review* 2621, 2005-2006.
[37] D. Gray, 'An Excuse-Centered Approach to Transitional Justice', at 2636 *et seq*. The author discusses a case at the Constitutional Court of Hungary for the "review of a law allowing prosecutions for those responsible for the suppression of the 1956 uprising" – reported by Gray in f.n. 141 as Judgment of March 3, 1992, [Constitutional Court] MK. No. 11/1992 (Hung.), translated in 1 J. const. L. in E. & Cent. E. 129 (1994); and the so-called German Border Guards Case – reported by Gray as Berlin State Court, No. (523) 2 Js 48/90 (9/91).

above), whereas others may choose the "transformative potential of the law over its formal duties of predictability and fair warning".[38]

The arguments set out here intimate that the rule of law dilemma is yet to be solved, both in academic terms and by courts of law dealing with these matters. However, this ambiguity is not necessarily a hindrance to the development of transitional justice processes and instituting mechanisms for finding truth and delivering justice, be they trial-based or not. As the following section will illustrate, the laws amenable to transitional justice are sufficiently broad in scope and application to suit the needs of each context.

C. Looking for Law: A Normative Mosaic Framed by International Law

In her concluding comments on "The "New Law" of Transitional Justice", Christine Bell defends the notion (and reality) of 'mess' in the international normative framework for transitional justice.[39] She notes that

At present international law emphasises the need for clear accountability for the most serious abuses and violations, and points *in the direction* [*emphasis added*] of a need for accountability more generally. A presumption of the legality of amnesties has been replaced with a presumption of their illegality. However, the new law has ambiguities, gaps and incoherencies that leave some room for negotiation, sequencing, and creative approaches. (…)

This might leave one to argue that the symbolism and the "idea of law" is as important as what the law actually says at any one point in time. If this is the case, then the question becomes: how do we best create a common consensus as to the "idea of law". The answer might be – we establish a notion of best practice, and encourage people to comply through processes that include democratic dialogue on how international standards are best implemented in any one context. Is this not the best that international law can offer in any case?[40]

This suggests that international law – and more specifically some of its specialised regimes, such as International Human Rights Law, International Criminal Law and International Humanitarian Law – though rough round the edges, does provide some kind of framework of reference. This position dovetails into what Ruti Teitel terms the 'steady state of transitional justice',

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[38] *Ibid*.

[39] C. Bell, 'The "New Law" of Transitional Justice', in K. Ambos et al. (eds.), *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development*, Springer-Verlag Berlin Heidelberg, 2009.

[40] *Ibid*. at 124.

normalised in institutions set out in international law, such as the International Criminal Court.[41]

Using international law and the standards set out by the UN as a safety net of sorts was argued by the Secretary General as being a viable and legitimate option:

United Nations norms and standards have been developed and adopted by countries across the globe and have been accommodated by the full range of legal systems of Member States, whether based in common law, civil law, Islamic law, or other legal traditions.[42]

The mosaic of normative sources and traditions from which transitional justice can borrow is broad, and the overlaps between the international legal framework and domestic legal systems are inevitable. Moreover, the cultural context in which transitional justice is experienced is also highly relevant, adding an extra layer to the plurality of relevant normative sources. Indeed, this situation of legal pluralism, whereby different legal systems coexist in the same space,[43] is perhaps one of the most visible features of transitional justice. In addition to ordinary domestic law – which in the context of transitional justice may pose problematic questions discussed above – combinations of legal pluralism may extend to local justice. Borrowing from Joanna Stevens, Lars Waldorf critically examines this feature, presenting "three key attributes" of local justice:

(1) it focuses on groups rather than individuals,

(2) it seeks compromise and community "harmony," and

(3) it emphasizes restitution over other forms of punishment.[44]

Waldorf fittingly notes, however, that "there is a tendency to romanticize local justice by downplaying its coercive aspects and its function in asserting (or reasserting) social control".[45] He echoes Eric Hobsbawm and Terence

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[41] R. G. Teitel, 'Transitional Justice Genealogy' at 89 *et seq*.

[42] United Nations Security Council, *The rule of law and transitional justice in conflict and post-conflict situations: Report of the Secretary General,* at 5.

[43] S. E. Merry, 'Legal Pluralism', in 22 *Law and Society Review*, 869, 1988, also discussed in Waldorf, *infra.*

[44] L. Waldorf, 'Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice', 79 *Temple Law Review,* 1, 2006, at 9 *et seq*, quoting J. Stevens, Penal Reform International, *Traditional and Informal Justice Systems in Africa, South Asia and the Caribbean*, 5-7, 13, 1999.

[45] L. Waldorf, 'Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice', at 10.

Ranger in their seminal work on *The Invention of Tradition*[46] in warning against the pitfalls of dealing with the local justice dimension:

What passes for harmonious, indigenous custom are more often than not "invented traditions" designed to promote social control and political ideologies. Demystifying local justice enables us to properly evaluate its role in transitional contexts.[47]

Proper evaluation of local legal practice and culture is also fundamental to understanding and interpreting the necessary level of input of the cultural context in transitional justice. Lieselotte Viaene and Eva Brems, *inter alia*, have identified the need to render transitional justice more responsive to the cultural contexts in which they operate:

In transitional justice, cultural challenges are part of a critical evaluation and reflection that is going on as part of the maturation process of the field. One of the outcomes of this process is the growing awareness among transitional justice scholars that the transitional justice template is highly abstract, general, legalistic and top-down. In a significant pendulum motion, academic thinking currently swings toward bottom-up, interdisciplinary, empirical and concrete approaches.[48]

However, in conformity to the caveat presented above in relation to local justice, Viaene and Brems issue a 'double caution' in relation to importing the cultural context:

One concerns the need to avoid incorrect simplistic notions of culture or tradition. The other relates to the risk of abuse of cultural arguments in international relations by governments attempting to cover up their shortcomings in dealing with the past.[49]

These considerations form the foundation for understanding why and how international lawyers engaging in the study of transitional justice ought to concern themselves with the cultural contexts – as will be expounded in the following section.

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[46] E. Hobsbawm and T. Ranger, *The Invention of Tradition*, 1983.

[47] L. Waldorf, 'Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice', at 6.

[48] L. Viaene and E. Brems, 'Transitional justice and cultural contexts: learning from the Universality debate', *Netherlands Quarterly of Human Rights,* Vol. 28/2, 199, 2010, at 211.

[49] *Ibid* at 220.

III- LOOKING AT TRANSITIONAL JUSTICE IN ISLAMIC SETTINGS

The opportunity to study transitional justice in relation to the Muslim-majority MENA region – with particular regard to the events of the Arab Spring – pose numerous opportunities to expand the field of transitional justice theory and practice, as well as numerous challenges linked to the complexities of political, social and cultural contexts. This section will take a theoretical approach in explaining why international transitologists should concern themselves with the study of transitional justice in Islamic settings, and then proceed to a comparative analysis of select principles of criminal justice set out in the Islamic legal tradition corresponding to those in international law (as relevant to transitional justice), encompassing elements of International Criminal Law (ICL) and International Human Rights Law (IHRL).

A. WHY SHOULD (INTERNATIONAL) TRANSITIONAL JUSTICE LOOK AT ISLAMIC SETTINGS?

As identified by Viaene and Brems, "Claims for cultural diversity and localisation need not be an obstacle to the ongoing development of an 'international law of transitional justice".[50] In the instance of introducing the concepts of (International) transitional justice into Islamic settings, much can be drawn from the existing and expanding comparative literature on Islamic law and some of the specialised regimes under PIL, in particular IHRL and ICL. Against this backdrop, "the starting point" for international transitologists "should be that universal standards can and should accommodate diversity and be responsive to local realities".[51] For this reason, the study of transitional justice with reference to Islamic settings ought to be a concern not only to scholars and practitioners operating in the MENA region, in contexts where Islamic law may be relevant, but more broadly to those engaging in the study of transitional justice from a perspective that encompasses both top-down and bottom-up considerations.

1. FRAMING THE ISLAMIC LEGAL TRADITION

For the purpose of this section, the expression 'Islamic legal tradition' is used self-consciously to indicate the body of law, legal practice and established (i.e. prior to the XX century) legal scholarship encompassing the traditional revealed sources of Islamic law, namely, the Qur'an and the Sunna/Hadith, and also the supplementary sources, namely *ijma'* (juristic consensus) and *qiyas* (legal analogy), considered here as methods of Islamic law (*fiqh*). The

[50] L. Viaene and E. Brems, 'Transitional justice and cultural contexts: learning from the Universality debate', at 220.
[51] *Ibid*.

Islamic legal tradition also includes subsidiary legal methods, such as *ijtihad* (legal reasoning), *istihsan* (juristic preference), *istislah* or *maslahah* (welfare/common good/public interest), *urf* (custom) and *darurah* (necessity), etc.[52]

Given the in(de)finite connotations of the terms *shari'ah* and 'Islamic law', the variety within what is generally denoted as 'Islamic law' (e.g. between the Sunni and Shia branches, and within the two) and the reality of the legal systems of Muslim-majority countries that present mixed systems (i.e. not solely derived from Islamic tenets), the expression 'Islamic legal tradition' seems to be a more appropriate choice of descriptor then 'Islamic law'. However, it must be noted that as these normative practices have evolved and have become incorporated into various legal systems and are being reinterpreted constantly (more or less openly) by contemporary scholars, the fact that they are labelled 'traditional' should not diminish their use and relevance for contemporary needs, including those of societies undergoing transition of radical political change.

Likewise, scholars and practitioners alike should not misconstrue the Islamic label often used to designate the positive laws of different Muslim-majority states: for instance, the positive laws of Saudi Arabia or the laws of Iran, the two most openly and self-consciously Islamic states in their institutional framework and legal structure, are the outcome of an 'ordinary' political process, thus mere crystallisations of what certain legislative bodies deemed to be Islamic in a given historical and geographic context. Without exploring these questions in more detail here, this paper rests on the (convincing) assumption that often the Islamic label is used strategically and (to a degree) ingenuously for purely political purposes.

B. Transitional Justice and International Criminal Law in Islamic Settings

The juxtaposition and interaction between International Law (and specifically for the purposes of this paper, International Criminal Law and International Human Rights Law) and the Islamic legal tradition is a reality – explicitly or latently so – of many Muslim-majority countries that adopt some form of *Shari'a* derived law. Indeed, virtually all contemporary states present a multi-tier legal system that encompasses international obligations, a centralised domestic normative framework, local regulations, religious norms and

[52] For a comprehensive overview and analysis of the sources and methods of Islamic law, this paper relies on the seminal work of M. H. Kamali, *Principles of Islamic Jurisprudence, 3rd Edition*, The Islamic Texts Society, Cambridge, 2003.

customary elements. For the purpose of transitional justice, as discusses in the first part of this paper, the criminal law space and some of its overarching questions are central in this phase. For this reason, the rest of this paper will focus on the criminal dimension of the Islamic legal tradition as relevant to transitional justice and jurisprudence.

A recurrent and widespread misconception – among lawyers and laypersons alike – regarding the relationship between ICL and IHRL as pillars of Public International Law, on the one hand, and Islamic *Shari'a*, on the other, assumes the two legal domains as dichotomous. This approach seems to reflect that peculiar tendency of some comparative legal commentators who set out to highlight differences in order to select a clear prevailing model (generally that of their own tradition), instead of engaging in a more balanced evaluation, which tends to be more conducive to an informed, constructive approach.[53] Purists of both extractions – international lawyers and *Shari'a* scholars and practitioners – have fallen into the trap of analytical prejudice which yields bitterness and suspicion at individual and institutional level to the great detriment of the course of justice. This stance has been rebutted convincingly by numerous scholars, who have instead argued convincingly that there is not only a significant theoretical overlap between the methods and objectives of international law and *Shari'a* (regardless of the sources – which are clearly of different philosophical inspiration),[54] but also that the two may (and often do) legitimately draw upon each other both in the interest of justice and to reflect and appreciate the multi-stratified complexity of the globalised legal order every person and legal person is party to.[55] Two macro-disciplines of legal scholarship may be employed to

[53] For an evaluation of the comparative study of International law and Islamic law, see D. Westbrook, 'Islamic International Law and Public International Law: Separate Expressions of World Order' *33 Virginia Journal of International Law* 819, 1992-1993.

[54] For instance, A. Maged, 'Arab and Islamic Shari'a Perspectives on the Current System of International Criminal Justice', *International Criminal Law Review* Volume 8, Number 3, 477, 2008; and M. Bohlander and M.M. Hedayati-Khakhi, 'Criminal Justice under Shari'ah in the 21st Century – An Inter-Cultural View', *Arab Law Quarterly 23* 417, 2009.

[55] For examples of fruitful analyses of both directions of legal borrowing, see M. Fadl, 'International Law, Regional Developments: Islam' in *Max Planck Encyclopaedia of Public International Law*, Max Planck Institute of Public International Law, 2010, on importing the tenets and instruments of Public International Law (PIL) inclusive of International Criminal Law (ICL) within the realm of Islamic Law; and M. Elewa Badar, 'Islamic Law (*Shari'a*) and the Jurisdiction of the International Criminal Court' *Leiden*

evaluate and support this view, namely comparative law, and law and society (socio-legal studies).[56] Due to limitations of time and space, regrettably, this is not the forum for an in-depth analysis of either, but suffice it to say that both provide theoretical and methodological cornerstones of the joint study of ICL and IHRL in the context of the Islamic legal tradition.

C. INTERNATIONAL LAW AND THE ISLAMIC LEGAL TRADITION

This sub-section discusses, on the basis of the existing literature, why international law is not incompatible with the Islamic legal tradition, thus laying the foundations for (international) transitional justice to operate without any purported and unfounded 'Islamic' exceptionalism to international law. Special attention will be dedicated to International Criminal law and the elements in International Human Rights Law that directly affect criminal justice. Without wishing to suggest that criminal justice is the only – or the most important – tool in the arsenal of transitional justice, given the theme of the conference it seems reasonable to concentrate on this component of transitional justice.

1. PUBLIC INTERNATIONAL LAW AS ISLAMIC LAW?

During the classical period of Islamic law (9th- 12th century) the legal framework of the world was binary: *dar al-islam*, i.e. the territory of Islam, and *dar al-harb*, i.e. the territory of war, supplemented by an intermediate category, *dar al-suhl*, a territory which has a pact (of peace) with the Muslims. [57] In sum, in the *dar al-islam* the community is ruled by Muslims under *Shari'a* (completely or partially) where Muslims are secured, whereas in the *dar al-harb* individuals cannot enjoy the rights and duties of the Islamic legal framework.[58] However, this condition can be averted through various means (that we cannot list here due to time constraints), including the adoption of valid international treaties and through diplomatic means, which in turn constitutes the foundation of Islamic international law.[59]

During the course of his life, the Prophet Muhammad entered diplomatic agreements with numerous non-Muslim rulers, paving the way for

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Journal of International Law, 24, 407, 2011, on the inclusion of the Islamic legal system among those considered by the international criminal judge.

[56] One of the founding texts of comparative legal scholarship is R. David, *Traité Elémentaire de Droit Civil Comparé*, 1950; for Law and Society, a useful overview is provided by L. Friedman, 'The Law and Society Movement' *38 Stanford Law Review* 763, 1985-1986.

[57] M. Fadl, 'International Law, Regional Developments: Islam', at 2.

[58] *Ibid*.

[59] *Ibid*. at 5 *et seq*.

subsequent treaties between Muslims and Christians throughout the Middle Ages and early Modernity.[60] And in the 20th century, "the active participation of Muslim states in international conferences, in the League of Nations, and the United Nations and its agencies, demonstrated that the *dar al-islam* has at least reconciled itself to a peaceful coexistence with *dar al-harb*".[61] Moreover, for some modern scholars of Islamic law, this set of events marks the end of the category of *dar al-harb*, as its function in the new world order has become obsolete.[62] As illustrated by Mohammad Fadel,

This group of Muslim jurists denied that the category of *dar al-harb* had any normative significance, and argued that it was instead an empirical category and that *jihad* was only authorized against hostile non-Muslims. The rise of international law and institutions such as the United Nations that purported to guarantee the independence of all States, secure the self-determination of the colonized, and protect, radically changed the political environment in which Muslims found themselves. This change in the international environment, according to these jurists, meant that international relations had changed from one in which war and conquest was the default rule to one in which peace and friendship was the default rule. And, according to these writers, Islam could fulfil its universal aspirations simply by virtue of international guarantees of religious freedom and the commitment by non-Muslim States to maintain a posture of neutrality with respect to the Islamic religion. In short, according to these theologians and jurists, any State that committed itself to providing Muslims freedom of religion and permitted Islam

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[60] *Ibid.* For more examples of the development of this type of law during the Ottoman Empire see M. Khadduri, 'Islam and the Modern Law of Nations' *American Journal of International Law, Vol. 50, No. 2*, 358, April 1956, at 360 *et seq*, and G. M. Badr, 'A Survey of Islamic International Law', *76 American Society of International Law. Proceedings*, 56, 1982.

[61] M. Khadduri, 'Islam and the Modern Law of Nations' at 370-371; also referring in FN 42 to the work of A.W. Dejany, 'Competence of the General Assembly in the Tunisian-Moroccan Questions', *Proceedings of the American Society of International Law*, 1953, p 53-59, on the competence of the UNGA to deal with Muslim countries .

[62] M. Fadl, 'International Law, Regional Developments: Islam', at 9, lists three prominent Islamic jurists that support the view that the category of *dar al-harb* became obsolete: Mahmud Shaltut (rector of al-Azhar Mosque University), in *Muhammad's Mission and Warfare in Islam* (1933) and *The Qura'n and Warfare* (1948); Muhammad Abu Zahra (professor of law at Cairo University), in *International Relations in Islam* (1964); and Wahba al-Zuhayli (member of the Islamic law committee of the Organisation of the Islamic Conference – OIC), in *International Relations in Islam: A Comparison with Modern International Law* (1981).

to be taught freely could not be considered part of *dar al-harb* (Al-Zuhayli 17–18, 21, 26–27).[63]

As a result of this paradigmatic shift, Fadel suggests that Islamic international law is a "set of rules that enables the creation of binding international agreements rather than impose a set of mandatory universal rules".[64] As a result of this, it would be possible to enter into international conventions consistently with the principles of Islamic international law, provided that the particular obligations are consistent with the principles of *Shari'a*. Consequently, there appears to be no overarching Islamic justification for the disregard of the core documents of ICL, including the Rome Statute founding the International Criminal Court. The only requirement under Islamic law is that the specific norms contained in ICL agreements do not contravene the principles of *Shari'a*, which, as subsequent sections of this paper argue, they do not.

In previous writings on the relationship between ICL and Islamic Law by Adel Maged, it has been noted that

"The main objectives of an efficient international criminal justice system from the prospective of Islamic *Shari'a* would be:

– To prevent the commission of serious crimes and acts of aggression;

– To bring to justice persons allegedly responsible for committing such grave crimes;

– To protect the civilians and other protected groups;

– To render justice to the victims;

– To deter criminals from committing crimes;

– To contribute to the restoration of peace by achieving justice and promoting reconciliation".[65]

This clarification is extremely useful for scholars of PIL/ICL as well as Islamic law, as it indicates that the Islamic approach to ICL is, arguably, supportive of the very core purposes of the ICL itself. Indeed, elements of 'Islamophobic' attitudes in conventional international law scholarship and practice would appear unfounded on these grounds, just as would the calls for Muslim exceptionalism to ICL on the basis of misconstrued and misrepresented Islamic arguments.

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[63] M. Fadl, 'International Law, Regional Developments: Islam', at 9, para 47.
[64] *Ibid*, at 11, para 58.
[65] A. Maged, 'Arab and Islamic Shari'a Perspectives on the Current System of International Criminal Justice', at 484.

2. INTERNATIONAL CRIMINAL LAW AND THE ISLAMIC LEGAL TRADITION

Having ascertained the premise of acceptability from an Islamic perspective of the body of ICL as a specialized regime of PIL, more specific normative provisions must be analysed. To do so, we shall briefly illustrate the main categories of crimes under Islamic law, and comment on some of the core principles of ICL as reflected in Islamic criminal law. Then, the focus will shift to the evaluation of the four core crimes under ICL (as defined in the Rome Statute) vis-à-vis the principles set out in the Islamic legal tradition.

The conventional distinction between categories of crimes under Islamic law is threefold: *hudud*, *qisas* and *diyya*, and *ta'azir*. *Hudud* crimes are considered as crimes against god, are prescribed in the *Qur'an* and *Sunna*, and constitute the backbone of the Islamic criminal order.[66] This group includes six/seven specific crimes (though there are differences of opinion among the four Sunni schools and differences with the Shia schools): apostasy, transgression (*baghi*)[67], theft, highway robbery, adultery, slander, drinking alcohol. The penalties for these types of crimes are considered to be harsh by contemporary standards, as they extend to corporal and capital punishments; a procedural remedy to this is that the standard of proof for these crimes is set at a particularly high threshold.[68]

The qisas constitute the second category of crimes, regulating murder, manslaughter, battery and other crimes against the physical integrity of the person.[69] The primary sources of Islamic law (*Qur'an* and *Sunna*) do not set out specific or mandatory penalties for these, but the wrong is regulated at human level, either through the 'talion law' (eye for an eye) or *diyya*, victim

[66] For an overview of the *hudud* crimes see M. C. Bassiouni, 'Crimes and the Criminal Process', *Arab Law Quarterly*, Vol. 12, No. 3, September 1997, at 269; M. Lippman, *Islamic Criminal Law and Procedure*, New York: Praeger, 1988; M. H. Kamali, 'Punishment in Islamic Law: A Critique of the Hudud Bill of Kelantan, Malaysia' *13 Arab Law Quarterly 203,* 1998, at 218 *et seq*; among others.

[67] Baghi in Arabic language and Islamic Shari'a is the transgression or rebellion against the legitimate leader by the use of force. For a detailed discussion of this topic, see K. Abou El Fadl, *Rebellion and Violence in Islamic Law*, CUP, 2001, at 8 *et seq*.

[68] On the harshness of punishments for the *hudud* crimes, and high standards of proof, see M. Baderin, *International Human Rights and Islamic Law*, OUP, 2003, at 75, *et seq*.

[69] M. C. Bassiouni, 'Crimes and the Criminal Process', at 269 *et seq*.

compensation.[70]The victim or his family have the right to pardon the perpetrator.

The third category, *ta'azir,* describes residual – yet conceptually quasi-infinite – offences against community interests or public order "punishable by penalties left to the discretion of the ruler or the judge".[71] These include certain criminal acts related to the *hudud* which do not present all the necessary requirements, or that do not pass the standard of proof test, as well as "all acts under the provisions of law, which are not punished by *hudud*".[72] It is under this category that one may place the bulk of statutory criminal provisions in many Muslim countries (although in many Muslim-majority countries the criminal codes and provisions are generally not presented as expressly founded in Islamic law).

These three categories of criminal offences are understood and supplemented by a multitude of so-called legal maxims (*al-qawa'id al-fiqhiyah*), that offer an indication as to the general principles of law that support the judicial function and highlight the key objectives of Islamic law.[73] Different schools of Islamic jurisprudence reflect the nuances of diverse interpretations of the holy sources and early applications of *Shari'a*; the main ones include four scholarly traditions in Sunni Islam, and three in Shia Islam.[74] It ought to be noted, however, that legal maxims are a result of the work and views of (human) Muslim jurists and not holy revelations *per se*; thus, as suggested by Sadiq Reza, they are "truly opinions rather than judgments; they are approximations or understandings of God's law rather than definitive statements of it".[75]

The broader overlap between the core principles of Islamic criminal law and ICL is striking, and there appears to be no room for Islamic 'exceptionalism' or apology/justification for non-compliance with cardinal tenets of law. These encompass (i) the principle of legality and non-retroactivity, (ii) the

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[70] *Ibid*.

[71] M. Elewa Badar, 'Islamic Law (Shari'a) and the Jurisdiction of the International Criminal Court', at 414. See also M. Lippman, 'Islamic Criminal Law and Procedure: Religious Fundamentalism v. Modern Law', *Boston College International and Comparative Law Review*, Vol. XII, NO. 1, 29, 1989, at 44.

[72]M. Elewa Badar, 'Islamic Law (Shari'a) and the Jurisdiction of the International Criminal Court', at 414.

[73] *Ibid*. at 416 *et seq.*

[74] See *inter alia* N.J. Coulson, *History of Islamic Law*, 2011.

[75] S. Reza, 'Torture and Islamic Law', 8 *Chicago Journal of International Law* 21, 2007-2008, at 26.

presumption of innocence, and (iii) equality before the law; to these are added the defences of superior orders and official capacity immunity.[76]

The principle of *nullum crimen sine lege* is enshrined in article 22 of the Rome Statute;[77] in the Islamic tradition, it is reflected in the Qur'anic verses 17:15[78], 28:59[79], 4:165[80], 6:19[81], and 5:98[82], and supported in a number of

[76] M. Elewa Badar, 'Islamic Law (Shari'a) and the Jurisdiction of the International Criminal Court', at 419 *et seq*, and M. C. Bassiouni, *The Sharia, Islamic Law, and Post-Conflict Justice* (distributed at the 11th Specialization Course in International Criminal Law, International Institute of Higher Studies in Criminal Sciences (ISISC) Siracusa, 2011) at 42 *et seq*.

[77] Art. 22 Rome Statute (*Nullum crimen sine lege)* must be read in conjunction with Art. 23 (*Nulla poena sine lege*) and art. 24 (*Non-retroactivity ratione personae*) of the Rome Statute, components and corollaries of the principle of legality.

[78] *Qur'ān* in *sūrat al-Isrā*':
(Allāh) said: "Be thou among those who have respite." (17:15) [Ali translation],
Reported in M. C. Bassiouni, *The Sharia, Islamic Law, and Post-Conflict Justice,* at 42, explaining that "the accused must first be given the opportunity to know the law, and thus no punishment can be imposed without prior law."

[79] *Qur'ān* in *sūrat al-Qasas*:
"Nor was thy Lord the one to destroy a population until He had sent to its centre a messenger, rehearsing to them Our Signs; nor are We going to destroy a population except when its members practice iniquity" (28:59) [Ali translation]
Reported in M. C. Bassiouni, *The Sharia, Islamic Law, and Post-Conflict Justice,* at 42, explaining that "establishment of the law and its divulgation (notice) must precede its application".

[80] *Qur'ān* in *sūrat al-Nisā'*:
"Messengers who gave good news as well as warning, that mankind, after (the coming) of the messengers, should have no plea against *Allāh*: For *Allāh* is Exalted in Power, Wise." (4:165) [Ali translation]
Reported in M. C. Bassiouni, *The Sharia, Islamic Law, and Post-Conflict Justice,* at 42.

[81] *Qur'ān* in *sūrat al-Ancām*:
Say: "What thing is most weighty in evidence?" Say: "*Allāh* is witness between me and you; This Qur'an hath been revealed to me by inspiration, that I may warn you and all whom it reaches. Can ye possibly bear witness that besides *Allāh* there is another *Allāh*?" Say: "Nay! I cannot bear witness!" Say: "But in truth He is the one *Allāh*, and I truly am innocent of (your blasphemy of) joining others with Him." (6:19) [Ali translation],
Reported in M. C. Bassiouni, *The Sharia, Islamic Law, and Post-Conflict Justice,* at 42.

[82] *Qur'ān* in *sūrat al-Mā'idah*:
"Know ye that *Allāh* is strict in punishment and that *Allāh* is Oft-forgiving, Most Merciful." (5:98) [Ali translation]

legal maxims and in the traditions of the Prophet.[83] Given their nature and source derivation, *hudud* crimes are anchored in the principle of legality, as are the *qisas*, through fixed procedures and punishments.[84] Conversely, the *ta'azir* crimes do pose a *prima facie* concern for the principle of legality given the wide discretion accorded to the rulers (law-makers) and judges (law-enforcers). However, this criticism has been rebutted in favour of the appreciation of the flexibility needed to deal with certain categories or crime.[85] Moreover, it could be argued that this category could in practice operate on a statute-based model, thus incorporating the guarantees of the principle of legality: the ruler in his/her legislative capacity would draft a criminal norm to reflect social needs (there is no apparent reason why this could not be done directly by a Parliament), it would be implemented by the ruler in his/her executive capacity (the Government – in the contemporary sense of the term), and enforced by the judiciary *after* the normative provision comes into force. Thus, following the structure of creation of a *ta'azir* crime as set out in classical terms, and adapting it to contemporary reality, it would not appear inconsistent with the requirements of the principle of legality, which could in fact be imported into the process and become an integral part of it. As a result, there appears to be consistency with the letter and spirit of the ICL ground norm contained in the Rome Statute.

Secondly, the presumption of innocence is set out in article 66 of the Rome Statute.[86] In the same spirit, under Islamic law, Mohamed Elewa Badar reports, "no one is guilty of a crime unless his guilt is proved through lawful evidence".[87] With specific reference to the *hudud*, the presumption of

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Reported in M. C. Bassiouni, *The Sharia, Islamic Law, and Post-Conflict Justice,* at 42.

[83] As reported by M. Elewa Badar, 'Islamic Law (Shari'a) and the Jurisdiction of the International Criminal Court', at 419. See also M. C. Bassiouni, *The Sharia, Islamic Law, and Post-Conflict Justice,* at 41 *et seq*.

[84] M. Elewa Badar, 'Islamic Law (Shari'a) and the Jurisdiction of the International Criminal Court', at 420.

[85] *Ibid*.

[86] The full text reads: Art. 66 (*Presumption of innocence*) encompasses the principle of 'innocent until proven guilty' (66.1), placing the onus on the prosecution (66.2) and setting the standard of proof sought by the court 'beyond reasonable doubt' (66.3).

[87] M. Elewa Badar, 'Islamic Law (Shari'a) and the Jurisdiction of the International Criminal Court', at 421; see also *ibid*, at 427, the reported legal maxims: 'certainty is not overruled by doubt'; 'the norm of [Shari'a] is that of non-liability'.

innocence is upheld in a *hadith* transmitted by Aisha.[88] Consistently, "it is also a well-established principle in *qisas* crimes […] that circumstantial evidence favorable to the accused is to be relied upon, while if unfavorable to him it is to be disregarded".[89] In keeping with the presumption of innocence until proven guilty for the major crimes, this same principle is also applicable to the *ta'azir*.[90] Bassiouni reports that in the Farewell Sermon, the Prophet said: "Your lives, your property, and your honor are a sacred trust upon you until you meet your Lord on the Day of Resurrection", which is interpreted as evidence of a requirement for "positive proof of crime" to interfere with an individual's interests and freedoms.[91] Thus, it is arguable that the presumption of innocence until proven guilty is a core tenet in Islamic law in a way which is compatible with the principle of ICL as presented in the Rome Statute.

Thirdly, equality before the law constitutes a founding principle of all legal systems, extends to all branches of law and as such has gradually become theoretically intertwined with the overarching principle of rule of law. Consequently, it is enshrined in the landmark post-war document, the Universal Declaration of Human Rights[92], in the International Covenant on Civil and Political Rights[93] and in numerous subsequent international law documents, and constitutes a cornerstone of ICL. Likewise, in Islamic law as well, crimes, punishments and criminal proceedings must apply equally, in order to curb the judge's discretionary power.[94] This can be deduced from *Qur'anic* verses 4:1 and 49:13.[95] Bassiouni also reports that the Prophet

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[88] "Avoid condemning the Muslim to *Hudud* whenever you can, and when you can find a way out for the Muslim then release him for it. If the Imam errs it is better that he errs in favour of innocence [pardon] than in favour of guilt [punishment]" reported in M. C. Bassiouni, *The Sharia, Islamic Law, and Post-Conflict Justice,* at 43.

[89] M. C. Bassiouni, *The Sharia, Islamic Law, and Post-Conflict Justice, op. cit.* at 43, and M. Elewa Badar, 'Islamic Law (Shari'a) and the Jurisdiction of the International Criminal Court', at 421, citing I.A. Rabb, 'Islamic Legal Maxims as Substantive Canons of Construction: Hudud – Avoidance in Cases of Doubt', *17 Arab Law Quarterly* 63, 2010, at 64-5.

[90] *Ibid*.

[91] *Ibid*.

[92] Art. 7.

[93] Art. 14.

[94] M. C. Bassiouni, *The Sharia, Islamic Law, and Post-Conflict Justice,* at 44.

[95] Reported in *ibid*. *Qur'ān* in *sūrat al-Nisā':*

"O mankind! Reverence your Guardian-Lord, who created you from a single person, created, of like nature, His mate, and from them twain scattered [like seeds] countless men and women; - reverence Allāh, through whom ye demand your mutual [rights],

adopted this approach himself, when he stated that the *hudud* punishments would be equally applicable to his own daughter.[96]

Moving on to the defence of superior orders, in ICL this is set out in Art 33 of the Rome Statute.[97] Notwithstanding the complexity in interpreting and applying this norm, it clearly rules out the "possibility of the plea of superior orders for the most odious and egregious international crimes, i.e. genocide and crimes against humanity, offences which normally involve widespread attack on innocent civilians".[98] Under Islamic law, it is understood that "Islam confers on every citizen the right to refuse to commit a crime, should any government or administrator order him to do so".[99] Moreover, the Prophet was reported as saying: 'there is no obedience in transgression; obedience is in lawful conduct only', and 'there is no obedience to a creature when it involves disobedience to the creator'.[100] Thus, this would suggest that even under Islamic law the defence of superior orders can be rebutted if the order is manifestly unlawful and the person accused knew it to be. It seems that the traditions of Islamic law do not contradict the letter and spirit of the

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and [reverence] the wombs [That bore you]: for Allāh ever watches over you." (4:1) [Ali translation].

Qur'ān in *sūrat al-Hujurāt*:

"O mankind! We created you from a single [pair] of a male and a female, and made you into nations and tribes, that ye may know each other [not that ye may despise each other]. Verily the most honoured of you in the sight of Allāh is [he who is] the most righteous of you. And Allāh has full knowledge and is well acquainted [with all things]." (49:13) [Ali translation]

[96] M. C. Bassiouni, *The Sharia, Islamic Law, and Post-Conflict Justice,* at 45.

[97] The full text reads: *Article 33: Superior orders and prescription of law*

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

(a) The person was under a legal obligation to obey orders of the Government or the superior in question;

(b) The person did not know that the order was unlawful; and

(c) The order was not manifestly unlawful.

2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

[98] P. Gaeta, 'The Defence of Superior Orders: The Statute of the International Criminal Court versus Customary International Law', *European Journal of International Law* 10, 172, 1999, at 190.

[99] A. A. Mawdudi, Human Rights in Islam, 1980, cit. in M. Elewa Badar, 'Islamic Law (Shari'a) and the Jurisdiction of the International Criminal Court', at 426.

[100] M. Elewa Badar, *supra,* at 426.

normative provisions of the Rome Statute; thus, there is no Islamic justification for non-compliance with this rule under ICL.

The other defence analysed for the purpose of this paper is that of official capacity immunity, enshrined in the III Nuremberg Principle,[101] and now in Art 27 of the Rome Statute.[102] In his comparative appraisal of this area, Mohamed Elewa Badar confidently states that 'in Islamic law, there is no recognition of special privileges for anyone and rulers are not above the law" [103] on the basis of prior findings by M.H. Kamali and A.A. Mawdudi.[104] This approach is supported by the traditions of the Prophet; Caliph Umar reports that the Prophet himself did not expect any special treatment that would place him above the law.[105]

Fair Trial and Due Process Rights

The right to a fair hearing and due process as set out in Article 14 ICCPR, as well as Articles 6, 7, 8, 9, 10 and 11 of the UDHR have been analysed and found compatible with the principles of Islamic law by numerous comparative scholars, such as Mashood Baderin[106] and Sultanhussein Tabandeh.[107]

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[101] The III Nuremberg Principle reads:
"The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible government official does not relieve him from responsibility under international law."

[102] The full text reads: *Article 27: Irrelevance of official capacity*
1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
2. 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.
For a more detailed appraisal of the immunities accorded to state agents and the ICC law, see D. Akande, 'International Law Immunities and the International Criminal Court', *98 American Journal of International Law* 407, 2004.

[103] M. Elewa Badar, 'Islamic Law (Shari'a) and the Jurisdiction of the International Criminal Court', at 426-427.

[104] These texts are: M.H. Kamali, *Shari'a Law: An Introduction*, 2008; and A.A. Mawdudi, *Human Rights in Islam*, 1980.

[105] This is reported in relation to unjustly striking a soldier at the battle of Badr; reported by M. Elewa Badar, 'Islamic Law (Shari'a) and the Jurisdiction of the International Criminal Court', at 427, citing Mawdudi.

[106] M. Baderin, *International Human Rights and Islamic Law*, at 97 *et seq*.

Some examples of specific guarantees which may be relevant to transitional justice contexts will be provided below.

Equality of parties before the courts

As noted by Baderin, "the Prophet himself and the righteous Caliphs after him demonstrated the principle of equality before the courts and tribunals both in words and in deeds", for instance when Caliph Umar reprimanded a judge for treating him more favourably due to his status and political power.[108] However, the principle of equality before the courts becomes more problematic when women are giving evidence, given the quran'ic verse indicating that a man's testimony is equal to that of two women.[109] However, Baderin points to two main factors to deconstruct the universality of this proposition: firstly, the context of this verse seems to refer specifically to commercial transactions, which were generally left to the male domain at the time the Qur'an was revealed; secondly, the rationale behind this rule seeks to serve the interests of substantive justice, and as such can be re-tuned to meet the needs of contemporary society.[110] He also brings additional evidence illustrating how this rule has now been successfully circumvented by the Pakistani Federal Shariat Court.[111] Therefore, there seems to be equivalent scope for equality of parties before the judge under the Islamic legal tradition.

Presumption of innocence until proven guilty

According to the hadith "everyone is born inherently pure", teamed with the legal principle of *istishab* (presumption of continuity), Baderin argues that under the Islamic legal tradition "an accused person is considered innocent until the contrary is proved".[112] He also reports Article 19(e) of the OIC Cairo Declaration on Human Rights in Islam, which provides for the presumption of innocence. Therefore, arguments by states suggesting otherwise on the basis of Islamic tenets are highly questionable.

Right to compensation for wrongful conviction

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[107] S. Tabandeh, *A Muslim Commentary on the Universal Declaration of Human Rights*, 1970.

[108] M. Baderin, *International Human Rights and Islamic Law*, at 100.

[109] Q: 2:282, in Baderin, *supra*, at 101.

[110] M. Baderin, *International Human Rights and Islamic Law*, at 102.

[111] *Ansar Burney v Federation of Pakistan* [1983] Pakistan Federal Shariat Court, LLD (FSC), cited in M. Baderin, *International Human Rights and Islamic Law*, at 102.

[112] M. Baderin, *International Human Rights and Islamic Law*, at 103.

Baderin notes that the "right to compensation of a personal who suffers injury or is punished through judicial error or miscarriage of justice" is recognised in the Islamic legal tradition.[113] To corroborate his argument, he reports an incident in which the second Caliph Umar was required to pay compensation to a woman who suffered this kind of injustice.[114] This point is especially relevant in the context of transitional justice, in which the course of justice may be affected by the turn of political events to the detriment of certain people involved in trials. The significance of the existence of the right to compensation for wrongful conviction in the Islamic legal tradition suggests that states may not hide behind Islamic injunctions for their decision or failure to provide compensation, and it may very well be argued by Muslim voices in positions of authority or impact that the right to compensation in these cases is in fact mandated.

IV- THIS IS NOT A CONCLUSION

The purpose of this paper was to discuss some of the themes surrounding the engagement of transitional justice in Islamic settings, mindful of the resurgence of the Islamic sentiment in the political leadership (for instance, Muslim Brotherhood in Egypt, En-Nahda in Tunisia) and public opinion in countries experiencing the Arab Spring. Focusing on some of the core themes of transitional jurisprudence, in particular issues surrounding criminal justice, this paper seeks, on the one hand, to reject suggestions that transitional justice based on international law is inappropriate for Islamic settings and calls for the engagement of international transitologists in the study of the operation of transitional justice in Islamic settings; on the other, it proposes that elements drawn from the Islamic legal tradition may be useful in presenting transitional justice to a Muslim-majority audience. Given that this is an extract of my current doctoral research, it is hoped that further investigation will assist me to expand and clarify some of my arguments and that I may also draw on the transitional justice experiences of the Arab Spring.

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[113] *Ibid* at 110.
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PART TWO
TRANSITIONAL JUSTICE: NATIONAL EXPERIENCES
DEUXIÈME PARTIE
JUSTICE TRANSITIONNELLE : DES EXPÉRIENCES NATIONALES

LE BRÉSIL

THE BRAZILIAN AMNESTY LAW: CONFLICTS BETWEEN THE SOCIAL AGREEMENT AND INTERNATIONAL COOPERATION

YURI SAHIONE PUGLIESE*

RÉSUMÉ

Le débat sur la justice transitionnelle au Brésil a récemment reçu plus d'attention. De la dictature à la démocratie actuelle, le gouvernement et la société brésilienne a entrepris des mouvements juridiques stratégiques pour faciliter la transition vers un nouveau régime et initié des transformations politiques reposant sur la confiance sociale. Cependant, ces mouvements sont remis en question au sein de la communauté internationale ainsi qu'au Brésil. La stratégique transitionnelle brésilienne laisse place au doute, à savoir si justice a été rendue concernant les violations aux droits de l'homme pendent la dictature. Ainsi, l'aspiration pour la justice perdure. Toutefois, pour comprendre cette aspiration ainsi que l'etat actuel des choses dans la juridiction brésilienne, il est important de rappeler certaines étapes de l'a histoire du Brésil.

Avec l'arrivée au pouvoir du dernier président issue de la dictature militaire en 1979 ainsi que le fin du régime dictatoriale, les militaires ont commencé a négocier au Congrès Nationale avec les réprésentants de la société civile la possibilité d'une amnistie totale, générale et sans-restriction, capable de contenter les militaires et les opposants qui ont commise des crimes cruels. Dans ce contexte transitionnel, la Loi 6.683/79 - connue sous le nom de la Loi d'Amnistie - a été promulguée. Ce acte, résult d'un accord entre société et État, était considéré comme un mécanisme politique-juridique fondamental pour renforcer et assurer la démocratie après la fin du régime dictatorial. Néanmoins, c'est cette même loi qui aujourd'hui, défi l'idéal de coopération et de juridiction internationale. Selon la communauté internationale, c'est le cas parce que la loi de l'amnistie brésilienne qui pardonne des crimes d'état ayant violé les droits humains, est trop étendue. Selon les Tribunaux Internationaux et d'autre nations, les crimes d'état qui constituent une menace pour les droits humains sont imprescriptibles et non-

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susceptible d'amnistie. Le débat sur le statut juridique des crimes d'état dans cette période transitionnelle a atteint un point culminant quand la Court Suprême Brésilienne avait maintenu les limites de la loi d'amnistie, ce qui a valu au Brésil une condamnation par la Cour Inter-Américaine des Droits Humains.

Dans cet article, j'analyserai tout d'abord les conséquences juridiques de la non-récognition par la Cour Suprême Brésilienne des crimes commis par les agents d'État brésilienne comme crimes contre l'humanité. Par la suite, j'évaluerai les conséquences de cette position en relation avec le devoir du Brésil de coopérer internationalement avec d'autres nations, en particulier celle qui ont l'intention d'établir poursuites pénales dans des cas similaires à celui du Brésil et qui demandent l'extradition du gouvernement Brésilien.

1- INTRODUCTION

On April 1st 1964, the Brazilian military led by Supreme Command of the Revolution deposed President João Goulart from power declaring the beginning of the military government. At the time, the establishment of a possible populist government was in the air due to the reforms proposed by President João Goulart. With the military coup, Brazil was ruled until 1985 by members of the Armed Forces who not only took over the leadership of the executive branch, but several key positions in the public administration. In order to hinder the threat of communism, the Brazilian State was fiercely structured with both the military and supporters of the regime.

Between 1964 and 1985, Brazil, like other Latin American countries, suffered from cruel and violent conflicts with civilians on the one side, dissatisfied with the regime, and on the other, the military leaders in power representing the state. With some contours of civil war, the Brazilian military regime was marked by the attempt to carve out an ideological thinking using all means possible, even inadmissible ones[1].

In 1979, right after the last military present Gal. João Carlos Figueiredo came to power, an armistice was being held in Congress between representatives of society and the military. With the negotiations concluded, although their credibility is still contested, the Law No. 6.683/79 known as

[1] According to the stated Min Celso Mello, the vote cast in the trial of ADPF No. 153: "Arise, then, dark sinister characters and institutions under whose auspices and authority is practiced, cowardly, criminal acts against those who opposed the political regime, and were submitted to unprecedented acts of villainy, as the practice of murder, kidnapping, enforced disappearance of persons and their physical elimination of sexual violence and torture."

the "Amnesty Law" was promulgated. With fifteen articles, only the first article of the law[2] was taken to be problematic. This article concerning the material scope of the amnesty has sparked lively debates until the present day.

The Amnesty Law was a barrier to the civilians who were willing to initiate criminal prosecution against the previous members of the military government, and civil society was only left with the civil courts to appeal to in asking for reparation of the injuries suffered at the time.

Given this legal structure and avoiding criminal prosecution, it was believed that social peace could be achieved through financial damage-reparations paid by the state and the exercise of the right of the victims to know the truth. However, this belief turned out to be false. The recent democratized Brazilian state refused to comply with the court orders that relied on the right to truth. Both victims and their families tried to take legal action to obtain information and official reports about what had happened, wishing to know precisely the reasons and the actions that militaries had done against them or against their relatives. Some were petitioning for information on the whereabouts of victims of enforced disappearances. However, all of them had the access to this information denied because the Brazilian State peremptorily refused to tell them the truth.

The Brazilian state denied to comply with its own court decisions, but the effects of this lack of cooperation did not remain limited to national boundaries. The right to truth had become an internationally recognized fundamental right and the international community was vigilant toward its protection[3].

Consequently, the obstinate behavior of Brazil resulted in the Commission on Human Rights filing a complaint against Brazil at the Inter-American Commission on Human Rights (CIDH). The CIDH, a commission based in

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[2] Art. 1 of Law 6.683/79 provides: Article 1 is granted amnesty to all those who, during the period September 2, 1961 and August 15, 1979, committed political crimes or related to these, electoral crimes, those who had their rights suspended and the political servants of the direct and indirect administration, foundations linked to the government, the servers of the Legislative and Judiciary, and the military leaders and union representatives, punished on the basis of institutional and complementary acts. § 1 - are considered related for purposes of this article, the crimes of any nature related to crimes committed by politicians or politically motivated.

[3] Articles. 32 and 33 of Additional Protocol I to the Geneva Convention of August 12, 1949 on the Protection of Victims of International Armed Conflicts

San Jose, Costa Rica, had received on March 29, 2009 a demand against the Federal Republic of Brazil called demand No. 11552 Julia Gomes Lund and others (The Araguaia Guerrilla).

The request demanded that the State be sentenced to make the truth known to society and be obliged to investigate, prosecute and punish the violations of human rights. These human rights violations consisted in enforced disappearances, torture and extrajudicial executions. The complaint of the Commission of Human Rights was that the Amnesty Law and the laws confidentiality of documents were both incompatible with the resolutions of the American Convention on Human Rights.

In 2002, parallel to the actions of the Inter-American Court of Human Rights, with victory at the polls of the then the candidate Luis Inacio Lula da Silva, the question arose on the national stage with a stronger impulse. Civil society hesitated about the new government's positions with respect to the acts committed by the military during the period dictatorship.

Despite the long time passed since the end of military regime and the promulgation of the Amnesty Law, the debate was still being taken seriously. For the first time in the history of Brazil, an openly leftist government came to power. The ministers and key advisors of the governing party had been themselves important characters of the resistance in the civil clash occurred at that time.

It was only in 2008 that the theme of transitional justice came to be debated more strongly. On July 31st, The Ministry of Justice held a seminar on the limitations and possibilities of the liability of officers that violated human rights during the period of state of exception in Brazil.

Just in the year that celebrated the 20th anniversary of the democratic Constitution of 1988, the “Citizen Constitution”, Brazil gave clear signs that the social wound caused by the dictatorship was still open and that the much-heralded social reconciliation had not yet occurred.

Still in 2008, taking advantage of this political moment and, in particular, of the in the public and notorious dissatisfaction of the Ministry of Defense with the return of the theme to the political agenda, the Bar Association of Brazil filed a claim of breach of fundamental precept (ADPF No. 153). This claim demanded the "Amnesty Law" to be interpreted "in conformity with the Constitution, to declare, in the light of its fundamental precepts that the amnesty granted by the said Act does not extend to common crimes committed by agents of the state”.

In that action, the BAR has asked the Supreme Court to declare the non-receipt of the Amnesty Law in the Brazilian legal order, especially after the enactment of the 1988 Federal Constitution the provisions of art. 1, § 1 of Law 6683 of December 19, 1979.

On April 28th, 2010, the Supreme Court (STF) of Brazil, by majority vote, dismissed the BAR's petition, claiming the impossibility to bring to criminal prosecution any of the authors of the crimes perpetrated by the Brazilian government during the nearly two decades of military government.

The decision of the Supreme Court was given seven months before the trial of the "Lund case" at the Inter-American Court of Human Rights (IACHR). The IACHR was constantly reaffirming its jurisprudence on amnesty laws with regard to enforced disappearances and extrajudicial execution. In the IACHR trial of the Lund case, Brazil was condemned and obliged to make the truth known to society, to prosecute and punish serious violations of human rights.

Although the trial between BAR and the Supreme Court has preceded the condemnation of Brazil by the Inter-American Curt, the position of IACHR on the subject was already known by the Brazilian Judiciary Court due to the trials of the cases of Barrios Altos and La Cantuta in the Republic of Peru and Almonacid Arellano in Chile.

The consequences of the divergent positions between the Brazilian Constitutional Court and the IACHR, contrary to what may seem, were not limited to the position of Brazil at the Inter-American Human Rights System.

In the case of decisions with binding erga omnes effects[4], the position adopted by the Supreme Court brought strong legal consequences for Brazil as a member of the international community. These consequences were especially significant with respect to requests for international cooperation in criminal matters, and more specifically, extradition requests.

Since the granting of extradition requests depends on the confirmation of crime in both the requesting and requested States fulfilling the condition of double criminality and double punishment, the amnesty for crimes committed

[4] On the erga omnes effect of judgments in actions for claim of breach of fundamental precept, art. 10, § 3 of Law 9.882/99, states: Article 10.Judged the action, will be far-communication to the authorities or bodies responsible for the acts challenged practice, setting out the conditions and manner of interpretation and application of fundamental precept. § 3 The decision will be effective against all and binding effect in relation to other organs of Public Power.

by the military during the dictatorial regime can cause insurmountable obstacles to the granting of extradition requests.

Thus, starting from the position taken by Brazil, this paper aims toanalyze the legal consequences of the non-recognition of crimes committed by state agents during the military regime as crimes against humanity. The analysis will explore the relationships between the State's national decision and the international duty to cooperate with other nations, especially those nations who intend to deploy the criminal prosecution against such state agents.

The proposed analysis has two perspectives: (i) that of the extradition requests relating to crimes against humanity committed abroad during the period of military government, but in which one or more acts of execution may had been practiced in Brazil or with the collusion / participation of the Brazilian state ("Operation Condor" - Ext 974/AR) and (ii) that of the passive extradition requests relating to crimes against humanity committed abroad during the period of military rule (Ext. 1.150/AR).

2. THE ACTS COMMITTED BY THE MILITARY GOVERNMENT AND THE CRIMES AGAINST HUMANITY

From the institution and repercussion of the Nuremberg and Tokyo tribunals, international precedents were developed. The understanding offered by these tribunals have been validated over time by other courts and have been consolidated as reliable instruments in safeguarding international human rights.

While many countries have recognized the international legitimacy and legality of the foregoing, there are still legal and cultural difficulties to be solved inside the countries themselves. The most obvious ones are: (i) the lack of harmonization between civil law systems (internal) and common law (international), (ii) the differing positions between the Constitutional Courts and International Tribunals. In this context of legal uncertainty, the question of the recognition of the acts committed by the military as a crime against humanity is posed.

The problem of the status of the acts committed by the military during the dictatorial regimes will be better contextualized below. In the following, the perspectives of the previous international courts, the Inter-American Court of Human Rights, the international doctrine and, finally, the understanding of Brazilian Constitutional Court will be presented.

2.1.THE INTERNATIONAL TRIBUNALS PRECEDENTS AND PERSPECTIVE

International Courts arise from the universal conviction that certain acts committed by human beings transcend the respect for the notion of

humanity, being then elevated to the status of cruel and atrocious acts. These acts that trivialize evil[5] have a special effect on human psychology.

The will to repress such kinds of crime faced material obstacles that were as important as the need to avoid impunity. At the time there was a lack of criminal typification for these kinds of criminal offenses. According to the dearth of legality as enshrined by Beccaria[6], *nulum crimen sine lege previa*, the punishment of atrocities committed during the Second World War seemed impossible.

Against this "barrier of legality"[7] a legal understanding was built based on natural law, the ius gentium. The intention was to promote criminal prosecution by reason of acts that violated pre-state and pre-legal rules. These rules corresponded to their own humanistic cultural standards in the current stage of the Western Christian civilization[8]. At the time, however, there was no internationally established criminal law.

With this perspective, between 1945 and 1946 the Military Tribunals of Nuremberg and Tokyo were established, in which violations of the laws and customs of war, that is, acts inside the scope of the crimes against humanity were going to be judged.

Years later, it can be said that the Nuremberg trials influenced the text of the International Covenant on Civil and Political Rights established in 1976. In this agreement the principle of legality was mitigated so that the possibility of crimes in the violation of international principles which were previously accepted by the international community could be accepted.

Although suffering great challenges[9], the Military Tribunals of Nuremberg and Tokyo have become important precedents for other international criminal tribunals such as those in the UN (Rwanda, Yugoslavia and Sierra Leone). Nuremberg and Tokyo served even as a basis for the International Criminal Court established by the Rome Statute.

Regarding the International Criminal Tribunals for Rwanda (1994), Yugoslavia (1993) and Sierra Leone (2000), all ad hoc, developed to meet

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[5] See H. Arendt, *Eichmann in Jerusalem,* São Paulo, Companhia das Letras, 1999.

[6] C. Beccaria, *Dos Delitos e das Penas*, São Paulo, Hemus, 1983

[7] See A.Sushek, C. Vieta, *Corte Penal Internacional*, Biblioteca del Congresso de la Nación, 2003, p.37

[8] C. Japiassu, *O Tribunal Penal Internacional*, Rio de Janeiro, Lumen Juris, 2004, p. 58

[9] In addition to the disputes concerning affront to the principle of legality, wondered if the fact that they are courts of exception promoting "peace of the victors."

and punish serious human rights violations committed by representatives of States against its own population, as Schabas[10] reports, not only the Nuremberg principles were reaffirmed, but also the UN resolutions and the decisions of the International Court of Justice. The case of Yugoslavia was innovative since in its statute it included a truly open typification clause. Instead of limiting it to typified conducts, it expressly called attention to the fact that the list of crimes in question were merely illustrative of the kind.

Faced with severe criticism directed at the ad hoc tribunals and the disrespect towards the principle of legality, the international community reached an agreement. They would establish a permanent tribunal with jurisdiction to acknowledge and judge crimes against humanity such as genocide, war and aggression. The court would judge crimes enshrined in its own Statute or under the rules of international humanitarian law after they became active. Thus, from the Rome Statute of July 17 of 1998[11], the International Criminal Court was established.

Note that the Rome Statute itself brought to the positive law the concept of crime developed in the International Tribunals that preceded it. These concepts were based on the idea of criminalizing violations of international humanitarian law[12].

Regarding the prosecution of crimes under international humanitarian law, the International Tribunals instituted precedents in order to allow punishment for acts that, while not predicted by law, are considered as importing violations of international laws and customs that existed previously form the occurrence of the punishable facts.

2.1.THE INTER-AMERICAN COURT OF HUMAN RIGHTS PERSPECTIVE

On August 7th, 1995, the Center for Justice and International Law (CEJIL) and Human Rights Watch / Americas on behalf of the missing persons during the Araguaia Guerrilla, filed a petition in the Inter-American Commission on Human Rights. The CEJIL was seeking to turn the Brazilian state responsible for the arbitrary detention, torture and forced disappearance of 70 people including members of the Communist Party of Brazil and peasants of the region. The disappearances are said to have

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[10] W. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone*, Cambridge University Press, p. 64

[11] The Rome Statute entered into force in Brazil through Decree No. 4388 of September 25, 2002

[12] C. Japiassu, op. cit., p. 13

occurred as a result of the Brazilian army operations undertaken between 1972 and 1975. On May 18th, 2009, the Commission filed a complaint before the Inter-American Court of Human Rights (CIHD).

With the procedural instruction having taken place on November 24th, 2010, the IACHR has upheld the demand to condemn the Brazilian government, among other duties, to: (i) promote the investigation and prosecution proceedings against those responsible for the disappearances; (ii) make efforts to locate the whereabouts of the victims and / or identify their remains; (iii) provide medical and psychiatric treatment for victims; (iv) conduct public act of international recognition of the facts; (v) implement a human rights program aimed at the armed forces; (vi) create the criminal offense of enforced disappearance of persons within a reasonable time; (vii) to indemnify the victims and their families.

In its ruling, the IACHR recognized that the acts performed by the Brazilian military, in particular the enforced disappearances, were crimes against humanity. The recognition happened because typical elements were identified, namely: (i) the existence of a systematic pattern applied and / or tolerated by State (ii) the deprivation of freedom, (iii) the direct intervention of state agents or their acquiescence, and (iv) the refusal to acknowledge the arrest and reveal the fate or whereabouts of the person concerned[13].

However, the Brazilian state argued that an international custom can only create a criminal offense if the criminal type had been established at the time of the facts (1972-1974). However, the universal classification of the crime against humanity in the international scenario occurred only with the Rome Statute with the establishment of the International Criminal Court in 1998.

The IACHR highlighted in its verdict that the recognition of the crime of enforced disappearance of persons for the practices carried out during the seventies finds no obstacle in the absence of current international custom. This is claimed to be so, because the Court, since its first contentious case[14], has reaffirmed that position which even predates the American Convention on Enforced Disappearance of Persons, from June 9 1994[15].

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[13] C. Bassiouni, *Introduction to International Criminal Law*, New York, Transnational Publishers Inc, 2003

[14] Velásquez Rodríguez v. Honduras.Merit.Judgement of 29 July 1988, Case and other Chitay Nech versus Guatemala, Judgement of 25 May 2010; If Ibsen Cárdenas and Ibsen Peña vs. Bolivia, Judgement of September 1, 2010

[15] The convention is still pending ratification, even though the text has already been approved by the Senate in 2011.

As for the prescription, the crime of enforced disappearance of persons has a broader perspective on the concept of permanence of the criminal offense. The consummation begins with deprivation of liberty of the person and the subsequent lack of information concerning his/her destination and extends until one is sure of the fate as well as the identity of that missing person, regardless of considering the crimes against humanity as imprescriptible.

Finally, concerning the "Amnesty Law", the Brazilian Commission concluded that the State's duty to punish crimes against humanity are unrenounceable, notwithstanding any law or rule of law terminating the criminality[16].

The ruling of the Case Gomes Lund and others ("The Araguaia Guerilla") vs. Brazil reinforces the importance of jus cogens in the consolidation of the typical elements that constitute crimes against humanity and the state's obligation to promote the criminal prosecution because it was given in a legal context largely legitimate and legal, to which the Brazilian state had previously and voluntarily joined.

2.3 THE BRAZILIAN SUPREME COURT PERSPECTIVE

Internationally, Brazil has recognized the legality and legitimacy of the acts of criminal prosecution for serious human rights violations that occurred in the last 60 years, and has signed but not yet ratified all the treaties and conventions of international humanitarian law.

It is known that there was never, by the Brazilian government or its institutions, any dispute with respect to the trials of Nuremberg and Tokyo Tribunals, of the UN's ad hoc Tribunals (ICTs) or the authority of the decisions issued by the Inter-American Court of Human Rights.

Therefore, one could reasonably conclude that Brazil, when confronted with serious violations of international humanitarian law in its own territory or violations with Brazilian participation, would adopt the international precedents and understanding showing consistency between its internal and external political practice. However, this is not what can be seen in the treatment of the crimes committed by the Brazilian State during the military regime.

Even with pressure from certain segments of the Brazilian society, the Supreme Court denied the validity in the Brazilian legal system of the international precedents, and of the common law, during the trial of the action of breach of fundamental precept No. 153 proposed by the Bar

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[16] See "VI. Conclusion "of Judge in the case Figueiredo Caldas Gomes Lund and others (" Guerrilla ") vs.Brazil

Association of Brazil, reaffirming the Roman-Germanic tradition of the country.

According to the Bar Association, the Law No. 6.683/79 entitled "Amnesty Law" would have to be interpreted in accordance with the Constitution of 1988. This had to be done in such a way that, in light of fundamental constitutional rights, it would be declared that "that the amnesty conceded to political or related crimes does not extend to common crimes committed by the agents of repression against political opponents during the military regime (1964/1985)."

Thus in this way, there would be no amnesty for those acts of atrocity that according to international standards are considered crimes against humanity, making way for the criminal prosecution of state agents, even after more than 30 years of committing such acts.

The focus point in the discussion about the amnesty is the interpretation of art. 1 § 1 of the Amnesty Law which predicts the extinction of criminal liability of those who committed political crimes or crimes linked to these. The problem is that the Law gives a particular definition for related crimes as being "crimes of any nature related to crimes committed by politicians or politically motivated."

From the expression "crimes of any nature related to political crimes", it came to be understood that acts committed by state agents would fall under the scope of amnesty, regardless of the degree of severity.

Although this understanding was established by a majority decision vote, the Constitutional Court created a gap in the Brazilian legal system. This gap occurs because international legal precedents, even those concerning crimes against humanity, cannot prevail over the constitutional laws of the country. Those laws themselves are responsible for the validation of international agreements.

Therefore, for the Hon. Eros Grau, if the crimes committed by the military during the dictatorship were connected to those crimes charged by opponents of the regime because both were inserted in a commonality of purpose (attack and defense of the regime), these were common crimes.

In addition to this argument, the Hon. Grau noted that said events since the Brazilian ratification of the main international instruments combating torture and international custom cannot overcome the principle of nullum crime sine lege.

In addition, the Hon. Gilmar Mendes voted in the sense that even if it is possible to recognize the imprescriptibility of such crimes because of the

treaties of humanitarian law incorporated in Brazil, they would not be applicable if ratified after the facts. It is not lawful, according to the national juridical structure, to apply criminal law retroactively to harm the indictee.

Moreover, as pointed out by the Hon. Celso de Mello, only internal law and not any international agreement can constitutionally qualify as a sole formal and direct source concerning the validation of the prescriptible status of the punitive claim, safe-conduct of its own constitutional exceptions.

The action was dismissed by a large majority vote but one cannot fail to note the divergent position of the Hon. Ricardo Lewandowsky. He considers that even though Brazil was passing through an internal situation of belligerence because of an "adverse psychological warfare", "Revolutionary War" or a "subversive war"[17], "yet the state officials are obliged to respect the commitments made by Brazil since the beginning of last century regarding the international humanitarian law.".

In support of their claim, the Hon. Lewandowsky cites a vote cast by Hon. Gilmar Mendes in the "Battisti Case "[18] who at the trial rejected any broad interpretation of the concept of political crimes that could include rape, pedophilia, genocide or torture. This argument was also embraced by the dissent vote of Hon. Ayres Britto.

In general, we observe that the Justices of the Supreme Court share the idea that the amnesty process is a bilateral negotiation and that negotiation is part of a much larger process of regime transition.

The prevalence of mutual forgiveness arguments obscure the discussion about the qualification of the crimes committed by the military as crimes against humanity in face of the international precedents. However, it seems clear that the Brazilian Supreme Court did not run from its traditional interpretation of the principle of legality, rejecting any form of criminality or qualification of the crimes not previously established by law.

Finally, it is important to note that the issue has not been definitively resolved because, six months later, the Bar Association of Brazil requested reconsideration of the Supreme Court in order to clarify its decision in light of the resolution of the IACHR.

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[17] These expressions are listed in the Institutional Act No. 14/69

[18] In delivering his vote in the Extradition No. 1085/IT, the Min Gilmar Mendes wrote: "In this line, certain kinds of crime regardless of their motivation or their political purpose, are not political crimes. That is, taken to extremes the opposite view, then we would have cases of rape, pedophilia, genocide or torture, among others, treated as purely political crimes, giving their authors the benefits of this framework."

3. THE UNDERSTANDING OF THE BRAZILIAN SUPREME COURT AND THE INTERNATIONAL DUTY TO COOPERATE

The Brazilian Constitutional Court decided on an erga omnes binding effect that the crimes perpetrated by state agents during the Brazilian military government are not crimes against humanity, and, therefore, could be pardoned. Eventually, this position creates legal impediment in relation to the international duty of the Brazilian State to cooperate with other States that, unlike Brazil, intended to punish their own nationals.

Similarly, the recognition of crimes committed by state agents as a common crime also appears as an obstacle to international cooperation, since they became subject to the statutes of limitations provided for in the ordinary criminal laws.

Therefore, by reason of the amnesty, or by reason of the limitation of ordinary crimes, it is not feasible to grant an extradition requests related to acts that were partly carried out in Brazil or even exclusively abroad.

It is evident that the Supreme Court protected the military of other South Americanstates, who found a safe refuge in Brazil against the criminal and political persecution in their home states. However, the actions of the Supreme Court with respect to requests for extradition of South American military agents, adopted totally incompatible legal positions. If analyzed in light of the precedent of the "Amnesty Law" in Brazil, the Supreme Court decisions demonstrated a clear political position in order to not interfere with the measures relating to transitional justice in each country.

In other words, the amnesty applies to cases that occurred entirely in Brazil, but is not valid for those who have had the participation of the Brazilian government as part of an international criminal organization. But what about the obstacle of not recognizing the existence of crimes against humanity and the subjection of them to the prescription of a common crime? By means of a flexible hermeneutic exercise, the category of common crimes was extended to these acts, alongside the removal of time limitations.

In order to better demonstrate the inconsistent and controversial decisions of the Supreme Court I will analyze the extradition proceedings No. 974/AR and 1.150/AR under the following conditions of extradition: (i) double criminality; and (ii) double punishment.

3.1. EXTRADITION 974/AR

In 2005, the Republic of Argentina sent to Brazil an extradition request against the military Uruguayan Juan Manuel Cordero Piacentini who may have perpetrated several offenses, including participation in the criminal

organization called "Operation Condor" and in the enforced disappearance of persons.

The request was made on the basis of extradition treaties between countries, internalized by the Decree No. 62979 of the 11th July, 1968 and later amended to include the crime of suppression and assumption of civic identity, forgery of public documents and kidnapping of underaged people, due to new alleged facts.

3.1.1. THE LEGAL FRAMEWORK AND THE DOUBLE-INCRIMINATION

On request, the Republic of Argentina supported the implementation of criminal sanctions provided in Arts. 144 bis, paragraph 1 and 210 bis of the Argentinian Criminal Code as well as the requirements contained in the Inter-American Convention on Enforced Disappearance of Persons.

In turn, in addition, it indicates a breach of the provisions contained in articles 139, No. 2 and 293 of the Penal Code, as well as several international conventions on human rights that the Argentinian Republic is a party.

Although Argentina has ratified most international conventions on human rights, such as the Inter-American Convention on Enforced Disappearance, which enabled the treatment of the alleged crimes as crimes against humanity, there was no indication of any kind of petitions relating specifically to crimes against humanity.

In fact, Argentina has no specific criminal offenses to indicate crimes against humanity[19]. So Argentina is forced to resort to the traditional criminal types to judge the events of its dictatorships.

However, the criminal offense was described in the petition as a crime against humanity because of the characteristics of the particular facts and the legal substratum of humanitarian law to which the Republic of Argentina was linked.

It remains a moot point, through the lenses of criminal typification and as a guarantee of foreign factors against foreign extradition request, whether one can create an offense of crime against humanity, describing the common types of domestic criminal law, by combining these with international agreements and international precedents.

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[19] See E. Malarino, *Persecución National Criminal Crimen Internacionales en America Latina y España*, and Ezekiel Malarino Both Kai (ed.), Konrad-Adenauer Stiftung 2003, p. 40/60

Although this process of creation may seem absurd, prima facie, this is nothing more than playing on the same creation process done by the Nuremberg Tribunal, where it was expanded the typical range of war crimes to cover the atrocities perpetrated by Nazis.

Moreover, the Inter-American Court of Human Rights, by extending its jurisdiction to both Argentina and Brazil, endorses the application of jus cogens in respect of the facts practiced by South American dictatorships.

The fact is that Argentina, like Brazil, has no specific type of criminal offenses related to crimes against humanity, nor facilitates immediate incorporation of international documents and precedents, because they adopt the moderate monist theory, which demands previous ratification of international documents by the Congress, despite the signing.

Not even the authority of the IACHR can be imposed to remove the basis of their Roman-Germanic legal systems, because the Court has no criminal jurisdiction, and their pronouncements are more like criminal guidelines to be followed by states, because they are devoid of enforceability.

On the Brazilian side, the Supreme Court, after receiving the request for extradition, narrowed the allocation of the same two offenses: (i) conspiracy (art. 288 CP) and of (ii) qualified kidnapping (art. 148, § 2 of the CP).

As for the crime of conspiracy, there seems to be no more difficulties to recognize the identity of offenses because both countries regulate conspiracy as a criminal offense.

On the other hand, the offense of qualified kidnapping does not approach the concept of the crime of enforced disappearance. In the first case, the illegal detention is followed by the intentional lack of information in order to deprive the victim of legal means of protection, while in the second, it would be classified only as a serious kind of deprivation of freedom.

However, when dealing with deprivation of liberty, even if qualified, a tort simpler than the enforced disappearance of persons and the dearth of specific criminal offense in both countries, according to the principle of subsidiarity, may amount to the typical conformation required to allow the extradition[20].

[20] Hon. Marco Aurelio dissented to admit the charge o deprivation of freedom because the victims should be presumed dead, considering that the facts occurred in 1976, but the Court conclude that was impossible to charge the crime of murder without the victim's body.

3.1.2. THE DOUBLE PUNISHMENT AND PRESCRIPTION

After overcoming the requirement of double punishment, it remains necessary to observe whether the conduct imputed to the person sought is punishable under the most favorable law of the countries. In this case, the analysis of double punishment will be limited to finding whether or not the prescription of the claim and the punitive effect of the "Amnesty Law" apply.

In face of arguments regarding the statute of limitations, the Republic of Argentina states that it did not occur to the extent that the Inter-American Convention on Enforced Disappearance of Persons Article VII claims that the state's intention to punish and the penalty to be imposed in relation to such facts is indefeasible.

Argentina, in advocating non-occurrence of the prescription, said that despite the fact that the Convention entered into force after the events occurred, there would be no obstacle in relation to its application, because the spirit of the Convention is inserted within the idea of jus cogens[21]:

The invocation of jus cogens by Argentina to justify the non-occurrence of prescription is not, as already explained, enforceable against the Brazilian State, which categorically denied the applicability of customary international criminal law, and has not ratified the Convention.

Likewise, the crime charged occurred more than thirty years ago, a period well above the higher limitation period provided for in Brazilian Criminal Law, which is twenty years.

Thus, for the crime of illicit association of persons (conspiracy), a time prescription was identified . However, the Constitutional Court acknowledged the crime of deprivation of liberty to be punishable, arguing that its consummation still persisted, over thirty years later, as people who have had their freedom subtracted were not found until today, nor their deaths were unequivocally proven.

In Brazil, the Law 9.140/95 legally recognized as dead all the people who have been accused of involvement in political activities from September, 2nd, 1961 and October 5th, 1988.

Thus, if the execution of the deprivation of freedom began in 1976 as stated in the request for Brazil, it presumably lasted until October, 5th, 1988, when all were recognized as dead.

Similarly, it was also argued that the Brazilian Civil Code of 2002 Art. 7 presumes dead any person in life-threatening circumstances or that had

[21] See Cf.CSJN Decision Making: 327:3312, the vote of Dr. Antonio Boggiano

been taken prisoner and was not found in up to two years after the end of a war. Furthermore, Art. 22 of Law No. 14.394/54 of Argentina also provides for the presumption of death of a person who is absent from home for more than three years, but about whom there has been news.

If the understanding of Hon. Marco Aurelio, assuming the applicability of the presumption of death had prevailed, the extradition should have been denied, because since 1998 more than 20 years passed, which is the maximum prescribed statute of limitations for the crime of aggravated homicide (art. 121, § 2 of the Criminal Code).

As to the charge of the crime of kidnapping of underaged people, the prevailing view qualified these as analogous to kidnapping, that is, that while the children are not returned to their families, even though they spent more than thirty years away, there remains the consummation of the offense, although the factual issue is much more related to ignorance on the part of children kidnapped of their true affiliation than their deprivation of liberty.

It is likely that a baby taken from his mother, who was in prison and given to another family for enforced adoption is suffering illegal constraint of his freedom after completing thirty years. The scarce factual data about the time of termination of the criminal provisions remains a particular case. One can imagine that with the scope of civil majority, there is no reason to believe that a person can still be obliged to live under the supervision of foster parents. Anyway, being the age of eighteen years considered the age of majority in Brazil, the crimes were consummated at least twelve years before, well above the limitation period of four years provided for in Brazilian law (Art. 249 c / c 109, V all the CP).

It is interesting to note that the argument in favor of the permanence of the offense of deprivation of liberty until the person or their remains are identified has been used by the IACHR in the enforced disappearance of persons, considered to be a crime against humanity, to justify their competence for events that occurred prior to the recognition of the Court's contentious jurisdiction by Brazil. The argument for adopting such a simple kidnapping offense, even if in the qualified form, appears disproportionate in allowing perpetuity of the act, featuring the imprescriptibility hypothesis, for cases without any expression.

Finally, in relation to the obstacle to granting extradition on the grounds of validity of the Brazilian "Amnesty Law", it is important to note that Ext No. 974/AR was decided before the trial of ADPF No. 153, so that regardless of the outcome, the presumption of validity of the "Amnesty Law" was present, preventing the granting of extradition

Nevertheless, the votes of the judges are clear in refusing to consider the case under the "Amnesty Law", since some of these judges were anticipating their votes and while for others there was a possibility of deciding the Ext No. 974/AR in a different way than ADPF No. 153.

The importance of the amnesty law as an impediment to the granting of extradition is not limited to the declaration of termination of punishment of political crimes and to those committed by state officials. Furthermore, there were identical factual situations (enforced disappearance of people, deprivation of liberty and unlawful association committed by state agents) which occurred in the territory.

The Ext No. 974/AR refers to a member of the so-called "Operation Condor", a criminal organization of which the Brazilian government also took part. Although the episode narrated occurred in Argentinian and Uruguayan territory without the direct participation of Brazil, such an organization had proven activities in Brazil and with the participation of agents of their armed forces.

Therefore, if the acts committed by the organization "Operation Condor" in Brazilian territory cannot be punished in Brazil due to the existence of the "Law of Amnesty," Brazil cannot recognize punishable acts committed by the same organization outside its borders.

Overcoming the barrier of amnesty and violating its own internal legal system, the Supreme Court authorized the extradition of Juan Manuel Cordero Piacentini, creating, even before the trial of ADPF No. 153, two different legal scenarios: (i) the internal, where there is no punishment, and (ii) international, which overcomes the legality in favor of cooperation with countries.

3.2. EXTRADITION 1150/AR

In 2008, the Republic of Argentina, based on the Extradition Treaty signed between the countries, internalized by Decree No. 62979 of July 11, 1968, sent an extradition request to Brazil for the Argentine military Norberto Raul Tozzo for allegedly carrying out several crimes of aggravated homicide and enforced disappearance of persons in the case of so-called "Massacre Margarita Belém".

3.2.1 THE LEGAL FRAMEWORK AND THE DOUBLE-INCRIMINATION

On request, the Republic of Argentina supports the implementation of criminal offenses provided in arts. 80, item 2 and 6, 141, 142, item No. 5, all of the Argentinian Criminal Code.

The point to be made in the analysis of double-incrimination of the extradition request No. 974 is different from the legal framework of the extradition request No. 1150, specifically concerning the crime of deprivation of liberty.

In 2008, the year of submission of application No. 1150 and three years after sending the extradition No. 974, there was legislative change to consider the conduct of imprisonment more serious if the agent at the time of the commission of the offense had been a member of the armed forces or other security force.

The Ext No. 1150 was ruled on May 19, 2011, or ten days after the publication of Law 26.679 of Argentina. The law included in the Argentine Criminal Code article 142 which defines the crime of enforced disappearance of persons.

The Brazilian Supreme Court did not observe the legislative amendment, which has a clear influence on the outcome of the trial, for it was the reason for the failure to recognize the double-incrimination characteristics of the common crime of kidnapping from the effective date of the new criminal offense, considering the continuity of the offense.

For Argentina, the facts described yielded to the concept of enforced disappearance of persons, but for lack of criminal offense itself, they were criminalized as kidnapping, lengthening the duration until the victims or their remains were located. The same interpretation was given by Brazil when the trial extradition No. 974.

According to the same notion of ongoing crime, if the crimes were committed so far , from May 9, 2011, kidnapping became enforced disappearance of persons, a crime in itself.

Apparently, nothing would change regarding the application by the Supreme Court, which could continue to apply the alternative for the crime of kidnapping. However, the Supreme Court itself explicitly recognize the atypical nature of crimes against humanity in Brazil, especially those provided in the Rome Statute.

Thus, since May 9, 2011, the case is no longer an imputation of kidnapping with contextual elements of enforced disappearance in both countries, and has become a crime of enforced disappearance in Argentina and in Brazil a non-offensive act.

Were it not so, the Justices of the Supreme Court would not have repeatedly stated the absence of previous law to punish crimes against humanity, as one of the obstacles to criminal prosecution to the Brazilian military.

3.2.2 THE DUAL-PUNISHMENT AND PRESCRIPTION

The extradition request under consideration has two important characteristics, in comparison to the extradition request No. 974/AR discussed above. The first is that his trial took place four months after the trial of ADPF No. 153, which ruled valid the Amnesty Law in Brazil and the second is that unlike the previous case, the facts took place in foreign territory, but without the participation of agents of the Brazilian state in the perpetration of the facts or in any kind of criminal organization.

Despite these peculiarities, the conclusion could not be different. First, because the crimes charged are covered within the Supreme Court itself in the ruling of the ADPF No. 153 which defined them as crimes related to political activities. Thus, the foundation of Hon. Carmen Lucia is wrong once she moved away the obstacle of political crime and, in turn, the Brazilian amnesty for the granting of extradition, because the provisions of the Extradition Treaty signed between Brazil and Argentina and the Agreement on Extradition between Member States of Mercosur and Chile and Bolivia.

Secondly, as the reiteration of the view taken in Ext No. 974/AR, that the crime of kidnapping is still being accomplished while the victims or their bodies are not identified, ultimately become a contradiction in terms with one of the foundations used by Min. Carmen Lucia to remove the political character of the offenses, that the Republic of Argentina lives in normal democratic situation.

Assuming that the Republic of Argentina is living in a situation of democratic normality, it is impossible to recognize the permanence in the maintenance of Peronist prisoners, communist or any other political orientation of opposition to military rule on false imprisonment to the present day.

That is why such criminal provisions should cease with the end of the regime. The application of the Criminal Law should maintain some consistency in all its aspects.

In other words, the notion of continuing duration of the crime of kidnapping until the victim or their remains are found is taken to extremes to imagine the possibility of punishing an agent more than 30 years later and after the punishment if the whereabouts of the victim continues to be unknown.

As it is an ongoing crime, even after conviction, each passing day there would be criminal repetition, creating a vicious cycle which should lead the agent to life imprisonment.

Thus, it is possible to work with an estimated average life of the victim to assume the time of termination of continuing duration, as an alternative to

any obstacle to the application of the institute of presumed death, but it cannot be the only criterion. If the victim is young the possibility of life imprisonment will present itself again.

On the other hand, if one can import concepts of the crime of enforced disappearance of persons, such as the Supreme Court did to recognize the end of the ad infinitum deprivation of liberty, the very type of contextual element of the enforced disappearance of persons indicates the end of the continuing duration. If the crime needs to be carried out by a state agent or by a person acting with the support, aid or assent of the State, when the state withdraws the authorization, support or assent, there is no longer one of the elements of the crime.

Therefore, the claim of the Supreme Court to take the duration of the fictitious imprisonment to points that are distant from the factual context constitutes matter of true legislative innovation, since it is more serious than the interpretation from the analysis of the offense of enforced disappearance of persons that is intended to be substituted by a less serious offense.

In this case, the issues relating to the duration of the offense of deprivation of liberty go beyond theoretical frameworks or fictions. As in the file, the defense brought in condemnatory criminal sentence of other soldiers who also participated in the "Massacre of Margarita Belén", for the crime of murder perpetrated against the same people were supposed to be missing.

The Supreme Court should never allow the extradition of a person for the permanent deprivation of liberty of people who were declared dead and whose murders were attributed to third parties. The argument of the Attorney General is that the presumption of death is not recognized in Brazil is not convincing. Therefore, specifically in the case of charges of murder after deprivation of liberty is not allowed to the Supreme Court to refuse to know the foreign sentence, even without approval.

As for the crimes of homicide, even though being a qualified act, and therefore, more serious, the Supreme Court does not recognize the punishment because the facts have occurred more than thirty years before, moving beyond the limitation period provided for in the largest Brazilian Penal Law, which is twenty years.

4. CONCLUSION

The international community is still undergoing a period of consolidation of the ideal of universal prosecution of crimes that undermine the concept of humanity.

The treaties, conventions and precedents of international tribunals relating to international humanitarian law served as a real material basis for the creation of international criminal types, and the latter also served to delimit the jurisdiction of the International Criminal Court.

Notwithstanding the fact that the States at the international level have not questioned the effectiveness and validity of documents signed in the last century, as well as the legitimacy of the ad hoc tribunals, it is seems that internally their position is different.

The confrontation between the Brazilian and Argentinian reality shows two different views of the application of international criminal law, in particular on its chapter about crimes against humanity in their internal plans.

While Argentina promotes the transition from regimes adopting measures declaring unconstitutional the pardons granted to the military and establishing criminal prosecution, among other measures, Brazil opted to promote national reconciliation adopting, among other measures, a broad, general and unrestricted amnesty, due to a widespread national debate.

In Brazil, the international pressure from the Inter-American Court of Human Rights which issued a complaint against the country for human rights violations during the dictatorship disrupted the conciliatory spirit of the amnesty, which is the reason why the Supreme Court upheld the full extinction of criminal liability.

However, the Supreme Court's decision could not be reserved for the particularity of the Brazilian case, since South American participants of the dictatorial regimes of their countries that even cooperated with the Brazilian regime eventually established residence in Brazil.

Therefore, by the organic law, the decision on the validity of the amnesty granted in the country hindered the other country’s intentions of suing the military because Brazil would never allow their extradition.

Against all expectations and in favor of the duty to cooperate internationally with nations, the Supreme Court has innovated the legal interpretation borrowing features from the crime of enforced disappearance of persons to the common crime of kidnapping. Finally, the Supreme Court granted both requests for extradition ignoring the existence of the extinction of criminal liability in the Amnesty.

The two cases studied show that there are two serious problems that need to be resolved in the long term. The first is that there is still an important gap in the Brazilian law on the possibility of punishment of crimes against humanity committed before the ratification of the Rome Statute; and the

second is that the ordinary criminal law does not lend itself to punish crimes against humanity, either by their failure in the writing of crime types, or because of insufficiency of their stipulated penalties.

There is at least the prospect that Brazil will complete the internalization process of international documents concerning the prosecution of international crimes, reforming its legal system to a common international standard. Although, it is known that with respect to the "years of lead", the country had chosen to bury its past.

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LE BURUNDI
DÉFIS ET PERSPECTIVES D'UNE JUSTICE TRANSITIONNELLE GLOBALE AU BURUNDI

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ABSTRACT

The Burundian study case presents some particularities among transitional justice process. Whereas the Arusha peace and reconciliation agreement for Burundi in 2000 decided setting up two transitional justice instruments, a special chamber and a Truth Reconciliation Commission the transitional justice process hasn't begun yet. Only National Consultations were organized in 2009. The negotiations and the mediation occurred during the ongoing war. There were no winners and no losers but just armed men who decided to discuss in order to conquer each respectively the power and then to keep it. That may explain why negotiations were so longer and staggered. A sort of consociativisme system was set up in Burundi as the model organization of power-sharing. Inside the politic game of power-sharing the peace-justice dilemma appears through manipulation of retributive justice which is assimilated to justice and the truth and pardon which claim referring to peace. Another particularity is found regarding numerous judicial and legal reforms relatively to children rights, lands conflict, electoral law or Criminal Code. Nevertheless, the bigger problem remains hard to resolve is the dependence of justice institution and magistrates to the political power. The Burundian context appears as an illustration of the extensive meaning of transitional justice. The global nature of the matter is emerging through its temporal and disciplinary versatility. On one hand, transitional justice seems to be past justice, currently justice and future justice at the same time and on the other hand it may take several forms outside the official one initially predicted.

Le Burundi, pays de l'Afrique de l'Est souvent assimilé à son voisin rwandais à cause de leurs similitudes ethniques, a pour autant connu une histoire

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criminelle très différente. En proie à des cycles de violences depuis son indépendance en 1962, l'ancien royaume est encore aujourd'hui divisé quant à la qualification à donner aux crimes commis contre une majorité de Hutu en 1972 et ceux perpétrés envers une majorité de Tutsi en 1993[1]. Ces deux périodes dramatiques sont considérées comme étant les plus meurtrières et donnent lieu à une concurrence des victimes quant à la revendication du crime de génocide de part et d'autre[2]. Le terme « événements » est diplomatiquement préféré à tout autre qualificatif dans l'attente d'une décision de justice qui mettra enfin un « mot juridique » sur ces horreurs. C'est à la suite des tueries de 1993 que l'opinion internationale, émue et choquée par le manque d'anticipation dont elle fit preuve pour le génocide rwandais, qu'un processus de paix a pu s'enclencher à partir de 1998 débouchant sur la signature des Accords d'Arusha pour la Paix et la Réconciliation au Burundi le 28 Août 2000[3]. En 2011, ont été nommés les experts ayant la lourde responsabilité de mettre en place la Commission Nationale pour la Vérité et la Réconciliation (CNVR), sans que soit évoqué l'établissement d'un tribunal spécial (TS) pour le Burundi. Alors que le projet de loi portant création de la CNVR burundaise a été voté en 2012, l'institution n'a toujours pas vu le jour.

À l'instar de son voisin rwandais, le Burundi présente la particularité de ne pas avoir expérimenté un processus de justice transitionnelle alliant politique de lutte contre l'impunité et objectif de réconciliation de façon aussi opportuniste et engagée. A l'inverse, la transition politique burundaise est le fruit de négociations échelonnées et de longue durée autour de la question du partage du pouvoir. Dépourvue de vainqueur comme de vaincu, l'idée de la justice transitionnelle amorcée à Arusha en 2000 n'a trouvé un début d'application qu'en 2009 lors de l'organisation de consultations nationales (CN)[4]. Ce laps de temps considérable (quasiment dix ans) entre l'accord de principe sur la mise en place d'un double mécanisme de justice transitionnelle, un TS et une CVR, et l'amorce d'une réalisation concrète, s'explique par une autre spécificité du contexte burundais, la signature d'un accord de paix au cœur même de la guerre civile et sans les principales

[1] Le Burundi compte huit millions d'habitants et est composé d'environ 85% de Hutu, 14% de Tutsi, 1% de Twa et de Ganwa appartenant à la lignée royale.

[2] CENAP, *Traiter du passé et construire l'avenir : la place de l'histoire dans la thérapie collective,* mars 2010, en partenariat avec Interpeace, 49 p.

[3] V. Accord d'Arusha pour la paix et la réconciliation au Burundi, 28 août 2000.

[4] Pour une analyse du déroulement des négociations V. C. SCULIER, « Négociations de paix au Burundi. Une justice encombrante mais incontournable », Center for humanitarian Dialogue, mai 2008, 56 p.

parties aux affrontements. Les récents événements, lors des élections présidentielles de 2010, ont démontré que le régime consociatif, dont a pu être qualifiée la configuration politique du pays, n'a pas été renouvelé[5]. Le boycott des élections par les partis d'opposition a démontré l'attachement à une logique de conquête militaire et exclusive du pouvoir et non pas la concession d'un partage du pouvoir au sein d'un système politique démocratique concurrentiel[6]. À sa place, le pouvoir du CNDD-FDD[7] s'est indéniablement renforcé pour finalement enterrer une position politique hégémonique. Au sein du jeu politique du partage du pouvoir le dilemme entre paix et justice apparaît à travers l'instrumentalisation de la justice rétributive assimilée à la « Justice » et la vérité et le pardon réclamés au nom de la « Paix ». Ces évocations restent cantonnées au registre des discours mais dans une perspective historique, la justice rétributive a toujours été utilisée comme moyen de disqualification ou d'élimination physique des opposants politiques.

La spécificité du Burundi en matière de justice transitionnelle, qui tient à l'inertie du processus officiel auquel répond la persistance à maintenir sur l'échiquier politique international la priorité de la question, démontre que cette justice spécifique peut prendre différents visages en dehors des schémas « classiques » qui lui sont d'habitude destinés. Toutefois, la quasi-absence d'une justice transitionnelle institutionnelle constitue un obstacle au développement des initiatives extra pénales et informelles. Par conséquent, moins qu'un concept figé c'est à un système flexible que semble davantage correspondre la justice transitionnelle qui entend établir la vérité, réparer les victimes et rendre la justice afin de réconcilier un peuple divisé.

D'une part, une des particularités du cas burundais tient au nombre de réformes judiciaires et juridiques entamées pendant la transition. En effet, le droit des mineurs, le droit foncier, le droit électoral, le code pénal ou encore

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[5] V. S. VANDEGINSTE, *Law as a source and instrument of transitional justice in Burundi,* Thèse de doctorat (Dir. Koen De Feyter), Université d'Anvers, Belgique, 2009, 683 p., S. VANDEGINSTE, « Burundi : entre le modèle consociatif et sa mise en œuvre », dans S. MARYSSE et al. (dir.), *L'Afrique des Grands Lacs. Annuaire 2007-2008*, Paris, L'Harmattan pp. 55-76 et S. VANDEGINSTE, « Le processus de justice transitionnelle au Burundi. L'épreuve de son contexte politique », *Revue Droit et Société*, 2009/3 (nº 73), pp. 592-593.

[6] V. International Crisis Group (ICG), « Burundi : du boycott électoral à l'impasse politique », Rapport Afrique N°169, 7 février 2011, 33 p.

[7] Acronyme pour Conseil National pour la Défense de la Démocratie-Forces de Défense de la Démocratie, parti politique à la tête duquel se trouve Pierre Nkurunziza, l'actuel président de la République du Burundi.

le code de la famille font l'objet ou ont fait l'objet de modifications sans compter l'adhésion du Burundi à la grande majorité des textes internationaux de protection des droits humains existant. Toutefois, cette logorrhée législative se heurte indéniablement à un problème général de taille et de fond : la question de l'indépendance du pouvoir judiciaire. Des défis plus spécifiques relatifs à l'adaptation des standards internationaux au contexte local, et inversement, à l'application des nouveaux textes ou encore à la non-exécution des décisions sont également à distinguer. Le blocage dans l'application de la justice transitionnelle du passé contraste avec l'effervescence qui caractérise la justice transitionnelle du futur et du présent par le biais des réformes judiciaires et juridiques. À l'analyse, la corrélation entre ces deux figures de la justice conduit davantage à conclure à une interdépendance entre elles et à une transcendance temporelle de la « Justice ».

D'autre part, le blocage de la justice transitionnelle institutionnelle burundaise n'est pas la seule manifestation de ce processus. Durant plus de dix ans diverses activités ont été mises en place par la société civile et divers acteurs, distincts de ceux mobilisés au sein du processus officiel, ont joué un rôle significatif quant au maintien de la question de la justice transitionnelle au sein du débat public. Tant la revendication et l'instrumentalisation politique de la paix, par l'évocation de la CVR, ou de la justice, par l'évocation du TS, dans les discours que les initiatives développées hors du cadre pénal et/ou institutionnel ont contribués à une extension épistémologique de la justice transitionnelle. Celle-ci démontre l'éminente globalité d'un processus nécessairement évolutif et flexible qui déconstruit et réinvente le sens à donner au terme « Justice ».

I. LA GLOBALITÉ TEMPORELLE OU LE PRAGMATISME D'UNE JUSTICE ÉMINEMMENT POLITIQUE

Globale, la justice transitionnelle l'est temporellement. Son ambition consistant à agir sur les crimes du passé et à prévenir leur réitération dans le futur atteste d'une certaine tendance : celle d'une justice non pas du moment mais qui concilie les temps de la Justice en mettant en exergue leur indéniable connexité. Le cas burundais est en ce sens riche d'enseignements car aux blocages subis par la justice transitionnelle du passé s'oppose l'encouragement formulé envers la justice transitionnelle du futur. Cependant, loin d'être autonomes ces deux champs d'interventions s'avèrent interdépendants. Une telle proximité interroge l'impérieuse nécessité du traitement des crimes du présent en complémentarité avec celui des exactions du passé et de la prévention de ceux de l'avenir. Parmi

cet agrégat temporel s'immiscent également des voix extra pénale non pas seulement parce qu'elles ne sont pas judiciaires mais parce qu'elles concernent d'autres matières du Droit pourtant toutes vouées à l'objectif de réconciliation et/ou de reconstruction nationale.

A) LA CONCURRENCE ENTRE UNE JUSTICE DU PASSÉ COMPROMISE ET UNE JUSTICE DE L'AVENIR OPPORTUNE

La réticence à appliquer les prescriptions de l'Accord d'Arusha relatives aux mécanismes de traitement du passé s'explique par des limites à la fois conjoncturelles et structurelles. Au titre des premières figure le manque de volonté politique qui transparaît à travers des négociations de paix laborieuses et l'argument de la priorité électorale. En effet, la justice transitionnelle a été analysée par les acteurs politiques comme un moyen de disqualification et non pas de réconciliation. La particularité consociative du Burundi, qui s'explique par l'absence de vainqueur et de vaincu à l'issue du conflit, peut difficilement se concilier avec un processus de justice transitionnelle qui inquiéterait les principales parties aux négociations situées aux plus hautes sphères de l'État[8]. Par ailleurs, l'impunité qui gangrène le pays depuis plus de quarante ans rend d'autant plus difficile l'application d'un processus basé sur le principe de lutte contre l'impunité[9]. La défiance ressentie par la population envers des institutions judiciaires corrompues se traduit par une défection de celles-ci au bénéfice d'un recours à la justice coutumière des *Bashingantahe*[10]. Autre phénomène

[8] V. S. VANDEGINSTE, « Burundi : entre le modèle consociatif et sa mise en œuvre », *op. cit.*

[9] V. NINDORERA (E.), *Le défi de l'impunité et les mécanismes de justice transitionnelle*, communication, Ngozi, le 3 février 2005 et Ligue des Droits de la personne dans la région des Grands Lacs (LDGL), « Burundi : quarante ans d'impunité », Rapport final, juin 2005, Kigali, 67 p. www.er.uqam.ca/.../Etude%20sur%20l'impunité%20au%20Burundi%20(LDGL)_0.doc

[10] Asumpta Naniwe-Kaburahe précise que *« dans le langage courant, le terme Bashingantahe (singulier : Umushingantahe) désigne des hommes intègres chargés du règlement des conflits à tous les niveaux, depuis la colline jusqu'à la cour du roi »,* A. NANIWE-KABURAHE, « L'institution des *Bashingantahe* au Burundi », dans L. Huyse et M. SALTER, *Justice traditionnelle et réconciliation après un conflit violent. La richesse des expériences africaines,* IDEA, pp. 159-188. Le terme est formé de l'association entre le verbe « *gushinga* », planté, fixer et du substantif « *intahe* », baguette de justice pour littéralement signifier «*celui qui fixe le droit* ». La référence à une « baguette » provient de la pratique selon laquelle les sages frappent le sol avec un bâton pour appeler la sagesse des ancêtres et souligner la force des jugements

significatif de cette crise de confiance, la justice populaire, tolérée par des représentants de l'État au niveau local voire encouragée, connaît une expansion certaine substituant à la justice publique la justice privée[11]. Face à cette confiscation du processus de justice transitionnelle du passé par l'élite politique, les contre-pouvoirs potentiels ne constituent que des alternatives lacunaires ou ponctuelles. D'une part, la société civile bien que constituée sous la forme d'un groupe de réflexion sur la justice transitionnelle (GRJT) a connu des difficultés de cohésion et demeure associée à l'opposition. Pour autant, si dans le passé son influence n'était que minime, elle s'implique davantage aujourd'hui tout en éprouvant des difficultés à se faire entendre et tout en demeurant éminemment urbaine, par conséquent peu représentative de l'entièreté de la population à 90% rurale, et « alimentaire ». D'autre part, la justice traditionnelle, même si elle est toujours considérée comme étant un vecteur de réconciliation sociale, n'a pas été épargnée par les années troublées de l'histoire burundaise[12]. Une autre difficulté transcende ces différentes limites et il s'agit de la division autour de l'ethnie qui aboutit à un « jeu de concurrence » entre les victimes[13].

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qu'ils rendent lorsqu'ils arbitrent des conflits. Le substantif *intahe* est utilisé dans un sens métonymique et symbolique pour signifier l'équité et la justice.

[11] V. HRW et APRODH, « La « justice » populaire au Burundi. Complicité des autorités et impunité », mars 2010. Disponible sur le site de HRW (http://www.hrw.org/fr/reports/2010/03/31/la-justice-populaireau- burundi)

[12] Certains sages ont été accusés d'être restés impassibles face aux exactions voire d'y avoir participé. Ils sont également parfois associés à une seule ethnie, les Tutsi, et considérés comme appartenant à une certaine classe politique, leur neutralité étant ainsi mise en cause. Dans une période plus contemporaine, l'institution a connu une refonte globale dans le sens d'une réglementation de la sélection de ses membres qui a conduit à ce que coexistent aujourd'hui des *Bashingantahe* informels et d'autres élus. Cette division et cette complexification de l'organisation ajoutée à l'absence d'une adhésion unanime démontrée à l'égard du pouvoir réconciliateur de cette justice hypothèque une implication à la hauteur de celle pratiquée au Rwanda.

[13] L'Accord d'Arusha précise que le conflit burundais est fondamentalement politique avec des dimensions ethniques extrêmement importantes et qu'il est le fait d'une lutte de la classe politiques pour accéder et/ou se maintenir au pouvoir. Il s'agit ici de la particularité du cas burundais car les négociations et la médiation correspondante ont eu lieu pendant les combats, c'est-à-dire concomitamment à la guerre civile. Il n'y a eu ni vainqueurs ni vaincus seulement des hommes armés qui ont décidés de dialoguer pour espérer chacun et respectivement conquérir le pouvoir et ensuite s'y maintenir. Selon la définition donnée par Arusha, il s'agit d'une continuation du conflit au sein duquel les arguments stratégiques s'affrontent et non plus les armes de

En l'absence d'application du double mécanisme de la justice transitionnelle immédiate, le droit burundais a eu l'occasion, au lendemain des massacres commis en 1993, de juger quelques unes des affaires qui y sont liées[14]. Ce traitement judiciaire a été avorté lorsque des libérations politiques massives ont été décidées[15] et différé lorsque l'argument de l'incompétence des instances burundaise a été soulevé[16].

À ce blocage d'une justice transitionnelle du passé correspond un foisonnement des réformes judiciaires qui interpelle davantage une justice transitionnelle de l'avenir. À ce titre, peuvent être citées les réformes du Code de la famille, du Code électoral, du Code de l'Organisation judiciaire ou du Code pénal. Les politiques de démobilisations participent au champ des réformes ayant vocation à empêcher les crimes du futur mais également à reconstruire un véritable État de droit[17]. Cette logorrhée législative n'est pas épargnée par les défis qui la confrontent aux questions de mise en conformité des textes par rapports aux standards internationaux, de prise en compte des pluralismes juridiques, de réflexions autour de la non application

guerre. Cette configuration peut expliquer pourquoi les négociations ont été aussi longues, et perdurent toujours à ce jour, et aussi échelonnées.

[14] V. R. GALAND et G. INEZA, *Etude de l'impact du projet: « faciliter l'accès à la justice des victimes et des prévenus de la crise de 1993 en vue de promouvoir la réconciliation »*, Avocats Sans Frontières (ASF) Belgique, Burundi, Septembre 2007, 88 p.

[15] Le 3 janvier 2006 un premier décret octroyât l'immunité provisoire aux détenus ou condamnés identifiées par la Commission comme étant des prisonniers politiques et aboutit à la libération de 673 personnes. La définition des «prisonniers politiques» est toutefois inconnue ce qui permet de lui attribuer un large champ d'application. Le 10 février 2006, 750 prisonniers sont libérés et le 14 mars suivant, 1844 jouiront du même sort ce qui porte au total à 3299 le nombre de libérations politiques. Ces libérations massives justifiées par l'objectif de réconciliation nationale ne furent pas toujours bien accueillies notamment par les « milieux » Tutsi.

[16] Le constat fait par les autorités politiques d'une compétence exclusive attribuée aux mécanismes de justice transitionnelle a pu servir un discours de disqualification des initiatives judiciaires locales en les décourageant, contribuant ainsi, à figer le temps judiciaire en reportant son exercice à une date et une légitimité ultérieures indéterminées.

[17] V. not. sur la démobilisation, République du Burundi, Commission Nationale de Démobilisation, de Réinsertion et de Réintégration (CNDRR), « Rapport final du secrétariat exécutif de la Commission nationale de démobilisation, réinsertion et réintégration des ex-combattants 2004-2008. Projet spécial enfants soldats », Décembre 2008, 12 p.

des nouvelles normes ou de leur absence d'exécution[18] et, de façon générale, à l'impérieuse nécessité à trouver, découvrir ou inventer des solutions adaptées dans un contexte d'évolutions et de changements sociétaux fondamentaux.

Ce contraste ainsi décrit conduit à constater théoriquement que parmi les outils transitionnels, certains interviennent de façon ponctuelle afin d'apporter une réponse juridique ou extra-juridique aux exactions commises pendant un conflit violent ou une période de répression politique tandis que d'autres interviennent de façon plus continue car ils entendent s'adresser aux futurs ou au présent. En outre, certains mécanismes produisent des effets immédiats, il s'agit, par exemple, du prononcé d'une peine à l'encontre de responsables de violations graves des droits de l'Homme tandis que d'autres manifestent des effets plus durables comme, par exemple, la construction d'un mémorial qui aura pour objet d'entretenir le souvenir de tel ou tel événement tragique. Les outils au temps d'intervention ponctuel n'ont pas forcément d'effets immédiats et ceux intervenant de façon continue de conséquences plus durables. Une telle répartition n'est pas hermétique ni représentative, bien au contraire ces catégories sont perméables et beaucoup d'instruments conjuguent un caractère avec celui du groupe à première vue antagoniste. C'est de cette interchangeabilité que née l'ambivalence caractéristique aux mécanismes transitionnels. Pour autant, elle est logique au regard de la spécificité même de la transition qui n'est ni passé ni avenir mais les deux à la fois, un « temps de passage » faisant le lien. La difficulté réside alors davantage dans la détermination du caractère conjoncturel ou structurel des effets produits par les instruments de la transition.

B) LA TRANSCENDANCE INDÉNIABLE D'UNE JUSTICE STRUCTURELLE, CONJONCTURELLE ET IMMÉDIATE

Le cas d'étude burundais confirme la théorie qui envisage l'ambivalence temporelle des instruments de la justice transitionnelle et, plus largement, du concept de justice en lui-même. En effet, le conflit foncier, par exemple, qui mobilise l'attention à cause de son ampleur (90% du contentieux judiciaire lui est consacré) est en lien direct avec les exactions du passé[19]. Les

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[18] V. not. D. KOHLHAGEN, *Le tribunal face au terrain : le problème d'exécution des jugements au Mugamba dans une perspective juridique et anthropologie*, RCN Justice & Démocratie, 2008.

[19] V. J-P. CHAUVEAU et P. MATHIEU, « Dynamiques et enjeux des conflits fonciers », dans *Quelles politiques foncières en Afrique noire rurale ? Réconcilier pratique, légitimité et légalité*, Ed. Karthala, Paris, 1998, pp. 243-257; UNOPS-PNUD

revendications concurrentes sur la terre opposent des déplacés ou des réfugiés, propriétaires originels, à des « nouveaux » occupants détenant ou non un titre de propriété, légal ou illégal. Cet imbroglio cadastral, légal et foncier constitue le point central d'un « télescopage » entre coutumes, normes judiciaires et tensions ethniques donc politiques. Ayant les mêmes ambitions de réconciliation que la justice transitionnelle, les stratégies de résorbassions du conflit foncier entendent toutes concilier mécanismes juridiques, médiation et justice coutumière en privilégiant une approche inclusive et pluridisciplinaire. Cette proximité observable des démarches s'explique par le caractère délicat d'un conflit foncier qui, au-delà de la question du partage de la terre, fait en réalité écho aux douloureux épisodes vécus par les Burundais et pendant lesquels les terres furent illégalement distribuées et les communautés contraintes à l'exil par peur des représailles ou des attaques.

En outre, le nouveau Code pénal burundais[20] illustre quant à lui les incidences et les liens entre la justice du présent, du futur et du passé. En effet, parmi les innovations du code figurent, notamment, la suppression de la peine capitale, l'abaissement de la l'âge de la responsabilité criminelle pour les mineurs, l'application de mesures de médiations et de suivi socio-éducatif ou encore l'intégration de la législation internationale d'incrimination du crime de génocide, des crimes contre l'humanité et crimes de guerre. À travers ces diverses mesures, le code criminel burundais donne toute compétence aux juges concernant les crimes internationaux, dont ceux commis en 1972, en 1993 et dans l'histoire plus récente du pays[21]. Le seul obstacle à de telles initiatives est d'ordre politique et tient à la fois à la compétence exclusive décrétée au bénéfice du double mécanisme de justice transitionnelle et au manque d'indépendance du pouvoir judiciaire. Autre connexion avec les conflits du passé, la criminalité des jeunes trouve en partie une explication dans le dénuement social qui caractérise de nombreuses familles monoparentales, matriarcales, ou des orphelins de

CNTB, *Mission d'étude sur la « problématique foncière et les solutions alternatives face aux défis de la réintégration et réinsertion des sinistrés au Burundi »,* Décembre 2007; RCN justice et Démocratie, *Droit Foncier,* Le Bulletin n° 27, Premier trimestre 2009 et GRAPAX, *Les enjeux actuels de la réforme de la loi foncière au Burundi,* Note de travail, GT Justice (Coordination : Y. Cartuyvels), Avril 2005.

[20] Le Nouveau Code Pénal Burundais est entré en vigueur le 22 avril 2009.

[21] V. le rapport de HRW : Document d'information, « Burundi : le massacre de Gatumba : crimes de guerres et agendas politiques », 7 septembre 2004 (http://www.hrw.org/fr/reports/2004/09/07/burundi-le-massacre-de-gatumba).

guerre sujets à la pauvreté, la prostitution et l'anomie. Le contexte de violences cycliques a produit une situation de paupérisation de la population.

À travers ces deux exemples apparaît le phénomène de perméabilité entre la justice transitionnelle et les politiques de développement. À l'origine dissociés et indépendants, ces deux domaines tendent aujourd'hui de plus en plus à se rapprocher. L'expansion de la justice transitionnelle, qui se traduit par son intérêt non plus exclusif pour les crimes du passé mais également pour ceux du présent et de l'avenir, est symptomatique de l'évolution convergente entre justice transitionnelle et développement. Par exemple, Susanne Buckley-Zistel souligne que, dans un sens commun, le développement fait référence à un processus dans lequel les circonstances visent l'amélioration pour le meilleur[22]. La justice transitionnelle et le développement partageraient alors un but commun : l'amélioration des relations et des structures dans le but de renforcer le bien être de tous les membres d'une société. Alors que la justice transitionnelle y travaille en ayant le regard tourné vers « le passé » et les violations des droits humains ainsi que vers « l'avenir » en tentant d'imaginer une société plus stable, le développement le fait essentiellement en agissant sur le présent tout en gardant en vue cet avenir plus radieux comme but à atteindre.

Si la globalité temporelle de la justice transitionnelle permet une extension du concept de Justice quant à sa vocation à ne traiter que les crimes du passé, sa globalité disciplinaire opère quant à elle une élévation de son ambition à rechercher les responsabilités, réparer et révéler les vérités.

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[22] S. BUCKLEY-ZISTEL, "Connecting transitional justice and development", international conference on *The contribution of civil society and victim participation in transitional justice processes,* Marburg, 2 déc. 2009. Dans un sens restreint, le développement peut faire référence à la croissance économique et la distribution des biens matériels ce qui constitue une définition très largement utilisée. Dans le contexte particulier des sociétés ayant connu la guerre, le génocide et des violations des droits humains, une définition plus substantielle semble requise. L'auteure emprunte la définition utilisée par le PNUD dans son rapport sur le développement selon laquelle le développement est *«a process of enlarging people's choices. The most critical ones are to lead a long and healthy life, to be educated, and to enjoy a decent standard of living. Additional choices include political freedom, guaranteed human rights and self-respect*" (Extraits de l'UNDP Human Development Report, *In* R. Duthie, Towards a Development-sensitive Approach to Transitional Justice, *In International Journal of Transitional Justice (IJTJ),* vol 2, issue 3, 2008, pp. 292-309).

II. LA GLOBALITÉ DISCIPLINAIRE OU L'ÉVOLUTION ÉPISTÉMOLOGIQUE D'UN CHAMP D'EXPERTISE

Globale, la justice transitionnelle l'est conceptuellement. Les instruments qu'elle mobilise pour réaliser ses objectifs sont à la fois juridiques et extra juridiques, nationaux et internationaux et participent également de visions de la Justice différentes. Par exemple, la rencontre entre politique de châtiment et politique de pardon, matérialisées respectivement par les tribunaux pénaux, internationaux ou nationaux, et les CVR et/ou la justice coutumière, illustre en réalité la mise en commun d'une justice rétributive et d'une justice restaurative. Le plus grand pari de la justice transitionnelle globale est alors de réussir à démontrer et organiser la complémentarité entre ces divers éléments. Par ailleurs, lorsqu'est étudié le cas du Burundi, la question de savoir comment la population gère elle-même l'aspect conjoncturel de la justice transitionnelle en l'absence d'instruments l'y aidant est prégnante. Cette observation incite à délaisser le concept de justice transitionnelle pour recourir à une analyse systémique de ce phénomène éminemment global.

A) LE DÉFI DE LA COMPLÉMENTARITÉ ENTRE VOIES PÉNALES ET VOIES EXTRA PÉNALES

À priori invisible, ou du moins immatériel, le « concept » de justice transitionnelle au Burundi n'en est pas moins largement capté, mobilisé et « brandi » telle une menace par les différents acteurs politiques et ce à travers la lecture de l'histoire tragique du pays qu'ils privilégient. La justice transitionnelle est aussi invoquée dans les discours comme le fondement d'un pardon national expiatoire. Deux interprétations, qui rejoignent celles suscitées par la dialectique paix *versus* justice, peuvent être distinguées. En premier lieu, les périodes troublées de l'histoire burundaises faites de massacres, de représailles, de coups d'État, de procès politiques et de manipulations ont été l'occasion de mobiliser le « visage » rétributif de la justice transitionnelle. Instrumentalisée au nom de la capture des traitres de l'État, des assassins présumés ou, pire, des génocidaires suspectés, la justice, souvent suivie de condamnation à la peine capitale, a pu permettre à des dirigeants burundais d'éliminer physiquement leurs opposants politiques. En second lieu, le pardon en tant que manifestation d'une « bonté d'âme » guidé par le souci de l'intérêt national a, quant à lui, pu justifier l'immunité de plusieurs responsables de crimes internationaux et être confondu avec le champ religieux pour amplifier sa capacité fédératrice et ainsi manipuler, dans une certaine mesure, les foules pieuses. La thèse selon laquelle, au Burundi, tout le monde est auteur et victime à la fois et que, par conséquent, le pardon mutuel s'impose est régulièrement invoquée.

Cependant, au-delà du fondement politique manichéen à l'une où l'autre mobilisation de la justice transitionnelle, reste que jamais les instigateurs ou planificateurs des différentes tueries vécues par le peuple burundais n'ont été inquiétés par une quelconque cour de justice. Seuls les exécutants ou les opposants politiques ont subis les foudres d'une justice partiale, inéquitable et dépourvue de garantie des droits de la défense car parfois purement expéditive.

Cette pratique, devenue habitude, a lentement mais sûrement installé au Burundi une culture de l'impunité devenue tout simplement endémique. La défiance des populations face aux institutions judiciaires, ainsi qu'aux autres, est nourrie d'une peur non seulement des représentants de l'État mais aussi de l'autre, le voisin soupçonné d'être dangereux et donc duquel il faut se protéger, tuer avant d'être tué. Parallèlement et en complément au cas d'espèce burundais, les potentialités et les limites de l'approche rétributive tout comme de la philosophie restaurative[23], sont illustrées à travers les diverses expériences de justice transitionnelle[24] qui permettent ainsi de rejeter toute vision caricaturale et alternative de ces deux approches de la justice.

D'une part, s'agissant des voies extra pénales, le cas du Rwanda avec les *Gacaca* et de l'Afrique du Sud avec l'emblématique CVR, démontrent que si l'idée de l'association d'une perspective restaurative de la justice aux processus de justice transitionnelle est désormais acquise, son application est parfois éloignée du concept auquel elle se rattache. Les dispositifs restauratifs n'ont parfois de restauratif que le nom et empruntent davantage à la justice répressive pour les uns ou négligent l'implication des victimes dans la recherche d'une solution équitable pour les autres. Pour autant, ces initiatives démontrent un intérêt de la part de la communauté internationale comme des gouvernements de transition pour la question. Le danger le plus courant qui menace la crédibilité des processus restauratifs est l'assimilation de ceux-ci à la délivrance d'un pardon décrété et salvateur. La justice

[23] Robert Cario définit par exemple la justice restaurative comme devant comprendre certains éléments que sont *« un conflit cristallisé par la violation d'une valeur sociale essentielle, la réparation des souffrances antérieures/consécutives subies par l'ensemble des protagonistes, un processus de négociation par la participation de tous, sous le contrôle d'un tiers professionnel »*, R. CARIO, *Justice restaurative. Principes et promesses*, L'Harmattan, 2005, p 55.

[24] V. E. MATIGNON, Les dispositifs restauratifs mis en œuvre à la suite de victimisations de masse*, In* R. Cario, P. Mbanzoulou (Dir.), *La justice restaurative. Une utopie qui marche ?,* L'Harmattan, coll. Controverses, 106 p.

restaurative ne repose pas sur le pardon même si elle peut le faciliter. Elle n'est pas non plus concentrée essentiellement sur les victimes et l'apaisement de leurs souffrances. Son ambition va bien au-delà puisqu'elle entend faire participer tous les acteurs du conflit dans sa résolution et prendre en compte tous les dommages subis ainsi que toutes les responsabilités impliquées. Elle agit également en complémentarité de la justice pénale classique et c'est peut-être là son plus grand défi. C'est parce que la justice rétributive est compétente pour appliquer une sanction pénale au regard des textes législatifs selon un rituel et une formalité propres que la justice restaurative peut réunir de façon informelle les protagonistes de l'infraction-conflit afin de verbaliser les actes subis et susciter une prise de décision négociée et consentie s'agissant de la solution à adopter, ceci à l'aide d'un tiers indépendant et impartial. Les effets positifs de l'une et de l'autre sont exacerbés par la coexistence de ces deux formes de justice.

D'autre part, s'agissant des voies pénales, l'analyse de l'intervention de la Cour Pénale Internationale (CPI) en Afrique, souvent décriée pour sa partialité et dénoncée comme étant un instrument aux mains d'un néo-colonialisme hégémonique et ingèrent, conduit à soulever plusieurs remarques relatives aux dilemmes et contradictions découlant de la confrontation entre théorie et pratique qu'elle implique. En pratique, la CPI est interprétée comme représentant une justice rétributive en opposition à l'idée de paix. L'instance internationale peut être mobilisée, en tant que menace ou moyen de pression, et saisie, concrètement en tant qu'instrument juridique, à différents moments d'un processus de sortie de crise. L'exemple ougandais démontre que l'utilisation de la CPI en dehors de la signature d'un accord de paix peut produire des effets pervers en opposition au but de a mise ne place d'une paix durable. En réalité, la CPI constitue un instrument disponible et manipulable par les politiques, tant les gouvernements que les rebelles ou partis d'opposition. En ce sens, elle peut facilement constituer une menace à l'encontre de l'adversaire, quel qu'il soit[25].

[25] Certains ont analysés l'action de la CPI en Ouganda comme ayant permis l'accélération des négociations afin de sortir du conflit et signer l'accord de paix tandis que d'autres notent qu'aucun accord n'a été signé et que la cour est un simple moyen d'instrumentalisation et de pression aux mains des rebelles comme du gouvernement. Dans ce cas, la paix semble être une condition préalable nécessaire à toute intervention judiciaire et la CPI en tant que représentation de la « justice » semble avoir faillit à l'endiguement des violences perpétrées.

L'exemple rwandais constitue, quant à lui, une illustration de la faiblesse et de l'ambigüité politique des objectifs de paix et de reconstruction après la perpétration de violences de masse, et en particulier d'un génocide, même si la justice rétributive est appliquée en tant que moyen d'atteindre la réconciliation, finalité ambitieuse s'il en est[26]. Ces expériences pratiques démontrent la notion restrictive de justice à laquelle il est fait référence et qui est utilisée[27]. En Ouganda parce que la CPI est considérée par les représentations des acteurs comme une justice rétributive et au Rwanda parce que la justice exercée l'est uniquement au profit d'une partie de la population.

En outre, au-delà des critiques classiques émises contre la CPI, telles la lenteur des procédures où leur caractère asymétrique, l'une d'entre elles fait douter de l'équité de l'instance : l'aspect sélectif de ses procédures[28]. Parmi les différentes possibilités d'ouverture d'une enquête[29], le rôle du Conseil de Sécurité est prépondérant au sein des procédures d'enquête de la CPI. Il

[26] En effet, dans un tel contexte la justice pénale internationale tout comme la justice pénale nationale ont été utilisées par les «vainqueurs» contre les «vaincus» et non pas dans une dimension transitionnelle. Il est difficile d'affirmer que le Rwanda ait connu une transition politique puisque les vainqueurs et les vaincus n'ont jamais négocié en tant que parties à un conflit pour trouver une solution consensuelle. L'uniformité de la diffusion de l'histoire des crimes commis ainsi que la rigueur dans l'éradication des récits dits révisionnistes auxquels s'ajoutent l'observation par certains d'une revendication en termes de justice de la part de certains Hutu de plus en plus audible, laissent perplexe quant à la réalité de la réconciliation nationale. Pour autant, la spécificité, dans l'horreur come dans son ampleur, du génocide interroge sur les autres options disponibles, leur pertinence, et leur opportunité. Certes le processus rwandais offre une stabilité politique au pays meurtri mais le prix de cette stabilité reste celui d'une génération possiblement sacrifiée et d'une paix décrétée sur la pérennité de laquelle il est autorisé de douter. Les récentes divisions internes essuyées par le parti au pouvoir ne font qu'étayer ces suspicions.

[27] V. Ch. SRIRAM et S. PILLAY, *Peace versus Justice? The dilemma of transitional justice in Africa,* University of Kwazulu-Natal Press, 2010, 373 p.

[28] V. S. CAPITANT, « Réponse judiciaire aux crimes contre l'humanité *versus* responsabilité de lutter contre leur commission ? », *Revue Tiers Monde*, N°205, Janvier-mars 2011, pp. 7-27.

[29] Lorsqu'une situation est référée au procureur par un État partie, lorsqu'une situation lui est referee par les Conseil de Sécurité des Nations Unies (CSNU), agissant pour signaler une menace à la paix et la sécurité international, ou lorsque la Chambre préliminaire l'autorise à ouvrir une enquête sur la base d'informations reçues par d'autres sources, telles que des sources individuelles ou d'Organisations Non Gouvernementales (ONG).

peut demander à la Cour de suspendre ses enquêtes pour une durée renouvelable d'un an et il est la seule autorité pouvant élargir les compétences de la Cour envers une personne non ressortissante d'un État partie. Toutefois, parmi les cinq membres permanents du Conseil de Sécurité, trois ne sont pas des États parties : les États-Unis, la Chine et la Russie. Par conséquent, des États non-parties peuvent poursuivre d'autres États non-parties devant la CPI mais les États non-parties siégeant en tant que membres permanents du Conseil de Sécurité ne peuvent pas en pratique être poursuivis à cause de leur droit de véto. D'un point de vue victimologique, la CPI atteste du potentiel restauratif de la réparation par la participation au processus judiciaire, une réparation symbolique[30]. Par ailleurs, concernant la perception de la CPI par les victimes, un rapport d'avril 2010 intitulé « *L'impact de la CPI sur les victimes et les communautés affectées* » réalisé par le groupe de travail sur les droits des victimes[31] souligne le manque de sensibilisation dispensée dans les pays où agit la CPI mais aussi dans ceux où elle n'a aucune procédure en cours ainsi que l'importance de poursuivre ces programmes d'information. Est également mise en exergue la déception des victimes face à la lenteur des procédures et au faible nombre de cas traités ainsi que la non représentativité des charges au regard de l'horreur des crimes commis. Le rapport précise également l'influence positive des interventions de la CPI qui se mesure, par exemple, à l'aune de la prise de conscience par les victimes de leurs propres droits ainsi que de leur volonté à les faire valoir. La mise en œuvre des procès sur les lieux de commission des actes n'en est pas moins hautement recommandée et le constat d'une déception des victimes face à la compétence temporelle restrictive de la CPI tout comme celui de l'expression d'un sentiment général de lassitude par les victimes directement impliquées dans les procédures de la CPI n'en sont pas moins dressés.

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[30] La CPI offre un rôle et un statut considérables aux victimes des violations des droits humains. En effet, par exemple sa décision du 17 janvier 2006 concernant le cas de la RDC autorise la participation des victimes à partir du stade de l'enquête. Ainsi, la Cour offre à la participation des victimes une double finalité : réparatrice des préjudices subis et répressive des crimes commis. Le double visage de l'action civile est consacré par la juridiction internationale. La CPI accepte d'envisager la réparation des victimes dans une certaine globalité en incluant le droit à une réparation procédural symbolique.

[31] V. "The impact of ICC on victims and affected communities", report of the victims' rights working group, April 2010, 40 p, http://www.redress.org/downloads/publications/Stocktakingreport2010.pdf

Les attentes par rapport au potentiel pacificateur de la CPI sont immenses et peuvent par conséquent être facilement déçues au regard des limitations matérielles avec lesquelles doit composer la Cour et des obligations diplomatiques en jeu. Le récent rapport des Nations Unies sur les crimes commis en RDC entre 1993 et 2003 suggère un aveu d'impuissance et appelle à rechercher des solutions complémentaires à celle que représente la CPI en faisant allusion à l'importance de la créativité en la matière[32].

À travers les expériences pratiques de justice transitionnelle, tant l'aspect pénal que l'aspect extra pénal attestent d'une évolution vers un renouvellement de la notion de Justice, du sens à donner à la peine en matière de crimes internationaux ainsi que de la place à accorder aux victimes. Ces changements sont non seulement révélés au sein des processus officiels mais également à l'observation des initiatives plus informelles comme le démontre, par exemple, le cas burundais.

B) LES PERSPECTIVES DE LA PLURIDISCIPLINARITÉ ET DE LA DIVERSITÉ DE L'APPROCHE TRANSITIONNELLE

Au titre du renouvellement des approches privilégiées par la justice transitionnelle figurent les CN réputées inclusives[33]. Au Burundi, ces CN avaient pour but de recueillir l'avis des burundais sur le processus de justice transitionnelle[34]. Toutefois, bien que plus de quatre mille personnes furent consultées, la formulation des questions posées peut faire douter de la pertinence de ces consultations par rapport à leur objectif affiché d'inclusion et d'implication des vœux populaires. En réalité, les burundais n'ont pas été invités à choisir quels instruments de justice transitionnelle ils voudraient voir s'appliquer mais à confirmer les décisions prises en aval par l'ONU et le gouvernement du Burundi. Cette approche n'est donc pas réellement inspirée par le souci de trouver un équilibre entre les besoins de la population et les impératifs des standards internationaux mais, au-delà, ce qui pose vraiment question est la possibilité pour les différents acteurs politiques d'utiliser les résultats à leur faveur. Par exemple, concernant la

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[32] V. ONU, Rapport publié le vendredi 1er octobre 2010 par le Haut commissariat des Nations Unies aux droits de l'homme (HCDH) et relatif aux violations graves des droits de l'homme et du droit humanitaire commises sur le sol congolais entre 1993 et 2003.

[33] V. Haut-commissariat des Nations Unies aux Droits de l'Homme (HCDH), *Les instruments de l'état de droit dans les sociétés sortant d'un conflit. Consultations nationales sur la justice en période de transition*, Rule of law tool, New York et Genève, 2009, 34 p.

[34] *Les consultations nationales sur la mise en place des mécanismes de justice de transition au Burundi,* Rapport, Bujumbura, 20 avril 2010, 119 p.

composition de la chambre spéciale, une première question demande au burundais s'ils préfèrent que les juges siégeant soient internationaux tandis qu'une deuxième question cherche à savoir s'ils veulent plutôt que ces juges soient nationaux. Finalement, les pourcentages obtenus pour l'une ou l'autre réponse sont parfois tellement proches que les résultats peuvent être utilisés dans un sens ou son contraire, au profit de la paix ou de la justice.

Au regard de la situation burundaise, des observateurs ont pu affirmer que le choix de la paix avait été fait et que peut-être, jusqu'à une période récente, cette option en dépit d'efforts fournis en matière de lutte contre l'impunité judiciaire, fonctionnait. Les élections de 2010, et l'installation d'un régime autoritaire qui s'en est suivie, ont été l'occasion de défaire cette théorie dans la mesure où elles ont démontré que la paix durable ou du moins la paix négative n'était pas encore solidement établie au Burundi. En effet, un boycott électoral fut organisé par les partis politiques d'opposition dénonçant des fraudes massives à l'annonce d'une large victoire du parti au pouvoir lors du premier scrutin. En l'absence d'adversaire, le président sortant et son parti furent réélus avec une très large majorité dans tout le pays. Ce boycott de 2010 a été analysé comme un véritable suicide politique[35]. Les exécutions arbitraires d'opposants politiques en 2011 et 2012 ont confirmé l'hypothèse d'une radicalisation de l'exercice du pouvoir[36].

En marge d'un processus de justice transitionnelle institutionnel bloqué, des initiatives se sont également développées au sein de la société civile burundaise sous diverses formes. Parmi celles-ci figure, par exemple, une expérience théâtrale qui propose une représentation sur le conflit et les victimisations subies parmi la population Hutu, Tutsi et Twa. Après le spectacle, le public est invité à participer à un groupe de parole afin d'exprimer ses sensations à propos de la pièce. Des psychologues animent le débat et posent des questions sur la justice transitionnelle. Cette expérience revêt la spécificité d'utiliser une approche restaurative en dehors de tout processus institutionnel[37]. Cependant, bien que plusieurs activités de ce genre ait été mises en œuvre au Burundi, il convient de rappeler que la société civile demeure essentiellement urbaine, alimentaire et protestataire

[35] V. International Crisis Group (ICG), « Burundi : du boycott électoral à l'impasse politique », *op.cit.*

[36] V. not. ICG, « Burundi : Bye Bye Arusha ? », Rapport Afrique N° 192, 25 octobre 2012, 37 p. (http://www.crisisgroup.org).

[37] V. RCN Justice & Démocratie, « Paroles de Burundais sur la justice d'après-guerre », Expérience de consultations réalisées auprès de la population sur la justice et le conflit au Burundi, Rapports 2006-2007, 239 p.

ce qui rend difficile une extension de ces initiatives à tous le territoire. L'éparpillement et l'isolement des activités de justice transitionnelle de la société civile témoignent également des difficultés pour les corps institutionnels à déléguer leurs fonctions en particulier dans le champ de la justice.

L'exemple burundais met en exergue dans de telles circonstances particulières, mais peut-être au sein de tous les processus transitionnels, l'importance des autres acteurs de la justice transitionnelle à côté des officiels. Par exemple, la société civile mais aussi les historiens, les médias, les acteurs religieux, ou l'utilisation du registre spirituel et, bien sûr, les besoins de la population, sont autant d'éléments dont l'analyse aide à comprendre les contours d'un système de justice transitionnelle donné ou permet de révéler le potentiel « réconciliateur » de certains.

Le principal défi de la justice transitionnelle est de trouver un équilibre entre les besoins internes et externes. Il s'agit d'un processus pour lequel le temps et la multiplicité des acteurs, des champs et des outils ne sont peut-être pas une faiblesse mais une force. Au Burundi, la possibilité de saisir la CPI ou la Cour Africaine des Droits de l'Homme, qui appartiendrait *a priori* à la société civile, demeure une solution parmi d'autres au sein d'un tel processus de justice transitionnelle, temporellement et disciplinairement global, en permanente évolution et relativement auquel les choix pris à un moment donné ne préfigurent pas le sens et la nature de ceux à venir.

LE CHILI

JUSTICE PÉNALE ET JUSTICE TRANSITIONNELLE. L'EXPÉRIENCE CHILIENNE DE LUTTE CONTRE L'IMPUNITÉ

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ABSTRACT

Transitional justice is a field of study which was born from practice. Indeed, societies around the world have implemented different legal and extra legal mechanisms to address massive human rights violations committed in the past. Along the way, these countries faced challenges in the transition from war to peace and authoritarian regimes to Rule of Law that involved attempting to reconcile at times both antagonistic and incompatible needs. Laying down arms, making peace, reconciliation, forgiveness, reparations for victims, the search for the Truth, reconstruction of democratic institutions, and prosecuting aggressors, all form part of the complex and ambitious endeavor of transnational justice.

However, each transition to justice is a unique experience and has its own characteristics. Consequently, the results and levels of satisfaction with the transition will depend on the conditions where it takes place and gap between ideal and obtainable outcomes. Therefore, this paper will study the Chilean experience in transition to democracy after the military dictatorship (1973-1990) by analyzing the ideal role of criminal justice in transitions to justice and contrasting it to a model which allows for impunity by avoiding criminal prosecutions.

We begin our discussion by describing the "impunity" model of transitional justice as a discursive-normative system imposed on fragile societies through amnesty laws incompatible with standards of international justice. Then, in the second section, we will demonstrate the importance of harmonizing transitional justice mechanisms the international obligations of States to prosecute, try and sanction crimes against humanity. In concluding, we will weigh the current achievements, challenges and frustrations of the Chilean experience of transitional justice.

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INTRODUCTION

La justice transitionnelle est un domaine d'étude né de la pratique. En effet, plusieurs sociétés en proie à un conflit ou sortant d'un conflit ont mis en pla divers processus et mécanismes judiciaires mais également extra-judiciaires pour faire face aux violations massives des Droits de l'Homme qui ont pu être commises dans le passé. D'après Ruti TEITEL, la justice transitionnelle peut être définie comme « *une conception de la justice liée aux périodes de changement politique, caractérisée par des réponses légales mettant en lumière les crimes commis par les régimes répressifs antérieurs* ».[1]

Il faut noter que ce modèle de justice est très récent. Au niveau théorique, les premiers documents mentionnant de manière expresse le terme de *justice transitionnelle* datent d'une vingtaine d'années tout au plus.[2] Au niveau pratique, la plupart des auteurs sont d'accord pour affirmer que la justice transitionnelle, telle que l'on la connait aujourd'hui, est née des expériences de transition démocratique ayant eu lieu au cours des années 80-90 en Amérique Latine et en Europe de l'Est.[3]

De nos jours, la définition de la justice transitionnelle ne fait pas l'objet d'un consensus. Il existe de fait différents mécanismes, simultanément utilisés ou non, qui tendent vers des objectifs multiples et variés qui ne coïncident pas toujours entre eux. Toutefois, malgré les distinctions existantes, tous les modèles de justice transitionnelle visent à rétablir un équilibre entre la garantie de l'État de droit et l'instauration d'une paix sociale durable.

Ainsi, les objectifs que la justice transitionnelle s'est fixée sont très ambitieux et parfois difficilement compatibles. Parfois, elle cherche une conciliation entre des éléments que tout oppose dans un contexte post-conflictuel : la signature des accords de paix ; le désarmement, la démobilisation et la réinsertion des combattants ; la réconciliation nationale ; la lutte contre l'impunité et les procès pénaux ; les réparations des préjudices subis par les victimes ; la recherche de la vérité et la mise en place d'un travail de

[1] R. G. Teitel, « Transitional Justice Genealogy », *Harvard Human Rights Journal*, Vol 16, Spring 2003, Cambrige, MA, 2003.

[2] En effet, celui-ci a été introduit par Neil KRITZ dans une collection publiée par l'United States Institute for Peace (USIP) en 1995. N. Kritz, (Dir.) *Transitional Justice: How emerging Democracies Reckon with Former Regimes*, Vols. I-III, Washington D.C., USIP, 1995.

[3] Certains auteurs identifient une première origine de la justice transitionnelle dans les tribunaux militaires pénaux internationaux de Nuremberg et Tokyo à l'issu de la Seconde Guerre Mondiale.

mémoire collectif ; la réforme des institutions de l'État et l'assainissement de la fonction publique.

Pour arriver à ses fins, la justice transitionnelle va utiliser tout un éventail de mécanismes juridictionnels et non-juridictionnels au sein desquels différentes ramifications existent.

Ainsi, en ce qui concerne les mécanismes juridictionnels, on distingue la justice du droit interne et celle mise en œuvre sous l'égide du droit international. En droit interne, cette justice présente un caractère parfois civil ou administratif (procès disciplinaires, responsabilité administrative, restitution des biens), parfois pénal. En droit international, elle se manifeste tantôt par la justice pénale internationale (Cour Pénale Internationale, Tribunaux pénaux ad hoc, tribunaux hybrides ou mixtes), tantôt par des mécanismes de protection régionaux ou universel des Droits de l'Homme.

En ce qui concerne les mécanismes non-juridictionnels, on trouve les Commissions d'enquête, les Commissions de vérité (et de réconciliation), les programmes administratifs de réparations et les Commissions nationales des Droits de l'Homme.

Il n'existe donc pas de modèle *standard* de justice transitionnelle, chaque conflit étant singulier tant dans ses origines que dans ses conséquences.[4] En ce sens, il existe toute une conjonction de facteurs qui déterminent la portée de la justice dans cette période. Ainsi, le contexte politique, le type de transition, les degrés de participation et les rapports de force entre les acteurs sont des éléments clefs qu'il faut prendre en considération.[5]

Dans ce contexte, et compte tenu du débat très nourri sur le rôle que doit jouer le droit pénal dans le cadre d'un processus de transition, nous allons analyser, à partir de l'expérience chilienne de transition vers la démocratie, les rapports entre la justice pénale et la justice transitionnelle.

Tout d'abord, il faut rappeler que, le 11 septembre 1973, le gouvernement démocratique de Salvador ALLENDE est renversé par un coup d'État militaire sanglant. Les forces armées prennent le pouvoir, décrètent la dissolution du Parlement et suspendent provisoirement l'ensemble des garanties constitutionnelles. Suite à cela, la Junte militaire, et plus particulièrement le Général Augusto PINOCHET, promulgue toute une série

[4] P. Hazan, *La paix contre la justice ? Comment reconstruire un État avec des criminels de guerre,* Bruxelles, André Versailles éditeur/GRIP, 2010, p. 55.

[5] R. Uprimny et M.P. Saffon, "Usos y abusos de la justicia transicional en Colombia", *Anuario de Derechos Humanos,* No 4, Universidad de Chile, Facultad de Derecho, Centro de Derechos Humanos, 2008, p. 175.

de décrets portant atteinte aux libertés fondamentales[6] et déclare dans un décret n°5 du 22 septembre 1973 que « *l'état de siège décrété […] doit s'entendre comme celui d'un état en guerre* »[7], instaurant *de facto* un régime autoritaire largement influencé par la doctrine de Sécurité Nationale.

Dans ce contexte, une répression violente et généralisée est mise en place dans tout le pays contre ceux que le régime considère comme des ennemis. La dictature utilise de manière massive et systématique[8] la disparition forcée de personnes, des exécutions sommaires ou extrajudiciaires, la torture et la privation arbitraire de liberté. En somme, pendant les 17 ans de dictature, 3 216 personnes ont disparu ou ont été assassinées. 38 254 personnes ont été soumises à des privations arbitraires de liberté, accompagnées le plus souvent par des tortures et autres exactions, comme des viols.[9]

La démocratie chilienne reste encore aujourd'hui imprégnée de ce lourd tribut du passé. Sa politique de transition, amorcée au début des années 1990, ne s'est pas faite sans encombre, et si dans un premier temps, un certain modèle d'impunité a prévalu dans ce que l'on peut définir comme une « *transition sous tutelle* » (I), un changement de paradigme s'est opéré en 1998, donnant de nouveaux moyens à la justice pour lutter contre l'impunité (II).

I. LA TRANSITION DÉMOCRATIQUE SOUS TUTELLE : L'IMPUNITÉ ÉRIGÉE EN RÈGLE.

La transition chilienne vers la démocratie débute suite au plébiscite du 5 octobre 1988 par lequel 55% des chiliens refusent d'octroyer un nouveau mandat présidentiel à Augusto PINOCHET. Ce dernier se trouve alors contraint d'organiser pour la première fois des élections libres et démocratiques. Elles se déroulent en décembre 1989 et mettent fin à une dictature militaire qui est demeurée au pouvoir pendant 17 ans (1973-1990). Cependant, pendant cette période dictatoriale, PINOCHET a soigneusement préparé tout un ensemble de mesures organisant le legs de son régime et

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[6] M. Feddersen, « Chile », dans Fundación para el debido proceso legal, *Las víctimas y la justicia transicional. ¿Están cumpliendo los Estados latinoamericanos con los estándares internacionales?,* Washington, DPLF, 2010, p. 65.

[7] Décret Loi No. 5 du 22 septembre 1973.

[8] M. Silva, « La situación del Decreto Ley de Amnistía después del fallo Almonacid Arellano », *Revista Persona y Sociedad,* Vol. XXV, No 2, Universidad Alberto Hurtado, 2011, p. 127.

[9] Comisión asesora para la calificación de detenidos, desaparecidos, ejecutados políticos y víctimas de prisión política y tortura ou Commision Valech II, Rapport du 26 août 2011.

garantissant l'impunité des crimes commis. Trois éléments juridiques permettent d'attester d'une telle mise sous tutelle de la transition démocratique.

En premier lieu, la Constitution de 1980, rédigée selon les désirs du dictateur, assure à PINOCHET un contrôle absolu des pouvoirs publics et donne une place prépondérante aux militaires, notamment par le biais du *« tout puissant* » Conseil de Sécurité Nationale. Le dictateur a également le pouvoir de désigner un certain nombre de Sénateurs, ce dans le but de contrôler les majorités parlementaires, et de garder la fonction de Commandant en chef de l'Armée jusqu'en 1998.[10]

En deuxième lieu, le régime militaire promulgue, le 18 avril 1978, le décret-loi 2 191, par lequel il accorde une autoamnistie générale au bénéfice de « *toutes les personnes qui, en tant qu'auteurs, complices ou coupables de dissimulation ont commis des fait délictueux pendant la période où l'état de siège était en vigueur, soit entre le 11 septembre 1973 et le 10 mars 1978, pourvu qu'elles ne fassent pas actuellement l'objet d'une inculpation ou d'une condamnation* »[11]. Il parait tout à fait judicieux de relever que c'est cette période qui fut la plus violente pendant le régime militaire.[12]

Enfin, comme le souligne si justement Nicolas PROGNON, en 1989, la dictature édicte « *une série de lois, couramment appelées « lois d'amarrage », qui cherche à limiter la démocratisation des institutions et la marge de manœuvre du gouvernement* ».[13]

On observe que le président élu lors des élections de 1989, Patricio AYLWIN, assume son mandat dans un contexte légal très complexe qui restreint de manière considérable son pouvoir de faire face aux violations massives des Droits de l'Homme. Ainsi, la justice transitionnelle du Chili des années 1990, soumise à la tutelle de PINOCHET et de ses alliés, est caractérisée par l'utilisation des mécanismes juridictionnels traditionnels favorisant l'impunité, comme la justice pénale militaire et le décret-loi d'amnistie de 1978 (A). Toutefois, c'est grâce aux efforts des

[10] J. A. de la Torre, « Chile: Legalidad de la injusticia e ilegalidad de la justicia », capítulo VI, dans *El derecho que nace del pueblo*, Bogotá D.C. Colombia, 1ª ed. ILSA, Serie « *Judicatura y democracia* », octubre de 2004, p. 154-159.

[11] Décret-loi 2191 du 19 avril 1978 article 1

[12] J. L. Guzmán, « Chile », dans K. Ambos et E. Malarino (Eds), *Jurisprudencia latinoamericana sobre derecho penal internacional. Con informes adicionales de España e Italia,* Konrad Adenauer Stiftung, Montevideo, Mastergraf srl, 2008, p. 135.

[13] N. Prognon « Le Chili, une transition vers la démocratie aboutie ? » *Revue ILCEA*, No. 13, *Les voies incertaines de la démocratisation,* 2010, p. 3.

gouvernements successifs que l'on va pouvoir pallier à cette carence de justice, avec la création d'autres mécanismes alternatifs de recherche de la vérité sur ce qui représente aujourd'hui « *les années de plomb* » et la mise en place de mécanismes de réparations des victimes de la dictature (B).

A) LES MÉCANISMES TRADITIONNELS D'IMPUNITÉ AU CHILI.

Dans le cadre de la justice transitionnelle, parmi les différents discours existant, il est un modèle qui privilégie l'impunité des bourreaux aux attentes des victimes. La condamnation des tortionnaires ne ferait en effet que rentrer la société dans une dynamique de vengeance qui mettrait en péril la possibilité d'un retour à l'Etat de droit et à la paix sociale. L'impunité serait l'unique chemin à la réconciliation et à la paix auxquels tous aspirent.

Ce discours légitime l'argument principal du décret-loi d'amnistie de 1978 pourtant fondé sur un discours de réconciliation nationale : « *l'impératif moral oblige à mener à bien tous les efforts visant à renforcer les liens qui unissent la nation chilienne, en laissant derrière soi des haines qui aujourd'hui n'ont plus de sens, et à encourager toutes les initiatives qui consolident la réunification des chiliens* ». A la lumière du texte, on comprend que cette réunification s'est construite sur l'oubli et l'impunité des crimes du passé. Nous sommes amenés à considérer une telle méthode comme ne relevant pas de la justice transitionnelle mais plutôt comme une justice que l'on pourrait qualifier de *« transactionnelle* ». Une telle justice affecte gravement les droits des victimes, le prix de telles transactions étant une remise en cause de la notion même de justice et ne peut être soutenue.

En pratique, l'autoamnistie chilienne est systématiquement appliquée jusqu'en 1998 par les tribunaux civils et militaires pour clore toute forme de procédure judiciaire concernant d'éventuels crimes commis entre 1973 et 1978. Durant cette période, la pratique judiciaire consiste à proscrire tout conflit de compétence entre la justice civile et la justice militaire lorsqu'un membre des forces armées est impliqué, et cela de manière automatique voire même avec l'aval de la Cour Suprême de Justice.[14] On remarque alors dans une telle hypothèse que les tribunaux militaires, qui se révèlent être d'ordinaire de véritables « *machines* » à juger et condamner les civils, tout au moins sous la dictature, rejettent sans véritable enquête l'ensemble des demandes portant sur d'éventuelles violations des Droits de l'Homme par

[14] R. Garretón, « Los tribunales con jurisdicción penal durante la transición a la democracia en Chile », dans J. Almqvist et C. Espósito, (dirs) *Justicia transicional en Iberoamérica*, Madrid, Centro de estudios políticos y constitucionales, Serie 199 « *Cuadernos y debates* », 2009, p. 69-86.

des militaires et appliquent mécaniquement le décret-loi d'autoamnistie de 1978.

Certes, en décembre 1989, dans son programme électoral, celui qui deviendra le président Patricio AYLWIN prévoit d'abroger le décret-loi d'autoamnistie. Néanmoins, il apparait rapidement que la voie parlementaire nécessaire pour mettre en œuvre cet engagement lui est fermée, notamment du fait de la présence des neuf sénateurs inamovibles nommés par le général PINOCHET, et une telle promesse restera lettre-morte, tout au moins sur le plan législatif.[15] Dès lors, c'est par la voie judiciaire que le président AYLWIN tente d'opposer sa vision en demandant à la Cour suprême de justice, le 4 mars 1990, d'ordonner aux tribunaux de mettre en œuvre, « *avec la plus grande diligence possible* », les procès. Il faut comprendre que le président AYLWIN a une théorie particulière de la manière dont doit être appliqué le décret-loi d'autoamnistie. Il en reconnait la légitimité mais en conteste la portée lorsqu'aucune enquête d'investigation n'est préalablement menée pour connaître de l'existence ou non de délits. Une telle vision n'est pas reprise par la Cour suprême de justice qui déclare le 24 août 1990 que l'interprétation dudit décret-loi, tel qu'entendue jusqu'alors, est conforme à la Constitution.[16]

Une telle position apparait difficilement soutenable et nécessite plusieurs remarques. Dans son rapport, la Commission de Vérité et Réconciliation fait une critique très sévère du comportement de la Cour Suprême de justice, notamment en ce qu'elle développe une défense très timorée des droits des victimes de la répression et fait preuve d'un certain zèle en veillant à l'application systématique du décret d'amnistie, avant même la fin de l'instruction des dossiers : « *l'attitude adoptée par la Cour Suprême durant la dictature produisit, dans une certaine mesure, un aggravement du processus de violations systématiques des Droits de l'Homme ; tant en n'assurant pas la protection des personnes détenues dont ils avaient connaissance que parce qu'elle octroyait aux responsables un statut d'impunité* ».[17]

Pour illustrer plus encore le comportement de la Cour suprême de justice, il est opportun de citer deux exemples illustrant ce que nous soutenons.

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[15] J. Zalaquett, « Procesos de transición a la democracia y políticas de de derechos humanos en América Latina », dans *Ensayos en Honor a Fernando Volio Jiménez*, 1997, p. 107-132.

[16] S. Lefranc, *Politiques du pardon.* Paris, PUF, 2002, p. 44.

[17] CNVR. Informe de la Comisión Nacional de la verdad y la reparación, p. 95-104.

D'abord, le cas du juge de la Cour d'appel de Santiago Carlos CERDA, qui enquêtait sur les opérations illégales du groupe « Comando Unido » et qui, le 14 août 1986, ordonna l'arrestation de 40 membres de la police et de l'armée de l'air. Le 30 août 1986, un juge militaire de l'armée de l'air contesta la compétence du juge CERDA et demanda le transfert du dossier à la justice pénale militaire. Deux jours après, la huitième chambre de la Cour d'appel de Santiago classa le dossier sur le fondement que le délit était prescrit. Le juge CERDA, qui ignora cette décision et continua l'enquête pour retrouver les disparus fut immédiatement suspendu par la Cour Suprême pour une période de deux mois sans droit au salaire pour faute grave.[18]

On trouve également le cas du juge de la Cour Criminel de Santiago, René GARCIA VILLEGAS qui accepta, entre 1985 et 1989, de juger plus de 40 cas de torture et tenta d'établir que celle-ci ne peut pas être acceptée comme un « *acte de service* » par le personnel militaire et que par conséquent elle ne relève pas de la compétence de la justice militaire. Le 25 octobre 1988, ce juge est suspendu de son poste pour une durée de 15 jours par la Cour suprême de justice au motif qu'il a donné des déclarations offensantes à l'égard de la justice pénale militaire.[19]

On peut dès lors considérer qu'à cette époque la Cour suprême agit en quelque sorte comme la « *gardienne de l'impunité au Chili* ». Pendant de nombreuses années le décret-loi d'amnistie est donc le principal obstacle au jugement et au châtiment des tortionnaires.

En définitive, « *face à ce blocage judiciaire, le gouvernement modéra encore ses exigences et renonça peu à peu à une justice autre que symbolique, assurée par les réparations* »[20] Le président AYLWIN déclare, le 8 juin 1992 « *je souhaite que chacun soit jugé, dans tous les cas … mais… la justice doit être rendue dans la mesure du possible. Il est probable que sans la loi d'amnistie la prolifération des cas aurait créé un climat dangereux pour la réconciliation. La loi a cependant été, sans aucun doute, un obstacle à la justice* ».[21]

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[18] J. Magasich, « La Commission de vérité et de réconciliation au Chili », *La Revue Nouvelle*. Novembre 2003, p. 63.

[19] « *Comme il est évident en cas précédents, le renvoi à la justice militaire des enquêtes qui mènent les juges civils et qui correspondent à faits dénoncés comme délits commis par agents de sécurité, restent paralysées et abandonnées, ce qui implique l'impunité des suspects* » Également le juge affirma à la Radio espagnole en septembre 1988 qu'au Chili il avait crimes de torture.

[20] S. Lefranc, *op.cit.,* p. 44.

[21] *Ibidem*.

B) LES MÉCANISMES ALTERNATIFS DE JUSTICE AU CHILI.

Malgré le fait que la justice n'a pas joué pleinement son rôle dans les premières étapes de la transition démocratique, les gouvernements démocratiques n'en ont pas moins fait des efforts importants pour tenter de combler les besoins et les attentes des victimes. Entre 1990 et 2010, ce sont quatre institutions qui sont créées et qui contribuent de manière évidente à la reconnaissance des victimes de la dictature.

En premier lieu, le 25 avril 1990, le gouvernement AYLWIN établit la Commission Nationale de Vérité et de Réconciliation[22] (CNVR). Cette Commission constitue une réponse alternative au problème de l'impunité judiciaire.[23]

En ce sens, la CNVR doit accomplir quatre objectifs : offrir un panorama complet du déroulement des évènements sous la dictature, ainsi que de leurs antécédents ; recueillir des informations suffisantes sur les victimes afin de pouvoir les identifier mais aussi connaître leur sort ; recommander des mesures de réparation et de restauration de l'honneur de ces personnes lorsque la CNVR l'estime juste ; recommander l'adoption des mesures légales et administratives qui doivent, à son avis, être adoptées pour prévenir la récidive de tels événements.[24]

Pour ce faire, la CNVR dispose en 1990 de neuf mois maximum pour remplir sa mission, limitée à l'enquête sur les crimes et disparitions forcées (exception faite des actes de torture et des emprisonnements arbitraires). Cette commission ne possède pas de compétence judiciaire mais peut exiger de toutes les administrations les informations nécessaires, pour ensuite les transmettre aux tribunaux. À cette époque, les forces armées s'opposent à participer, arguant dans la plupart des cas que les documents ont été détruits. Cette raison a fait florès au sein de l'institution militaire et deviendra une règle générale. Elle est le reflet de cette attitude consistant à nier le déroulement des événements.

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[22] Décret suprême 355 du 25 avril 1990. Commission nationale de la vérité et de la réconciliation.

[23] P. Aylwin, « La comisión de la verdad y reconciliación de Chile », Conferencia I Curso Especializado en Derechos Humanos para el Cono Sur, Instituto Interamericano de Derechos Humanos, Serie « *Estudios de Derechos Humanos* », Tomo II, octubre 1994.

[24] CNVR. Informe de la Comisión Nacional de la verdad y la reparación. F. S. Benavides, *Justicia en épocas de transición conceptos, modelos, debates, experiencias*. Barcelona, España, Institut Catalá International per la Pau ICIP, 2011, p. 49.

Le 8 février 1991, la CNVR transmet son rapport au président ALWYN. Dans ce document de plus de 2 000 pages, sont répertoriés 2 298 assassinats ainsi que 1 068 disparitions forcées.[25] Ce Rapport présente pour l'époque une avancée essentielle dans le rétablissement de la vérité malgré le rejet du contenu du document par les militaires[26] et par la Cour suprême de justice.[27] Cette dernière refuse le rapport lors d'une déclaration publique dans laquelle l'ensemble de ses membres le qualifient de partisan et tendancieux.[28]

En deuxième lieu, le gouvernement AYLWIN agit face au blocage judicaire du décret-loi d'amnistie en usant d'une justice symbolique assurée par le principe de réparation des victimes. Il faut souligner que la CNVR ouvre la voie à une telle politique de réparation.[29] D'une part, la réparation s'organisa sous la forme d'hommages de la Nation aux victimes. D'autre part, le gouvernement instaure, le 8 février 1992, la Commission Nationale de Réparation et Réconciliation[30] chargée de mettre en œuvre les recommandations de la CNVR : elle doit informer sur le sort des disparus ; créer un dossier d'archives historiques ; se prononcer sur les cas pour lesquels la CNVR n'était pas parvenue à une conclusion[31] ; et déterminer qui, parmi les proches des disparus, doivent bénéficier du statut de victimes.

En outre, la loi 19 123 du 8 février 1992 octroie une pension mensuelle aux familles des victimes, une bonification, mais aussi l'exemption du service militaire pour les fils des victimes, des prestations médicales, la participation

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[25] La CNVR n'a pas pu décider sur 634 cas.

[26] PINOCHET répondit que l'Armée du Chili ne voyait certainement aucune raison de demander pardon pour avoir pris part à cette tâche patriotique du rétablissement de la paix sociale et de la démocratie.

[27] J. L. Guzmán, « Chile », dans K. Ambos, E. Malarino et G. Elsner (Eds), *Justicia de transición. Informes de América Latina, Alemania, Italia y España,* Konrad Adenauer Stiftung, Montevideo, Mastergraf srl, 2009, p. 226-227.

[28] De plus, elle argua du fait que la Commission avait outrepassé les limites de ses fonctions en assumant celles que personne ne lui avait confiées. R. España Ruiz, « La Cour suprême chilienne et les violations des droits de l'homme : la fin d'une enclave autoritaire ? », dans R. Fregosi et R. España (dir), *Droits de l'homme et consolidation démocratique en Amérique du Sud*, L'Harmattan, 2009, p. 90.

[29] Instituto Nacional de Derechos Humanos – INDH, *Situación de los Derechos Humanos en Chile*, Informe Anual 2010. 158-159.

[30] Loi 19 123 du 8 février 1992. Corporación Nacional de Reparación y Reconciliación.

[31] En effet la CNVR et la CNRR ont documentée un total de 3 196 personnes assassinées dont 1.102 disparues durant la dictature militaire.

au programme spécial de santé connu sous la dénomination de « Programme de réparation et attention intégrale en santé » (PRAIS) ainsi que des bourses d'enseignement.[32]

En troisième lieu, en 2003, c'est-à-dire dans des circonstances totalement différentes de celles que nous avons abordé jusqu'alors et qui feront l'objet de la seconde partie de notre communication, le président Ricardo LAGOS met en place la Commission Nationale sur l'emprisonnement politique et la torture.[33] Cette Commission a la tâche de révéler dans un délai de six mois l'identité des victimes d'emprisonnement politique et de torture durant la dictature. Dans son rapport final du 28 novembre 2004, cette Commission détermine l'existence de 28 459 victimes. Il faut noter aussi que ce Rapport sera bien accueilli par l'ensemble de la société et il n'y aura pas de critiques visant à délégitimer le travail de cette Commission.[34]

En dernier lieu, en février 2010, une Commission est chargée de qualifier des cas qui n'ont pas fait partie des trois précédents Rapports. Cette Commission consolide le nombre total de victimes de la dictature : 3 216 personnes disparues ou assassinées et 38 254 prisonniers politiques, certains ayant fait l'objet de torture.[35]

En définitive, les mécanismes alternatifs de justice mis en place au Chili constituent un apport vital au processus de transition étant donné que ceux-ci sont spécifiquement centrés sur les besoins des victimes et facilitent l'accès à la vérité et à la réparation. Toutefois, ces mécanismes ont vu le jour dans un contexte d'impunité récurrent. Les résultats de ces outils non-juridictionnels se sont avérés insuffisants pour les victimes. Il faut attendre 1998 pour voir un réel changement de paradigme dans la lutte contre l'impunité.

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[32] P. de Greiff, « Los esfuerzos de reparación en una perspectiva internacional: el aporte de la compensación al logro de la justicia imperfecta », *Estud, Socio-Jurid*, Bogotá, Colombia, 7 (Numero especial), agosto 2005, p.175.

[33] Décret 1040 du 26 septembre de 2003. Commission nationale sur l'emprisonnement politique et la torture.

[34] R. España Ruiz, op.cit, p. 86-93. Les propos du Commandant en chef de l'Armée, Cheyre, dans une déclaration à l'école militaire, sont révélateurs de ce fait : « *Les violations des droits de l'homme ne peuvent avoir de justification éthiques, jamais et pour personne. Nous voulons avancer, nous avons besoin d'avancer. La vérité et la Justice sont nécessaires* ».

[35] Comisión asesora para la calificación de detenidos, desaparecidos, ejecutados políticos y víctimas de prisión política y tortura ou Commision Valech II. Rapport du 26 août 2011.

II. LA LUTTE CONTRE L'IMPUNITÉ : UN CHANGEMENT DE PARADIGME.

La justice transitionnelle est dynamique, en constante évolution et est l'objet de changements de circonstances qui favorisent de nouveaux équilibres ouvrant la voie à des poursuites judiciaires jadis impossibles. Au Chili, certains faits historiques, politiques et judiciaires sont à l'origine d'un bouleversement majeur dans la manière de concevoir les politiques de transition. En mars 1998, PINOCHET abandonne le commandement de l'Armée pour devenir sénateur à vie. L'ex-dictateur, à partir de là, ne pourra plus se servir de sa fonction, comme il l'avait jusqu'à présent fait, pour déstabiliser la fragile démocratie chilienne.[36]

Ensuite, le 16 octobre 1998, PINOCHET est placé en état d'arrestation à Londres suite à un mandat d'arrêt international émis par la Chambre Nationale Espagnole pour des délits de génocide, d'actes de torture, de terrorisme international et d'enlèvement par la disparition forcée ou l'assassinat d'environ cinquante ressortissants espagnols sous la dictature.[37]

Le président chilien Eduardo FREI réagit à cet événement et propose la création d'une Table de Dialogue comprenant divers membres de la société civile et des militaires dans le but de retrouver les dépouilles des personnes disparues : « *Ceci ne peut se faire qu'avec le concours des forces armées puisque les escadrons de la mort et les polices secrètes étaient formés à 95% de militaire*s »[38]. Cependant, pour RIVANDENEIRA « *l'objet de cette initiative, prise à la suite de la détention du général Augusto Pinochet à Londres, était d'offrir à l'Angleterre des éléments destinés à aider la stratégie du gouvernement chilien pour obtenir le renvoi du général au Chili, et clore ensuite, dans un délai déterminé, la question des violation des Droits de l'Homme commises pendant la dictature de Pinochet (1973-1990)* »[39].

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[36] En effet, PINOCHET affirmait, en rapport aux militaires suspectés des crimes, « *si quelqu'un touche un seul de mes hommes, l'État de Droit arrive à sa fin* »

[37] Audiencia Nacional. Pleno de la Sala de lo Penal. Sumario 19/97, noviembre 4 de 1998 et sumario 1/98 noviembre 5 de 1998 ; M. Pinto, *L'Amérique latine et le traitement des violations massives des droits de l'homme*, Institut des hautes études internationales de Paris. Paris II. Coll « *Cours et travaux »,* No 7, 2007, p. 28. La plainte originale contre PINOCHET avait été déposée auprès de la justice espagnole le 28 mars 1996.

[38] Ligue des droits de l'homme et autres*, Le procès de la dictature chilienne en France*. 2010.

[39] C. Rivadeneira, « Les enjeux de la table de dialogue. Les droits de l'homme au Chili 1999-2000 dans R. Fregosi et R. España (dir), *Droits de l'homme et consolidation démocratique en Amérique du Sud*, L'Harmattan, 2009, p.47.

Après une forte campagne diplomatique menée pour le gouvernement d'Eduardo FREI afin d'empêcher l'extradition de PINOCHET vers l'Espagne, ce dernier est rapatrié au Chili le 2 mars 2000, à la condition que la justice chilienne le juge. Sur ce point, l'affaire PINOCHET revêt pour la justice chilienne une difficulté majeure puisqu'il jouissait, en tant que sénateur à vie, d'une immunité parlementaire. Le 5 juin 2000, la Cour d'appel de Santiago, dans l'affaire *Caravana de la muerte*, et suite à un vote très serré de quatorze voix contre neuf, procède à la levée de ladite immunité et décide[40] :

« [Qu']*un dossier serait ouvert à l'encontre du général PINOCHET puisque c'était la seule façon de permettre aux particuliers qui ont saisi les tribunaux ainsi qu'aux inculpés, de débattre, à travers le déroulement de la procédure, et de prouver, le cas échéant, que les faits qui font l'objet de ces actions en justice sont constitutifs des crimes énoncés* ».[41]

Le 8 août 2000, la Cour Suprême décide, par 14 voix contre 6, de confirmer la levée de l'immunité parlementaire. Sur ce point, Rodrigo ESPAÑA, considère que dans cette décision, « *le plus haut tribunal du pouvoir judiciaire a mis en évidence une rupture institutionnelle, et plus précisément un changement d'attitude des membres de la Cour Suprême vis-à-vis de PINOCHET ainsi que des violations des Droits de l'Homme. Il ne fait aucun doute que cette décision avait pour objectif de redorer l'image de la Cour Suprême auprès de la communauté internationale et d'une grande partie de la société chilienne*.»[42]

Nous ne rentrerons pas dans les détails de l'affaire PINOCHET. Simplement, nous soulignerons que les procès judiciaires contre l'ex-dictateur seront en finalité classés avant même toute condamnation, et ce conséquemment au décès de PINOCHET le 10 décembre 2006. Si la justice n'a pu, par manque de temps, donner une sentence à l'égard des exactions commises pendant la dictature en ce qui concerne PINOCHET, d'autres personnalités de premier et second ordre du régime dictatorial verront leur responsabilité reconnue.

Sur ce point, Rodrigo ESPAÑA affirme que *« c'est à partir de l'année 1998 que la Cour suprême met en œuvre les plus importantes ruptures avec l'ancien régime, telles que la réinterprétation de la loi d'Amnistie, l'acceptation des plaintes contre Pinochet, l'établissement d'arrêts*

[40] PINTO Monica, 2007, op.cit., p. 32.
[41] Cour d'appel de Santiago. Affaire Pinochet. *Caravana de la muerte*. Arrêt du 5 juin 2000. Également la Cour suprême de justice, le 8 août 2000, confirma l'arrêt de la Cour d'appel de Santiago sur la levée de l'immunité parlementaire de PINOCHET.
[42] R. España Ruiz, op.cit., p.93.

condamnatoires contre les militaires (en service ou à la retraite) pour violations des Droits de l'Homme ».[43] Un changement de paradigme est intervenu. Désormais, s'il n'est plus question d'amnistier les crimes commis pendant la dictature (A), il subsiste des problèmes relatifs à l'application des sentences rendues par les Cours et de nombreuses controverses relatives au dispositif de prescription partielle mis en place en 2007. (B)

A) L'INTERDICTION D'AMNISTIER LES CRIMES DE LA DICTATURE.

Au Chili, le droit international est utilisé comme un outil puissant de lutte contre les mécanismes traditionnels d'impunité, et notamment contre le plus célèbre d'entre eux, le décret-loi d'amnistie. En effet, l'article 5 de la Constitution politique de 1980 établit que « *l'exercice de la souveraineté reconnaît une limite, celle du respect des droits essentiels qui émanent de la nature humaine. Il est du devoir des organes de l'État de respecter et de promouvoir de tels droits, garantis par cette Constitution ainsi que par les traités internationaux ratifiés par le Chili et qui sont actuellement en vigueur* ».[44]

Ainsi, le droit international conventionnel prime sur l'ensemble des normes de droit interne. Il faut pourtant souligner que la plupart des conventions de protection des Droits de l'Homme seront ratifiées après la dictature militaire. C'est pourquoi la jurisprudence chilienne est davantage centrée sur les conventions ratifiées avant le coup d'État de 1973. La jurisprudence à cet égard est chargée d'une forte ambigüité et il est courant d'y trouver de grandes contradictions.

Pour illustrer ce point, prenons l'exemple des Conventions de Genève sur le droit humanitaire de 1949[45] ratifiées par l'État chilien en avril 1951. Ces conventions établissent qu'aucun crime contre l'humanité ne saurait être prescrit ou amnistié. Cela signifie que le décret-loi d'amnistie de 1978 ne serait ni valide ni applicable en ce qui concerne les exactions commises durant la dictature militaire. Cependant, « *invoquer les conventions de*

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[43] R. España Ruiz, op.cit., p. 96.

[44] Constitution politique du Chili de 1980. Article 5. Traduction de R. Silva « Vers une réinterprétation de la loi d'amnistie chilienne de 1978 ? » dans R. Fregosi et R. España (dir), *Droits de l'homme et consolidation démocratique en Amérique du Sud*, L'Harmattan, 2009, p. 103.

[45] J. Precht Pizarro, « Vigencia de la ley de Amnistía », *Revista del Centro de Estudios Constitucionales*, Santiago, Chile, Universidad de Talca, 2003, p.258 ; J. L. Guzmán Dalbora, « El tratamiento de los crímenes internacionales en la jurisprudencia chilena: Una cabeza de Jano », *Lateinamerika Analysen,* 18, 3/2007, p. 95-122. n

Genève posait encore une fois un problème d'interprétation, puisqu'on pouvait leur opposer qu'il ne s'agissait pas d'un conflit armé interne, entre forces armées régulières, avec occupation d'une partie du territoire »[46]

Toutefois, en septembre 1998 dans l'affaire Pedro POBLETE CORDOVA, la Cour suprême de justice entame un virage jurisprudentiel essentiel qui renverse l'état d'impunité existant. La Cour décide de la réouverture d'un dossier qui avait été classé par la justice pénale militaire à cause du décret-loi d'amnistie. La Cour affirme désormais que pour que la loi d'amnistie s'applique, une investigation menant obligatoirement à l'identification du responsable du crime est nécessaire. En outre, la Cour suprême reconnait l'applicabilité des Conventions de Genève de 1949 car le décret-loi No 5 du 12 septembre 1973 avait décrété l'existence d'un « *état de guerre interne* ». La Cour reconnait que ces Conventions interdisaient à l'Etat chilien de prendre des mesures assurant l'impunité et protégeant leurs auteurs.[47] Cette jurisprudence vient remettre en question l'interprétation faite jusqu'alors des conditions d'application du décret-loi d'amnistie.[48]

En outre, le Système interaméricain de protections des Droits de l'Homme joue lui aussi un rôle clef dans la lutte contre l'impunité. La Commission interaméricaine des Droits de l'Homme reconnait systématiquement que les lois d'amnisties promulguées dans le cadre des transitions vers la démocratie en Argentine[49], au Chili[50], au Salvador[51], en Haïti[52], au Pérou[53]

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[46] R. Silva, op.cit., p. 103.

[47] Cour suprême de justice. *Affaire Pedro Enrique Poblete Cordova*. Rol 469-98. Arrêt du 9 septembre 1998. K. Fernández Neira, « Breve análisis de la Jurisprudencia Chilena, en relación a las graves violaciones a los derechos humanos cometidos durante la dictadura militar », *Estudios Constitucionales*, Año 8, No 1, Universidad de Talca, 2010, p.473 ; J. L. Guzmán Dalbora, op.cit., 2007, p. 117. H. Quezada Cabrera, « Sentencia dictada por la Corte Suprema en el caso Prats », *Anuario de Derechos Humanos*, Universidad de Chile, 2011, p.163.

[48] En ce sens, Cour suprême de justice. Affaire *Episodio Parral*. Rol 248-98. Arrêt du 7 janvier 1999. Cour suprême de justice. Rol 3.231-03. Arrêt du 9 septembre 2004. Cour suprême de justice. *Affaire Miguel Angel Contreras Sandoval*. Arrêt du 17 novembre 2004. Cour suprême de justice. *Affaire Carlos Humberto Contreras Maluje*. Rol 6186-2006. Arrêt du 13 novembre 2007. Cour suprême de justice. Affaire *Caravana de la muerte, Episodio San Javier*. Rol 4723-07. Arrêt du 15 octobre 2008.

[49] CIDH. Rapport nº 28/92, affaires 10147; 10,181; 10.240; 10262; 10,309; et 10,311. Argentine, 2 octobre 1992, par. 40 et 41.

[50] CIDH. Rapport nº 34/96, affaires 11.228; 11.229; 11231; et 11.282. Chili, 15 octobre 1996, par. 70 et CIDH, Rapport Nº 36/96. Chili, 15 octobre 1996. par. 71.

[51] CIDH. Rapport nº 1/99. Affaire 10480. El Salvador, 27 janvier 1999, par. 107 et 121.

ou encore en Uruguay[54] ont violé ou violent les droits des victimes à la protection judiciaire, le devoir d'investigation, de poursuite, de mise en accusation et de sanction des responsables de violations des Droits de l'Homme des Etats, conformément aux articles 1.1, 8.1 et 25 de la Convention américaine.[55]

Ensuite, en 2001, la Cour Interaméricaine des Droits de l'Homme, dans l'affaire Barrios Altos contre Pérou, déclare que sont « *inadmissibles les dispositions d'amnistie, les dispositions de prescription et l'établissement de dispositions visant l'exclusion de responsabilité ayant pour objet d'empêcher l'enquête et la sanction des responsables de violations graves des Droits de l'Homme telles que la torture, les exécutions sommaires, extrajudiciaires ou arbitraires ainsi que les disparations forcées, qui sont toutes interdites car portant atteinte à des droits non susceptibles de dérogation et reconnus par le droit international des Droits de l'Homme* ».[56]

C'est pourquoi, la Cour Interaméricaine des Droits de l'Homme condamne en 2006 le Chili dans une affaire ALMONACID ARRELLANO sur l'application du décret-loi d'amnistie[57] : « *En conséquence, de par sa nature, le décret Loi No. 2 191 n'a pas d'effet juridique et ne peut pas continuer à constituer un obstacle à l'investigation des faits de l'espèce nécessaires pour l'identification et la condamnation des individus responsables de ces faits ; il ne peut pas non plus avoir le même impact ou un impact similaire*

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[52] CIDH 8/00. Affaire 11378. Haïti, 24 février 2000, par. 35 et 36.

[53] CIDH. Rapport nº 20/99, affaire 11.317. Pérou, 23 février 1999, par. 159 et 160; CIDH. Rapport Nº 55/99, affaires 10.815; 10.905; 10.981; 10.995; 11.042 et 11.136. Pérou, 13 avril 1999, par. 140; CIDH. Rapport nº 44/00, affaire 10.820. Pérou, 13 avril 2000, par. 68, et CIDH. Rapport nº 47/00, affaire 10.908. Pérou, 13 avril 2000, par. 76.

[54] CIDH. Rapport 29/92. Affaires 10.029 ; 10.036 et 10.145. Uruguay, 2 octobre 1992, par. 50 et 51.

[55] JOINET, Louis. *Lutter contre l'impunité. Dix questions pour comprendre et pour agir*. Paris. Éditions La Découverte. 2002. p 15-16

[56] Cour IDH. *Affaire Barrios Altos c. Pérou*. Arrêt du 14 mars 2001. Para. 41

[57] Luis ALMONACID ARELLANO est une victime exécutée devant sa famille en septembre 1973. La Cour Martiale a appliqué le Décret loi d'amnistie en mars 1998. En septembre 1998, la Cour suprême de justice déclara inadmissible le recours de cassation et ordonna classer le dossier. Fundación de Ayuda Social de las Iglesias Cristiana, FASIC, El errático camino de la justicia, Balance año 2007.

sur les autres cas de violation des droits consacrés par la Convention américaine survenus au Chili ».[58]

B) L'IMPRESCRIPTIBILITÉ PARTIELLE DES CRIMES DE LA DICTATURE ?

La prescription est définie comme « *un obstacle procédural juridique visant à empêcher l'ouverture ou la poursuite d'une procédure judiciaire en raison du lapsus de temps écoulé. Elle peut s'appliquer en droit pénal, civil ou administratif. En droit pénal, elle peut empêcher la poursuite des auteurs de violations graves des Droits de l'Homme, quand les crimes ont été commis longtemps auparavant* »[59]. Néanmoins, il existe un consensus au niveau international résumé dans le rapport JOINET de 1997 :

« *La prescription ne peut être opposée aux crimes graves selon le droit international tels que les crimes contre l'humanité. À l'égard de toutes violations, elle ne peut courir pendant la période où il n'existe pas de recours efficaces.* »[60]

En ce sens, la Cour Suprême de justice adopte en 2006 une jurisprudence très importante lorsqu'elle considère que les exactions commises durant la dictature sont des crimes contre l'humanité. Ces exactions deviennent *de facto* imprescriptibles. En l'espèce, en décembre 2006, la Cour suprême de justice casse l'arrêt de la Cour d'appel de Valdivia qui avait préalablement déclaré prescrit les meurtres d'Hugo VASQUEZ MARTINEZ et de Mario SUPERBY survenus en décembre 1973.[61] La Cour Suprême base sa décision non seulement dans le *jus cogens* mais aussi dans l'arrêt de la Cour Interaméricaine ALMONACID ARELLANO.[62] La Cour Suprême va même encore plus loin dans son raisonnement[63] et affirme que la déclaration de prescription de l'action pénale de l'espèce contredit la Convention sur l'imprescriptibilité des crimes de guerre et des crimes contre

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[58] Cour IDH. *Affaire Almonacid Arellano et autres c. Chili*. Arrêt du 26 septembre 2006. par. 119.

[59] Commission Internationale de juristes, *Le droit à un recours et à obtenir réparation en cas de violations graves des droits de l'homme.* Genève, Suisse. 2006, p.201.

[60] L. Joinet, Rapport final révisé établi en application de la décision 1996/119 de la Sous-Commission. L'administration de la justice et les droits de l'homme des detenus. *Question de l'impunité des auteurs des violations des droits de l'homme* (civils et politiques). Doc. E/CN.4/Sub.2/1997/20/Rev.1. 2 octobre 1997, par. 31.

[61] Cour suprême de justice. *Affaire Hugo Vasquez Martinez et Mario Superby*. Rol 559-04. Arrêt du 13 décembre 2006.

[62] Cour IDH. *Affaire Almonacid Arellano et autres c. Chili*. Arrêt du 26 septembre 2006. Para 96 et 99.

[63] K. Fernández Neira, op.cit., p. 479.

l'humanité de 1968.[64] Il est à noter que cette Convention n'est pas ratifiée par le Chili mais que selon la Cour, elle fait partie du droit coutumier et par conséquent revêt un caractère obligatoire.[65]

Toutefois, il faut souligner le fait qu'au Chili, la figure du précédent judiciaire n'existe pas et que la jurisprudence n'a pas de caractère obligatoire.[66] Ainsi, la jurisprudence de la Cour Suprême ne consolide donc pas les critères d'interprétation du droit. Dans la pratique, le sens des arrêts reste déterminé par la composition de la Chambre de la Cour Suprême qui connait le cas d'espèce.[67] Cela ne permet pas d'avoir de certitude quant au contenu et à l'application du droit.

Dans l'affaire Jacqueline del Carmen BINFA CONTRERAS du 22 janvier 2009, la Cour Suprême de Justice admet la prescription du crime en énonçant qu'il n'était pas possible d'affirmer de manière certaine qu'au moment de l'enlèvement de la victime un état de guerre interne existait, et que par conséquent les Conventions de Genève s'appliquaient.[68] En définitive, « *Ces décisions reviennent à annuler le travail accompli par des juges consciencieux qui, durant des années, ont mené des enquêtes dans les diverses affaires impliquant les droits humains* ».[69]

Par ailleurs, malgré la reconnaissance du caractère imprescriptible des crimes commis pendant la dictature, la Cour suprême de justice adopte et applique depuis 2007 une conception difficilement compréhensible et

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[64] ONU. *Convention sur l'imprescriptibilité des crimes de guerre et des crimes contre l'humanité*. 26 novembre 1968

[65] Voir aussi. Cour suprême de justice. *Paulino Flores Rivas. Affaire Molco*. Rol 559-2004. Arrêt du 13 décembre 2006. Cour suprême de justice. *Affaire José Matías Ñanco*. Rol 2666-04- Arrêt du 18 janvier 2007. Para. 17. Cour suprême de justice. *Affaire Carlos Humberto Contreras Maluje*. Rol 6186-2006. Arrêt du 13 novembre 2007. Cour suprême de justice. *Affaire Fernando Vergara Vargas*. Rol 6308-2007. Arrêt du 8 septembre 2008. J. L. Guzmán Dalbora, op.cit., 2007, p 106 et 108 ; G. Aguilar Cavallo, « La Corte Suprema y la aplicación del Derecho Internacional: Un proceso esperanzador », *Centro de Estudios constitucionales*, Vol.7, Núm.1, Universidad de Talca, 2009, p. 96 ; K. Fernández Neira, op.cit. 2010, p. 481. Instituto Nacional de Derechos Humanos – INDH, op.cit. p.153-158.

[66] J. L. Guzmán Dalbora, op.cit., 2007, p. 99.

[67] K. Fernández Neira, op.cit., p.468. Fundación de Ayuda Social de las Iglesias Cristiana, FASIC, El errático camino de la justicia, Balance año 2007.

[68] Cour suprême de justice. Affaire Jacqueline del Carmen Binfa Contreras. Rol 4329-08. Arrêt du 22 janvier 2009.

[69] J. del Pozo, *Droits humains: les incohérences de la justice et du gouvernement au Chili*. Observatoire des Amériques. Février 2008.

soutenable dudit caractère, à savoir la « *prescription partielle* » ou « *semi-prescription* » des crimes. Cette figure juridique, propre au droit chilien, est consacrée dans l'article 103 du code pénal et permet de sanctionner les responsables de graves violations des Droits de l'Homme par des peines plus douces, des peines dites « *humanisée*s ». Cette réduction considérable de la sanction pénale produit de nouveaux problèmes et de multiples débats au sein de la société chilienne. Il peut en effet arriver qu'après un long procès devant les juridictions pénales, les responsables des crimes les plus graves bénéficient d'une simple remise en liberté sous surveillance, ce qui, selon Hernán QUEZADA, peut être en pratique considéré comme relevant d'une certaine impunité.[70]

On ne saurait assez souligner la trop grande bienveillance de la justice chilienne à l'égard des responsables de graves violations des Droits de l'Homme, en particulier lorsque vient le moment de les sanctionner. Le principe de proportionnalité qui doit prévaloir entre les peines et les délits n'est pas respecté.[71] Certes, la tenue d'un procès ne peut que satisfaire les victimes et leur famille[72], mais encore faut-il que le jugement qui y est rendu soit juste, équitable et proportionné, sans quoi il renforcera leur sentiment d'injustice et d'impunité et s'ajoutera aux drames qu'ils ont déjà vécus.

Jusqu'en février 2012, 1 342 procès ont été ouverts pour des crimes commis sous de la dictature de PINOCHET, impliquant la responsabilité de 799 personnes. Parmi elles, 249 ont été condamnées de manière définitive (confirmation de la décision). Néanmoins, seules 72 de ces personnes se trouvent encore aujourd'hui en prison, les autres ayant bénéficié du principe de prescription partielle instauré par la Cour Suprême.[73] Au final, on estime que plus de 71% des personnes responsables pour ces crimes ne sont jamais allés en prison ou alors y sont allés pour des périodes de très courte durée. Certaines affaires restent pendantes à l'heure actuelle et il est encore trop tôt pour tirer un bilan définitif du processus de transition. On peut

[70] H. Quezada Cabrera, op.cit, p. 164-165.

[71] K. Fernández Neira, op.cit., .p. 486 et 487

[72] E. González Cueva, *Perspectivas teóricas sobre la justicia transicional*. New York, New School for Social Research, 2001, p. 24.

[73] Observatorio de Derechos Humanos. « *Verdad, justicia y memoria: violaciones de derechos humanos del pasado* », dans Centro de Derechos Humanos. *Informe anual sobre derechos humanos en Chile 2012*. Facultad de Derecho. Ediciones Universidad Diego Portales. 2012. pp. 28 – 29

légitimement penser que ni les victimes, ni leur famille, ni les responsables de ces crimes ne connaitront un jour ce bilan, car beaucoup d'enquêtes, d'investigations, de procédures judiciaires restent encore à mener pour établir la lumière sur ce qu'il s'est passé pendant la dictature militaire.

L'ESPAGNE

THE OBLIGATION TO EXTRADITE OR PROSECUTE IN SPAIN REGARDING WAR CRIMES, GENOCIDE AND CRIMES AGAINST HUMANITY

MARTA SOSA NAVARRO*

RÉSUMÉ

La nature atroce des principaux crimes internationaux- les crimes de guerre, le génocide et les crimes contre l'humanité, aux fins de cet article- transforme le triomphe de l'impunité dans ce contexte, dans l'une des expressions les plus criantes d'injustice.

D'un point de vue strictement juridique, la mise en œuvre réussie de la justice transitionnelle exige la consolidation d'un droit pénal international qui ne permet pas des «lacunes d'impunité». En dépit de l'applicabilité du principe de l'intervention minimum qui caractérise le droit pénal général, en garantissant la responsabilité pénale, dans la mesure où elle permet un plus grand respect des principes de légalité et de sécurité, demeure l'un des principaux objectifs de tout système juridique.

Par conséquent, la délimitation du cadre des juridictions nationales et internationales concernant les crimes mentionnés ci-dessus se présente comme la première étape en vue d'atteindre cet objectif. Établir clairement les obligations, les rôles et les responsabilités des tribunaux nationaux et internationaux dans l'éradication de ces attaques odieuses contre les droits de l'homme contribue à la consolidation d'un climat de sécurité juridique, en obtenant de cette façon l'investigation et la poursuite de ces violations graves de droit international qui menacent la «paix, la sécurité et le bien-être du monde".

Dans ce contexte, la définition de la nature juridique de l'obligation d'extrader ou de poursuivre devient un point de départ nécessaire. Cet article vise à jeter un peu de lumière sur la définition internationale du principe cité par l'analyse de toutes les sources à partir desquelles la position de l'Espagne sur la nature juridique de l'obligation d'extrader ou de poursuivre peut être déduite.

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La méthode utilisée pour mener à bien cette tâche a consisté en la recherche, l'exploration et l'analyse des sources suivantes: conventions multilatérales et bilatérales signées et ratifiées par l'Espagne, législation national pertinente et jurisprudence espagnole.

A. INTRODUCTION

The atrocious nature of the core international crimes – for the purpose of this article, war crimes, genocide and crimes against humanity - turns the triumph of impunity in this context into one of the most glaring expressions of injustice.

From a strictly legal point of view, the successful implementation of transitional justice requires the consolidation of an international criminal law that makes no allowance for "impunity gaps". Despite the applicability of the principle of minimum-intervention which characterises general criminal law, guaranteeing accountability, in so far as it enables a deeper respect of the principles of legality and security, remains one of the main objectives of any legal system.

Hence, outlining the scope of national and international jurisdictions regarding the aforementioned crimes presents itself as the first step in order to accomplish this goal. Clearly establishing the obligations, roles and responsibilities of national and international courts in the eradication of these heinous human rights violations contributes to the consolidation of a climate of legal security, securing in this way the investigation and prosecution of those grave breaches of international law which threaten the "peace, security and well-being of the world[1]".

In this context, defining the legal nature of the obligation to extradite or prosecute becomes the necessary starting point. This paper aims to shed some light on the international definition of the cited principle through the analysis of all the sources from which Spain's position on the legal nature of the obligation to extradite or prosecute can be inferred.

B. STATUS OF THE ISSUE

Back in 1949, the United Nations' International Law Commission (ILC) detected the need to establish the legal nature of this obligation. Nevertheless, this issue was not included among the Commission's long-term topics until 2004, with the appointment of a Special Rapporteur followed

[1] Preamble of the Rome Statute, UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6, available at: http://www.unhcr.org/refworld/docid/3ae6b3a84.html [accessed 10 December 2012].

by a Working Group[2]. The research project addressing this topic concentrates on the analysis of materials submitted by different States in which they present their position regarding the legal nature of this alternative obligation.

At the time this research was carried out, no more than 30 states had submitted the requested reports to the UN Working Group[3].

Spain is among the countries that have not complied with this duty, consequently delaying the potential legal construction of this obligation as a binding international custom.

The identification of this lacuna motivated this author's decision to explore a topic which intends to offer a broad vision of the Spanish legislation and case-law in respect of this international obligation. Through an in-depth analysis of this country's position, this research aims to make a modest but necessary contribution to elaborate a potentially ground-breaking answer to the ILC's question: what is the legal nature of the obligation to extradite or prosecute in respect of core international crimes[4]?

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[2] Report of the International Law Commission, 56º period of sessions, Annex, p.345, UN Doc. A/59/10.

[3] The States are hereafter listed chronologically: Austria, Croatia, Japan, Monaco, Qatar, Thailand and United Kingdom (Comments by Governments, 59th session of the International Law Commission, UN. Doc. A/CN.4/579, March, 5, 2007); Chile, Ireland, Lebanon, Mexico, Slovenia, Sweden and Tunisia (Comments by Governments, 59th session of the International Law Commission, UN. Doc. A/CN.4/579/Add.1, April, 30, 2007); United States, Letonia, Serbia and Sri Lanka (Comments by Governments, 59th session of the International Law Commission, UN. Doc. A/CN.4/579/Add.2, June, 5, 2007); Kuwait (Comments by Governments, 59th session of the International Law Commission, UN. Doc. A/CN.4/579/Add.3, July, 2, 2007); Poland (Comments by Governments, 59th session of the International Law Commission, UN. Doc. A/CN.4/579/Add.4, de July, 11, 2007), and Chile (complementary information), Guatemala, Mauritius, the Netherlands and Russia (Comments by Governments, 60th session of the International Law Commission, UN. Doc. A/CN.4/599, May, 30, 2008). Nevertheless, this number requires an update as the document elaborated by the International Law Commission on Comments from the Governments during its 61º period of sessions (2009) refers to reports and information handed in from new States: Argentina, Belgium, Canada, South Africa and Yemen. Comments by Governments, 61st session of the International Law Commission, UN Doc. A/CN.4/612, March, 26, 2009.

[4] The underlying intention of the ILC when trying to define the legal nature of this obligation is no other but to establish whether international law can use the *aut dedere aut judicare* clause, so many times included in international treaties, as a legal tool to enforce the activation of compulsory jurisdictions. Essentially, the question at

C. AIM, METHOD AND ANALYSIS

The aim of my research is to assist with the definition of the legal nature of the obligation to prosecute or extradite through the analysis of Spain's position. As a preliminary clarification, it must be noted that the legal nature of this principle has only been analysed in respect of what have been considered core international crimes or serious violations of International Criminal Law by the majority of the legal doctrine and by conventional instruments such as the Rome Statute: war crimes, genocide and crimes against humanity[5].

The method applied to carry out this task has consisted in researching, exploring and analyzing the following sources: multilateral and bilateral International Conventions signed and ratified by Spain, relevant domestic law and Spanish case-law.

In order to simplify the presentation of the results analysed which enabled the extraction of conclusions on Spain's consideration of the cited obligation, the studied sources have been divided into four groups: 1. Multilateral treaties to which Spain is State Party; 2. Bilateral treaties to which Spain is a state Party; 3. National legislation and 4. Spanish Case-Law.

1. MULTILATERAL TREATIES TO WHICH SPAIN IS STATE PARTY

The multilateral treaties hereinafter reviewed are limited to those instruments which meet the following requisites:

Focus on the regulation of the serious violations of International Criminal Law that have previously been referred to.

Specifically include the obligation to extradite or prosecute.

Among the multilateral treaties ratified by Spain that articulate this obligation, we find both conventional instruments that include this clause in respect of all three aforementioned international core crimes and treaties that address war crimes, crimes against humanity or genocide independently.

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stake is whether this obligation is to be considered a treaty-based one, binding the signatory parties only, or whether it has evolved to become, in the light of State practice and *opinio iuris*, customary international law and consequently, universally binding.

[5] P. GAETA., "International Criminalization of Prohibited Conduct" in A. CASSESE., "The Oxford Companion to International Criminal Justice", Oxford University Press, Oxford, 2009, p.65.

I. Instruments that recognize the obligation "aut dedere aut judicare" in respect of all three crimes subject of this investigation: war crimes, crimes against humanity and genocide.

Among the multilateral treaties ratified by Spain that refer to the application of this principle we find firstly the Rome Statute of the International Criminal Court (ICC), from 1998. This Statute establishes the subsidiary nature of the ICC's competence to investigate and try the alleged authors of these crimes. The complementary nature of the ICC, developed in articles 15, 17, 18 and 19 of the Statute, responds to an interest to fill in that legal lacuna to make sure that the alleged authors of the crimes within its jurisdiction are held accountable regardless of the unwillingness or inability of the States to prosecute them[6].

The Statutes for the International Tribunals for the Former Yugoslavia and Rwanda, created in application of Chapter VII of the UN Charter, are two examples of recognition of the primary jurisdiction of an International Tribunal. In this case, the alternative obligation to extradite or prosecute is asserted but it is articulated in slightly different terms given that the International Tribunal enjoys primacy over national courts.

The procedure followed in the creation of these Tribunals, based on the aforementioned Chapter VII, implies that the Statutes that regulate them are automatically binding for all those States that have ratified the UN Charter.

Moreover, Spain is among those countries that have passed national laws to implement domestically those obligations that derive from the cited Statutes[7].

Thirdly, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment was ratified by Spain in 1987 and seems to regulate in article 7[8], the obligation to prosecute as subsidiary to the obligation to extradite.

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[6] E. GOMEZ CAMPELO., Fundamentación teórica y praxis de la extradición en el derecho español, Servicio de Publicaciones Universidad de Burgos, Burgos, 2005, p.211. The admissibility requirements which are evaluated by the ICC to decide whether the case falls into its jurisdiction are explored here. (art. 17,1 y 19,1 Rome Statute).

[7] LO 15/1994 de 1 de junio para la cooperación con el Tribunal Internacional para el Enjuiciamiento de los presuntos responsables de violaciones graves del Derecho Internacional Humanitario cometidos en el territorio de la Ex Yugoslavia y la LO 4/1998 de 1 de julio, para la Cooperación con el Tribunal Internacional para Ruanda.

[8] Article 7.1: "The State Party in territory under whose jurisdiction a person alleged to have committed any offense referred to in Article 4 is found, shall in the cases

II. Instruments that recognize the obligation "aut dedere aut judicare" in respect of war crimes.

The four Geneva Conventions, ratified by Spain in 1952 without any reservations, refer to this alternative obligation in regulating the applicable law in armed conflict. However, in some occasions, the international case law seems to have considered the option to prosecute as preferable to the option to extradite[9].

The Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, signed by Spain on the 7th of July 2001, asserts the binding character of this principle in respect of the attack on cultural goods. Article 17 refers to the obligation to prosecute as an alternative to extradition and article 18 is aimed at enabling the extradition to all State parties in the Convention, in an effort to ensure accountability of this specific type of war crime through the application of the obligation to extradite or prosecute.

III. Instruments that recognize the obligation "aut dedere aut judicare" in respect of crimes against humanity.

Among those treaties that regulate crimes against humanity and recognize the binding nature of this alternative obligation in respect of them, we can highlight both the International Convention for the Suppression of the Acts of

contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution". UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: http://www.unhcr.org/refworld/docid/3ae6b3a94.html [accessed 10 December 2012]

[9] Affaire relative au mandat d'arrêt du 11 avril 2000, (République Démocratique du Congo c. Belgique), Arrêt du 14 Février 2002, Opinion dissidente de Mme Van Der Wyngaert, P. 174, Cour Internationale de Justice.

Nuclear Terrorism[10] and the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others[11].

IV. Instruments that recognize the obligation "aut dedere aut judicare" in respect of genocide.

Finally, the recognition to the obligation to extradite or prosecute can be inferred in this scope from the joint analysis of various articles in the Convention on the Prevention and Punishment of the Crime of Genocide, ratified by Spain in 1968. While article 4 recognizes the obligation of States to punish the authors of genocides, part 2 of article 7 outlines the Parties' obligation to grant extradition in application of the legislation and treaties in force. In this specific case, the terms used to articulate this obligation correspond to the original formulation by Hugo Grotius (obligation to extradite or to punish[12]) and have been replaced by a terminology which is more in line with human rights standards and the presumption of innocence principle.

All of these international conventions have something in common: they all refer and articulate in a more or less direct way the obligation to extradite or prosecute.

In fact, among the multilateral conventions and treaties reviewed, some have been found to exceed the scope of this analysis due to an absence of explicit reference to this obligation. As a practical example to illustrate the application of this criteria in the selection of international instruments to analyse, the allusion that can be found to this principle in the Additional

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[10] Ratified by Spain on the 22nd of February 2007 but not yet in force. In its article 11, the referred clause is included in the following terms: "The State Party in the territory of which the alleged offender is present shall, in cases to which article 9 applied, if it does not extradite that person, be obliged, without exception whatsoever an whether or not the offense was committed in its territory to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the law of the State". UN General Assembly, *International Convention for the Suppression of Acts of Nuclear Terrorism*, 13 April 2005, A/59/766, available at: http://www.unhcr.org/refworld/docid/425e58694.html [accessed 10 December 2012].

[11] Ratified by Spain on the 18th of June 1962, article 9 regulates the obligation to prosecute in those cases where extradition cannot be successful because of the existence of the legal prohibition to extradite nationals. UN General Assembly, *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*, 2 December 1949, A/RES/317, available at: http://www.unhcr.org/refworld/docid/3ae6b38e23.html [accessed 10 December 2012].

[12] H. Grotius, De Iure Belli ac Pacis, Book II, chapter XXI, paras. III and IV.

Protocol I to the Geneva Conventions is articulated as the "duty to cooperate with other States in the prosecution and extradition" was not considered specific enough and consequently left this Protocol out of the scope of this research.

It should be noted that instruments that regulate international crimes which have been signed but not ratified by Spain have also been left out, i.e. Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III).

2. BILATERAL TREATIES TO WHICH SPAIN IS A STATE PARTY

The number of bilateral treaties signed or ratified by a State on a specific issue should also be taken into consideration when attempting to infer a country's position on a particular topic or principle. This section intends to find out what Spain's position is in the scope of bilateral treaties that recognize the obligation to extradite or prosecute through the analysis of the numerous bilateral instruments to which Spain is a State Party.

It must be noted that bilateral treaties tend to address the question of extradition in general terms, that is, without referring to a particular category of crime but requiring, for its application, a minimum level of seriousness.

The 31 bilateral instruments studied can be divided, for the purpose of clear exposition, into 5 categories.

Among the first group, we can find those that refer explicitly to the alternative obligation. This group is comprises extradition conventions between Spain and Bolivia, Costa Rica, Canada, China, El Salvador, India, Mauritania, Morocco, Mexico, Nicaragua, Peru, Uruguay and Panama.

Some of the bilateral extradition agreements explored require a joint interpretation of various articles in order to identify the recognition of this obligation in the sense we have referred to it. Extradition treaties with Algeria, Argentina, Honduras, Brasil, Cape Verde, Chile and the Dominican Republic are part of this group.

A third group of bilateral instruments can be highlighted. This cluster includes conventions such as the one between the Republic of Korea and Spain in respect of which the recognition of the principle "*aut dedere aut judicare*" seems dubious.

There is a fourth group of treaties in which recognition of this principle is purely a formal one, with no practical applicability. Law is used in these instruments to indicate a purely formal commitment to end impunity and guarantee accountability. By articulating wide and comprehensive exceptions to the obligation to extradite, bilateral extradition treaties with

Australia, Cuba, Ecuador and Liberia manage to distort the main objective of this principle as a tool to avoid the creation of areas of impunity.

Finally, some of the instruments reviewed are strongly conditioned by the period of time in which they were drafted, and are articulated in a way which avoids their application in the scope of modern international criminal law. The extradition treaty between Spain and the Republic of Colombia from 1894 is an example of this modality.

3. NATIONAL LEGISLATION

Domestic legislation which provides for the obligation to extradite or prosecute is also addressed in the context of this research as it is considered one of the main sources from which to infer a State's consideration of the legal nature of this obligation.

At this preliminary stage, a distinction must be drawn between active and passive extradition. Only the latter is relevant for the purpose of this research.

The first reference to the cited obligation in Spanish domestic law can be found in the Constitution. Article 13.3, when regulating the figure of passive extradition refers to "Treaties and Law" as the sources of passive extradition, consolidating at a constitutional level the principle "*nulla traditio sine lege*". The absence of an explicit reference to other not positivized sources of International Law such as customary law has been object of criticism among Spanish academics.

On the next hierarchical level, the "Organic Act on Judiciary" from 1 July 1985, establishes, in its article 23, the criteria to determine the jurisdiction of Spanish courts. After addressing the territorial, personal and subject-matter jurisdiction, it recognised the applicability of the principle of universal jurisdiction in respect of certain crimes. The Guatemalan genocide case and the contradictory decisions issued around it reflected the controversial nature of this principle. The debate came to an end when the Supreme Court's Decision (STS 327/2003, February 25) denying the Spanish tribunal's jurisdiction under a domestically articulated universal jurisdiction principle was reversed in a later judgement from the Spanish Constitutional Court (STC 327/22205). In this judgement, the applicability of this principle was inferred both from the Convention on the Prevention and Punishment of the Crime of Genocide and from article 23.4 of the "Organic Act on Judiciary".

However, on November 4, 2009, the Spanish Government enacted a bill that intended to limit the scope of its universal jurisdiction law and may, in the future, restrict Spain's ability to prosecute serious human rights crimes. The

amendment limits the law's application to cases where (i) the alleged perpetrators are present in Spain, (ii) the victims are of Spanish nationality, or (iii) there is some relevant link to Spanish interests[13].

Despite the potential restriction in the access to Spanish courts of the victims of human rights abuse that may result from this amendment, the meaning of this new provision will depend on the Spanish Court's interpretation of it. The "relevant link to Spanish interest clause" could be interpreted as broadly as to enable, in praxis, the applicability of the abolished universal jurisdiction principle.

Nevertheless, the cited amendment explicitly refers to the "*aut dedere aut judicare*" principle given that the law, as modified, will not be a basis for jurisdiction if another, "competent court or International Tribunal has begun proceedings that constitute an effective investigation and prosecution of the punishable acts."

Still at the national level, the Passive Extradition Act 4/1985 from the 21st of March articulates recognition of the aforementioned alternative principle in article 3, by asserting the State's duty to prosecute the alleged authors of crimes when extradition has been denied on the basis of the principle of non-extradition of nationals. International Treaties are also given priority in respect of national law as a source to regulate passive extradition.

Notwithstanding the 2009 reform limiting the applicability of the principle of universal jurisdiction by Spanish courts, the most recent development at legislative level has been the passing of a 2003 Act, which intended to implement the Rome Statute at a domestic level (LO 18/2003 de Cooperación con la Corte Penal Internacional). This instrument, in article 7, grants a subsidiary character to the Spanish courts in respect of the International Criminal Courts jurisdiction regarding specific crimes: genocide, war crimes, crimes against humanity and crime of aggression.

4. SPANISH CASE LAW

Lastly, a country's case law is a clear indicator of its position on a particular issue. Through their decisions, judges provide us with an insight into the reasoning behind a particular interpretation of a certain premise. The evolution in the treatment given to the figure of extradition at a judicial level is crucial when addressing the potential customary nature of the *aut dedere aut judicare* principle at international level.

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[13] Article 23.4 Ley Orgánica 6/1985 de 1 de Julio de 1985, available at http://noticias.juridicas.com/base_datos/Admin/lo6-1985.l1t1.html - a23 (Accessed 10 December 2012).

For the purpose of this study, decisions from three different organs within the Spanish Judicial system have been explored: the Spanish National Court (Audiencia Nacional), the Supreme Court and the Constitutional Court.

The Spanish National Court (Audiencia Nacional) enjoys jurisdiction over serious crimes committed outside the country when, according to Spanish law and international treaties, Spanish courts have jurisdiction to prosecute them. Its activity in the international arena has therefore been determined by the applicability of the universal jurisdiction principle until the 2009 reform of the Law on the Judiciary, which abolished this principle. It must be noted that the decisions issued by this organ can be reversed by the Spanish Supreme Court.

Despite the fact that the universal jurisdiction principle has been applicable in Spain until recently, its practical enforcement has often been frustrated and limited to the completion of a very initial phase. This is largely the result of the diplomatic tensions that arise whenever State sovereignty is challenged through the investigation of crimes which often involve State responsibility or that have been committed by or with the acquiescence of Government representatives. The opening of proceedings against Israeli authorities for the killings in Gaza in 2002, the case against the Chinese authorities for the genocide in Tibet, the indictment issued against military officials allegedly responsible for the Jesuits Massacre case in El Salvador or against the alleged authors of the Guatemala Genocide case are just some examples which illustrate this.

Yet, the Spanish National Court can also claim to have among its case law two ground-breaking decisions within the scope of international criminal law. The following decisions have contributed in a practical and constructive way to the definition of the universal jurisdiction principle. Its analysis has also allowed us to infer some ideas in respect of the nature of the principle explored in this paper: the obligation to extradite or prosecute.

In this sense, the Pinochet case represents a turning point in respect of the direct applicability of customary international law to *ius cogens* or core international crimes that have been referred to here.

The arrest of former dictator Augusto Pinochet in England based on an extradition request from Spain, despite its final outcome, opened the door to a possibility that, until then, only appeared feasible on paper: the exercise of universal jurisdiction over human rights abuses by national courts.

The reasoning in the extradition request issued by the Spanish National Court to the British authorities refers to the “international acceptance of the direct applicability of universal protection in respect of jurisdiction over the

crime of genocide[14]". Despite the fact that in this case the Spanish courts claimed jurisdiction on the basis of the applicability of the principle of universal jurisdiction, the reasoning behind this assertion, in so far as it is based on the will to guarantee accountability, is a valuable source to take into account when analysing the legal nature of the "*aut dedere aut judicare*" principle. This clause, though different to the principle of universal jurisdiction, can be interpreted to be included within its wider scope. Thus, some conclusions regarding the concurrence of the elements of customary law (State practice and *opinio iuris*) in respect of the obligation to extradite or prosecute can be extracted from the analysis of State practice and courts' reasoning on the principle of universal jurisdiction in respect of core international crimes.

Through the Scilingo Case, the Spanish National Court confirmed, once again, the applicability of the universal jurisdiction principle in prosecuting the core international crimes perpetrated during the Argentinean "Dirty War".

The primacy given by this organ to the universal jurisdiction principle over domestic Argentinean laws that forbid the opening of these proceedings must be highlighted here[15].

The importance of the legal reasoning articulated by this Tribunal in asserting that the applicability of the universal jurisdiction principle is grounded in customary international law has two explanations. On one side, it allows us to infer the Tribunal's position on the legal nature and enforceability of the universal jurisdiction principle and on the other side, it also provides us with case-law material which identifies international custom as a source of law that can justify the applicability and binding character of a principle it formulates[16].

The evolution of the Spanish Supreme Court's position on the legal nature and applicability of the "*aut dedere aut judicare*" principle in respect of the aforementioned core international crimes has also been explored in this article. Throughout the analysis of various decisions ruled in the last ten

[14] Auto de la Audiencia Nacional de 3 de Noviembre de 1998.

[15] At the time of the revision and updating of this article, Argentina is holding its third trial to investigate and prosecute those alleged responsible for orchestrating the "death flights", a technique used by the military dictatorship which ruled Argentina between 1976 and 1983, which consisted in tossing political opponents into airplanes, stripe them naked and drug them to throw them alive to the river or ocean to drown. See El Pais, 9 December 2012.

[16] Sentencia de la Audiencia Nacional de 19 de abril de 2005, No. 16/2005.

years by this organ, an interesting development towards its recognition can be deduced.

In the case of acts amounting to the crime of genocide which took place in Guatemala between 1978 and 1990 denounced to the Spanish National Audience, the Spanish Supreme Court held in 2003, through a restrictive interpretation of the principle of universal jurisdiction which was regulated at the time in the Spanish law, that the Spanish tribunals did not have jurisdiction over the alleged crime of genocide. This is mainly for two reasons: the principle of universal jurisdiction which enabled Spanish courts to investigate core international crimes was considered by this Tribunal to be subsidiary to the jurisdiction of the country in which this crimes had taken place (Guatemala) and the recognition of the principle of universal jurisdiction could not be deduced from the Genocide Convention which means, according to the Tribunal, that the Spanish courts could not lean on the applicable international instrument to justify the applicability of the principle of universal jurisdiction[17]. This decision was later reversed by a 2005 decision by the Constitutional Court which considered that the Supreme Court had carried out a restrictive interpretation of the Genocide Convention, an instrument inspired on the principles of universal prosecution and the will to end impunity.

In 2006, the Supreme Court shifted positions towards the recognition of the applicability of the universal jurisdiction principle by virtue of its articulation in Spanish domestic law (article 23.4 of the Law on the Judiciary, LOPJ). The cited Court reversed a decision issued by the Spanish National Court that held that the Spanish Courts did not have jurisdiction over the case of the death of a Spanish journalist in Iraq as a result of an attack by the US army against the Palestina Hotel[18]. After asserting that these acts could amount to war crimes, the Supreme Court identified a direct link between the need for a Tribunal to address this case and the right to effective judicial protection. It held that, in application of the universal jurisdiction principle regulated in the Law on the Judiciary, the Spanish Tribunals enjoyed jurisdiction in this case. The reasoning in this decision not only reflects the evolution of the Court's position towards recognition of the universal jurisdiction principle (which implies a tacit acceptance of the *aut dedere aut judicare* obligation) but also

[17] "(…) respecto al delito de genocidio, la jurisdicción de los Tribunales españoles, sobre la base del principio de justicia universal, no puede extraerse de las disposiciones del Convenio para la prevención y sanción del genocidio, ni de las de ningún otro convenio o tratado suscrito por España." STS 327/2003, Feb. 5, 2003.
[18] STS 1240/2006, Dic, 5, 2006.

highlights that the application of this principle can be understood as an expression of the compromise to fight impunity that can be implemented in other cases through the application of international treaties or customary international law.

In 2007, a decision in the context of mass atrocities committed in Argentina during the "Dirty War" of the 1970s confirmed this new approach[19]. The Spanish courts were considered to have jurisdiction over the case of Ricardo Cavallo, a former member of the armed forces who had allegedly participated in the aforementioned crimes by virtue of the universal jurisdiction principle that had been incorporated into the Spanish Domestic Law in 1985. The Spanish jurisdiction was questioned in so far as it was based on a principle established in a law that was not in force when the crimes took place. This doubt was solved in favour of the applicability of this law since given the fact that it had a procedural nature, it could not, if applied retroactively, violate the principle of legality.

The Court held in this decision that "the universality principle had no limits other than the *res judicata*", supporting or confirming its recognition of the validity of the universality principle in respect of the core international crimes.

The number of Constitutional Court decisions on this topic has increased significantly in the last years as a result of the consideration of the figure of extradition as a tool to protect fundamental rights. Two conclusions can be inferred from the analysis of three selected and significant decisions issued by this organ: on one side, this Court explicitly acknowledges the primacy of International Treaties over domestic law in extradition matters (STC 11/85 of 30th January 1985) and on the other side, through a precedent-setting and controversial decision on the Guatemala case (STC 237/2005 of the 26th September 2005), this Tribunal asserts the priority of customary international law in the scope of genocide. It must be noted that, despite the fact that at the time of this decision Spain had not modified its universal jurisdiction statute, thus enjoying a domestic back-up, the Tribunal insisted on defending the applicability of the principle of universal jurisdiction based on the absence of its prohibition in the Genocide Convention, finding a justification for it in the inspiring principles of universal persecution and avoidance of this crime of this Convention[20].

[19] STS 705/2007, Jul. 17, 2007.

[20] STC 237/2005, Sept. 26, 2003, Sala II del Tribunal Constitucional, FJ 5.

D. CONCLUSIONS

This article has intended to carry out an analysis of Spain's position on the legal nature of the principle "*aut dedere aut judicare*" in respect of the cited international core crimes.

Before presenting the specific conclusions reached on this issue, two preliminary observations should be made: firstly, it must be noted that throughout this study, international law has been given primacy over domestic law by the executive, legislative and judicial powers in Spain and secondly, the recognition of the core international crimes addressed in this paper as *ius cogens* has been evidenced both internationally and domestically.

The in-depth analysis of all aforementioned sources has been aimed both to answer the ILC's customary law-constructing question on behalf of Spain and to present a possible analytical model that could serve as a guide for countries that still have not answered the ILC's request.

In brief, Spain's position on the legal nature of the alternative obligation to extradite or prosecute, though contradictory at some stages, can be inferred from the following conclusions:

The multilateral conventional practice generally recognizes this obligation as a binding part of international law, which is not the case with bilateral conventions or treaties. In order to understand the full implications of this statement it must be highlighted on one side, that the multilateral instruments studied here regulate exclusively the aforesaid core international crimes and on the other side, that the bilateral instruments that did not recognise this obligation were often drafted with the intention to be applied also to minor crimes.

Spanish domestic law does not recognize unequivocally the customary nature of this obligation.

The studied case law has demonstrated, up until now, the binding nature of this obligation through the application of the universal jurisdiction

The international and Spanish legal doctrine agrees on the need to consolidate, from a constructivist point of view aimed at eradicating impunity, the obligation to extradite or prosecute as customary law within general international criminal law[21].

[21] See, among others: C. BASSIOUNI, Universal Jurisdiction for International Crimes: Historical Perspectives and contemporary practice in 42 VA.J. INT´L L (2001), A. CASSESE., International Criminal Law, 2nd Edition, Oxford University Press, New York, 2008; M. OLLE SESE, Justicia Universal para Crímenes Internacionales, La Ley, Madrid, 2008; E. WISE, E and C. BASSIOUNI, Aut Dedere Aut Judicare,: The Duty to Extradite or Prosecute in International Law, Martinus Nijhoff Publishers, Netherlands, 1995; F. BUENO ARUS, F., J. DE MIGUEL ZARAGOZA, Manual de Derecho Penal Internacional, Publicaciones de la Universidad Pontificia Comillas, Madrid, 2003; M. GARCIA ARAN, D. LOPEZ GARRIDO, Crimen Internacional y Jurisdicción Universal: el caso Pinochet, Tirant lo Blanch, Valencia, 2000.

TRANSITIONAL JUSTICE IN SPAIN AFTER MORE THAN 70 YEARS?: BETWEEN THE LAW OF HISTORICAL MEMORY AND THE LEGAL POSSIBILITIES TO INVESTIGATE THE CRIMES OF FRANCO'S REGIME

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Résumé

Depuis que le 16 Octobre 2008, lorsque le Juge d'Instruction de l'Audiencia National espagnole, *Baltasar Garzón* a ouvert le premier cas d'enquêter sur les crimes commis pendant la guerre civile espagnole et la dictature de Franco, pour enquêter en particulier, après plus de 70 années de silence, oubli et impunité, les crimes de disparitions forcées qui ont eu lieu pendant cette période, un intense débat médiatique a eu lieu dans lequel les autorités, associations, experts et personnalités différentes ont déclaré la pertinence, ou non, de ouvrir une procédure judiciaire pour enquêter sur ce qui s'est passé pendant la Guerre Civil et le franquisme dans l'État espagnol.

Loin d'être l'occasion de commencer à fermer cette blessure profonde qui est encore ouvert dans la société espagnole, depuis plus de trois ans, la possibilité d'enquêter les disparitions forcées a été enveloppé dans un nuage de controverse et de opposition, en ce qui concerne non seulement les possibilités juridiques pour mener à bien cette recherche et pouvoir répondre à les demandes des familles des victimes, qui sont insatisfaits de la insuffisante Loi Espagnole de la Mémoire Historique, mais aussi, et en particulier, en ce qui concerne la nécessité et l'opportunité.

Cependant, vous ne pouvez pas fermer la porte à la possibilité d'ouvrir une véritable recherche, sans procéder à une analyse sur la question, parce que c'est la première fois que les demandes des victimes des crimes commis ont été prises en considération, les crimes qui n'ont jamais été objet de poursuites, de telle sorte que l'impunité a été la règle générale concernant les événements survenus pendant la guerre civile et la dictature de Franco.

Cet article tente d'analyser les points qui ont causé des problèmes les plus polémiques qui se posent lorsque vous essayez d'ouvrir une enquête pénale aux cas de disparition forcée pendant le régime de Franco, en essayant, autant que possible, de trouver des solutions: le problème de la non-rétroactivité du droit pénal et la qualification des faits comme crimes contre l'humanité, la question de la permanence du crime de détentions illégales et

par rapport à cela, la question de la prescription, l'existence d'une Loi d'Amnistie; les obligations internationales de l'Etat espagnol, les devoirs envers les victimes et la nécessité de les protéger, et l'identification des responsables.

1. INTRODUCTION

Since 16 October 2008, when the Examining Judge of the High Court *Baltasar Garzón* opened the first case to investigate crimes committed during the Spanish Civil War and the Franco dictatorship -to investigate in particular, after more than seventy years of silence, forgetting and impunity, the crimes of enforced disappearances that occurred during this period[1]- an intense media debate has taken place in which the authorities, associations, experts and different personalities have declared the appropriateness or not of starting legal proceedings to investigate what happened during the war and the Franco period in the Spanish State.[2]

Far from constituting an opportunity to start to close this deep wound which remains open in Spanish society, for over a year the possibility of investigating enforced disappearances was marred by controversy and opposition regarding not only the suitability of the national judicial order but also, and in particular, regarding the need for and the advisability of this action. Many people have opposed the obligation of the State to investigate but some of the most tenacious opposition has come from the Chief Prosecutor of the High Court, *Javier-Alberto Zaragoza Aguado*, who on 20th October lodged an appeal and on 21st October a competence case in which he strongly criticised the contents of the Writ.[3]

However, one cannot close the door to the possibility of opening an actual investigation without conducting an analysis about why this is the first time that the demands of the victims of the crimes committed[4] have been taken into consideration, given that these crimes have never been investigated or

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[1] *See* Writ of 16 October 2008. Preliminary Proceedings Summary 399/2008 V. of the High Court Preliminary Proceedings Chamber nº 5.

[2] Concerning the different opinions on the matter the newspaper *El País* compiled and interesting selection of texts and interviews in the section entitled 'La recuperación de la Memoria Histórica' <www.elpais.com/todo-sobre/tema/Recuperacion/Memoria/Historica/202/>, 4 January 2010.

[3] Appeal lodged by the Chief Prosecutor of the High Court *Javier-Alberto Zaragoza Aguado* on 20 October 2008 and competence case on 21 October 2008.

[4] *See* the start of the Writ of 16 October 2008, *supra* note 1, that lists the numerous demands presented by associations and individuals since 2006.

prosecuted, leading to impunity as the general rule concerning the events which occurred during the Civil War and the Franco dictatorship.[5]

There are various problems that arise when trying to start a criminal investigation into the cases of enforced disappearance during Franco's regime: the problem of the non-retroactivity of criminal law and the classification of the facts as crimes against humanity; the question of the permanence of the crime of illegal detentions and regarding this matter, the question of termination; the existence of an amnesty law; the identification of those responsible and the need to protect the victims. It is not the author's intention to carry out a detailed, in-depth study of all these questions, which would by far exceed the aims of this work, but rather present a brief introductory analysis of the points that have caused most controversy in trying, insofar as possible, to find some solutions.

2. CLASSIFICATION OF THE ACTS COMMITTED AS CRIMES AGAINST HUMANITY IN THE FORM OF CRIMES OF ILLEGAL DETENTION AND PRINCIPLES OF LEGALITY AND NON-RETROACTIVITY OF THE CRIMINAL LAWS UNFAVOURABLE TO THE DEFENDANT.

The main criticism to denying the possibility of initiating a criminal investigation is that the acts that occurred during the dictatorship and the Franco period cannot be classified as crimes against humanity, because doing so would constitute a violation of the principle of legality, given that article 607 bis of the Spanish Criminal Code, introducing this criminal category, was only incorporated into the code in October 2004.[6]

Firstly, before taking other points into account (principle of legality, non-retroactivity…), we should consider whether the acts committed in Spain were effectively crimes against humanity or not, a category that includes, inter alia, enforced disappearances related to illegal detentions.[7]

Article 607 bis of the Spanish Criminal Code, which classifies crimes against humanity, states that:

1. Those who commit the acts stipulated in the following section as part of a generalised or systematic attack against the civil population or against a part of it shall be accused of crimes against humanity.

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[5] As affirmed in the Writ of 16 October 2008, *supra* note 1, in legal grounds one and fourteen.

[6] *See* the appeal lodged by the Chief Prosecutor of the High Court *Javier-Alberto Zaragoza Aguado* on 20 October 2008, *supra* note 3, considering 5.

[7] Article 163 to 168 of the *Spanish Criminal Code*.

In any event, the perpetration of such acts shall be considered a crime against humanity:

1st Based on the victim belonging to a group or collective that are persecuted for reasons that are political, racial, national, ethnical, cultural, religious or gender related or other reasons that are universally recognised as unacceptable under international law ...

2. Those accused of crimes against humanity shall be punished: ...

6th With a prison sentence of 12 to 15 years when they detained a person and refused to recognise the deprivation of freedom or provide information concerning the fate or whereabouts of the detained person ...

Knowing the history of what took place in Spain during those ill-fated years, there seems to be no doubt that what occurred in Spain was "a systematic generalised attack against the civil population or against a part of it"[8] since the aim was to rise up against a legitimate government and systematically wipe out the opposition.[9] In this way, when a crime of illegal detention, or a similar act, when the enforced disappearance of people is committed as part of a systematic or generalised attack against the civil population for political reasons, it will be classed as a crime against humanity.[10] With regards to the aforementioned, there is no doubt that the acts committed constitute, at least materially, crimes against humanity in the form of enforced disappearances.

However, the main problem is not the fact that doubts exist concerning the effective classification as crimes against humanity of the acts committed, but rather that this category was not incorporated into the Criminal Code until the Organic Law 15/2003 of 25 November, meaning that when these acts were committed there was nothing in the Criminal Code that classified this conduct as crimes against humanity.[11] Therefore, if we wish to apply article 607 bis of the Criminal Code we need to face the possible violation of the principle of non-retroactivity and the principle of legality.

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[8] *See* Writ of 16 October 2008, *supra* note 1, legal grounds three. Specifically, legal grounds two, three and partially four and six describe the elements and legal classification of the acts committed.

[9] Concerning the Francoist crimes, their systematic and large scale nature, *see* all, *La cuestión de la impunidad en España y los crimenes franquistas*, *2004*, Equipo Nizkor, <www.derechos.org/nizcor/españa/doc/impuesp.html., III. B)>, 4 January 2010.

[10] As established not only in article 607 bis but also in article 7.1.i) of the *Rome Statute of the International Criminal Court*, of 17 July 1998.

[11] Article introduced by the Organic Law 15/2003, of 25 November which modifies the Organic Law 10/1995, of 23 November, of the *Spanish Criminal Code*, in force since 1 October 2004.

The underlying point here is the permanent conflict between international criminal law and national criminal law and, in particular, to what extent it is possible to apply international criminal customary law rules, ratified by Spain and which form part of the so-called *ius cogens*, but which were not included in national criminal law at the time the acts were committed.

This is without doubt a matter of great controversy yet to be resolved and a detailed analysis of this would exceed the aims and possibilities of this study. But in considering it to be the main hindrance and criticism to the possibility of investigating the crimes of Franco's regime, it is necessary to make a brief reference to the debates surrounding this issue.

An important section of the doctrine –eminently of the internationalist doctrine-, tends to consider that the perpetrators of crimes against humanity have criminal liabilities based on the international rules that have prohibited this type of conduct since the end of the 19th century or the start of the 20th century, even though these crimes were not included in national laws at the time they were committed.[12] Crimes against humanity are recognised as such in international customary law, in such a manner that the prohibition of enforced disappearance is a principle of *ius cogens* and is afforded the status of a mandatory provision under international law.[13] Similarly, the

[12] With regards to the classification of crimes against humanity, *see*, among others, Cherif Bassiouni, *Crimes against humanity in International Criminal Law* (Martinus Nijhoff Publishers, Dordretch/ Boston/ London, 1992); Geoffrey Robertson, *Crímenes contra la humanidad: la lucha por una justicia global (*Siglo XXI, Madrid, 2008); Margalida Capellá i Roig, La *tipificación internacional de los crímenes contra la humanidad* (Tirant lo Blanch, Valencia, 2005).

[13] The recognition of crimes against humanity as common law dates back to humanitarian law with the *Martens Clause*, incorporated into the Preamble of the 1899 *Hague Convention II relating to the Laws and Customs of War on Land*: "Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience" and its common law character is confirmed in the *Nuremberg Principles* after Ruling 3074 (XXVIII) of 3 December 1973 regarding the principles of international cooperation for the detention, arrest, extradition and punishment for individuals guilty of war crimes and crimes against humanity. For a more detailed view of crimes against humanity in common law and its evolution to the current classification, *see España: poner fin al silencio y a la injusticia, la deuda pendiente con las víctimas de la Guerra Civil española y del régimen franquista*, 2005, Amnesty Internacional, pp.

prohibition of crimes against humanity and, in particular, illegal detentions, is conventionally included in multiple treaties, many of which are ratified by Spain.[14]

On the other hand, article 15.2 of the International Covenant on Civil and Political Rights states that a person may be judged and sentenced for "acts and omissions which when they were committed, constituted a crime according to the general principles of law recognised by the international community". This is also included in the European Convention on Human

22-23, <www.es.amnesty.org/paises/españa/>, 4 January 2010; Capellá i Roig, *supra* note 12.

[14] The first positive charge of crimes against humanity in international law is in the *Nuremberg International Court Statute*, article 6. c) and is confirmed in Ruling 95 (I) of 11 December 1946 of the United Nations General Assembly. Crimes against Humanity have been defined in the Statutes of international criminal Courts and are listed in article 7 of the *Rome Statute*, *supra* note 10: "1. For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:… i) Enforced disappearance of persons". Also the *International Convention for the Protection of All Persons from Enforced Disappearance* (E/CN. 4/2005/WG.22/WP.1/REV.4, 23 September 2005), article 5: "The widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law" and article 2: "Enforced disappearance is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which places such a person outside the protection of the law"; *Declaration on the protection of all persons from enforced disappearances* (A/RES/47/133, approved by the General Assembly in its ruling 47/133, 18 December 1992), article 1: "1. Any act of enforced disappearance is an offence to human dignity. It is condemned as a denial of the purposes of the Charter of the United Nations and as a grave and flagrant violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and reaffirmed and developed in international instruments in this field.

2. Such an act of enforced disappearance places the persons thereto outside the protection of the law and inflicts severe suffering on them and their families. It constitutes a violation of the rules of international law guaranteeing among other things, the right to recognition as a person before the law, the right to liberty and security of the person and the right not to be subjected to torture and other cruel, inhumane or degrading treatment or punishment. It also violates or constitutes a grave threat to the right to life".

Rights and Fundamental Freedoms in article 7.2 that states that "[t]his article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations". In this sense, we cannot say that Spain was not aware of these international principles, which it accepted since, in 193,1 it had incorporated the universal rulings of International Law into its national law by means of article 7[15] of the Constitution of the 2nd Republic. This suggests that the crimes against humanity committed from 1936 onwards had already been prohibited since 1864, the year in which the humanitarian law code was stated in the Geneva Convention, principles of humanitarian law which Spain incorporated through article 7 of its Constitution of the 2nd Republic.

This means that the nature of mandatory provisions in international law for crimes against humanity provide that the applicable principle of legality is not the national but the international one, which makes *retrospective application*[16] of international criminal law possible. This interpretation, which has been admitted by numerous national and international Tribunals[17] and supported by a large part of the internationalist doctrine[18], allows to retroactively apply the current Spanish Criminal Code, since at the time the acts were committed they were already classed as criminal according to international customary law.

In this sense, the High Court has recognised that the existence of duties on an international level makes it possible to punish individuals for violating international law.[19] We refer to the interpretation, not exempt from

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[15] *Constitution of the 2nd Republic of 1931*, article 7: "The Spanish State will respect the universal rules of International Law, incorporating them into its statutory law".

[16] *See* Javier Chinchón Álvarez, 'Examen del Auto del Juzgado de Instrucción nº 5 de la Audiencia Nacional', nº 7054 *Diario La Ley* (Año XXIX), p. 3.

[17] *See*, *Kislyiy* v. *Estonia*, 17 January 2006, European Court of Human Rights and the actual Public Prosecutor's Office in the Writ of 17 July 2008 of the High Court Preliminary Proceedings Chamber nº 2, Preliminary Proceedings 211/09L, has recognised that crimes against humanity belong to common law and therefore *erga omnes* is effective although Spanish legislation did not incorporate this until 2004.

[18] With regards to the doctrine that supports this theory *see* Chinchón Álvarez, *supra* note 16, p. 3; Margalida Capellá i Roig, 'Los crímenes contra la Humanidad en el caso Scilingo', nº 10 *Revista electrónica de estudios internacionales* (2005); Manuel Ollé Sesé, 'Justicia universal para crímenes internacionales', *La Ley,* Madrid (2008) , pp. 64-66.

[19] *See* Judgement nº 15/2005 of the Criminal Division of the High Court, Section 3, of 19 April 2005, (*Scilingo* case).

controversy, that the High Court takes of the principle of legality and the principle of non-retroactivity in criminal law in the trial known as the Scilingo Case[20] in which the Argentine navy officer *Adolfo Scilingo* stood trial as the perpetrator of crimes against humanity applying article 607 bis of the Spanish Criminal Code; these crimes were committed during the first few years of the Argentine dictatorship in 1976 when they did not yet exist in the Spanish Criminal Code as they were not expressly classified until 2003, and did not come into force until 1 October 2004.

The main line of argument of the decision is based on understanding that while applying article 607 bis to acts that took place before this article was incorporated into the Criminal Code, this does not mean it is breaching the principle of retroactivity since what is really being applied is an international regulation that already existed in international customary law. Article 607 bis of the Criminal Code simply incorporates a customary principle into criminal law which by its international *ius cogens* nature and its obligatory validity *erga omnes* already existed prior to being incorporated into national law. Because of its special nature and its general character, it makes it necessary to reinterpret traditional criminal principles, which does not imply breaching them but finding different solutions without going against them. This means declaring the general principle of the direct applicability of international law concerning individual criminal liability for crimes against humanity.

Without forgetting the importance of the principle of legality –constituting the right to not stand trial for conduct that was not a crime when it was carried out- and, with regards to this, the prohibition of non-retroactivity[21], that form part of not only national law but also international law[22], the Tribunal

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[20] *See* for analysis of the Judgement of the High Court nº 1672005 of 19 April, known as the *Scilingo* case the articles of Capellá i Roig*, supra* note 18.; Alicia Gil Gil, 'La Sentencia de la Audiencia Nacional en el caso Scilingo' nº 7 *Revista Electrónica de Ciencia Penal y Criminología* (2005), that criticises this point of the Judgement for understanding it breaches the principle of criminal legality. Also articles of Carmen Lamarca Pérez, 'Internacionalización del Derecho Penal y principio de legalidad: el Caso Scilingo', nº 34 *La Ley Penal: Revista de Derecho Penal, procesal y penitenciario* (January 2007) and Francisco Bueno Arús, 'Fuentes y principios generales del Derecho Penal Internacional de nuestro tiempo (Reflexiones sobre la Sentencia de la Audiencia Nacional en el Caso Scilingo)', nº 34, *La Ley Penal: Revista de Derecho Penal, procesal y penitenciario*, (January 2007), among others.

[21] Articles 25 and 9.3 of the *Spanish Constitution* and article 2 of the *Spanish Criminal Code*.

[22] Article 7 *European Convention on Human Rights and Fundamental Freedoms,* 4 November 1950 (ratified by Spain in 1979), article 15 *International Covenant on Civil*

understands that an international formulation of this principle is possible; this allows for flexibility, since it considers that crimes against humanity were criminal when they were committed, this conduct was criminal under international law therefore it would not violate the principle of legality and the prohibition of non-retroactivity.[23] This means that the flexible reinterpretation of the principle of legality would no longer render it as *nullum crimen sine lege* but as *nullum crimen sine iure.*

The apparent necessary pursuit of coexistence between international regulations and in international law, establishes that it is necessary to apply the national statutory law in force in the State, so that conduct that is deemed punishable by international law is regulated under criminal law. Therefore, this flexibility of the principle of legality is necessary when dealing with crimes of an entity and an incredible charge so that, disregarding this necessary reformulation and adaptation of the principle to an international legal context, it would mean disregarding the fact that the basis of the principle of legality is just.[24]

It is undeniable that the conclusions reached by the High Court are more than controversial. In Spanish law, in both the criminal and case law doctrine, the interpretation of the principle of legality has always been very strict in such a way that the international classification would not be sufficient to allow international law to be applied directly to national law, without it being incorporated into statutory law.[25] This implies that international

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and Political Rights. Ruling 2200 A (XXI), adopted by the United Nations General Assembly, 16 December 1966 and articles 22 and 23 of the *Rome Statute*, *supra* note 10.

[23] In Judgement nº 15/2005 of the High Court, *supra* note 19, understands that this would not breach article 25 of the *Spanish Constitution* (and regarding this, neither does it breach articles 9.3 and 2 of the *Spanish Criminal Code*) since this article establishes that: "Nobody may be sentenced or punished for actions or omissions that did not constitute a crime, offence, or breach of the law when they were committed according to legislation in force at the time" and according to the legislation in force at the time, the rules of international common law, these conducts were criminal.

[24] *See* Judgement nº 15/2005 of the High Court, *supra* note 19, "only superficial treatment of respecting the principle of criminal legality and against its actual raison d'être, considering it above all as a principle of justice, would allow for questioning the applicability to the case of article 607 bis of the *Spanish Criminal Code,* which does not breach article 25 of the Constitution nor any of the other international rules for human rights".

[25] *See,* Gil Gil*, supra* note 20, p. 6 and the following understands that international common law cannot be applied directly because it does not guarantee the formal and

customary law cannot be the direct source of national criminal law, since this would breach the principle of legality.[26]

The main elements hindering the application of international common law are, on the one hand, the lack of a specific criminal penalty in international rules –an unavoidable requirement of the principle of legality in criminal law-, which determines its nature as *non-self-executing* thereby impeding its direct application.[27] On the other hand, the non-existence of an express definition[28] of crimes against humanity when the crimes took place and, lastly, customary law is incapable of providing the necessary requirement for the principle of taxativity.[29]

This strict interpretation impedes any type of flexibility of the principle of legality with regards to international offences, through the nature of the offence or the offender[30], in such a way that, in the search for coexistence

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physical demands required by the principle of legality carried out by the Constitutional Court. International law, when it is not incorporated, is only understood to be a source of interpretation for national law. Concerning this matter, although with a different opinion, *see also La obligación de investigar los crímenes del pasado y garantizar los derechos de las víctimas de desaparición forzada durante la Guerra Civil y el franquismo*, November 2008, Amnesty International, p. 17, <www.es.amnesty.org/paises/españa/> , 4 January 2010.

[26] *See* Lamarca Pérez*, supra* note 20, p. 76.

[27] *See* ibid, p. 76 and Alicia Gil Gil, *Derecho Penal Internacional* (Tecnos, Madrid, 1999), p. 95 and following.

[28] Another problem is that the express definition of these crimes was not elaborated until the Statute of the International Criminal Court and the Tribunals ad hoc, an express definition that is necessary to safeguard the principle of legality. This means that although they were defined in the common law rules and the ius cogens, they were not sufficiently specific.

[29] *See* Gil Gil*, surpa* note 20, p. 6 and *supra* note 27, p. 87 and following. But the Spanish doctrine goes beyond this as it understands that not even the fact that crimes against humanity are defined in the *Rome Statute, supra* note 10, is compatible with the strict taxativity required by our principle of legality. *See* on this matter, Grupo de Estudios de Política Criminal. *Una propuesta jurídica penal internacional*, Document nº 6, 2002, pp. 32, 38 and 39.

[30] The argumentation of the magistrates of the High Court, and those that accompany this to uphold the necessary flexibilisation of the principle of legality and thereby give prevalence to material justice over formal legality (that the principle of legality exists to protect citizens from the State and not to protect criminals of massive attacks against humanity, or the argument that links the principle of legality to justice as its essence or understanding that when clear injustice occurs through the application of this principle reformulation of the principle is necessary, *see*, *supra*) are harshly criticised

between national law and international law, the latter cannot prevail over the rights and guarantees protected by the Constitution. The internationalisation of criminal law cannot be carried out in a random manner, in the same way the fight against impunity for the most heinous crimes cannot be carried out to the detriment of the rights and guarantees of the Rule of Law.

Therefore, the solution reached by the High Court to apply article 607 bis would violate the principle of legality that requires the punishment to be defined before the crime is committed,; in other words, it prohibits non-retroactivity of criminal rules that are unfavourable for the defendant, in spite of the fact that the prohibition established in the article already existed in international customary law. However, the Scilingo Trial, despite being harshly criticised, also led to a general reassessment of the incorporation of international Law into national law for criminal purposes.

Later, this Trial of the High Court was reviewed by the Supreme Court[31], who gave a new solution to the problem, which was no less controversial, if possible, than its predecessor.[32] The Supreme Court admitted that even though we were dealing with ordinary crimes such as crimes of illegal detention, as they took place within a context of crimes against humanity, given their systematic and generalised nature; this gives them characteristics typical of international law crimes, raising the question of imprescriptibility, meaning that the States would have to prosecute these crimes.[33]

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by Gil Gil, *surpa* note 20, p. 7 and following as he considers that all exceptions and flexibilisation of principles and guarantees puts the Rule of Law at risk. In the same way, another criticism of the flexibilisation of the principle of legality since the severity of the crimes should not result in a decrease in the basic guarantees is Lamarca Pérez*, surpa* note 20, pp. 76-77, which criticises these argumentations of the High Court as it forgets that the law should be equal for everyone. Also regarding this, *see* Bueno Arús*, surpa* note 20, pp. 86-87 and Ezequiel Malarino, *Persecución penal nacional de los crímenes internacionales en América Latina y España* (Max Planck Institut, Honrad Adenauer, Montevideo, 2003), p. 55 and following.

[31] *See* Judgement of the Supreme Court nº 798/2007, of 1 October 2007.

[32] *See*, concerning the Judgement of the Supreme Court, nº 798/2007, of 1 October 2007, among others, Ollé Sesé, *surpa* note 18, pp. 64-67, 162-183.

[33] Judgement of the Supreme Court, nº 798/2007, of 1 October 2007, legal grounds seven: "(the circumstances described) mean that these are crimes against Humanity, increasing the injustice, which leads to a greater punishment; raising the question of imprescriptibility".

In this way, although the need for the complete classification of crimes against humanity and their incorporation into national law is protected[34], there is no room for doubt that the acts were definitely committed within a context of crimes against humanity, which allowed the Supreme Court in its day to incorporate the characteristics of crimes against humanity into these offences.

It is this innovative solution which suggests that, although the enforced disappearances committed during the Civil War and Franco's regime were not classified as crimes against humanity when the acts were committed, they were not committed as isolated crimes but as part of a systematic and generalised plan of attack against part of the civil population; in that regard, we would be dealing with crimes against humanity due to the *element of context*, or in other words, ordinary crimes have acquired certain characteristics under international criminal law based on the context in which they were committed. Given the problem of which criminal law to apply, reference can be made to the Criminal Code effectively in force at the time when the crimes were committed, classifying in articles 474 to 476 the crimes of illegal detentions, articles which are still in force in the current Criminal Code; however, we must never forget taking into account their context, they would amount to crimes against humanity.

In this sense, while being protected by the fact that crimes against humanity cannot be prosecuted as they were not classified as such at the time they were committed, the context of crimes against humanity incorporates a greater content of offences of a conduct that is criminal in itself, the crime of illegal detentions, a crime that was already classified when it was committed and which has survived in our legal system to the present day.

Similarly, although article 607 bis cannot be applied as it would be a violation of the principle of legality, the acts themselves can be effectively classified as crimes against humanity because of the contextual element, which would allow some aspects of their special nature to be considered. In this sense, considering this special nature will determine the prosecution and investigation since, in spite of the fact that according to regulations these are ordinary crimes of illegal detentions, effectively they fall under the scope of crimes against humanity. Therefore, for example, they should be considered

[34] In Judgement nº 798/2007, of 1 October 2007, the Supreme Court states that the application of article 607 bis by the High Court breached the principle of legality formulated in article 25.1 of the *Spanish Constitution* by breaching the principle of non-retroactivity in criminal rules and because of the need for the law to be previously written and true and transposed to national law.

as crimes against humanity for the purposes of declaring their imprescriptibility.[35]

This interpretation contradicts the more traditional and strict views that come from the Spanish doctrine and case law. Nonetheless, a new interpretation that allows the investigation and prosecution of the most serious crimes committed against humanity cannot be considered as an attack on the Rule of Law because of the violation of the principles of legality and criminal non-retroactivity; instead, it should be seen as the need for the national legal system to adapt and strive to balance the requirements of international law, regulations that are also mandatory for the State. In this sense, we must not forget that if Spain does not prosecute international crimes because the conduct was not classified at the time in the Spanish Criminal Code it would be contravening its international obligations[36], therefore looking for alternative interpretations is not a trivial matter.

3. CRIME OF ILLEGAL DETENTION AND STATUTE OF LIMITATIONS

As we have seen, although crimes against humanity were not incorporated into the Criminal Code until the Organic Law 15/2003 in article 607 bis, which would impede its application as it breaches the principle of legality, illegal detentions were already defined in the Criminal Code of 1932 in articles 474 to 476 as ordinary crimes, criminal conduct that has remained classified in the successive Criminal Codes. Therefore, without forgetting the context in which crimes against humanity were committed, the events that occurred are included in the definition of illegal detentions without giving an account of the whereabouts of the detained person, these crimes are included in articles 163, 166 and 167 of the Spanish Criminal Code.[37]

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[35] *See* Writ of 16 October 2008, *supra* note 1, legal grounds four: "The legal classification defined, as will be reasoned later, is that of a permanent crime of illegal detention, without providing information concerning the whereabouts of the victim, within the context of crimes against humanity, thereby rendering irrelevant the problems of non-retroactivity that could have been alleged".

[36] The *International Covenant on Civil and Political Rights, supra* note 22 and the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, *supra* note 22, conventions which Spain forms part of, in articles 15.1 and 2 and article 7.2 respectively, establish this responsibility of the State for breaching its international obligations.

[37] The Chief Prosecutor of the High Court along with other people, have argued that the crime of detention, aggravated through not providing information on the fate and whereabouts of the victim was not introduced into the *Spanish Criminal Code* until 1944 therefore applying it to this case would violate the principle of non-retroactivity of criminal law unfavourable to the defendant. *See*, the appeal lodged by the Chief

We are, in any case, dealing with illegal detentions, criminal conduct according to both the present Criminal Code and the Criminal Code of 1932,;therefore, the problems surrounding crimes against humanity with regards to violating the principle of non-retroactivity do not exist concerning the crime of illegal detention.

However, having overcome the problem of violating the principle of legality, we are still faced with the matter of the statute of limitations for the crime of illegal detentions.

The crime of illegal detentions is a crime that is instantly completed but has permanent effects[38], in other words, it continues and does not end until the whereabouts of the people that have disappeared have been determined.[39] This means that, as stipulated in article 132 of the Criminal Code[40], the statute of limitations for this crime does not come into being until the illicit situation has ended; in other words, not until the whereabouts of the victims has been stated, which means that for this case we can declare that the

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Prosecutor of the High Court *Javier-Alberto Zaragoza Aguado* on 20 October 2008, *supra* note 3, considering 1; Alicia Gil Gil, *La justicia de transición en España. De la amnistía a la memoria histórica,* (Atelier, Barcelona, 2009), p. 160. What is true is that, also regarding this point, when interpreting the principle of legality attention must be paid to the special nature of the crimes committed -which 'materially' are crimes against humanity-. This suggests focussing on the fact that illegal detentions have been defined in the *Spanish Criminal Code* since 1932 and only the aggravation was introduced afterwards, a fact that while not completely irrelevant, cannot be the key point to prevent prosecution for these abominable crimes.

[38] There is a unanimous consensus of the doctrine in understanding illegal detention to have a permanent nature. *See*, among others, Gerardo Landrovre Díaz*, Detenciones ilegales y secuestros* (Tirant lo Blanch, Valencia, 1999), p. 67 and following; Carlos Climent Durán, *Detenciones ilegales cometidas por autoridad o funcionario público* (Tirant lo Blanch, Valencia, 1999), p, 156 and 152; Francisco Muñoz Conde and Meche García Arán, *Derecho penal. Parte especial* (16th ed., Valencia, 2007), p. 196; Tomás Vives Antón, and Carlos Martínez-Buján Pérez*,* [et. al.] *Derecho penal. Parte especial* (2nd ed., Tirant lo Blanch, Valencia, 2008), p. 164.

[39] Concerning the end of the crime *see*, for all, Emiliano Borja Jiménez*,* 'La terminación del delito', Volume 48 January-April *Anuario de derecho penal y ciencias penales*, (1995), pp. 89-185.

[40] Article 132 of the *Spanish Criminal Code* "1. The terms established in the preceding article will be calculated from the day on which the punishable offence was committed. In cases of continued crime, permanent crime, as well as cases of offences that require regular practice, these terms will be calculated, respectively, from the day on which the last offence was committed, when the illicit situation was eliminated or the conduct ceased".

statute of limitations has not yet become operative since the victims of these crimes have still not been found.[41]

As established by numerous International Treaties[42], the act of enforced disappearance is considered to be a permanent crime while the perpetrators continue to conceal the fate and whereabouts of the missing person and the facts have not been clarified.[43] For this reason, it is essential to begin the investigation of these crimes, as this is the only way to put an end to these illegal detentions.[44]

Therefore, although these are ordinary crimes and are not classified as imprescriptible as crimes against humanity are, the fact that they are permanent crimes means they do not fall under the statute of limitations,

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41 With regards to the arrangement of permanent crimes, *see*, for all, Paz Lloria García, *Aproximación al estudio del delito permanente* (Comares Publishers, Granada, 2006).

42 *See*, among many other international documents and conventions, *Declaration on the protection of all persons from enforced disappearance, supra* note 14, article 17.1: "Acts constituting enforced disappearance shall be considered a continuing offence as long as the perpetrators continue to conceal the fate and the whereabouts of persons who have disappeared and these facts remain unclarified". In the same way article 8.1 b) of the *International Convention for the Protection of All Persons from Enforced Disappearance*, *supra* note 14, indicates that: "1. A State Party which applies a statute of limitations in respect of enforced disappearance shall take the necessary measures to ensure that the term of limitation for criminal proceedings:… b) Commences from the moment when the offence of enforced disappearance ceases, taking into account its continuous nature". Also *Resolution 56/83 of the United Nations General Assembly concerning the responsibility of the State for internationally illegal crimes*, 28 January 2002, article 14.2 "The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation".

43 *See*, regarding the consequences of the permanent nature of enforced disappearance, Miguel A. Rodríguez Árias,, *El caso de los niños perdidos del franquismo. Crimen contra la humanidad,* (Tirant Lo Blanch Publishers, Valencia, 2008, pp. 93-116). *Miguel A. Rodríguez Árias* goes even further in his conclusions as he calls for article 2.2 of the *German Criminal Code* to be applied which understands that if criminal law is modified while a crime is ongoing "the law in force when the crime ends should be applied". This would make article 7.1 of the *Rome Statute* applicable, *supra* note 10, which classifies the crime of enforced disappearance as a crime against humanity without this breaching the principle of legality, *see* pp. 99-102.

44 *See* Writ of 16 October 2008, *supra* note 1, legal grounds nine.

because as the illicit situation has not ended –the disappearance of the people detained-, the statute of limitations has not become operative.[45]

Against this majority view, it has been claimed that for the crime to be considered unfinished in its permanent nature it is necessary "for the person to be alive and deprived of liberty for all this time, which is not possible in the Spanish case as death was public and notorious".[46] In this way, if the statute of limitations was to be calculated from the moment the bodies appeared this would mean interpreting the precept as a crime of suspicion which, on the one hand, is constitutionally forbidden and, on the other hand, would also mean allowing external factors to determine when the limitation period starts. According to this interpretation, the statute of limitations for the crimes of illegal detention is calculated as starting from the moment the subject dies, as indeed seems to have happened in all the cases to be analysed[47]; therefore it is really a case of crimes of murder for which the statute of limitations had already begun.[48]

Arguments can be raised against this interpretation since, on the one hand, doctrine and case law both state that it is unnecessary for the victims of illegal detentions to be found alive[49] because the crime of illegal detention

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[45] *See* Borja Jiménez, *supra* note 39, pp. 182-184.

[46] *See* the appeal lodged by the Chief Prosecutor of the High Court *Javier-Alberto Zaragoza Aguado* on 20 October 2008, *supra* note 3, considering 1. The same opinion is held by Gil Gil, *supra* note 37, pp. 98 and 161, who argues that the unlawful situation ceases when the detained person is released or dies in such a way that a different interpretation would not be compatible with the law of not declaring against oneself.

[47] The Chief Prosecutor has based these conclusions on the interpretation of article 483 of the *Spanish Criminal Code* of 1973 which at the time classified illegal detentions and on the Judgement of the Supreme Court, of 25 June 1990, known as the '*Nani* case'. *See*, the appeal lodged by the Chief Prosecutor of the High Court *Javier-Alberto Zaragoza Aguado* on 20 November 2008, *supra* note 3, considering 6.

[48] In any case, as indicated by Amnesty International, *supra* note 25, p. 20, even if we were dealing with a crime of murder, and not a crime of enforced disappearance, this would be classified as a crime against humanity, and would therefore be imprescriptible.

[49] Article 17 of the *Declaration on the protection of all persons from enforced disappearances*, *supra* note 14; article, 8.1 of the *International Convention for the Protection of All Persons from Enforced Disappearance*, *supra* note 14; *The case of the Blake* v. *Guatemala,* 2 July 1996, Inter-American Court of Human Rights.

without giving an account of the whereabouts of the victim is classed as a crime against freedom, not as the presumption of death.[50]

On the other hand, we cannot preclude the argument that the Spanish Tribunals have followed with regards to the illegal detentions in the proceedings relating to the crimes of enforced disappearances committed in Chile and Argentina by virtue of the authority granted by the principle of universal jurisdiction, an interpretation that at no time required proof that the victims were found alive, even when it was known that many of them were dead. We cannot ignore the need for argumentative coherence in the Tribunals which should not differentiate between events that occur within the borders of the Spanish State and those that occur outside them.

Lastly, if it were necessary for victims to be found alive in order to be able to investigate and prosecute crimes of illegal detention, this would mean that the victims' relatives would have to prove that they were alive so the missing people could be located and identified. And this is not only irrational but would also lead to the establishment of a *'probatio diabolica'*[51] for the relatives of the victims which would tacitly imply that they would never obtain the truth or justice for the crimes committed.

Therefore, the fact that the victims have died does not mean that this alters the classification of the crime that continues to be one of enforced disappearance. What would happen is that once the victim's death had been confirmed the appropriate proceedings for the crimes could take place.[52]

In any case, we must not forget that even though the illicit conduct does not cease until the whereabouts of the victims are known, the time the illicit conduct ceased must be established by the courts. In the same way, the question of the statute of limitations, as it constitutes a form of extinction of criminal liability, must be declared by means of legal proceedings from the Criminal Judge.[53]

But even though considering this interpretation as problematic, we must not forget the special nature of the crimes committed; even if we accept them as ordinary crimes, they have been committed within a context of crimes against humanity. They include particularly serious violations that are effectively crimes against humanity, although the problems posed by the principle of legality at national level prevent them from claiming the special

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[50] *See* Amnesty International, *supra* note 25, p. 19.
[51] *See* Ibid., p. 19.
[52] *See* Vives Antón and Martínez-Buján Pérez, *supra* note 38, p. 170.
[53] *See* Amnesty International, *supra* note 25, pp. 19 and 22.

characteristics, imprescriptibility among them, which the international legal system grants these crimes. This must be understood in the sense of finding the most favourable interpretation contravening their statute of limitations.[54]

However, these should not be the only key points when analysing statutory limitations. Although it is true that our Criminal Code only recognises the imprescriptibility of crimes against humanity in article 131.4 of the Criminal Code, we must not forget the international principles concerning this matter. In this way, international law establishes that the statute of limitations does not start until the victims of violations of human rights have effectively appealed against the violation.[55] Therefore, in the case concerning us we would have to take into account the fact that the relatives of the victims, between the time the crimes were committed and the Constitution coming into force, could not exercise any legal proceedings.[56] But we must also take

[54] *See* Chinchón Álvarez*, supra* note 16, p. 4.

[55] *Updated set of principles for the protection and promotion of Human Rights through action to combat the impunity* (E/CN. 4/2005/102/Add.1), adopted by the United Nations Commission on Human Rights on 8 February 2005, principle 23: "the period for the statute of limitations, for punishments as well as the hearings, may not run during the period in which there are no effective legal measures against the offence". In the same way, article 7 of title IV relating to *the statute of limitations in the basic Principles and directives on the rights of victims of clear violations of the international laws on human rights and victims of grave violations of international humanitarian law to lodge appeals and obtain reparation*. (E/CN. 4/2005/L.10/Add.11), resolution 2005/35 adopted by the United Nations Commission on Human Rights, 19 April 2005, establishes that: "The national rulings on statutes of limitations for other types of violations that do not constitute crimes by virtue of international law, including the limitations for civil actions and other procedures, should not be excessively restrictive". In the same sense, article 2 of the *International Covenant on Civil and Political Rights, supra* note 22; article 17.2 of the *Declaration on the protection of all persons from enforced disappearance, supra* note 14; article 8.2 of the *International Convention for the protection of All Persons from Enforced Disappearance*, *supra* note 14. With regards to the case law that has been pronounced for this matter, *see Streletz, Kessler and Krenz* v. *German,* 22 March 2001, European Court of Human Rights and *Cyprus* v. *Turkey*, 10 May 2001, European Court of Human Rights.

[56] Although it is true that, as indicated by Gil Gil*, supra* note 37, p., 163, the *Spanish Criminal Code* does not contain among its suspension clauses the limitations when criminal prosecution has not been possible, this only serves to emphasise even more the Spanish State's breach of its international obligations as it does not adapt its national rules to the requirements established in international Conventions.

into account the existence of an Amnesty Law[57] and the no less significant tendency of judges and Tribunals to ignore claims for years.[58]

4. THE EXISTENCE OF AN AMNESTY LAW.

There is an additional element hindering the investigation of enforced disappearances committed during the Civil War and Franco's regime: The law 46/1977 of 15th October, the amnesty law that included provisions to forgive and forget with regards to crimes that had not been investigated nor prosecuted, and their perpetrators never brought to justice. This is a law of impunity despite the fact that this nature is denied.[59]

However, we must not forget that the amnesty law is incompatible with state laws since as it is a pre-constitutional regulation it contravenes the Constitution which in article 62. i) prevents pardons from being granted and, in the same vein, breaches the Criminal Code that has suppressed the concession of general amnesties in the form of the extinction of liability as established in article 130. Similarly, amnesties are also incompatible with the right recognised in the Constitution to an effective appeal and to be heard by an independent and impartial tribunal (article 24 of the Spanish Constitution).

Furthermore, the amnesty law is also incompatible with International Human Rights Law [60] since the laws of absolute pardon and amnesty are incompatible with the obligation to investigate and bring to trial crimes against humanity, as well as with the obligation to guarantee everyone the right to an effective appeal and to be heard by an independent Tribunal that imposes international law on the States.[61] There are many international instruments that expressly prohibit amnesties and other similar measures for perpetrators of crimes of enforced disappearance as well as case-law

[57] Amnesty Law 46/1977 of 15 October 1977.

[58] This is illustrated by the fact that only after seventy years has a Judge taken the initiative to investigate the crimes committed during the Civil War and under the Franco's regime.

[59] It is the Chief Prosecutor of the High Court who states that it would be 'legally absurd' to question the legality of this rule on attributing it with the stigma of impunity. In the appeal lodged by the Chief Prosecutor of the High Court *Javier-Alberto Zaragoza Aguado* on 20 October 2008, *supra* note 3, considering 7.

[60] Concerning the incompatibility of the amnesty laws with International Criminal Law, *see*, among others, Robertson, *supra* note 12, p., 283 and following Alberto Zuppi, 'En busca de la memoria perdidas: las leyes de amnistía y la impunidad de crímenes de lesa humanidad', *Nueva Doctrina Penal* , (2000/B).

[61] *See infra*, 7.2. Victims' right to the truth, justice and reparation.

denying the applicability of amnesties when they violate basic rights.[62] In particular, the amnesty law of 1977 contravenes article 2.3 of the International Covenant on Civil and Political Rights, which prohibits amnesties relating to serious violations of human rights, a treaty that Spain became party to before this law came into force, thereby the amnesty law violated international law from the moment it was designed.[63] In this way, it contravenes the need for national laws to be in line with international obligations, an obligation resulting from the principles of good faith and *pacta sunt servanda*.[64]

As stated above, the Spanish Tribunals, by means of the competence that the principle of universal jurisdiction grants them, have prosecuted violations of human rights and international law. The most relevant point concerning the question being analysed here is that prosecutions have been carried out even though an amnesty law was in place.[65] This was because this law was not considered binding as it contravened International Law. It makes no sense for the Spanish State to take cover behind the existence of this 1977 amnesty law in order to not begin investigating the crimes committed and to decide to maintain this in force, as this clearly contradicts the way the country operates.

Nevertheless, this amnesty law does not cover all cases of impunity since in article 1.c) it excludes from the scope of amnesty acts amounting to serious

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[62] *Declaration on the protection of all persons from enforced disappearance*, *supra* note 14, article 18. "1. Persons who have or are alleged to have committed offences *(of enforced disappearance)* shall not benefit from any special amnesty law or similar measures that might have the effect of exempting them from any criminal proceedings or sanction"; *Updated set of principles for the protection and promotion of Human Rights through action to combat the impunity, supra* note 55, principle 22, 23 and 24; The actual UN also rejects the amnesty recourse as a solution for armed conflicts or the transition to democracy and this has been demonstrated on numerous occasions by the Commission of Human Rights. In this sense, the *Seventh report of the Secretary-General of the United Nations concerning the Observation Mission in Sierra Leona (*United Nations document S/1999/836, 30 July 1999), para. 7. With regards to case law on this matter, *see*, the Judgement of the International Criminal Court for Ex Yugoslavia, of 19 December 1998.

[63] The *International Covenant on Civil and Political Rights, supra* note 22 was signed by Spain on 28 September 1976, ratified on 27 April 1977 and published in the Official Spanish Gazette on 30 April 1977.

[64] *See* Chinchón Álvarez, *supra* note 16, p. 4

[65] *See* Amnesty International, , *supra* note 25, p. 23, specifically in the *Pinochet* case, the *Miguel Cavallo* proceedings and the *Scilingo* case.

violence against the life or integrity of a person[66], which allows for investigations into the enforced disappearances that took place within a context of crimes against humanity .

In the same way, in article 9[67] the amnesty law establishes that the application of amnesty belongs exclusively to judges, in other words, even if amnesty were to be granted for the crimes committed during the dictatorship, it must be requested expressly before a Court.[68]

However, even precluding international regulations concerning the matter as well as the constitutional principles and guarantees, there is another argument to overcome the obstacle presented by the Amnesty Law. , Given its nature, the crime is on-going today and this criminal permanence of illegal detention prevents the amnesty law from being applied.[69]

Lastly, international laws and case law remind us that not only is impunity maintained through rules of amnesty, but also through equivalent measures.[70] Any measure that limits the investigation of and prosecution for crimes also goes against international law, as it perpetuates impunity by allowing exemption from criminal liability. Perhaps at this point we should

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[66] Article 1. c): "All acts of identical nature and intention as those established in the previous paragraph carried out up until 6 October 1977, whenever they did not constitute a serious threat to the life and integrity of the persons".

[67] Article 9: "The application of amnesty, in each case, will correspond exclusively to the judges, Courts and corresponding legal authorities, who, in accordance with the procedural laws in force and in an urgent manner, will adopt the relevant decisions in compliance with this Law, whatever the stage of the process and the jurisdiction may be".

[68] *See* The vote cast by the magistrates *José Ricardo de Prada Solaesa, Clara Bayarri García and Ramón Sáez Valcárcel* on the writ of 2 December 2008 that declares the Examining Judge to be incompetent, point V. This is also shown in *Amnesty International*, *supra* note 25, p. 25

[69] *See* Writ of 16 October 2008, *supra* note 1, legal grounds eleven. Also, concerning the impossibility for perpetrators of permanent crimes that have been completed but have not yet finished to benefit from the application of an amnesty law, Borja Jiménez, *supra* note 39, p. 182 and following. For this point we do not share the opposite opinion of Gil Gil,, *supra* note 37, p., 163, who understands that to consider a crime included within the scope of an amnesty Law, it is enough to begin this within the scheduled periods even when it was not completed until later.

[70] Article 18.1 of the *Declaration on the protection of all persons from enforced disappearance, supra* note 14, "1. Persons who have or are alleged to have committed offences *(of enforced disappearance)* shall not benefit from any special amnesty law or similar measures that might have the effect of exempting them from any criminal proceedings or sanction".

ask to what extent the state's strict procedural mechanisms sometimes become branches of this amnesty law that is extended by the legal system impeding crimes from being judged or even investigated. In this sense, Amnesty International considers that the existence of an amnesty law and its legal application has not really been the determining factor in Spanish justice to prevent any legal proceedings concerning the crimes committed from being correctly concluded. The determining factor has been a series of legal protocols that have prevented justice from being carried out and have perpetuated impunity for these crimes.[71]

5. AIMS OF THE PROCESS

Another of the harshest criticisms of the possibility of investigating enforced disappearances is that since all those possibly responsible for committing the crimes of enforced disappearance have died, it makes no sense to initiate criminal proceedings, as punishment of them (which would not be possible) would be the purpose of this.

However, criminal investigation is not only justified by clarification and assigning liabilities to the possible perpetrators. Concerning the monistic theories that limit the function of criminal proceedings to the action of *ius puniendi*, there are various authors who defend the diverse functions of contemporary criminal proceedings, among them the protection of the victim.[72] In this regard, the principal, but not the unique, objective and function of criminal proceedings[73], the punishment of criminal conduct, should not be confused with the purposes of instruction: to investigate the possible perpetration of crimes and from this to establish the appropriate responsibilities.[74]

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[71] *See*, Amnesty International*, supra* note 13*,* p. 53 on indicating that the Amnesty Law sent a demobilisation message to all claims for justice, a message that, as we can *see*, still continues today.

[72] *See*, José M. Asencio Mellacdo, *Derecho Procesal Penal* (Tirant lo Blanch, Valencia, 2004), p. 27 and Vicente Gimeno Sendra, *Derecho procesal penal*, (Colex Publishers, Madrid, 2007), p. 44 that indicates that criminal proceedings must also become a useful instrument for the reparation of the victim.

[73] In the appeal lodged by the Chief Prosecutor of the National Court *Javier-Alberto Zaragoza Aguado* on 20 October 2008, *supra* note 3, considering 3, although in the actual appeal he states that "(about criminal proceedings) the existence cannot be justified if it is not possible to fulfil the essential purposes: the clarification of specific acts that can be criminally prosecuted…"

[74] Article 299 of the *Spanish Criminal Procedure Act:* "In summary they constitute the actions aimed at preparing the trial and the procedural steps to discover and make a record of the perpetration of the crimes with all the circumstances that may affect their

In this way, for the purposes of finding out if a crime has been committed, who it was committed by and if the victims have had their right redeemed, as in this case there are clear indications that a crime was committed, there can be no other option but to initiate criminal proceedings in order to clarify the facts; this is because, on the one hand, there are still victims who need to have their right redeemed and, on the other, we do not know if there are still people responsible for committing these crimes.

Under no circumstances would this be an abuse in the exercise of jurisdiction for purposes beyond the procedure because the aim of the procedure is not only to find the person guilty of the crimes but also to investigate the crimes committed and grant protection to the victims that are still missing and to their families, who continue to suffer the effects of the disappearance. In this regard, in the interests of fulfilling the obligations of the State, it should be interpreted that the aim of the criminal procedure is not only and exclusively to exercise the *ius puniendi* of the State: it also has to guarantee the rights of the victims by clarifying the facts surrounding the disappearances and redeem their right to the truth, justice and reparation[75], and these purposes of the procedure are just as important and legitimate as criminal prosecution. This is not a negative implementation of criminal proceedings; it just means that the purpose cannot only and exclusively be criminal prosecution.

Furthermore, in this case it would be too presumptuous and daring to state that the people responsible for committing the crimes are definitely dead because first it is necessary to investigate the facts and then, once these have been clarified, it can be determined if criminal liability exists or not due to the death of the alleged offenders. Despite the fact that liability will be declared terminated due to the death of the person responsible[76], as an initial requirement the existence of a crime must be established because if

classification, and the guilt of the offenders, guaranteeing their personal and the pecuniary responsibilities".

[75] As indicated in the Writ of 16 October 2008, *supra* note 1, legal grounds thirteen: "The possible non-existence of people directly or indirectly responsible for these crimes, does not impede the need to have all the essential data for the incriminatory classification of the acts, as well as the need to grant protection to the victims, all the more since they remain disappeared today".

[76] *See* article 637.3 of the *Spanish Criminal Procedure Act* in relation article 130.1 of the *Spanish Criminal Code.*

not, there would be no liability to terminate.[77] In this case, after the facts have been clarified, it makes sense to dismiss the case, but not before.

Even though it is possible that those responsible for these crimes no longer exist, it is also necessary to start proceedings because, as enforced disappearances are a crime of a permanent nature, investigation has to take place for the crimes to cease.[78]

Not starting legal proceedings would be a negative implementation of justice, because we are dealing with a crime that is still on-going and because it has not been investigated this has led *de facto* to the extinction of liability as well as impunity.[79] Although time does not heal all wounds, it does mean that those who caused them die, but their crimes carry on, immortal in time, and they must be investigated.

Lastly, as we have seen, the special nature of the crime of enforced disappearance, imbued with the context of crimes against humanity, requires a more flexible interpretation, even to understand that the purposes of the procedure is not simply criminal prosecution but also the clarification of the facts and the protection of the victims of such abominable crimes.

After all this, one must remember and emphasize at this point that the claims of the associations of victims and the individuals, have not been made to establish criminal liability but in order to clarify the facts through direct help from the State to locate and exhume the remains.[80]

6. THE PASSING OF TIME.

The opinions opposing the start of legal proceedings have also argued that too much time has passed now and that it does not make sense now to start criminal proceedings because even if those responsible are still alive it would be very difficult to identify them and they would be very elderly.

Contrary to how it may seem, the passing of time does not make prosecution for these crimes impossible, even though they were committed years ago. Firstly, because the disregard of the Spanish State of its obligations for years cannot be used as an excuse now to definitively abandon its obligations. In this sense, the actual European Court of Human Rights pays

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[77] *See* Writ of 16 October 2008, *supra* note 1, legal grounds thirteen.

[78] *See supra* "3. Crime of illegal detention and criminal statute of limitations."

[79] *See* Writ of 16 October 2008, *supra* note 1, legal grounds fourteen.

[80] Regarding the relevant claims of the victims, *see*, the documents produced by the Forum for Historical Memory <www.foroporlamemoria.es>, and Association for the Recovery of Historical Memory <www.memoriahistorica.org>, among other associations for the recovery of Historical Memory.

particular attention to the time element in the investigation of crimes of enforced disappearances and criticises delays in fulfilling the duty to prosecute for these crimes.[81]

Secondly, this disregard and lack of protection for the victims throughout these long years should be a reason for greater investigative diligence, not to definitively abandon their claims for justice, truth and reparation. In all fairness, the passing of time does not exclude but actually increases the need to reparation the victims, a reparation that is supported by their right to the truth and to the clarification of the crimes of which they were victims. The debt owed to victims of crimes against humanity, their demands for the truth, justice and reparation, cannot be cancelled because of the passing of time.[82]

Thirdly, although it has been alleged that the amount of time that has passed poses a problem for the investigation as the results may be frustrated by the passing of time, this, in turn, may disappoint the relatives-victims[83], so we should not assume this to be the case; on the contrary, nowadays we have improved technical means for gathering evidence and examining the facts, possibilities that did not exist years ago.[84]

Lastly, the current context of the Spanish State favours clarifying the truth. The fact that seventy years have now passed: living in a stable democracy in which those responsible have already died or are now very elderly, lessens the conflict.[85]

7. WHY START LEGAL PROCEEDINGS TO INVESTIGATE CRIMES COMMITTED DURING THE CIVIL WAR AND THE FRANCO DICTATORSHIP? OBLIGATIONS OF THE STATE AND VICTIMS' RIGHTS.

7.1. INTERNATIONAL AND NATIONAL OBLIGATIONS OF THE SPANISH STATE.

Once it is established that the possibility to start investigations exists in law, there are also multiple reasons why a legal investigation must begin. It has

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[81] *See Bazorkina* v. *Russia*, 11 December 2006, European Court of Human Rights; *Luluyev and others* v. *Russia*, 9 November 2006, European Court of Human Rights.

[82] *See* Amnesty International, *supra* note 13, p. 12.

[83] *See* article for Agustín Peréz-Cruz, 'Dudas sobre la actitud de Garzón', *La Razón*, 21 October 2008, <www.larazon.es/68671/2/noticia/Espa%F1a/Dudas_sobre_la_actitud_de_Garz%F3n>

[84] *See* Miguel A. Rodríguez Árias, 'La nueva ley 'de la memoria' y la vulneración de los artículos 2 y 13 del Convenio Europeo para la Protección de los Derechos Humanos en el caso de los desaparecidos del franquismo', nº 63 *Jueces para la democracia* (2008), p. 81.

[85] Although as we can *see* from the multiple criticisms received by the Writ of 16 October, *supra* note 1, the conflict is lesser but not nonexistent.

been argued that after more than seventy years it is unnecessary to investigate crimes committed during the Civil War and the Franco dictatorship because, among other reasons, the establishment of the Law of Historical Memory[86] is sufficient to satisfy the claims of the victims' families.[87]

However, the Spanish State has committed itself in numerous international treaties concerning the investigation and prosecution of international crimes and, in particular, the crime of enforced disappearance; therefore it has the unavoidable obligation of beginning legal proceedings with regard to clarifying the crimes committed during the Civil War and the dictatorship, as well as the unavoidable obligation to carry out an official investigation.[88]

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[86] Law 52/2007, of 26 December which recognises and extends rights and establishes measures in favour of those who suffered persecution or violence during the Civil war and the dictatorship.

[87] *See* the appeal lodged by the Chief Prosecutor of the High Court *Javier-Alberto Zaragoza Aguado* on 20 October 2008, *supra* note 3, considering 8 and the submission of further observations on 21 October 2008, considering 3.

[88] There are numerous international treaties that establish this obligation to investigate. Among others: article 12.2 of the *International Convention for the Protection of All Persons from Enforced Disappearance, supra* note 14: "Where there are reasonable grounds for believing that a person has been subjected to enforced disappearance, the authorities referred to in paragraph 1 of this article shall undertake an investigation, even if there has been no formal complaint". Also article 24.2 that establishes "the obligation to continue with the investigation until establishing the fate of the disappeared person"; *Declaration on the protection of all persons from enforced disappearance*, *supra* note 14, article 13.6: "An investigation, in accordance with the procedures described above, should be able to be conducted for as long as the fate of the victim of enforced disappearance remains unclarified"; article 2.3 b) of the *International Covenant on Civil and Political Rights, supra* note 22: "b) The competent authority, legal, administrative or legislative, or any other authority deemed competent by the legal system of the State, shall decide on the rights of each person who files this appeal, and shall develop the possibilities of legal resources"; *Basic principles and directives on the right of victims of manifest violations of the international rules of human rights and of serious violations of the international humanitarian law to lodge appeals and obtain reparation, supra* note 55, article 3. b): "(obligation to) Investigate the violations effectively, quickly, completely and impartially and, if necessary, to adopt measures against those deemed responsible in accordance with national and international law"; Also in other documents such as Resolutions 1994/39 and 1995/38; The United Nations Human Rights Commission or the European Council Decision 2003/335/JAI of 8 May 2003 *on the investigation and prosecution of crimes of genocide, crimes against humanity and war crimes*. Concerning the opinion of the European Court of Human Rights regarding the need for an effective investigation, *see Assenov* v. *Bulgaria*, 28 October 1998, *Mc Cann* v. *the United Kingdom*, 27

Furthermore, these investigations must be undertaken officially through legal means and in an impartial and independent manner, without it even being necessary to lodge an appeal.[89]

It is also necessary to investigate those international crimes resulting from the permanent nature of the crimes of enforced disappearance because only then will the crime cease to be on-going, thereby bringing an end to the unlawful situation as required by various international treaties.[90]

In this sense, the Public Prosecutor's Office had and still has the national and international obligation to legally promote public prosecution when faced with evidence –as clear as day- of the fact that the crime of illegal detentions was committed[91]; this obligation results from its role as being responsible for citizens' rights, its obligation to provide justice and its obligation to prevent the most serious crimes under international law from remaining unpunished.

September 1995, *Tanis* v. *Turkey,* 30 November 2005. In the case law dictated by the Spanish Constitutional Court we can also find references to the need for a sufficient and effective investigation to comply with the right to effective legal protection declared in article 24.1 of the *Spanish Constitution*. Among others *see*, Judgements of the Constitutional Court, nº 123/2008, of 20 October or nº 52/2008 of 24 April.

89 *Declaration on the protection of all persons from enforced disappearance*, *supra* note 14, article 13.1: "…Whenever there are reasonable grounds to believe that an enforced disappearance has been committed, the State shall promptly refer the matter to that authority for such an investigation, even if there has been no formal complaint…" and the *International Convention for the Protection of All Persons from Enforced Disappearance*, *supra* note 14, article 12.2: "shall initiate an investigation, even if there has been no formal complaint".

90 *Basic principles and directives on the right of victims of manifest violations of the international rules of human rights and of serious violations of the international humanitarian law to lodge appeals and obtain reparation*, *supra* note 55, article 22 a): "(duty to) adopt effective measures so that these violations do not continue". In the same way in *Resolution 56/83 of the United Nations General Assembly on the responsibility of the State for internationally wrongful acts*, *supra* cite 42, article 29 and 30 establishes the "Continued duty of performance. The legal consequences of an internationally wrongful act under this part do not affect the continued duty of the responsible State to perform the obligation breached". As well as "(the duty to) cease that act and guarantee non-repetition".

91 Concerning the national and international obligations of the Public Prosecutor's Office to legally promote the action of justice, *see* articles 124 of the *Spanish Constitution*, 541 of the *Organic Law of the Judicial Branch*, the *organic Statute of the Public Prosecutor's Office*, and *Law 50/1981 and Law 27/2007 which modifies it, as well as the United Nations Directives on the function of Prosecutors,* passed in September 1990.

Opposing and impeding the investigation of the facts, placing particular emphasis on bringing the exhumations to a standstill[92], denies the claimants their right to justice and, therefore, violates their right to effective legal protection and their right to obtain truth, justice and reparation.[93]

Moreover, the State has the generic obligation of complying with the Treaties it is party to, in such a way that it cannot present obstacles in its national law to shield itself from not complying with these treaties.[94] In short, it cannot choose which international obligations to comply with or not depending on its own particular interests. Likewise it has the generic obligation to fight against impunity; impunity will occur if the right to justice recognised by the UN are violated.[95]

For years the Spanish State has forgotten its national and international obligations in the fight against impunity, the investigation of the systematic violations of human rights and the recognition of the victims' right to justice. In this regard, the Law of Historical Memory, in articles 12 and 13[96],

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[92] *See* appeal lodged by the Chief Prosecutor of the High Court *Javier-Alberto Zaragoza Aguado* on 20 October 2008 and competence report of 21 October 2008, *supra* note 3.

[93] The magistrates who signed the vote that disagreed with the conclusion of the writ of the High Court declaring the Examining Judge to be incompetent, state that the way the Prosecutor acted 'abused the law and good faith' and, lastly, his request to cancel all the agreed was a clear breach of the victims' right to effective legal protection. Concerning this, The vote cast by the magistrates *José Ricardo de Prada Solaesa, Clara Bayarri García and Ramón Sáez Valcárcel* on the writ of 2 December 2008 that declares the Examining Judge to be incompetent, point III. 1 and V. Along these lines, Amnesty International, *supra* note 25, p. 6, states that perhaps we should ask ourselves if the attacks against the Examining Judge are an attack on his judicial independence with all the opposition and scheming.

[94] Article 26 relating to article 27 of the *Vienna Convention on the Law of Treaties* (23 May 1969, U.N. Doc A/CONF.39/27)

[95] *See Diane Orentlicher's Report, an independent expert in charge of updating the set of principles for the fight against impunity*, (E/CN.4/2005/120/Add. 1, 8 February 2008).

[96] Articles 12 and 13 of the *Law of Historical Memory*. Article 12: "Measures to identify and locate victims. 1. The Government, in collaboration with all the Public Authorities, will produce a protocol of scientific and multidisciplinary action that guarantees institutional collaboration and suitable intervention in the exhumations. Similarly, it will hold the appropriate collaboration agreements to subsidise the companies that participate in the works. 2. The Public Authorities will produce and make available to all relevant parties, within their respective regional scope, maps showing the land where the remains of the people referred to in the previous article are located,

establishes that the State only has the responsibility of assisting the victims' families in their search for the remains of the missing people through allocating grants, as well as the responsibility of producing maps and regulating the temporary occupation of areas of land if necessary.[97]

But the Law of Historical Memory does not reflect international requirements. It does not make any sense that the victims' families, through associations and aids from the State, take on the responsibility and effort of exhuming and identifying the remains of their missing relatives.[98] The Spanish State

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including all the supplementary information available on them. The Government will determine the procedure and will produce a complete map that covers the whole country of Spain, which will be made available for all relevant citizens and will incorporate the data that should be issued by the various competent Public Authorities.

The areas included in the maps will be subjected to special preservation by the map holders, in accordance with the regulations established concerning this matter. Similarly, the competent public authorities will adopt measures to preserve the sites appropriately".

Article 13. "Administrative authorisations for location and identification activities. 1. The competent Public Authorities will authorise the prospection tasks aimed at locating the remains of the victims mentioned in section 1 of article 11, in accordance with the regulations on historic heritage and the protocol of operations approved by the Government. The competent administrative and legal authorities will be immediately informed of the findings. 2. The Public Authorities, exercising their jurisdiction, will establish the procedure and conditions for the direct descendents of the victims mentioned in section 1 of article 11, or the entities acting on their behalf, to recover the remains buried in the corresponding common graves, for their identification and eventual transferral to another place. 3. In all cases, the exhumation will be subjected to administrative authorisation by the competent authority, in which consideration will be given to the opposition of any of the direct descendents of the persons whose remains are to be moved. To such effects, and before the corresponding resolution, the competent authority should give appropriate publicity to the requests presented, always informing the General Administration of the State of its existence for it to be included in the map mentioned in the first section of the previous article. 4. The remains that have been moved and are not claimed will be buried in the cemetery corresponding to the municipality in which they were found".

[97] *See* Luciano Parejo Alfonso, 'Administración pública y memoria histórica', in Jóse Antonio Martín Pallín and Rafael Escudero Alday, (eds.), *Derecho y memoria histórica* (Trotta Publishers, Madrid, 2008), p. 147 and following, that mentions the Public Authorities' duty to 'facilitate' the activities of locating and identifying the remains of disappeared victims of violence, activities which are private.

[98] This Law ignores the Nizkor report, which in 2004 asked for a law for the exhumation and identification of victims. *See* Equipo Nizkor, *supra* note 9, VI.

breaches the serious international responsibility of locating, exhuming and examining human remains; in short, the state breaches the obligation of taking an active role in shedding light on the crimes[99], by delegating this responsibility to associations of victims' families.[100] The State is obliged to appropriately examine the scene of these crimes and to recover material evidence, complying with a protocol of exhuming, identifying and burying the remains, since ultimately they constitute legal evidence.[101]

Therefore, the investigation work necessary to locate the graves, exhume and identify remains should be carried out by means of legal proceedings – as occurs in all the countries surrounding us[102]- and not by the system created by the Law of Historical Memory that establishes a fate of *self-restitution* by relatives exhuming the remains of the missing people.[103] But even more alarmingly, if possible, is that article 13 of the Law of Historical Memory even allows opposition to these remains being duly located and exhumed, which implies undue obstruction by action or omission by the State, given this wording.[104]

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[99] For more definitive details on the international obligation of the State to begin an official investigation, in terms interpreted as 'effective and independent' by the European Court of Human Rights and how because of this the Spanish State breaches articles 12 and 13 of the *Law of Historical Memory, see*, Rodríguez Arias, *supra* note 84, p. 73 and following.

[100] It is understood that in these cases there is also a violation of the procedural dimension of the duty to protect the right to life ex article 2 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, *supra* note 22.

[101] *See* Amnesty International, *supra* note *25*, p. 27.

[102] More than thirty States that are examining their past to clarify crimes committed in wars or during dictatorships have been directly involved in the exhumations, assuming the direct protection of the process and in the majority of cases it was the Public Prosecutor's Office that initiated the investigations in order to clarify the crimes committed against humanity. Among many others, Chile, Argentina, Morocco, Guatemala, South Africa or Germany. Furthermore, there is no previous case in which the victims' relatives were in charge of the exhumations and recovering the bodies. For an approach to the different processes carried out in more than thirty states which emphasises the Spanish government's scarce involvement in the matter, *see*, Natalia Junquera, 'No es la sociedad civil. Es el Estado', *El País*, 17 November 2008,www.elpais.com/articulo/sociedad/sociedad/civil/Estado/elpepisoc/20081117elpepisoc_1/Tes

[103] *See* Rodríguez Árias, *supra* note 84, p. 70.

[104] Article 13.3: "In all cases, the exhumation will be subjected to administrative authorisation by the competent authority, in which consideration will be given to the

In view of this, the Judges and Prosecutors of this country have displayed a truly shocking omission in their duties to prosecute and investigate these crimes over decades, allowing these crimes to continue in silence, disregarding the families' right to the truth and making absolutely no effort at all to put an end to this suffering. But the State has not only not fulfilled its obligations by not acting but, regarding the exhumations, it has constantly strived for years to administratively and even legally impede the localisation of the victims.[105]

To intend to rectify the shortcomings of the Law of Historical Memory would be necessary to establish a whole series of specific measures such as the creation of a group of experts and an investigating police force to undertake the work of locating and exhuming remains, therefore beginning to satisfy the victims' rights.[106]

Without doubt this goes against the stance that the Spanish Courts have maintained over recent years concerning crimes against humanity committed abroad. As we have seen on many occasions, the Spanish Courts have prosecuted crimes against humanity based on the competence granted to them by the principle of universal jurisdiction, a stance that rejects the national mechanisms granting impunity, whether these be amnesty laws or fraudulent interpretations of the national criminal laws.[107] Logic and coherence now prevent our courts from allowing the acts committed in our country to remain unpunished.[108] It makes no sense that the prosecution under universal jurisdiction initiated by the High Court against crimes committed outside our country is not met by the same commitment to prosecute injustice when crimes are committed within Spain.

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opposition of any of the direct descendents of the persons whose remains are to be moved". *See*, regarding this, Rodríguez Árias*, supra* note 84, p. 83.

[105] The vehement appeal from the Chief Prosecutor of the High Court and the later stopping of the exhumations by the High Court are a good example of this. In the same way, the Public Prosecutor's Office has not initiated any action involved with the location and exhumation nor clarification of the facts for all these years.

[106] For the specific tasks of the group of experts as well as the investigative police force, *see* Writ of 16 October 2008, *supra* note 1, legal grounds sixteen to eighteen.

[107] As has already been demonstrated, it is sufficient to mention the cases related to crimes against humanity committed in Argentina and Chile.

[108] As indicated in the report from Amnesty International, *supra* note *25*, p. 6, the Spanish State had the chance to act in coherence with its position on injustice committed outside its borders. In the same sense, José M. Moreno Díaz, 'Perspectivas sobre la Ley de Memoria Histórica', nº 7 *Entelequia. Revista Interdisciplinar: Monográfico* (September 2008), p. 251.

It is now the Spanish State that is the focal point of the international community in the hopes that it will at last meet its obligations to investigate the crimes committed and thereby guarantee the right to the truth, justice and reparation for the relatives of the victims of the crimes. If justice is denied, thereby violating its international obligations, this could determine the international responsibility of the State.[109] We must also not forget that, as these are crimes against humanity, they are susceptible to being prosecuted universally, which means that legitimately, and in view of the fact that the Spanish State is not fulfilling its international obligations, they could be judged by other countries that consider their competence to be concurrent or complementary to Spanish jurisdiction.[110]

With the Writ of 16th October the Spanish State faced the possibility of finally fulfilling its national and international obligations, with the possibility of investigating the crimes against humanity that were committed during the dictatorship, and of satisfying the victims' right to the truth, justice and reparation; once again it has allowed this opportunity to pass by , leaving the case in the hands of the regional courts, which for years have shown very little willingness to investigate the events, lack of will confirmed by their inactivity during this last year .

7.2. THE VICTIMS' RIGHT TO THE TRUTH, JUSTICE AND REPARATION.

The State has the duty of putting an end to the prolonged injustice that the victims of enforced disappearance and their families have been subjected to over the years. It has the duty of putting an end to the impunity guaranteeing the right to the truth, justice and reparation in its entirety.[111] Therefore, the obligation to investigate directly affects the victims' rights: the rights to the truth, justice and reparation.

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[109] Amnesty International, *supra* note 13, pp. 44 and 45. Although the States seem to forget it, their participation in the international community through the signing of Treaties is not merely symbolic, but leads to obligations and responsibilities in the case of them being breached, responsibilities that involve the possibility of going to the European Court of Human Rights and alleging the State's violation of the laws defined in these Treaties.

[110] *See* The vote cast by the magistrates *José Ricardo de Prada Solaesa, Clara Bayarri García and Ramón Sáez Valcárcel* on the writ of 2 December 2008 that declares the Examining Judge to be incompetent, point V.

[111] *See, Manifesto,'Para pasar página primero hay que leerla',* 20 November 2008, Amnesty Internacional, <www.es.amnesty.org/paises/espana/victimas-de-la-guerra-civil-y-del-franquismo/firma-el-manifiesto/>, 4 January 2010.

Firstly, the victims of crimes of enforced disappearance have the internationally recognised right to reparation.[112] The victim's right to reparation is linked to the need for it to be a '*restitutio in integrum*'[113] that includes the involvement of the State in offering reparations to the victims-relatives beyond merely offering grants[114], meaning that the right to reparation is not satisfied with symbolic declarations and economic compensation.[115]

Secondly, they also have the right to the truth, finding out[116] the truth on how these violations were carried out and knowing the fate of the missing people.

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[112] *Updated set of principles for the protection and promotion of Human Rights through action to combat the impunity, supra* note 55, principles 31 to 34; *Basic principles and directives on the rights of victims of clear violations of the international laws on human rights and victims of grave violations of international humanitarian law to lodge appeals and obtain reparation*, *supra* note 55, articles 15 to 18; *Declaration on the protection of all persons from enforced disappearance, supra* note 14, article 19.

[113] With regards to the need for a *restitutio in integrum, see*, Rodríguez Árias, *supra* note 43, pp. 173, 174 and 195-202, in which he declares the relevance in Spain with article 13 of the *Law of Historical Memory* which establishes it is a fate of 'family auto restitution' the model established by the Franco dictatorship after the Civil War and not the international model of '*restitutio in integrum*' of the State, stating that restitution is not obtained if the crimes committed are not investigated in an impartial manner.

[114] Particularly significant to this point is the *Kelly and others* v. the *United Kingdom*, 4 May 2001, European Court of Human Rights as it expressly indicates that "(the authorities) cannot leave this matter to the initiative of the relatives to file an official complaint or assume the responsibility through any type of investigation procedures".

[115] *Basic principles and directives on the rights of victims of clear violations of the international laws on human rights and victims of grave violations of international humanitarian law to lodge appeals and obtain reparation*, *supra* note 55, article 22: "Satisfaction must include, when it is relevant and applicable, all or some of the following measures:… c) The search for the disappeared persons, for the identities of the children abducted and for the corpses of the people murdered, and help to recover them, identify them and bury them again in accordance with the express or alleged wish of the victim or the cultural practices of their family and community". The *Declaration also established the importance of the right to reparation in its fundamental principles of justice for the victims of crimes and the abuse of power*, adopted by the General Assembly in resolution 40/34, 29 November 1985.

[116] As shown by the *International Convention for the Protection of All Persons from Enforced Disappearance, supra* note 14, article 24. 2: "Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Each

The victims' families have still not found their missing relatives and therefore have not had the possibility of finding out the truth concerning the circumstances in which these crimes were committed. Although it is true that criminal investigation would not provide the most absolute truth[117], they would at least put an end to the widespread forgetting, by exhuming the victims that are still buried all over Spain. Similarly, we must not forget that the right to the truth is not only an individual right but also a collective right[118] and is balanced by the States' duty to remember.[119]

Thirdly, the victims' right to obtain effective legal protection from the Courts is recognised in the right to the truth, justice and reparation. The right to legal resources is an unrepealable right recognised in treaty and customary law and includes investigation without delay, effective, independent and impartial, access to justice, suitable and effective reparation of the damage suffered and access to objective information concerning the violations of human rights. This means that the lack of an effective investigation by the State breaches the law included not only in the Spanish Constitution under the legal system in force, recognised in article 24.1[120], but also various international Treaties that establish this obligation.[121]

State Party shall take appropriate measures in this regard". Also in the *Updated set of principles for the protection and promotion of Human Rights through action to combat the impunity*, *supra* note 55, principles 4 and 5. Furthermore, the *Updated set of principles for the protection and promotion of Human Rights through action to combat the impunity*, *supra* note 55, principle 24 b) establishes that this right to know the truth extends to the family "Even though the people responsible may not be found, the amnesty law must not undermine the family's right to the truth".

117 *See* Daniel R. Pastor, '¿Procesos penales para conocer la verdad? La experiencia argentina', in Pablo D. Eiroa and José M. Otero, (eds.), *Memoria y Derecho penal* (Fabian di Placido Publishers, Buenos Aires, 2007), p, 351 and following, which criticises, from the perspective of Argentinean experience, the value of criminal proceedings as an instrument to find out the truth.

118 *See* Equipo Nizkor, *supra* note 9, IV. B)

119 *Updated set of principles for the protection and promotion of Human Rights through action to combat the impunity*, *supra* note 55, principles 2 and 3.

120 Article 24. 1 of the *Spanish Constitution*: "All persons have the right to the effective protection of the judges and courts in the exercise of their rights and legitimate interests, and in no case may there be a lack of defence".

121 *Basic principles and directives on the rights of victims of clear violations of the international laws on human rights and victims of grave violations of international humanitarian law to lodge appeals and obtain reparation. supra* note 55, articles 11 to 14; *European Convention for the Protection of Human Rights and Fundamental Freedoms*, *supra* note 22, article 13: "Right to an effective reparation: Everyone

Lastly, we must indicate here that the suffering of the victims' relatives must be taken into consideration; the relatives are also victims themselves as they suffered a great loss resulting from the disappearance.[122] This leads to a victimisation of the family, the so-called relatives-victims of enforced disappearances.[123] This is how the European Court of Human Rights sees it along with various international Treaties since the stress, the anguish, the uncertainty that the families of the disappeared people go through breaches article 7 of the International Covenant on Civil and Political Rights[124] and article 3 of the European Convention on Human Rights and Fundamental

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whose rights and freedoms as set forth in this Convention are violated shall have an effective reparation before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity"; *International Covenant on Civil and Political Rights, supra* note 22, article 2.3: "Each one of the State Parties in this Pact is responsible for guaranteeing that: a) All persons whose rights and freedoms as set forth in the Pact are violated shall have an effective reparation, notwithstanding that the violation has been committed by persons acting in an official capacity". Also, concerning the victims' right to reparation *see*, Amnesty International, *supra* note 13, p. 32 and following.

[122] *See* Writ of 16 October 2008, *supra* note 1, legal grounds nine.

[123] Regarding the recognition of the families of the disappeared people as victims *see*, Rodríguez Árias, *supra* note 43, pp. 125-140.

[124] This has been demonstrated on various occasions by the European Court of Human Rights. Among others, *Schedko* v. *Belarus*, 11 January 1999, *Osmanoglu* v. *Turkey,* 24 January 2008*, Orhan* v. *Turkey* case, 18 June 2002, *Kurt* v. *Turkey*, 25 May 1998, *Cyprus* v. *Turkey*, 10 May 2001, European Court of Human Rights. In the same way article 24 of the *International Convention for the Protection of All Persons from Enforced Disappearance*, *supra* note 14, "1. For the purposes of this Convention, 'victim' means the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance"; *Basic principles and directives on the rights of victims of clear violations of the international laws on human rights and victims of grave violations of international humanitarian law to lodge appeals and obtain reparation*, *supra* note 55, article 8: "(…) the term 'victim' shall also refer to the immediate family or the persons in charge of the direct victim and the persons who have suffered harm when intervening to help victims in danger or to prevent them from becoming victims"; *Declaration on the fundamental principles of justice for the victims of crimes and the abuse of power, supra* note 115, article 2; *Updated set of principles for the protection and promotion of Human Rights through action to combat the impunity*, *supra* note 55, principle 4 and 34. And it is this family that shall have the right to reparation as established by the *Declaration on the protection of all persons from enforced disappearance*, *supra* note 14, article 19 "…In the event of the death of the victim as a result of an act of enforced disappearance, their dependents shall also be entitled to compensation".

Freedoms that establishes that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment".

8. THE LAW OF HISTORICAL MEMORY.

Among the many different ways of making the transition from a dictatorship to a democracy, for many years the Spanish State opted to "start from scratch with a clean slate", with the impunity of the criminals and the crimes committed. The amnesty law provided the solution for not assigning liability to the leaders of the previous regime, shielding itself in the need to reconcile and forget.[125] This suggests that forgetting everything destructive would also destroy the memory of what had happened.[126]

But we must not confuse the need for transitional justice, resulting from the complicated situation of a Civil War and a dictatorship, with an alternative to truth and justice. However necessary peace and stability are in a country after a difficult period of a dictatorship, the process of reconciliation should never be an excuse for impunity of crimes committed during this era. During this transitional process rights to the truth, justice and reparation should be respected and it is clear that these rights are not obtained through the amnesty laws that the State adopted[127], since the debt owed to the victims of crimes against humanity cannot be cancelled out by the State's acts of pardoning or forgetting.[128]

The Law of Historical Memory intended to heal the wounds that had been open for so many years and it is true that only once this law was passed could the families of the victims of enforced disappearances approach the authorities to request the opening of the common and hidden graves and identify the remains of their relatives. But it has not been enough. The Law of Historical Memory has not only been unsatisfactory but has not even half satisfied the demands for the clarification of the truth and reparation for the

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[125] *See*, concerning the mistaken Spanish transitional justice, Equipo Nizkor, *supra* note 9.

[126] As correctly pointed out by Chinchón Álvarez, *supra* note 16, p. 5, we are dealing with one of the shameful voids of Spain with regards to the basic measures to adopt within the scenario of 'Transitional Justice'

[127] Recently the United Nations Human Rights Commission urged for the abolishment of the amnesty Law and requested the creation of an independent commission in charge of re-establishing the historical truth concerning the violations of human rights during the Civil War. *See* United Nations Human Rights Commission. Ninety-fourth session, 31 October 2008*, Adopts Final Conclusions and Recommendations on Reports of Denmark, Monaco, Japan, Nicaragua and Spain.*

[128] *See* Amnesty International*, supra* note 13, p. 12.

victims that have been requested over the years[129], and it also perpetuates the forgetting of the crimes committed.

At any rate, although the victims´ rights recognised by the Law of Historical Memory were not sufficient with regards to the right to the truth and justice, the Law did not deny or impede in any manner the possibility of obtaining justice by means of legal proceedings.[130] It is one thing is that the Historical Memory tries to discover the truth about the past and reparation the victims by economic means, and it is another, very different matter to start legal proceedings, necessary to repair this injustice that has gone on over the years. By means of the measures adopted within the framework of a criminal investigation, this process of exhuming and identifying the corpses is painful, but at the same time required and necessary for the families of the victims, can be carried out at last.

Many people thought and indeed still think that the road to reconciliation is the passing of time, silence and forgetting. They believe that we should learn to live in the present and look to the future and forget the past. There are many that still believe that starting to investigate the crimes of the past is not only unnecessary but would also open old wounds from the past initiating a *inquisitio generalis*[131], a general case against Francoism[132] that only seeks

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[129] Concerning the *Law of Historical Memory* and historical memory in general, *see* Antonio Martín Pallín and Rafael Escudero Alday, (eds.), *Derecho y memoria histórica* (Trotta Publishers, Madrid, 2008); Pablo D. Eiroa and José M. Otero, (eds.), *Memoria y Derecho penal* (Fabian di Placido Publishers, Buenos Aires, 2007); Gonzalo Acosta Bono, Ángel Del Río Sánchez and José M. Valcuente del Río, *La recuperación de la memoria histórica. Una perspectiva transversal desde las Ciencias Sociales* (Centro de Estudios andaluces. Consejería de la presidencia, Seville, 2007); Margalida Capellá i Roig, 'La recuperación de la Memoria Histórica desde la perspectiva jurídica e internacional', nº 7 *Entelequia. Revista Interdisciplinar: Monográfico* (September 2008); Moreno Díaz, *supra* note 108; *Amnesty International*, *supra* note 13; *Víctimas de la Guerra Civil y el franquismo: no hay derecho. Preocupaciones sobre el proyecto de ley de derechos de las víctimas de la guerra civil y del franquismo*, 2006, Amnesty Internacional <www.es.amnesty.org/paises/españa/>; Amnesty Internacional , *supra* note *25.*

[130] 2nd additional provision: "the previsions contained in this Law are compatible with the exercise of the actions and access to the ordinary and exceptional legal proceedings established in the laws or in the international conventions and treaties signed by Spain".

[131] The Writ denies that it has this aim to examine the Spanish Civil War in Court. Writ of 16 October 2008, *supra* note 1, legal grounds one.

[132] In the appeal lodged by the Chief Prosecutor of the High Court *Javier-Alberto Zaragoza Aguado* on 20 October 2008, *supra* note 3, considering in it 4 b) which

revenge. But the families, in spite of the time that has passed and efforts of the State to silence their demands[133], have never been able to forget the 114,266 people that disappeared.[134] These people are fathers, mothers buried in common graves, in fields and ditches all over the country.[135] We are not dealing here with something from the past, something that only needs to be judged by the passing of time and historians. These are real victims, real graves, and real human remains of thousands of people who disappeared, whose families have never forgotten them. There is not, nor will there ever be, any forgetting and pardoning without justice, because time does not heal wounds caused by crimes as abominable and outrageous as enforced disappearances carried out in the context of crimes against humanity.

In order for us to talk about long-lasting reconciliation, justice is necessary, because only when we can look at the past without feeling ashamed will we be able to talk about true reconciliation and with it a fairer and more peaceful coexistence. How can we talk about real reconciliation when after more than seventy years there are still more than 100,000 missing people, people who disappeared and have never been forgotten by their families? How can we talk about reconciliation when despite the silence the families have been forced into for years in the interests of maintaining a fictitious reconciliation, nobody has ever been able to silence their claims for justice?

By opening criminal proceedings and with the investigations that would subsequently be carried out, the events that took place could be clarified, the truth behind the people who disappeared could be discovered and their corpses could be exhumed with the guarantees offered by the proceedings,

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accuses the Examining Judge of the High Court of initiating a general case against Francoism, a general inquisition that is prohibited in our Constitution.

133 The families of the victims have never stopped trying to make their claims heard, seeking justice in the Spanish Courts for years without obtaining any response other than silence in such a way that the High Court ended up being the only and last effective resource for the families of the disappeared *See,* Chinchón Álvarez, *supra* note 16, p. 2

134 Writ of 16 October 2008, *supra* note 1, legal grounds six. But in the expert report that is being elaborated, the designated experts estimate that the total number of victims is between 136.062 and 152. 237.

135 Benjamín Prado, expresses perfectly the suffering and anguish of the victims in his article 'Un tupido velo. 140.000 muertos invisibles', *El País*, 18 January 2009, <www.elpais.com/articulo/portada/tupido/velo/elpepusoceps/20090118elpepspor_10/Tes>, "(the disappeared people) seem to have been buried twice, once under the funereal land of tyranny and again under the bureaucracy of freedom".

so their families could give them a dignified burial at last. But despite the fact that, as we have discussed, the legal problems to commence criminal investigations can be overcome, there is an opportunity to start to close the deep wounds that have remained open in Spanish society for so many decades, and then be able to talk about true reconciliation and justice.

Despite the fact we are dealing with crimes against humanity through their context, crimes have remained unpunished since they were committed; despite the fact that these crimes are still on-going today, despite the fact the Spanish State by remaining inactive is breaching its international obligations and its duty to defend the rights of the victims, once again the victims' need for the truth, justice and reparation have been forgotten, rights that recognised nationally and internationally, the rights of the victims and their families that the Law of Historical Memory only managed to outline minimally.

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LE MAROC

LA JUSTICE TRANSITIONNELLE AU MAROC : CAS DE L'INSTANCE ÉQUITÉ ET RÉCONCILIATION

AMINA SLIMANI*

ABSTRACT

Following any political transition after an armed conflict or a totalitarian repressive regime, a heritage of heavy human rights violations faces the new system. Different paths are followed by states to treat this situation, not all of them are necessarily judicial; truth and reconciliation commission are another option.

Since 1990, Morocco initiated a political action facing its own history that included massive violations of human rights; forced disappearances, arbitrary detention, and massive mistreatments of detained persons. Several institutions have been put in movement to deal with this history proving the serious efforts of the regime to reinforce the pillars of a modern democratic society, namely: The Consultative Council of Human Rights in 1990; the independent body of Arbitration in 1999 and the Equity and reconciliation Committee 2004.

The Committee on Truth and reconciliation has been assigned three main tasks: a fact finding mission on the scope of the violations committed; the determination of the institutional responsibilities for these violations, establishing a mechanism for reparations of victims and proposing reforms in order to avoid the repetition of violations.

This paper aims at witnessing the experience of Morocco in regards to transitional justice in the light of the works of the mentioned bodies. Following axes should be treated:

The Historical and political context in which the violations were committed,

Characteristics of the Moroccan approach of transitional justice

The interaction between the different bodies established by the Moroccan government

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The impact of recommendations of the Truth and reconciliation committee on the reforms introduced in Morocco

INTRODUCTION

A l'instar d'un grand nombre de pays de la région Sud et Est de la Méditerranée, le Maroc a été par le passé traversé par de longues périodes de troubles et d'instabilité politique généralement accompagnées de violations des droits de l'Homme (torture, disparitions forcées et arrestations arbitraires etc). Afin de tourner certaines pages de l'histoire et dans une perspective de transition vers un avenir plus stable et plus démocratique, les commissions de vérité sont une option non négligeable. Leur but est de trouver une voie non pénale pour résoudre des conflits nationaux profonds et ayant donné lieu à des violences graves. Il s'agit d'obtenir la vérité et d'offrir une compensation aux victimes à défaut de pouvoir rendre justice[1].

Le régime marocain niait souvent l'existence de centre de détention politique et de détenus politiques au pays, assimilant ces derniers à des délinquants de droit commun dûment condamnés par les tribunaux. Ce n'est que depuis 1990 que le Roi Hassan II passa de la dénégation à une reconnaissance implicite de graves violations des droits de l'homme, notamment par la création en avril 1990 d'un conseil consultatif des droits de l'homme (CCDH)[2]. Ce début de confrontation du Maroc avec son propre passé s'est poursuivi et consolidé après l'intronisation en 1999 de Mohamed VI, le fils aîné de Hassan II. Dès ses premiers discours, le jeune souverain a affirmé sa volonté de rompre avec le régime autoritaire du père en réconciliant le peuple avec la dynastie Alaouite et de donner une nouvelle image d'un Maroc moderne, pacifique et respectueux des droits de l'homme.

Face à une critique interne et internationale et en réponse aux recommandations du centre international pour la justice transitionnelle[3], le pays opte pour une « transition » au cours de laquelle la communauté panse ses plaies, répare les dommages commis et restaure les sentiments de confiance et de justice dans la société. Le Maroc adopta alors l'expérience

[1] S. Leman-Langlois, « Le modèle "Vérité et réconciliation" » Victimes, bourreaux et institutionnalisation du pardon », *Informations sociales*, 2005/7 n° 127, p. 112-121.

[2] Le CCDH constitue l'une des institutions majeures de la transition démocratique au Maroc en matière de règlement du passé des violations graves des droits de l'Homme. Il été substitué par le CNDH (conseil national des droits de l'homme) en 2002 sous le règne de Mohammed VI.

[3] Centre International pour la Justice Transitionnelle, Les commissions de la vérité et les ONG : Le partenariat indispensable, « Les lignes directrices Frati » pour les ONG s'engageant auprès des commissions de la vérité, Document thématique, Avril 2004.

de la justice transitionnelle par la création en 2004 d'une commission de vérité qui porte le non de l'Instance Équité et réconciliation (IER)[4].

Le recours à des commissions de vérité qui sont l'emblème de la justice transitionnelle est de plus en plus fréquent dans les pays ayant connus de violations massives des droits de l'Homme. Nous assistons aujourd'hui à des expériences multiples de transition politique dans les pays arabes qui ont opté pour les commissions de vérité comme mécanisme de règlement de conflit. C'est le cas de la Tunisie, de l'Egypte et de la Lybie, sociétés en transition après la chute des régimes autoritaires et dictatoriaux. Ces pays ont intérêt tout naturellement à profiter des expériences plus anciennes de justice transitionnelle comme celle du Maroc notamment.

Pour donner un aperçu de cette expérience, plusieurs questions méritent d'être posées : Tout d'abord, dans un pays qui n'a connu ni guerre civile ni chute de régime autoritaire, comment peut-on justifier la création d'une instance d'équité et de réconciliation (IER)? Dans quels contextes historique et politique le Maroc a eu recours à la justice transitionnelle ? Ensuite, quelles sont les particularités et les limites de l'IER et quels sont ses effets ? Autrement dit, la commission de vérité marocaine est-elle une expérience réussie ?

Pour répondre à ces interrogations, il convient de présenter les particularités de la justice transitionnelle au Maroc (I) avant de s'intéresser à la réussite d'une telle expérience (II).

I. LES PARTICULARITÉS DE LA JUSTICE TRANSITIONNELLE AU MAROC

La principale caractéristique des commissions de vérité est sa flexibilité pour s'adapter à tout type de système transitoire. Chaque commission a son propre modèle et son propre contexte. Elles ont toutefois pour objectif commun la préparation d'un avenir plus juste, plus pacifique et plus respectueux des droits de l'homme.

A. CONTEXTE

« Les stratégies de sortie des conflits, dictatures ou régimes totalitaires dépendent fortement des contextes dans lesquels ces processus ont lieu, de leur histoire, de leur culture, du nombre de victimes, de la durée de la répression, de la nature des acteurs, etc »[5] . Pour le cas du Maroc, la

[4] M. Behnassi, « Le mandat de l'instance équité et réconciliation », dans *Instance équité et réconciliation : rapports et études*, Rapport final, t. 2, Mai 2005

[5] M. Bleeker, « Justice transitionnelle et construction d'une paix durable : des agendas complémentaires », dans Centre International pour la Justice

transition démocratique s'est effectuée sans changement de régime ni renversement de la monarchie, le Roi conserve l'ensemble de ses pouvoirs. Il ne s'agit pas non plus d'une guerre civile prolongée ni de période d'occupation étrangère marquée par une violation permanente et systématique des droits de l'homme. Le Maroc a connu plutôt des périodes noirs appelées souvent années de plomb et qui se sont étalées sur environ quarante années[6]. Ces violations ont été limitées dans le temps et dans l'espace tout en étant irrégulières puisqu'il y avait par moment des périodes d'accalmie, d'ouverture et de dialogue politiques entre le régime et ses opposants[7].

Quelles sont alors ces violations dont la vérité devait être établie par la commission de vérité et de réconciliation IER ?

Depuis l'indépendance en 1956 et jusqu'en 1990, on peut compter environ une trentaine d'événements et de procès d'inégale ampleur qui ont donné lieu à une série de violations dont les qualifications varient entre disparition forcée et détention arbitraire associées à la torture et au mauvais traitements des détenus. Au tout début (fin des années cinquante), ces violations ont été le fait des appareils officiels de sécurité de l'Etat qui devaient faire face à des résistants et à des membres de l'armée de libération qui refusaient de se fondre dans les nouveaux appareils de sécurité. Ces violations se sont accrues durant les années 60 et 70. En mars 1965, une émeute populaire avait été violemment réprimée et qu'en octobre 1965, Mehdi Ben Barka, leader de l'UNFP (gauche marocaine) était enlevé à Paris et est resté disparu depuis lors. En 1973, l'une des composantes de l'UNFP a entrepris des actions armées, ce qui a durci la répression. Les deux tentatives successives de coup d'Etat ont entraîné des réactions d'une extrême violence de la part du régime. Tous ces événements ont donné lieu à une série de violences et de violations graves des droits de l'homme. Ce qui a

Transitionnelle, La justice transitionnelle dans le monde francophone : état des lieux, Conference Paper 2007/2, p.71-81, p. 73

[6] F. Vairel, « Le Maroc des années de plomb : équité et réconciliation », *Politique africaine*, 2004, p. 181-195 ; F. et al., Brisset-Foucault « Vérité, justice, réconciliation ou comment concilier l'inconciliable », *Mouvements*, 2008/1 n° 53, p. 9-13.

[7] Voir, M. Berdouzi, « L'expérience marocaine en matière de reconnaissance et de réparation des violations des droits humains », dans *Instance équité et réconciliation : rapports et études*, Rapport final, t.2, Mai 2005.

nécessité une période de transition pour passer d'un régime autoritaire et policier à un régime plus démocratique et plus libéral[8].

Ainsi, la transition au Maroc peut se définir comme une volonté politique de rompre avec le passé et de favoriser l'ouverture, la démocratie et le respect des droits de l'homme. La création de la commission de vérité marocaine (IER) par le Roi Mohamed VI le 7 janvier 2004 s'inscrit alors dans cette perspective[9]. L'instance Équité et Réconciliation n'est pas née dans un contexte conflictuel, mais plutôt dans un climat plus ou moins stable puisqu'elle vient en continuité d'autres institutions préparatoires et réparatrices l'ayant précédé.

Quel est le processus de création de l'IER ?

En premier lieu, Mohamed VI décide de mettre en place en 1999 une Instance Indépendante d'Arbitrage chargée de l'indemnisation des victimes ou de leur famille. Si cette instance a permis l'indemnisation de plus de 4 000 personnes, certaines organisations des droits de l'homme fustigent sa conception. Elles lui reprochent de n'avoir pour mission que l'indemnisation matérielle en négligeant la réhabilitation des victimes et la détermination des responsabilités, outre la question de son autonomie et de sa composition. Dans un second temps et parallèlement à l'ouverture de l'État et ses initiatives en faveur des droits de l'homme, la société civile créa un Forum intitulé Vérité et justice. Le but de cette association est de peser sur le pouvoir et d'entrer en négociation avec lui, voire de lui faire admettre la démarche de la recherche de la vérité. Parmi les revendications du Forum figurent la lutte contre l'impunité et le devoir d'établir la vérité sur les circonstances des violations des droits de l'homme. Le Forum abandonne toutefois la revendication de juger les personnes responsables des atteintes aux droits de l'homme pendant la période des violences allant de 1956 à 1999. En contrepartie, le pouvoir promet de faire la lumière sur cette période dans le cadre d'une instance ad hoc. Ce compromis entre les deux parties a trouvé naturellement en la justice transitionnelle un cadre approprié pour être mis en œuvre. L'IER voit ainsi le jour pour un mandat initial de neuf mois qui a été prolongé à deux reprises. Sa compétence matérielle fut

[8] Voir, A. Lamghari Moubarrad, « Constitution et garantie de la non répétition des violations graves des droits de l'homme au Maroc », dans *Instance équité et réconciliation, Constitution et droits de l'homme*, juin 2005.

[9] Dahir Royal 1.04.42, Journal Officiel, 10/04/2004. « le Dahir officialisant la création de l'IER n'a été publié que le 10 avril 2004, date à laquelle commence le mandat officiel de l'Instance alors que dans les faits le Roi a institué cette instance le 07 janvier 2004 et ses membres ont commencé leurs travaux dès cette date.

limitée puisque seules les détentions arbitraires et les disparitions forcées ont été considérées.

Tel fut le contexte de création de a commission de vérité marocaine, la question qui se pose est celle qui concerne ses caractères spécifiques.

B. CARACTÈRES

Sandrine Le franc, l'une des spécialistes de la justice transitionnelle, estime que « si la justice transitionnelle est « transitionnelle », c'est qu'elle n'est pas ordinaire, et de fait l'expression a tiré une partie de son succès de la méfiance de groupes divers à l'égard de l'application du « cours normal » de la justice (pénale, ou administrative) dans un contexte de fragilité de la « transition » vers la paix et/ou la démocratie »[10]. Le Maroc s'est engagé dans un tel processus en abandonnant la voie pénale dans le traitement des violations commises par le passé jugeant que la priorité doit être accordée à la restauration de la dignité des victimes. Les membres de la commission marocaine qui sont en grande partie d'anciennes victimes font valoir qu'une commission bien menée peut aboutir à des résultats hors de portée des tribunaux : par exemple, elle permet d'obtenir des informations sur les crimes, traiter des milliers de cas et contribuer à la réconciliation sociale[11].

A cet égard, nous nous interrogeons comment les victimes de ces violations, devenues membres de la commission, ont accepté d'abandonner la voie pénale et soutenir l'impunité des responsables. Comment une victime peut-elle choisir une option non pénale en réponse à des violences aussi criminelles. L'octroi de quelques dirhams par l'auteur même de ces crimes en guise de réparation suffit-il à faire oublier les blessures du passé ? Ou bien est- ce véritablement une volonté profonde d'assurer la réconciliation sociale et de pardonner ou plutôt une volonté politique d'afficher la modernité et la démocratie sur le plan interne et international ? Pour répondre à ces interrogations, nous revenons à l'une des particularités de l'IER. Cette institution trouve sa raison d'être dans un pacte conclu entre les victimes et les bourreaux des années sombres de l'histoire du Maroc. La commission de vérité marocaine devait bénéficier à chacune des parties au conflit, elle n'a été qu'une justice négociée, Mais a-t-elle été librement négociée ?

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[10] S. Lefranc, « La justice transitionnelle n'est pas un concept », *Mouvements,* 2008/1 n° 53, p. 61-69, p. 62.

[11] Fédération Internationale des Ligues des Droits de l'Homme (FIDH), Rapport n°396 : Les commissions de vérité et de réconciliation : l'expérience marocaine, Séminaire régional, Rabat, Maroc, 25-27 mars 2004.

La commission marocaine a permis de dire la vérité, mais une vérité sans visage et sans nom. Dire la vérité dans le cadre de la justice transitionnelle au Maroc signifie seulement le témoignage des victimes exprimant ouvertement leurs expériences douloureuses. Driss Elyazami, ancien membre de l'IER, notait à juste titre que la commission de vérité marocaine a permis « d'avancer de manière considérable dans l'établissement de la vérité sur plusieurs épisodes de cette histoire et de ces types de violations, restés jusque-là marqués par le silence ou le tabou »[12]. Toutefois, si L'IER a organisé une série d'auditions publiques pour les victimes, leur parole était loin d'être totalement libre. Pour donner une idée sur le déroulement de ces auditions, nous dirons seulement que les victimes ou les personnes qui comparaissent au nom d'une victime avaient tout au plus 20 minutes pour s'exprimer ; les personnes présentes dans la salle ne posaient pas de questions et les membres de l'IER n'interrogeaient pas les auditionnés, qui ont signé préalablement un protocole leur interdisant de divulguer les noms des tortionnaires[13]. Il s'agit donc d'une liberté sous protocole. L'objectif étant seulement de libérer les victimes d'un lourd fardeau qu'elles ont porté ou leurs familles pendant de longues années. Il aurait fallu organiser, comme c'est le cas dans d'autres commissions étrangères, des auditions consacrées aussi à entendre les responsables et à avouer les crimes qu'ils ont commis par le passé.

Ainsi, à la différence de certaines commissions étrangères ayant permis l'identification et le transfert des responsables au judiciaire (comme c'est le cas en Argentine, Pérou, Sri lanka ou Canada par exemple), l'IER n'a pas eu pour mission ni pour compétence d'identifier des responsabilités, ni renvoyer les responsables à la justice. De quelle justice parle-t-on alors ? En dépit des non dits et les rôles des uns et des autres sur la question de la légitimité de la violence de l'État, les implications de la monarchie, des partis et des personnalités politiques et la responsabilité du système sont présentes dans tous les esprits et ne font aucun doute (Elles pouvaient se déduire des témoignages des victimes faisant référence aux lieux et aux périodes des

[12] D. El Yazami, « Maroc, la parole libérée », *La pensée de midi*, 2006/3 N° 19, p. 20-28, p. 22.

[13] Frédéric VAIREL, « L'Instance Équité et Réconciliation au Maroc : lexique international de la ré-conciliation et situation autoritaire », *in* Sandrine LEFRANC (dir.), *Après le conflit, la réconciliation*, Paris : Michel Houdiard, 2006, p. 229-259. Cet auteur a noté qu'au Maroc, « les auditions publiques ont permis un rapprochement entre le régime et certains de ses opposants plutôt qu'un affichage de la critique ».

violences qu'elles ont subi) [14]. Par conséquent, si le régime est l'auteur présumé des violations, l'indépendance et l'impartialité de la commission de vérité marocaine se trouvent sérieusement affectées. L'institution monarchique étant au même temps l'instigateur, le financeur et même l'organisateur du projet. Or, dans le cadre de la justice transitionnelle et dans les politiques de pardon mises en place notamment en Amérique latine ou encore en Afrique du sud, le tiers de justice, l'arbitre doit nécessairement se situer en dehors de la communauté politique, sans liens avec celle-ci [15]. Dans le cas du Maroc, on peut se demander quelle portée et quelle crédibilité accorder à cette opération d'équité et de réconciliation du fait que la monarchie se situe hors des institutions et au sommet de toute institution. Il y a là une spécificité de la transition politique marocaine ainsi qu'une spécificité du système lui-même.

Nonobstant ses limites, l'IER a-t-elle eu les effets escomptés ? S'agit-il d'une expérience réussie ?

II. LA RÉUSSITE DE LA JUSTICE TRANSITIONNELLE AU MAROC

Lors de son discours pour la création de la commission de vérité, le Souverain du Maroc précisa que l'objectif de cette instance sera de faire en sorte que les Marocains « *se réconcilient avec eux-mêmes et avec leur histoire, qu'ils libèrent leurs énergies et qu'ils soient partie prenante dans l'édification d'une société démocratique et moderne, gage de prévention de toute récidive* ». En tant que première commission de vérité à être créée au Moyen-Orient et en Afrique du Nord, l'IER est chargée de réaliser trois objectifs principaux : l'établissement de la vérité sur les violations graves des droits de l'homme intervenues entre 1956 et 1999, la détermination des responsabilités institutionnelles (non individuelles), l'indemnisation et la réhabilitation des victimes et l'élaboration de propositions de réformes, susceptibles de garantir la non-répétition de telles violations.

En effet, la commission marocaine a eu le mérite d'aborder frontalement la problématique des années de plomb et d'affirmer la responsabilité de certaines institutions pour les violations des droits de l'homme commises massivement à une certaine époque. L'IER a réalisé également réparation et

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[14] Sur ce point, voir, A. Ounnir, « La justice et la magistrature au Maroc », dans *Instance équité et réconciliation : rapports et études*, Rapport final, t. 1, Mai 2005 ; H. Amouri, « L'émergence de la question des droits de l'homme au Maroc : entre expression de la société civile et réponse de l'Etat », op. cit.

[15] E.G.Cueva, « Commissions de vérité : Mythes et leçons apprises », dans Centre International pour la Justice Transitionnelle, *La justice transitionnelle dans le monde francophone : état des lieux*, Conference Paper 2007/2, p. 17-20.

soutiens financier, moral et médical aux victimes et aux familles des victimes. (Sans entrer dans les détails des chiffres) 9 280 personnes obtiennent des indemnisations financières ; 1895 personnes bénéficient d'un suivi personnalisé dans la perspective d'une réintégration dans la fonction publique et d'une régularisation de leur situation administrative et professionnelle. La commission a mis également en place une unité médicale d'accueil[16].

Il s'agit ici des effets directs de L'IER, mais la commission a-t-elle eu des effets sur le long terme quant à la promotion de la justice et le respect des droits de l'homme.

A. EFFETS DIRECTS

Pour réaliser ses objectifs, la commission a émis dans son rapport final une série de recommandations qui s'articulent autour de trois axes : assurer des réformes constitutionnelles, mettre en œuvre une stratégie nationale de lutte contre l'impunité et assurer le suivi des recommandations. Quelles sont ces recommandations et ont-elles été suivies d'effet ?

Les principales recommandations de l'IER dans le domaine de la justice concernent l'adaptation de la législation pénale aux conventions internationales en matière des droits de l'Homme et l'incrimination des violations, la consécration constitutionnelle de la primauté du droit international des droits de l'homme sur le droit interne ainsi que le renforcement de la séparation des pouvoirs et l'indépendance de la justice pénale et sa promotion auprès de la société civile[17]. En ce qui concerne le suivi des recommandations de l'IER quelques réalisations peuvent être mentionnées : le versement des indemnisations aux victimes des années de plomb est plus ou moins achevé ; le Conseil national des droits de l'homme travaille à la préparation des autres mesures de réhabilitation des victimes dont en premier lieu la couverture médicale. De même, les programmes de réparation communautaire font depuis plusieurs mois l'objet d'une vaste concertation avec les acteurs associatifs des régions touchées par les violations et les universitaires marocains. Ces programmes ont reçu d'ailleurs les premiers financements. Toutefois, l'effet de la justice transitionnelle au Maroc ne peut être ancré seulement sur la réparation

[16] IER, Rapport final, livre 2 : Etablissement de la vérité et détermination des responsables ; livre 3 : La réparation, Novembre 2005.

[17] Sur ces recommandations et leur suivi, voir notamment, M. Idrissi Alami Machichi, Etude sur la conformité du projet de code pénal avec les principes et les règles adoptées dans le système des droits de l'homme, CNDH, Les éditions La croisée des chemins, 2012, p. 27 et s.

accordée aux victimes, mais doit aussi intéresser globalement le domaine de la justice et des droits de l'homme au Maroc.

B. EFFETS INDIRECTS

Depuis le début de ce siècle, le Maroc a véritablement enclenché une dynamique réformatrice globale marquée par de nombreuses initiatives (Code de la famille, projet de Code pénal, Code de procédure pénale, Instance équité et réconciliation, initiative nationale pour le développement humain, régionalisation, installation du Conseil économique et social, et récemment la nouvelle Constitution). Nous ne pouvons pas nier que dans une région dominée par l'instabilité, l'autoritarisme politique et les pressions impériales mais vaines pour "la réforme", le Maroc se distingue au moins à trois niveaux : l'amorce d'une relation apaisée et informée à l'histoire, une vitalité du débat public sur l'avenir et l'accumulation de réformes sur des questions fondamentales.

Le processus de réformes globales au Maroc est alors pour partie déjà en marche. Le pays s'est doté récemment en juillet 2011 d'une nouvelle Constitution qui a été largement approuvé lors d'un référendum. La nouvelle Constitution repose sur des piliers majeurs, à savoir : l'avancement du chantier de la régionalisation ; la garantie de l'indépendance de la justice ; la consolidation du principe de séparation et d'équilibre des pouvoirs ainsi que la responsabilisation des décideurs à l'échelle central et régional. La nouvelle constitution marocaine consacre également le renforcement des institutions représentatives et la constitutionnalisation de certaines instances chargées de la bonne gouvernance, des droits de l'homme et de la protection des libertés.

Toutes ces réformes sont importantes et témoignent certes de la volonté de construire un État plus démocratique et plus juste, mais elles démontrent également que le Maroc connaissait un déficit en matière de justice et de respect des droits de l'homme. Cependant, la question qui se pose est de savoir si l'ensemble de ces réformes ainsi que l'intérêt de la société civile pour la justice et la politique pénale constitue un indice de réussite de la commission de vérité et de réconciliation marocaine ?

Certains analystes ont considéré que le chantier des réformes législatives, institutionnelles et économiques que connaît le Maroc depuis ces deux dernières années n'est pas une réponse aux recommandations de l'instance Equité et Réconciliation. La réforme de la Constitution par exemple serait plutôt une réaction de l'Etat face au bouillonnement révolutionnaire que connaissent les pays voisins dans la région, comme la Tunisie, la Lybie et l'Égypte. Cependant, des membres du gouvernement démentent cette

analyse en assurant que ces réformes ne sont pas conjoncturelles puisqu'elles ont été entamées avant même le début de ce que les journalistes appellent le « printemps arabe » et viennent en continuité d'une longue marche vers la démocratie.

Les deux hypothèses sont correctes : d'une part, les recommandations de l'IER ne sont pas les premières revendications en faveur de la réforme de la justice et de la promotion des droits de l'homme, mais peuvent être des stimuli complémentaires non négligeables. D'autre part, le mouvement populaire que connaît le Maroc après les révolutions des pays voisins et les pressions internationales constituent également des facteurs à prendre en compte. En plus, craindre et anticiper la colère du peuple est légitime et si cette crainte est facteur de réformes dans un pays, cela n'est pas en soi critiquable.

Quant à l'évaluation de ces réformes, le constat est loin d'être satisfaisant surtout dans le domaine pénal. En effet, pour éradiquer l'impunité, il n'est pas suffisant d'affirmer la nécessité d'une réforme législative ou d'apporter des modifications superficielles, il faut encore réformer le texte en profondeur et en assurer l'application[18]. Il faut aussi mettre en place des politiques publiques dans les secteurs de la justice, de la sécurité et du maintien de l'ordre, de l'éducation et de la formation permanente, ainsi qu'une implication active de l'ensemble de la société. Ces éléments permettront entre autre de garantir la non répétition des exactions ayant fait l'objet du mandat de l'IER. De plus, la garantie d'un non retour serait également la ratification du statut de la Cour pénale internationale que le Maroc a signé et ne souhaite pas ratifier.

En somme, l'insuffisance des réformes au Maroc et partant du suivi des recommandations de l'IER se constate à deux niveaux : d'une part, toutes les réformes nécessaires n'ont pas été réalisées et d'autre part, celles qui ont été accomplies ne sont pas à la hauteur des espérances.

D'abord en ce qui concerne les réformes accomplies dans le domaine constitutionnel. Par exemple, les nouveaux articles 109, 110 et 117 de la Constitution consacrent le renforcement de l'indépendance de la justice et l'interdiction de toute immixtion dans les affaires du juge sous peine de sanction. Toutefois, en comparant les nouveaux articles avec les anciens, nous remarquons qu'il n'y a pas d'avancée majeure surtout en matière de

[18] Sur la nécessité d'une réforme globale du code pénal, voir, les travaux du séminaire organisé par le ministère de la justice sur « La politique criminelle au Maroc : réalité et perspectives », Mekhnès 9-11/12 2004.

séparation des pouvoirs et de l'indépendance de la justice. Le problème est le respect de ces principes dans la pratique et non pas la consécration de leur valeur constitutionnelle.

De même, dans le but de renforcer les droits des justiciables, la nouvelle constitution prévoit le droit de se prévaloir d'une exception d'inconstitutionnalité d'une loi ou d'un règlement autonome. En effet, cette initiative courageuse vient en réponse aux recommandations de l'IER et permet à l'une des parties dans un procès d'entraver l'application d'une loi dont dépend l'issue du litige dès lors qu'elle estime qu'elle porte atteinte aux droits et libertés garantis par la Constitution. Cette disposition qui consacre le contrôle de constitutionalité *a posteriori* rappelle l'exception d'inconstitutionnalité introduite dans la Constitution française (la loi du 23 juillet 2008). Cependant, la disposition marocaine manque cruellement de précisions sur les conditions et les modalités de son application en attendant une loi organique.

Ensuite, concernant les réformes inachevées dans le domaine législatif, le Code pénal marocain nécessite une révision générale afin de l'adapter à l'évolution de la criminalité et de l'harmoniser avec les engagements internationaux du pays, notamment en matière de protection des droits et libertés de l'homme et de lutte contre le crime. Le législateur a certes entamé la réforme de la législation pénale, notamment par la révision du Code de procédure pénale en 2004 et l'adoption de la loi contre la torture en 2005. Cependant, une réforme globale du Code pénal de 1963 est plus que nécessaire.

Au-delà des enjeux politiques qui la sous-tendent et à défaut d'ester en justice les responsables, la commission de vérité IER a permis au moins de lever le voile sur des périodes d'exactions massives de l'histoire du Maroc. Cependant, si le retour à la paix et à la cohésion sociale ne peut réussir sans une reconnaissance officielle des faits et des responsabilités, la justice transitionnelle au Maroc n'a-t-elle pas de justice que le nom ? Les victimes se trouvent confrontées à des tortionnaires impunis et l'indemnisation ne saurait remplacer l'identification et la responsabilisation des auteurs de graves violations des droits de l'homme[19]. A cet égard, la commission de vérité au Maroc a été une option douce pour les gouvernements ayant violé les droits de l'homme et voulant éviter la justice pénale.

[19] Dans ce sens, N. Mamère, « L'impunité et le devoir de mémoire », *Mouvements*, 2008/1, n°53, p.20-25 ; E. Jelin , « Les mouvements sociaux et le pouvoir judiciaire dans la lutte contre l'impunité », *Mouvements* 2006/5, n°47-48, p.82-91.

De plus, si l'un des objectifs de la justice transitionnelle est de prévenir la récidive et la répétition des crimes commis par le passé, la réussite de l'expérience marocaine dans ce domaine reste à approuver. L'existence dans la pratique d'une véritable transition au Maroc est douteuse puisqu'il n'y a eu ni guerre ni chute de régime, ni même passage réel et effectif d'un régime autoritaire à un régime plus respectueux des droits de l'homme. L'arrivée même des islamistes, autrefois à l'opposition, à la tête du gouvernement ne semble pas éradiquer le sentiment d'injustice et d'inégalité qui ronge la société. Certaines violations des droits et libertés après la commission IER peuvent être considérées comme une continuité de pratiques violentes du passé. Les violences observées dans le Sahara lors des manifestations en faveur de l'indépendance (2004) ; les arrestations massives d'islamistes ou supposés tels après les attentats du 16 mai 2003 ainsi que les détentions des manifestants appartenant au mouvement du 20 févier et de certains journalistes (2011) en sont quelques exemples.

En évaluant également l'IER, il ne faut pas négliger son impact au-delà des frontières. Nombreux sont les acteurs de la société civile issus d'Algérie, d'Egypte, d'Irak, du Yémen, du Liban, de la Tunisie, de la Lybie, et de bien d'autres pays qui ont suivi avec attention le travail de l'IER et qui essaieront de s'en inspirer pour leurs propres combats. D'ailleurs, la commission de transition tunisienne installée après la chute du régime de Ben Ali vient de solliciter la collaboration du CNDH marocain pour l'amorce d'une nouvelle expérience de la justice transitionnelle en Afrique du Nord. Or, l'effectivité d'une telle influence restera limitée puisque les contextes ne sont pas les mêmes et les enjeux ne sont pas les mêmes. Peut être que l'inspiration se focalisera iniquement sur l'aspect organisationnel du projet. Quoiqu'il en soit, en comparant l'expérience marocaine dans la justice transitionnelle et les commissions de vérité connue dans le monde, nous pouvons qualifier l'IER comme étant la plus douce et la plus élémentaire commission de vérité. Quant à la réussite de la justice transitionnelle au Maroc, nous doutons de son impact quant à la réalisation de ses objectifs primordiaux, à savoir combattre l'impunité et assurer un Etat plus juste et plus équilibré. En tout cas, le Maroc est actuellement devant un grand examen, celui du nouveau gouvernement sous l'aune de la nouvelle constitution.

LE RWANDA

CRAFTING TRANSITIONAL JUSTICE: SIGNIFICATIONS OF RIGHTS-BASED ORGANIZATIONS AND LEGAL AID IN RWANDA

STEFANIE BOGNITZ*

RÉSUMÉ

Influencé par des idées transnationales portant sur les droits de l'Homme, la démocratie et l'État de droit, le projet rwandais d'unité nationale fait face à des défis particuliers. L'invention d'une nation post-génocidaire, réconciliée, renvoie l'image d'un état autoritaire ayant partiellement propagé certaines conceptions relatives à la la démocratie, la liberté, le développement et les droits humains. Si l'on considère la manifestation de la souveraineté étatique et la reproduction sociale des rapports de pouvoir dans l'histoire du Rwanda, en prenant comme référence la région des Grands Lacs, il ressort en effet une continuité frappante dans la généalogie de l'autorité et de la surveillance. Pour prendre le contre-pied de telles tendances, je suggère de reporter délibérément l'attention sur des processus de rupture, susceptibles d'être observés dans le cadre d'interventions humanitaires et judiciaires. Cette contribution se donne pour but d'étudier ces phénomènes, en mettant en question la formation d'une societé civile.

Cette recherche se concentre sur les organisations de la societé civile qui s'engagent en faveur des droits humains, dans le contexte politico-juridique de l'après-génocide rwandais. Les organisations opérant dans le domaine des droits de l'Homme, et disposant d'un poids significatif, sont la charnière d'un transfert de standards globaux des droits humains vers les champs locaux de l'intervention humanitaire et judiciaire, ce qui est censé produire de l'ordre social/public et de la stabilité politique au Rwanda. Comme point de départ, ma contribution prend en compte – d'une part – la contestation des concepts et pratiques de rétorsion, médiation et châtiment provenant d'acteurs étatiques et – d'autre part – les organisations non-gouvernementales. De surcroît, il s'agit de partir des modes d'appropriation normative de l'État de droit pour, ensuite, mettre en évidence les pratiques

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rétorsives et punitives qui ont trouvé leur inscription dans la justice transitionelle et donné son expression politico-juridique à la gouvernance rwandaise.

L'État d'exception post-génocidaire a alimenté les interventions d'agences (inter)nationales de donateurs. Ceci se matérialise au travers de la société civile et des organisations non-gouvernementales, qui sont souvent affiliées à des instances internationales et agissent dans une optique claire de restauration de l'ordre social. L'activité des organisations de la societé civile au sein du contexte politico-juridique de l'après-génocide rwandais sera au centre de cette contribution. Pour ce faire, l'intention est de thématiser l'interaction entre idées globales et locales sur les droits humains, l'organisation et l'*empowerment* de la societé civile rwandaise, ainsi que les formes prises par son intervention en période de justice transitionelle. Les unités de base de l'analyse sont la societé civile et ses organisations formelles. A la base de mon chapitre réside la conviction qu'étudier les organisations de la societé civile permet non seulement de questionner le discours sur le Rwanda comme un lieu de bonne gouvernance propagé à travers le monde de manière fervente, mais aussi de prendre en compte les points de vue des acteurs (non-étatiques) sur la réconciliation.

INTRODUCTION

This paper aims to contribute to the discourse in and around transitional justice initiated by anthropologists, such as Rosalind Shaw, Lars Waldorf and Alexander Hinton among others. These critics call for localizing and embedding the post-conflict legal itinerary of transitional justice into respective contexts. Such a local approach to transitional justice strongly resists an idea of transitional justice which has reached the scale of a universally applicable toolkit to bring about justice or a ready-made intervention always having a desirable legal fix at hand. Based on qualitative research data from a post-conflict country, I will stress the context-dependency of transitional justice and focus on a delineated socio-political realm – the case of post-genocide Rwanda. Having said this, I will explicitly try to interweave some significant aspirations, results as well as shortcomings of transitional justice with ambitions of state as well as non-state actors towards building a reconciled, stable and thriving nation state. I summarise these two underlying streams of my argument for this contribution as an inventory of the Rwandan transitional justice trajectory. With this critical inventory of transitional justice in the Rwandan setting, I intend to shed a different light on Rwanda's saliency to bring about justice and establish socio-public order. My contribution will address questions

about the relation between transitional justice and truth, transitional justice and its subjects, and transitional justice for the benefit and/or expense of what and whom. Finally, I will explore the opportunity of the coming of age of a critical public bearing witness to and raising scrutiny towards transitional justice mechanisms in Rwanda.

Post-conflict scenarios hold a certain space of intervention for a multitude of actors, organizations, donors and consultants of different kinds. The post-genocide state of exception has fuelled the interventions of (inter)national donor agencies which materialized in civil society and non-governmental organizations, often with international affiliations and an outspoken agenda to restore social order. Post-genocide Rwanda has experienced the mushrooming of numerous organizations embedded in civil society that are involved in rights-based activism[1] focusing on, but not limited to the legal-political sphere. Within the discourse of rights-based activism global human rights are translated in local arenas where humanitarian and legal interventions are adapted or better re-localized and shaped according to established expectations. For the Rwandan setting, these expectations include the development of socio-public order, re-establishment of political stability and the quest to define a truth around a contested past which helps to outline certainties about the challenges that lie ahead in the future. This includes the interface between global and local ideas about human rights, the organization and empowerment of Rwandan civil society and its forms of intervention in transitional justice. I suggest, that studying interventions of rights-based organizations, not only challenges the Rwandan good governance narrative that fervently travels the globe and national aspirations towards peaceful co-existence, but takes significant (non-state) actors' approaches towards reconciliation and legal empowerment of all Rwandans into account.

TRANSITIONAL JUSTICE FROM RWANDAN GRASSROOTS – AAPPING THE FIELD

First of all we should recall that transitional justice incorporates two imperative procedures, a process of transition within some kind of political environment and a process that aims at bringing about justice. The concept therefore suggests a certain 'path dependency', which implies that the disposition of a transitional process shapes the outlook of justice (Collins 2010: 4). But still, these two interconnected processes provoke a plethora of critical and sometimes open-ended questions, as for instance: How does the trajectory of transition look like and what is finally at stake - i.e. transition to

[1] Rights-based organizations from here on

what? Can we simply assume in accordance with political sciences that a transition undergoes some form of consolidation in order to finally reach a state of democracy (Teitel, 2000: 5) and if so, who shapes and defines these political stages especially within a plurality of interests and a multitude of actors? Equally challenging questions can be posed about the idea of justice implied in the rather teleological and apparently unidirectional concept of transitional justice. Who differentiates justice from injustice? Could some form of justice ever be detached from political ambitions and power relations? How can we measure some form of justice?

Richard Wilson in his 2001 study on the TRC in South Africa has aptly emphasized that

[t]he study of transitional truth and justice has been too dominated by philosophical discussions abstracted from specific contexts, and we should instead examine how the politics of punishment and the writing of a new official memory are central to state strategies to create a new hegemony in the area of justice and construct the present moment as post-authoritarian when it [in fact] includes many elements of the past (Wilson 2001: xvi).

But even if we cannot come up with a 'one fits all' answer to these questions, we would all agree on an intervention, be it labeled transitional justice or otherwise, which deals with coming to terms with gross human rights violations, war crimes, acts of genocide especially in an interconnected transnational world.

Either impunity or punishment have often been coined as initial decisions to be taken in order for transitional justice to gain momentum. In this regard post-conflict Rwanda is a highly interesting scenario since we witness a dialectical appropriation of both. Yet again, this insinuates that law can hardly be separated from politics or culture. A culture of partial impunity and punishment looms large over Rwanda where only certain war crimes and acts of genocide committed by a certain group of Rwandans are persecuted, whereas a range of other war crimes are not matters of concern, neither for transitional justice nor for universal jurisdiction.[2] On the other hand, the government tirelessly 'fights the culture of impunity' and digs deeper for the

[2] Time and again universal jurisdiction undergoes explicit scrutiny by the president when he for instance instructs Rwandan lawyers and judges to proudly defend state sovereignty and emancipation from Western moral and legal domination in delivering independent, unbiased judgements and emphatically representing the national jurisdiction.
See: http://www.newtimes.co.rw/news/index.php?issue=14872&article=49076&term=Kagame; last accessed: 19 Jan 2012.

'real truth about what happened during the genocide'(see Burnet 2010). These are the words with which the Rwandan government emphatically introduced genocide-related mass-adjudication of state-initiated gacaca courts that delineate the intersection between locality and justice, a form of local, bottom-up justice one might think. By now this has become a creative legal apparatus to impose a mixture of transitional justice and justice of the powerful on survivors, victims and perpetrators. As a result of this, most of the nation was put on trial (Waldorf 2010: 3) and had to accept punishment.

These legal political decisions have to be analysed against the background of a nation building process in post-genocide Rwanda which was faced by a significant double bind: "How to build a democracy that can incorporate a guilty majority alongside an aggrieved and fearful minority in a single political community" (Mamdani 2001: 266).

This dilemma sets the scene for experiments in transitional justice, and indeed the Rwandan state reinterpreted the judiciary 'on the grass', the traditional gacaca courts. These community courts, as a form of legal re-organization of Rwandan civil society and thus traditionally concerned with disputes over land and restitution, were adapted by the state as adjudication for genocide-related crimes.[3] This judiciary followed a twofold purpose, punishment and reconciliation, as well as a dialectical appropriation of both legal technologies in seeking truths. In terms of punishment, perpetrators were sentenced to prison detention or community service that served the purpose of reintegration. But testimonies and narratives about the genocide uncovered legal/therapeutic truths that were taken to reconcile survivors and offenders, often alongside re-traumatization of victims and survivors alike (Clark 2010; Friedman 2010; Jones 2010). What is at stake is whether the transitional justice of Gacaca can foreclose retributive violence and retaliatory conflicts (see Borneman 1997; Wilson 2001).

There are manifold trajectories to overcome mass atrocities, violence and gross human rights violations. These have been coined as (para)legal mechanisms of forgiveness, punishment and amnesia to achieve reconciliation and re-establish social order (Graybill 2004). Rwanda, however, has chosen a post-conflict itinerary of meticulous mass punishment interconnected with public victim-offender exposure which has traces of forgiveness and amnesia too. Transitional justice in Rwanda has dealt with

[3] "In Rwanda, even the most localized of the justice processes, the Gacaca, are hardly about eradicating the culture of impunity but rather about tightening the control of a minority government and about passing down its imagery of Rwandan identity" (Oomen 2005: 906).

the responsibility of so called perpetrators by direct accusations, naming and identifying *génocidaires*. On the local level of transitional justice mechanisms, gacaca serves as state-imposed, enforced, public stage for the rule of post-genocide organic law. Participation in its enactment is mandatory for every Rwandan citizen (see also: Humphreys 2010; Thomson & Nagy 2011).

Gacaca procedures and judgements have also caused perceptions of illegitimacy among Rwandans, especially with regard to those who contend their degree of punishment as for instance life imprisonment for genocide-related allegations which are according to the Gacaca-judiciary legitimate and legally-binding judgements.

Punishments imposed under the rule of transitional justice, especially in Gacaca trials (under the authority and adjudication of lay-judges [*inyangamugayo*]) still reverberate with regard to legal disputes[4] and initiatives for amnesty and remissions of prison sentences. The measurement and punishment of genocide-related crimes carried out by lay judges of the gacaca courts implies various ruptures with regard to evidence, legitimacy and truths. Especially the "combination of a mediation discourse and punishment in gacaca led to mixed results" (Doughty 2011: 167) and contributed to its ambiguity. The first is more directed towards the restorative aspect of transitional justice by trying to reintegrate antagonists, envisage reconciliation and sustainable public order, whereas the second is obviously retributive in nature and postpones the re-establishment of equilibrium within communities. The restorative and the retributive aspects of gacaca and therefore the local trajectory of transitional justice were never self-explanatory; on the contrary, they were ruled by inconsistencies, biases and intuition of state-authorized lay-judges.

The procedures of gacaca have caused a number of uncertainties and insecurities especially in rural areas where mutual social and reciprocal relationships are imperative for an integrated community, and for the very life

[4] Authors who have carried out extensive research on transitional justice argue that genocide-related accusations are instrumentalised in disputes over land and property especially between neighbours. "Many participants in gacaca have incentives to make false accusations. Genocide accusations become 'weapons of the weak' in personal, social, and economic disputes in Rwanda's local communities. The easiest way to get rid of a troublesome neighbour whose property is coveted is to accuse her of genocide in gacaca" (Waldorf 2006: 72). Recent resettlement programmes and reintegration of Genocide-refugees add fuel to these conflicts (Dr Pietro Sullo, personal communication).

of individuals. For purposes of seeking the truth, naming perpetrators, exposing genocide victims and survivors to reach some form of reconciliation, gacaca as a public legal mechanism of transitional justice interferes in more private and intimate strategies to come to terms with the past. Against the background of proximity in rural communities - survivors often live alongside perpetrators (released prisoners, returnees and repatriates) - the restoration of social harmony is of central significance. Reconciliatory practices between victim and offender such as sharing drinks (*gusangira urwagwa*) or intermarriage have always been accepted to lay a conflict to rest. Seeking justice in gacaca, however, is by far not an unbiased process, since the idea of justice within these legal forums has been repeatedly obscured by resentment, mistrust, social power, corruption, coercion and silencing (Buckley-Zistel 2006: 145). Even though gacaca has always been praised by the Rwandan Government as a homegrown legal strongly embedded in local communities that can be easily used to bring about transitional justice, it remains a state-initiated legalized post-conflict itinerary of transitional justice and is faced with contestations. Again Richard Wilson convincingly summarizes this: *"[I]n post-conflict situations, states often impose forms of conflict resolution in a top-down manner and in so doing, usually fail to appeal to local moralities and institutions to create the conditions for peace"* (Wilson: 2001: 214).

Resistance to post-conflict justice of gacaca as well as resentment towards the national program of reconciliation and unity as substantial elements of the transitional justice trajectory in Rwanda is to date silently enacted in retaliatory cycles of violence and revenge killings (on either side of the constructed ethnic categories) by means of poisoning which is frequently reported, yet impossible to count or prove. In this respect, the rule of law in transitional justice remains partially detached from everyday practices of seeking justice, revenge or choosing to forget (chosen amnesia; see Buckley-Zistel 2006). It is thus not the legacy of the genocide and the introduction of legal technologies to fight genocide ideology that determines the daily life of the majority of Rwandans but a certain genocide-related continuum that poses essential questions of securing survival and co-existence.

TRANSITIONAL JUSTICE AND AN EMERGING CIVIL SOCIETY?

During the last two decades, increasing attention is directed to a kind of 'new humanitarianism' which shifts the focus of many studies in the social sciences whose object of inquiry is situated in a field called 'global justice' (Wilson and Mitchel 2003: 2). Here we witness a transnational circulating

metacode of human rights ideals and amplified voices calling for universally accessible organisations and institutions promoting justice. Aspirations like 'access to justice' and 'bringing justice to the people out there' have become catch phrases and are mission and vision of many organisations and their interventions respectively positioned in civil society organisations or the so-called third sector. Moreover, in Rwanda, justice is seen as constitutive for the endurance of peace-making initiatives. The idea of justice has permeated to the very local contexts where people are educated to become emancipated legal subjects and encouraged to be conscious about their rights as Rwandan citizens. Moreover, Legal interventions that cut across established realms of the justice sector aim at reconciliation and empowerment of subjectivities that are entangled in social/political/legal disorders. Rights-based organizations are assumed to shape civil society, to strengthen civil culture and to produce patterns of social order and mechanisms of control from below along the production and dissemination of knowledge (see Levy Palluck & Green 2009). It is open to debate whether these processes will also have an impact on the emergence of an informed and critical public. However, legal information and education for the rural population can only be selective and is often problem-oriented. Thus, the aspect of temporality and context-dependency prevails for rights-oriented interventions. Rights-based organizations and other civil society organizations engaged in the domain of justice have outlined their main interventions as the organization of access to justice for indigent and vulnerable groups, legal advice, community legal education and legal aid, as well as legal representation in certain cases and under the condition of allocated funds (see also Conner, Emshoff & Davidson 1978).[5]

There are two forms of legal aid to be differentiated, traditional and structural legal aid (Mitchell 2009). Traditional legal aid focuses preferably on extra-judicial resolution of disputes by giving beneficiaries advise on their situation, educating them about laws, rights and functioning of the legal system, orienting them to responsible authorities at the community level and informing them about the production of necessary evidence, which are mostly written documents or the search for witnesses. The design of traditional legal aid emphasises the temporality of a beneficiary's situation. It defines the point in time of the beginning of the dispute, the phase of legal aid and the anticipated resolution of it. It therefore shapes a dispute, claim or

5 http://www.lawcf.org/; http://www.lawcf.org/index.asp?page=clear+rwanda; accessed on 13 Jan 2011

need by engaging only in the essential legal aspect that has to reach a closure.

[...] Traditional legal aid – the form of aid that seeks, in principal part, to implement current law – can inform people of their rights, motivate them to demand that their rights be respected, and expose inconsistencies between the values expressed in the law as written and values evident in the public policies actually effect the poor (Mitchell 2009: 406).

Traditional legal aid concerns the rightful implementation and practice of existing laws. It could be assumed that the traditional style of legal aid emphasises laws and power that are already in place. It thus bridges the divide between the state of the individual and the state of the nation, embedding individual claims into larger legal-political frameworks.

Structural legal aid on the other hand, is an approach which aims at challenging existing structures and specifically laws that may at times go against the realisation of the common good and reproduce injustice for the poor and the vulnerable. Through its practice-oriented approach and empirical experience, structural legal aid could contribute to new configurations, such as legal reforms and adaptations of the law in order to grant 'more rights' especially to the poor (see also Mitchell 2009: 379).

Empirical evidence however shows that this dichotomy cannot withstand certain challenges and everyday practices of legal aid and the legal aid apparatus in Rwanda. Legal aid realities are much more complex, messy, donor-dependent and can only act in line with existing legal guidelines for its practice and regulations for its implementation.

THE RIGHT TO HAVE RIGHTS - TISSEMINATION OF KNOWLEDGE IN LEGAL AID CLINICS

Global ideas on human rights are translated from a transnational metacode of human rights law and adapted in rights-based activism and CSO-initiated interventions in Rwanda (see Merry 2006a; Rottenburg 2005, 2009a). The expertise of Rwandan brokers and human rights activists is re-inscribed in the global discourse when it travels along with ideas of justice.

Actors involved in rights-based activism and legal aid in specific need to be conceived [in accordance with Merry (2006b: 134)] as intermediaries. [1] These intermediaries, who are involved in translation processes of global models into local settings and vice versa, again translate local practices and systems of knowledge into global flows of ideas (Merry 2006b: 134).

The legal aid clinic can be coined as a meaningful model transfer from the "global North" to Rwanda, but also within the country. The legal aid clinic at

the National University of Rwanda in Butare has been a model transfer based on the organizational form of the project-based legal aid clinic at the University of Ottawa in Canada. The legal aid clinic allocates legal expertise accessible for anyone who considers a certain complex of problems, in its most general sense, within a normative-legal framework. It most notably qualifies for its accessibility, its immediacy and the procurement of legal aid as a good for the benefit of the public and its common interest. It is significant, especially for those who are deprived of fair access to legal institutions, primarily because of insufficient knowledge, resources and networks (Paterson 1991). Legal aid offered by a legal aid clinic is a charitable model of legal assistance and a genuine form of achieving local justice (Waldorf 2006: 14-16).

The legal aid clinics could be perceived as an innovative organisational form for legal advice, and thus moves basic mechanisms of mutuality into the public consciousness. Jurists and future lawyers are practically trained by means of actual cases (situated and contextualized in the legal clinic) and gain practical knowledge, which in the end will qualify them as experts in transitional justice. With regard to the administration of institutionalized legal practice, the following experimental adaptation is brought about. In order to establish legal aid as a social technology of the rule of law, the Faculty of Law of the National University of Rwanda (NUR) delegates the subject legal advice to the legal aid clinic.[6] Within this organizational framework, cases are heard, negotiated and decided under the supervision of future lawyers. The inscription of cases and rendering of case files follow after questionnaires of claimants' oral accounts of disputes are filed as a standardized written form on which a follow-up court case can be built upon. On the basis of this written form, the involved legal experts translate matters of dispute into either negotiable (mediation) or triable (court) cases. They act as mediators between (often illiterate) claimants and shape conceptions of justice and legal order. Above all, lawyers and paralegals give advice and represent needy and destitute clients *pro bono publico* – for the public good.

In the legal aid clinic of the University in Butare, law students hear clients' cases, provide legal advice, negotiate between disputing parties, and if necessary direct the case to a trained legal adviser. 80% of the disputes are related to property rights which are *droit commune* cases, whereas disputes originating from the period of the Genocide (April until July 1994) have to be

[6] See also: http://www.lac.nur.ac.rw/
http://www.uottawa.ca/associations/clinic/eng/main.htm

tried as genocide (-related) cases (Ullmann und Donat 2004).[7] Such cases are of particular difficulty for lawyers, as well as paralegals, since these disputes' entanglement with human rights violations of the past can be highly complex, contested, and especially challenging to prove in terms of providing evidence.

In addition, the future jurists accompany cases entrusted to them dutifully until the final pronouncement of a judgement, even after it has been procured to a court. In these instances, and as a matter of liability, cases exceed the capacities and responsibilities of the legal aid clinic, and therefore have to be handed over.[8]

Nonetheless, the organizational form of the legal aid clinic cannot be maintained without external financial support. In practice, (inter)national non-governmental organizations contribute to support public access to legal aid and justice (see also DIHR 2004).

Pro bono publico legal aid is inscribed in the organizational form of the legal aid clinic. This legal inscription travels as a public-social technology from centres of knowledge, as for instance the mobile legal aid clinic of NUR in Butare, into peripheral spaces perceived as marginal by local actors and intermediaries respectively. The legal technology is set in motion, since the problematisation of legal peripheries has created certain voids. It is through these voids that the continuum of invisibility or even absence of the rule of law materialises, in particular with reference to conditions of injustice that were reiterated in the years after the Genocide. Nevertheless, the legal aid clinic as a new form of organization to negotiate justice has to be recontextualized. Unless local actors, that are generally set apart from any legal discourse, get involved, legal intermediaries cannot implement the legal aid clinic as a public-social technology of justice. In order to avoid losses of meaning in this assemblage of legal aid, when it travels from centers to peripheries the following provisions have to be fulfilled. The legal technologies have to be inscribed in the organizational form of the legal aid,

[7] See: http://www.rav.de/publikationen/infobriefe/archiv/infobrief-93-2004/aufarbeitung-des-voelkermordes/

[8] In its self-representation, the legal aid clinic in Butare enlists the following numbers as evidence for success: In 2001 legal advice was financed in three cases by the legal aid clinic. 24 cases were procured to and tried in (criminal) courts. The legal aid clinic further announces for the same year that all clients represented by jurists and paralegals affiliated to the legal aid clinic have won their cases at first instance (DIHR 2004). ttp://humanrights.inforce.dk/files/pdf/Publikationer/final_legal_aid_report_eng_040412.pdf

in order then to be included in a new institutional and material order/regime. It is only under consideration of these provisions, that the legal aid clinic as innovative legal technology can establish meaningful forms of advice and counseling. The experts involved inherit the responsibility of intermediaries and make decisions in their function as obligatory steps that precede the legitimate established, but nevertheless exclusive, legal institutions.

So what is the significance of legal aid in transitional justice?

Legal aid is a constitutive element in the discourse of transitional justice from violent conflict to enduring national stability. As a continuum of transitional justice, legal aid is appropriated to re-establish a socio-legal order and settle legal ambiguities as well as new disputes resulting from mass accusation and punishment, lay judgements and entanglement between prosecutor/perpetrator of Gacaca jurisdiction.

Additionally, the disposition of legal aid in its organizational form could be elevated to yet broader contexts of conflict, mediation and reconciliation where it could serve as a leitmotif and a universal organizational form to spread and access legal aid. The legal aid clinic with its attached legal technologies has already been translated and adapted in the region, as for instance Congo, Burundi, Darfur and Malawi (Friedman 2010; Mbgako 2011), where the rule of law is detached from peripheries and the idea of justice as manifest in legal institutions is a mere side note.

The travelling technology of legal aid seems to be a creative toolkit for experts as well laymen. Nonetheless, these tools can only be successfully appropriated when there are standardized procedures already in place. Although the legal aid clinic is a field of experimenting for future lawyers and paralegals, since there is still a visible lack of legal experts, it is a significant public-social technology of legal advice which will gradually improve on the basis of its lessons learnt. Moreover, it is assumed that the legal clinic as a travelling technology shapes a certain consciousness about rights and justice of involved actors. Legal expertise is assumed to be adapted by laymen and again set in motion so that it translates in yet other, forms of everyday, lay knowledge about the idea of justice (see also Sen 2009).

CONCLUSION

After transitional justice or in a phase of post-transitional justice (Collins 2010) in Rwanda, there are emerging matters of dispute over land, property and livestock through which individuals as well as groups within local communities express resentment to restitution programs for returnees and repatriates for instance. In fact, legal reforms of transitional justice reordering inheritance and land succession triggered a massive case load of land

disputes alone. Unless legal reforms and legal aid are more significantly directed towards the issue of land claims and disputes over access to and property of land especially among the rural population, erupting land conflicts will be yet another rupture the country has to face.

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ON THE ROLE OF SUBSTANTIVE CRIMINAL LAW IN TRANSITIONAL JUSTICE : RAPE IN RWANDA AS A CASE-STUDY

SARA PORRO*

RÉSUMÉ

Dans le processus de la justice de transition, le droit pénal de fond ne constitue pas seulement la base juridique des poursuites pénales, mais peut aussi contribuer à l'établissement de la mémoire historique. C'est ce qui ressort de la jurisprudence sur les crimes de viol commis en connexion avec le génocide rwandais de 1994.

Ces crimes ont été poursuivis d'un côté devant le TPIR et de l'autre devant les tribunaux rwandais conventionnels et les *Gacaca*. Le TPIR a fait application du droit international coutumière, qui défini le viol comme un crime international et de manière détaillée. Les tribunaux rwandais, par contre, ont fait application du droit interne existant au temps des événements, qui définissait le viol comme un crime interne et de façon vague.

En raison du cadre normatif différent, la jurisprudence du TPIR a consolidé la notion de viol génocidaire, alors que les tribunaux rwandais n'ont pas distingué entre viol génocidaire et viol simple mais occasionné par le génocide. À cause de la définition vague des éléments constitutifs du viol en droit rwandais, par ailleurs, les condamnations pour viol prononcées par les tribunaux rwandais n'ont pas établi un cadre historique précis sur les épisodes de violence sexuelle.

INTRODUCTION

It is well-known that rape was sadly a characterising feature of the Rwandan genocide of 1994. Criminological research has estimated that at least 350.000 female victims were raped during approximately 100 days of genocide from the killing of President Habyarimana on 6 April 1994 through

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mid-July[1]. It has been reported, furthermore, that incidents of genocide-related rape encompassed both genocidal rapes, i.e. rapes perpetrated as part of a systematic strategy to destroy the Tutsi population, and opportunistic rapes, i.e. rapes driven by individual motives and facilitated by the widespread chaos caused by the genocide[2].

Like other genocide-related offences, cases of rape connected to the Rwandan genocide have been adjudicated by three different tribunals, namely the ICTR[3], specialised chambers within Rwandan conventional courts[4], and *Gacaca* courts[5]. To date, the debate on advantages and

[1] C. BIJLEVELD, A. MORSSINKHOF, A. SMEULERS, «Counting the Countless. Rape Victimization during the Rwandan Genocide», *International Criminal Justice Review*, 2009, p. 208; this figure does not include male rape victims.

[2] C. W. MULLINS, «We Are Going to Rape You and Taste Tutsi Women. Rape during the 1994 Rwandan Genocide», *British Journal of Criminology*, 2009, p. 719, at p. 720 et seq., 726 et seq.

[3] International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994, established by Security Council Resolution No. 955/1994 of 8 November 1994.

[4] Established by Organic Law No. 08/96 of August 30, 1996, on the Organization of Prosecutions for Offences Constituting the Crime of Genocide or Crimes against Humanity Committed since October 1, 1990; see for details C. CISSÉ, «The End of a Culture of Impunity in Rwanda? Prosecution of Genocide and War Crimes before Rwandan Courts and the International Criminal Tribunal for Rwanda», *Yearbook of International Humanitarian Law*, 1988, p. 161, at p. 181. A copy of Organic Law No. 08/96 is available on-line at http://www.geneva-academy.ch/RULAC/national_legislation.php?id_state=185 (last visited on 11 January 2013).

[5] Within the domestic system of criminal justice, until 2008 rape cases were adjudicated by specialised chambers of conventional courts only; in 2008, the adjudication of rape affaires was transferred to *Gacaca*, except for cases involving planners of the genocide or persons in government positions at least at the *préfecture* level: arts. 1 and 9 Organic Law No. 13/2008 of 19 May 2008, amending Organic Law No. 16/2004 of 19 June 2004, Establishing the Organisation, Competence and Functioning of Gacaca Courts Charged with Prosecuting and Trying the Perpetrators of the Crime of Genocide and Other Crimes against Humanity, Committed between October 1, 1990 and December 31, 1994; on the declared aim of this transfer see B. A. OLWINE, «One Step Forward, but Two Steps Back: Why Gacaca in Rwanda Is Jeopardizing the Good Effect of Akayesu on Women's Rights», *William&Mary Journal*

drawbacks of holding rape trials before each of these tribunals appears to be focused mainly on how procedural aspects, such as the level of fair trial rights and the degree of victims' protection, have affected national reconciliation[6]. In addition to procedural issues, however, attention has to be drawn also to the fact that the ICTR on the one hand, and Rwandan conventional courts and *Gacaca* courts on the other hand, have applied different frameworks of substantive criminal law on rape. The definition of rape acknowledged in each of these systems has arguably had an impact on how historical truth on genocide-related rapes has been consolidated in judgments issued by the ICTR and by domestic courts.

1. APPLICABLE SUBSTANTIVE CRIMINAL LAW

Within the subject-matter jurisdiction determined by the ICTRSt.[7], adjudication of rape cases before the ICTR is based on customary international law as existing at the time of the genocidal events. Customary international law criminalises rape not as such, but as an underlying act of core crimes. More specifically, in this system of substantive criminal law rape can first of all be a way of committing genocide, if the particular rapist acted with the specific intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such[8]. Furthermore, in customary international

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of Women and the Law, 2011, p. 638, at p. 662, available on-line at http://scholarship.law.wm.edu/wmjowl/vol17/iss3/6/ (last visited on 11 January 2013). An amended version of Organic Law 16/2004 can be found in P. C. BORNKAMM, «Rwanda's Gacaca Courts. Between Retribution and Reparation», Oxford *et al.*, Oxford University Press, 2012, at p. 167 et seq.

[6] *Inter alia* A. P. I. MAZIMHAKA, «Much to Be Done: Towards an Effective Transitional Justice Model for Dealing with Conflict-Related Crimes of Sexual and Gender-Based Violence», LLM Dissertation, University of Cape Town, at p. 53 et seq., 62, 66 et seq., with further references, available on-line at http://www.publiclaw.uct.ac.za/ (last visited on 11 January 2013), as well as on *Gacaca* HUMAN RIGHTS WATCH, «Justice Compromised. The Legacy of Rwanda's Community Based Gacaca Courts», 2011, at p. 112 et seq., available on-line at http://www.hrw.org/reports/2011/05/31/justice-compromised-0 (last visited on 11 January 2013); OLWINE, «One Step Forward, But Two Steps Back», *cit.*, at p. 653 et seq.; S. E. POWERS, «Rwanda's *Gacaca* Courts: Implications for International Criminal Law and Transitional Justice», *ASIL Insights*, 23 June 2011, available on-line at http://www.asil.org/insights110623.cfm (last visited on 11 January 2013).

[7] Statute of the ICTR.

[8] See on rape as a way of causing serious bodily or mental harm pursuant to art. 2(2)(b) ICTRSt.: *Akayesu*, ICTR-96-4-T, at para. 731; on rape as a way of deliberately inflicting on the group conditions of life calculated to bring about its physical destruction pursuant to art. 2(2)(c) ICTRSt.: *Kayishema and Ruzindana*, ICTR-95-1-T,

law, rape can also amount to a crime against humanity, if committed as part of a widespread or systematic attack against the civilian population[9]. Rape can also be a war crime, if committed in connection with an armed conflict[10].

Within the subject-matter jurisdiction of specialised chambers in Rwandan conventional courts and of *Gacaca* courts[11], in contrast, adjudication of rape cases is based not on international law, but on domestic substantive criminal law applicable at the time of the events. Rwandan laws regulating the prosecution of genocide-related offences within the domestic system of criminal justice expressly stated that the Penal Code of 1977 was to be applied[12]. In Rwandan substantive criminal law as existing during the genocide, rape was provided for as an ordinary offence[13]. The more serious offences of rape as a genocidal act, as a crime against humanity and as a

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at para. 116; on rape as a way of imposing measures intended to prevent births within the group pursuant to art. 2(2)(d) ICTRSt.: *Akayesu*, ICTR-96-4-T, at para. 508.

[9] Art. 3(g) ICTRSt.

[10] Art. 4(e) ICTRSt.

[11] The subject matter jurisdiction of specialised chambers was set out in art. 1 of Organic Law No. 08/96, *cit.*, which provided as follows: «The purpose of this organic law is the organization of criminal proceedings against persons who are accused of having since 1 October 1990, committed acts set out and sanctioned under the Penal Code and which constitute:

a) either the crime of genocide or crimes against humanity as defined in the Convention on the Prevention and Punishment of the Crime of Genocide of 9 November 1948 [...]; or

b) offence set out in the Penal Code which the Public Prosecution Department alleges or the defendant admits were committed in connection with the events surrounding the genocide and crime against humanity.».

The subject matter jurisdiction of *Gacaca* courts was set out in art. 1 of Organic Law No. 16/2004, *cit.*, which provided as follows: «This organic law establishes organization, competence and functioning of Gacaca courts charged with prosecuting and trying the perpetrators of the crime of genocide and crimes against humanity, committed between October 1, 1990 and December 31, 1994, or other crimes provided for in the penal code of Rwanda, but according to the declarations from the Public prosecution or testimonies against the defendant, as well as the defendant's confessions in relation to criminal acts carried out with the intention of committing genocide or crimes against humanity.».

[12] Art. 39 of Organic Law No. 08/1996, *cit.*: «Unless otherwise provided in this organic law, all laws, including the Penal Code [...], shall apply to proceedings before the Specialized chambers»; Para. 14 of the Preamble to Organic Law No. 16/2004, *cit.*: «[...] prosecutions must be based on the Penal Code of Rwanda».

[13] In detail *infra*, *sub* 3.

war crime were introduced in domestic law only in 2003[14]; due to the principle of legality, it could not be applied in the genocide trials.

2. THE ELEMENTS OF RAPE IN CUSTOMARY INTERNATIONAL LAW

The definition of rape in customary international law has emerged from two landmark judgments of the ICTR and the ICTY[15], namely *Akayesu*[16] and *Kunarac et al.*[17].

In *Akayesu*, the Trial Chamber of the ICTR put forward the first-in-history definition of rape in international law by focusing on the nature of rape as a form of aggression against the person and sexual autonomy. More specifically, in *Akayesu* the ICTR distanced itself from the traditional notion of rape as non-consensual sexual intercourse, and opined that rape is to be understood in broader terms as «a physical invasion of a sexual nature, committed on a person under circumstances which are coercive»[18].

In *Kunarac et al.*, subsequently, the Trial Chamber of the ICTY[19] specified, to some extent modified, and complemented the *Akayesu* definition of rape. Concerning the element of physical invasion set out in *Akayesu*, first of all, in *Kunarac et al.* the ICTY clarified that it includes «the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) the mouth of the victim by the penis of the perpetrator». Differently from *Akayesu*, furthermore, *Kunarac et al.* held that since rape is a form of aggression against sexual autonomy, it does not necessarily require any coercive circumstances; lack of consent to the sexual act is sufficient. Finally, *Kunarac et al.* added to the *Akayesu* definition of rape the element of *mens rea*, stating that international criminal responsibility for rape is only incurred if

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[14] Law No. 33*bis*/2003 of 6 September 2003, Repressing the Crime of Genocide, Crimes Against Humanity and War Crimes; a copy of this law is available on-line at http://www.geneva-academy.ch/RULAC/national_legislation.php?id_state=185 (last visited on 11 January 2013).

[15] International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, established by Security Council Resolution No. 827/1993 of 25 May 1993.

[16] *Akayesu*, ICTR-96-4-T.

[17] *Kunarac et al.*, IT-96-23-T & IT-96-23/1-T, upheld in the relevant parts by *Kunarac et al.*, at paras. 127 et seq.

[18] *Akayesu*, ICTR-96-4-T, at paras. 587 et seq., 687 et seq.

[19] On what follows *Kunarac et al.*, IT-96-23-T & IT-96-23/1-T, at para. 460, upheld by *Kunarac et al.*, IT-96-23 & IT-96-23/1-A, at paras. 127 et seq.

the particular rapist intended to realise a sexual penetration, and knew in terms of practical certainty that the other person was not consenting to it.

3. The Elements of Rape in Rwandan Law

In Rwandan criminal law applicable at the time of the relevant events, rape was provided for by art. 360 of the Penal Code of 1977 in the following terms:

«*Est puni d'un emprisonnement de cinq à dix ans celui qui aura commis un viol. Est assimilé à la violence le fait d'abuser d'une personne qui, par l'effet d'une maladie, par l'altération de ses facultés ou par toute autre cause accidentelle, a perdu l'usage de ses sens ou en a été privé par quelque artifice. Si le viol a été commis sur la personne d'une enfant âgé de moins de seize ans, le coupable sera puni d'emprisonnement de dix à vingt ans. Si le viol a causé la mort de la personne sur laquelle il a été commis, le coupable sera puni de mort.*»[20].

This provision appears to refer to rape as a meta-juridical notion, instead of defining it. The kind of sexual act required for rape to be established is not specified. In addition, while the mention of violence and incapacity to resist the sexual act points to the fact that rape can be perpetrated in coercive circumstances, it is not clear whether coercion is to be understood as a necessary element of the offence[21]. Finally, no indication on the *mens rea* requirement is contained in art. 360 of the Penal Code; Rwandan criminal law, moreover, does not appear to acknowledge a default mental standard applicable unless otherwise provided, which could fill this lacuna[22].

Rwandan jurisprudence on genocide-related rapes does not seem to have specified the notion of rape referred to in the Penal Code of 1977[23], which has thus remained vague as to both *actus reus* and *mens rea*.

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[20] A copy of the Penal Code of 1977 is available on-line at http://www.geneva-academy.ch/RULAC/national_legislation.php?id_state=185 (last visited on 11 January 2013).

[21] *Contra* AVOCATS SANS FRONTIÈRES, «Vade-mecum. Le Crime de Génocide et les Crimes contre l'Humanité devant les Juridictions Ordinaires du Rwanda», Kigali and Bruxelles, 2004, at p. 115 et seq.

[22] W. A. SCHABAS, M. IMBLEAU, «Introduction to Rwandan Law», Cowansville (Québec), Les Éditions Yvon Blais, 1997, at p. 38.

[23] In most cases, specialised chambers of conventional courts have limited themselves to ruling that rape was established because the perpetrator raped the victim (e.g. Chambre Spécialisée du Conseil de Guerre à Nyabisindu, 16 August 1999, *Caporal Ndazigaruye*, in AVOCATS SANS FRONTIÈRES, «Recueil de Jurisprudence. Contentieux du Génocide», Vol. IV, p. 339, at p. 367 No. 10, available

4. Substantive Criminal Law and Historical Truth

The different frameworks of substantive criminal law on rape applicable before the ICTR on the one hand, and before Rwandan courts on the other hand, appear to have had a two-fold impact on how historical truth has been consolidated in judgments issued by these tribunals.

Firstly, the ICTR has entered convictions for rape not as such, but as an underlying act of core crimes. From the point of view of historical truth, convictions for rape as a crime against humanity[24] and as a war crime[25] have crystallised in legal terms the factual finding that a particular incident was connected to the genocidal events. Convictions for rape as a genocidal act[26], on the other hand, have crystallised in legal terms the factual finding that a particular incident not only took place in the context of genocide, but moreover was part of a strategy to destroy the Tutsi population.

Rwandan courts, in contrast, have entered convictions for rape based on art. 360 of the Penal Code of 1977[27]. From the point of view of historical truth,

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on-line at http://www.asf.be/publications/asf_jurisprudencegenocide_4/ (last visited on 11 January 2013), or because the perpetrator raped the victim by using coercion (e.g. Chambre Spécialisée du Conseil de Guerre à Kigali, 24 November 1998, *Adjudant Chef Rwahama*, in AVOCATS SANS FRONTIÈRES, «Recueil de Jurisprudence», *cit.*, Vol. II, p. 283, at p. 310, available on-line at http://www.asf.be/publications/asf_jurisprudencegenocide_2/ (last visited on 11 January 2013)).

[24] E.g. *Akayesu*, ICTR-96-4-T, Verdict, confirmed by *Akayesu*, ICTR-96-4-A.

[25] E.g. *Renzaho*, ICTR-97-31-T, Verdict.

[26] E.g. *Akayesu*, ICTR-96-4-T, Verdict, read together with paras. 698 et seq., confirmed by *Akayesu*, ICTR-96-4-A.

[27] See as to conventional courts e.g. Chambre Spécialisée du Conseil de Guerre à Kigali, 24 November 1998, *cit.*, at p. 314; as to *Gacaca* courts e.g. Jurisdiction Gacaca de Secteur de Cyarwa Cy'Imana, District de Huye, 10 December 2008, *Ntirenganya, Karamage, Kavamahanga, Nyangabo, Karekezi*, in AVOCATS SANS FRONTIÈRES, «Observations de Jurisdictions Gacaca. Province du Sud/Ex-Province de Butare. Decembre 2008», available on-line at http://www.asf.be/publications/rwanda_juridictionsgacaca_observations200812/ (last visited on 11 January 2013).

Some confusion could be engendered, nonetheless, by the fact that conventional courts have sometimes stated that a particular rape «constituted genocide»: e.g. Chambre Specialisée du Tribunal de Première Instance de Gisenyi, 12 February 1999, *Gakuru et al.*, in AVOCATS SANS FRONTIÈRES, «Recueil de Jurisprudence», *cit.*, Vol. II, p. 63, at p. 78. In this context, however, the expression «constituted genocide» is arguably to be understood not in a technical sense, but rather as referring to the subject matter jurisdiction of specialised chambers within conventional

these convictions have concerned affairs falling within the subject-matter jurisdiction of specialised chambers in conventional courts and of *Gacaca* courts, and therefore necessarily involving incidents connected to the genocide. The application of art. 360 Penal Code, however, has relieved domestic courts from specifically addressing the issue of whether a particular incident was part of a genocidal strategy, or merely arose out of personal motives[28]. As a consequence, the distinction between genocidal rapes and opportunistic rapes is not to be found in the case-law of Rwandan courts.

Secondly, ICTR convictions for rape have established an accurate historical record of what happened during particular incidents. Thanks to the detailed definition of the elements of rape in customary international law, it can be assumed that each conviction[29] has been based on the factual findings that some kind of sexual penetration was imposed on the victim, and that the particular rapist knew with certainty that the other person was not consenting. The vague notion of rape in Rwandan law, on the contrary, does not permit to assess whether convicted rapists imposed sexual intercourse or other sexual acts, whether coercion was used, and whether the perpetrator was aware that the other person did not give their consent.

5. Conclusions

In light of the Rwandan experience of adjudication of genocide-related incidents of rape, it is arguable that in transitional contexts the existence of a framework of substantive criminal law dealing specifically with core crimes and setting out their constitutive elements can contribute to establishing an accurate record of historical truth.

First of all, convictions entered for core crimes, and not for ordinary offences, acknowledge in legal terms the particular seriousness of offences committed with the overarching goal of eliminating a population, or in the context of a war or of other forms of mass-scale violence. Therefore, from the point of view of historical truth, the recent trend of enacting comprehensive domestic

courts as set out in art. 1 of Organic Law No. 08/96, *cit.* Such interpretation seems to be confirmed, moreover, also by the fact that Rwandan case-law has described as «constituting genocide» also offences that technically can never be genocidal acts, such as e.g. housebreaking: Chambre Specialisée du Tribunal de Première Instance de Gisenyi, 12 February 1999, *cit.*, at p. 78.

[28] Of course, the same argument could be developed also with regard to other genocidal offences, such as e.g. killing.

[29] See e.g. references in footnotes 24 to 26.

legislation incorporating core crimes in the domestic legal system, prompted by the passing of the Rome Statute[30], is to be praised[31].

Furthermore, the gravity of the offences perpetrated in the context of a genocide, of a widespread or systematic attack against the civilian population, or of a war, should not be a reason for disregarding the principle of specificity as to their definition. Detailed definitions of core crimes allow the case-law not only to administer justice consistently with the guarantee of legality, but also to crystallise an accurate historical record of past atrocities.

[30] Rome Statute of the International Criminal Court Adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998.

[31] On domestic legislation on core crimes see A. ESER, H. KREICKER (eds.), «National Prosecution of International Crimes», Berlin, Duncker & Humblot, 2003–2005; M. NEUNER (ed.), «National Legislation Incorporating International Crimes. Approaches of Civil Law and Common Law Countries», Berlin, BWV, 2003.

RAPPORT DE SYNTHÈSE

PROFESSEUR JEAN CÉDRAS*

Chers amis,

Je suis certain d'exprimer l'opinion générale en vous disant combien j'ai été heureux de vous entendre. Vos remarquables interventions m'ont beaucoup appris et je vous en remercie.

Je suis chargé de vous transmettre les regrets de notre ami le Pr Reynald Ottenhof, qui aurait tant aimé se joindre à vos travaux. Vous savez que Reynald est l'un des créateurs du comité Jeunes Pénalistes de notre Association. Hélas il souffre de diabète et son médecin lui a ordonné de rester chez lui à se reposer. N'interprétez pas son absence forcée comme une marque de désintérêt !

J'évoquerai brièvement une autre grande figure de notre Association, notre Président honoraire le Pr Cherif Bassiouni, "père" de la Convention de Rome de 1998, pour reprendre l'expression imagée et juste du Pr. Schomburg lors de son propos liminaire. Cherif était président du Comité de rédaction de la Convention, vous imaginez la situation... Cherif a aussi largement contribué à la rédaction des "Principes de Chicago sur la justice d'après conflit" (comme le nomme l'ONU en français). J'interprète le choix de votre thème "La justice transitionnelle" comme un hommage que vous lui rendez et je suis sûr qu'il en sera touché.

Qu'est ce que la Justice transitionnelle ?

Les10 thèses remarquablement énoncées par le Pr Schomburg sont à illustrer.

Dans les sociétés en transition, d'où le terme de justice transitionnelle, voici la définition retenue en 2004 par Kofi Annan dans un rapport au Conseil de sécurité : « [la justice transitionnelle est] l'éventail complet des divers processus et mécanismes mis en œuvre par une société pour tenter de faire face à des exactions massives commises dans le passé, en vue d'établir les responsabilités, de rendre la justice et de permettre la réconciliation ».

Point souligné par de nombreux intervenants, par exemple M. Gutierrez à propos du Chili ou Mme Pampalk pour la Sierra Léone et le Timor Oriental :

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différences dans la nature des conflits, types et gravité des violations, besoins des victimes, situation politique, tout diffère d'un cas à l'autre. Chaque processus de justice transitionnelle est donc unique et a ses spécificités tenant à son contexte historique et social. Son efficacité et sa durabilité implique qu'il soit réalisé par des acteurs nationaux (au besoin avec l'aide internationale). Il est donc imprudent de généraliser telle solution ou d'induire des règles générales de quelques cas particuliers.

Autre point commun : dans ce domaine au confluent de la politique, du droit, de la sociologie des masses, des groupes de pression seule une approche transdisciplinaire de la réalité locale est pertinente.

Qu'il s'agisse d'une guerre civile ou de la chute d'une dictature , de la libéralisation progresssive d'un régime ou encore d'une occupation étrangère, Kofi Annan mettait ainsi en lumière les quatre piliers de la JT :

Exactions massives, établir les responsabilités, rendre la justice, permettre la réconciliation.

I - PES EXACTIONS MASSIVES

Les exactions massives se réfèrent principalement à la Convention sur le génocide du 9 décembre 1948, à l'article 7 du Statut de Rome, à la Convention des Nations Unies de 1968 reconnaissant l'imprescriptibilité des crimes de guerre et des crimes contre l'humanité (dont naturellement le génocide) , pour ne citer que les principaux textes compétents...

n'ont guère besoin d'illustrations :

- crimes sexuels érigés en tactique de guerre (Mlle Poro pour le Ruanda, Cherif Bassiouni pour la Bosnie Herzégovine, Mme Scarpa pour la Sierra Léone)
- disparitions forcées en Espagne de 150 000 personnes (Mmes Zapico Barbeito et Fernandez Pacheco-Estrada), au Maroc (Mme Slimani), au Chili (M. Gutierrez)
- au Maroc encore, pour exemple, arrestations arbitraires, traitement brutal des détenus, avec tortures, traitements inhumains et dégradants.
- sans oublier le transfert forcé de populations en vue de la purification ethnique, notamment en Bosnie et en Croatie (Mme Mujivrana Vajda) dans les années 1991-1994. Cet auteur met en lumière l'exigence d'un dol spécial, si difficile à prouver, et préconise l'harmonisation de la jurisprudence croate avec le droit international.

Ni les crimes économiques tels que profiteurs de guerre, processus de privatisation, transferts forcés de propriété pendant les conflits.

II - ÉTABLISSEMENT DES RESPONSABILITÉS

L'établissement des responsabilités en présence d'exactions massives commises par un très grand nombre de personnes, suppose avant tout de combattre leur impunité, "expression flagrante de l'injustice" (Mme Sosa):

D'abord lutter contre l'oubli d'une part et le déni d'autre part, lutter parfois après des dizaines d'années de silence (Espagne, grâce à la société civile et Maroc, où les autorités ont mis fin au déni). La loi mémorielle espagnole de 2007 et les poursuites engagées par certains juges vont en ce sens, même si elles restent insuffisantes aux yeux de certains; bien sur les CVR ont toute leur place dans ce combat.

Ensuite lutter contre la prescription extinctive, contraire à la Convention de 1968. Solution générale, cependant mise en doute en Croatie, nous dit Mme Roksandic Vidlieka, sur les crimes des profiteurs de guerre et des transferts forcés de propriété pendant le conflit. Et en ce cas, se posent différents problèmes de légalité dont on reparlera (incrimination imprécise, rétroactivité, loi d'imprescriptibilité applicable même lorsque le délai de prescription est expiré).

Puis lutter contre l'amnistie, exemples de l'Afrique du Sud (Mme Salcedo), du Brésil (M. Pugliese), le Soudan (Mme Zimmerman). Le mot n'est pas prononcé au Soudan, de peur des objections internationale. Ces amnisties sont souvent négociées avec la société civile par les dictateurs et leurs agents avant de quitter le pouvoir. Au Brésil, 42 000 disparus. Les lois d'amnistie peuvent être invalidées par la Cour interaméricaine des droits de l'homme, qui estime insuffisantes les mesures alternatives de la JT.

Lutter contre la coalition du silence au Burundi, nous explique Mme Matignon, où finalement chaque ethnie a commis un génocide contre l'autre puis les chefs de guerre ont cessé la lutte et se partagent les richesses du pays. L'accord d'Arusha de 2000 n'est toujours pas mis en oeuvre aujourd'hui et la CVR pas créée.

Participe de cette lutte contre l'impunité la règle aut dedere aut judicare, extrader ou juger, finement analysée pour l'Espagne par Mme Sosa en une coutume internationale contraignante, position adoptée par la doctrine et la jurisprudence (compétence universelle), même si la loi reste ambigue.

Mais établir les responsabilités suppose que soient levés un certain nombre d'obstacles. Des exemples sont donnés pour l'Espagne par Mmes Zapico Barbeito et Fernandez Pacheco-Estrada.

Obstacles en termes d'opportunité de rouvrir les plaies si longtemps après la dictature de Franco (1939-1975). Obstacles sur le plan juridique, questions

de la non rétroactivité de la loi pénale, qualification des faits (en vue d'apprécier leur imprescriptibilité), valeur des lois d'amnistie, caractère continu ou non de ces crimes...

III – NENDRE LA JUSTICE

Chacun est conscient, comme l'a finement démontré Mme Tatsuda, qu'il faut doser la justice répressive et la justice réparatrice. Il faut les deux car si les grands criminels sont jugés par la CPI, les criminels moins importants échappent souvent au juge national, pour diverses raisons. Attention cependant que les poursuites devant la CPI ne sapent pas les efforts locaux de réconciliation ! Faut-il alors reconnaître à la CPI un droit d'intervention judiciaire internationale pour que la population ressente la justice comme facteur de paix et d'harmonie sociale et non de punition et de désir de vengeance ?

Parcourons ces différentes juridictions, du premier écheon local au dernier échelon international.

- Commençons par les gacacas, ces tribunaux communautaires villageois du Ruanda, exposés par Mlle Porro. Il y en 12000 et ils ont jugé 1, 2 M d'affaires. On peut se demander si les moyens punitifs et réparateurs s'accordent avec le protection des droits des victimes. Un rapport de Human Rights Watch du 31 mai 2011 dénonce l'inéquité des procédures, la corruption des juges et des témoins, les erreurs de procédure commises par des juges non juristes, l'intimidation des témoins et des victimes, les représailles... Le gouvernement ruandais a annoncé leur disparition pour la fin de cette année 2011 (après leur avoir soustrait la compétence sur les militaires). Mlle Porro estime que les victimes sont mieux protégées et la réconciliation mieux assurée devant les juridictions étatiques.

Sans doute ces gacacas sont-ils trop proches des populations, dans les villages où tout le monde se connait depuis des générations ?

- Il faut néanmoins des juges locaux, du même Etat ou de la même région, de la même culture que celles du conflit, pas des juges importés d'un autre continent. Mme Pampalk examine le cas de la Sierra Léone et du Timor Leste (Timor Oriental). Il faut donc des mécanismes de justice transitionnelle, selon les circonstances de nature locale, nationale ou internationale. Leur efficacité et leur durabilité implique qu'ils soient réalisés par des acteurs nationaux (avec au besoin l'aide internationale).

Les exemples du Timor Leste et de la Sierra Léone sont instructifs car ils combinent mécanismes de justice transitionnelle judiciaires et

extrajudiciaires et que les CVR ont travaillé avec le Tribunal spécial pour la SL et l'Unité des crimes graves au Timor Leste.

- Viennent ensuite les juridictions nationales, qui parfois semblent poursuivre bien timidement. Nous savons que les autorités nouvelles préfèrent souvent laisser le temps à l'oubli... Voyez les systèmes nationaux du Ruanda, au Brésil, en Afrique du Sud...

A l'échelon supérieur, nous avons les trinbunaux pénaux internationalisés examinés par M. Bonacic. Ils comprennent des juges nationaux et des juges étrangers. Kosovo, Timor Oriental, Sierra Léone, Cambodge, Bosnie Herzégovine. Leur avantage par rapport aux tribunaux nationaux est la volonté politique de poursuivre et juger, la compétence sur la procédure et l'impartialité lorsque tout cela n'existe pas au niveau national. Leur avantage par rapport aux tribunaux internationaux, ils jugent sur place, ils coûtent moins, une meilleure connaissance du pays, une procédure plus rapide et une influence "droits de l'homme" sur le système national. Ces tribunaux nouveaux sur la scène internationale ne méritent-ils pas d'être encouragés ?

Pour des raisons non semblables mais analogues, je mettrais sur le même plan les juridictions régionales, telle la Cour interaméricaine des droits de l'homme : extranéité mais proximité, rapidité, coût, immersion dans la culture du pays voisin concerné.

La CPI, compétente pour les violations graves commises depuis le 1er janvier 2002 et pour les Etats qui l'ont ratifiée (ni la Chine, ni les Etats Unis entre autres). Mme Zimmerman expose que deux phases successives doivent être observées : protectorat puis consolidation de l'état de droit . Au cas du Soudan, elle pense que les autorités ont choisi une stratégie d'évitement de la CPI, d'abord en anistiant largement mais sans le dire, ensuite en faussant le principe de subsidiarité de la CPI, bloquant ou ralentissant des poursuites qui sont déja éffectivement engagées. Depuis 2005, le tribunal spécial a jugé seulement 13 poursuites sur les 160 prévues. Nous sommes ici dans l'hypothèse de la paix contre la justice.

Il est très intéressant de comparer des procédures et des sanctions entre les juridictions nationales, internationales et internationalisées. M. Knust le fait de manière très vivante relativement au génocide ruandais. Un survol fort instructif des interconnexions entre le TPIR, le système judiciaire ruandais et les gacacas est ainsi offert. La comparaison des procédures et des sanctions permet de voir comment ils fonctionnent l'un par rapport aux autres. Le défi commun est le très grand nombre d'accusés, nombre qui excède les capacités juridictionnelles de la justice classique : il faut attribuer à chaque individu sa part personnelle de responsabilités. Une approche

plurale est-elle envisageable dans l'entreprise de réconciliation sociale fondée sur les droits de l'homme ? M. Knust propose enfin un modèle plural de justice transitionnelle, combinant les trois systèmes.

Certes, hors classement, nous avons l'hypothèse de la compétence universelle, que M. Devrim situe entre la souveraineté de l'Etat et la justice internationale. La compétence universelle ne présente aucun lien entre l'Etat qui juge et le crime. Cette compétence sert aujourd'hui à empêcher l'impunité de crimes graves, en particulier les crimes de guerre et les crimes contre l'humanité commis dans des régions particulièrement instables dont les habitants ne bénéficient pas de protection légale adéquate. Mais des divergences peuvent apparaître quant à ce « pouvoir de jugement international », car des normes nationales sont appliquées à des infractions internationales, le cas échéant par plusieurs pays à la fois quant au même crime. Parmi les problèmes, M. Devrim signale le manque d'entraide judiciaire ou l'insuffisance du système judiciaire du pays qui juge. L'utilisation de ce pouvoir se complique encore avec la CPI.

IV – AERMETTRE LA RÉCONCILIATION

Pour réconcilier entre eux des compatriotes déchirés, la justice transitionnelle peut s'appuyer sur trois piliers d'inégale importance : la recherche de la vérité, la culture et la religion locale et la formation culturelle et juridique aux droits de l'homme.

a) Les Commissions Vérité et Réconciliation, ou les instances équité et réconciliation sont analysées par M. Sarcy. Quelle que soit leur diversité infinie, il y a cependant des constantes. Alternatives ou préalables aux poursuites, elles visent à réunifier les sociétés déchirées par la recherche d'une vérité, non seulement judiciaire mais aussi historique. La vérité a une double fonction : libératrice des victimes mais aussi des bourreaux. C'est la création d'un roman national, une réécriture de l'histoire. C'est une thérapie permettant de reconstruire la victime, elle obéit à un rituel comme en Afrique du Sud où la confession publique, l'expiation morale permet ou favorise l'amnistie. C'est une catharsis permettant de se libérer des pulsions du passé. Une thérapie de groupe. Les Commissions Vérité et Réconciliation sont parfois critiquées : instaurées par les nouveaux pouvoirs , elles permettent d'asseoir la légitimité des nouveaux dirigeants sous couvert d'une recherche objective de la vérité. Sont-elles des armes de propagande ? Le cas de la Côte d'Ivoire en est un exemple, où la Commission a fait l'objet d'une construction juridico politique.

b) l'enracinement local et religieux des instances de réconciliation semble indispensable à de nombreux intervenants. Un panorama des expériences

de JT est dressé en montrant qu'elles sont largement influencées par les milieux sociaux, culturels et religieux. Il est nécessaire de contextualiser la JT en laissant place aux normes locales. Une plus grande efficacité est attendue des JT qui jouissent sur place d'une légitimité culturelle et d'une résonnance locale que des solutions importées d'ailleurs. Le droit musulman, parmi d'autres, peut soutenir la JT pour répondre aux besoins spécifiques des sociétés musulmanes. Reconnaissance que droits de l'homme et droit musulman peuvent être réconciliés.

En effet, nous dit Mme Panpineto, la JT n'est pas absente du Coran, source de la Charia,. De toutes manières nous gagnons à découvrir les héritages des différentes religions. Peut-on utiliser le Coran, la sharia pour répondre aux victimes des violations des droits de l'homme, promouvant ainsi la JT ? Ainsi par exemple, la sourate de Al Shoura développe largement des objectifs matériels et spirituels de la justice transitionnelle en réglementant l'amnistie ("Allah guide vers lui celui qui se repent"). Il y a aussi des techniques spirituelles tels le Maad (l'au-delà comme destination finale).

c) Mme Bognitz examine pour sa part l'engagement associatif humanitaire et l'assistance judiciaire, dans l'exemple du Ruanda. Elle pointe la continuité dans la généalogie de l'autorité et de la surveillance, déplore le comportement de l'Etat ruandais et préfère se tourner vers la société civile pour achever les buts de la JT.

Elle affirme que les ONG sont le vecteur d'un transfert des standards globaux des droits de l'homme vers les arènes locales de l'intervention humanitaire et judiciaire, cela par un jeu de dialogue entre les idées globales et les conceptions ruandaises sur la matière des droits de l'homme. L'assistance judiciaire à la société civile prend la forme par exemple d'éducation légale.

La restauration de l'ordre social, dit Mme Bognitz, n'est possibe que si on analyse la société civile et ses institutions formelles.

Mais existe t-il des idées transnationales de justice ? Une idée universelle des droits de l'homme?

Comment comprendre une société civile si différente de la nôtre ? Peut-on apprendre à autrui ce que sont les droits de la personnalité lorsque l'on vient d'une culture totalement différente ? Ne risque t-on pas d'être accusé d'impérialisme, de paternalisme, de néo colonialisme ? Et n'oublions pas que les responsables ruandais des massacres sont des personnages hautement cultivés. Deux ministres ont été condamnés hier 30 septembre 2011 par le TPIR pour le massacre de Tutsis... La justice transitionnelle est donc une question d'actualité, vouée à longtemps le demeurer.

AIDP ASSOCIATION INTERNATIONALE DE DROIT PENAL
INTERNATIONAL ASSOCIATION OF PENAL LAW
ASOCIACIÓN INTERNACIONAL DE DERECHO PENAL IAPL

Bulletin de cotisation

Nom*:	
Prénom*:	
Sexe:	Masculin ☐ Féminin ☐
Adresse *:	
Etat/Province (si nécessaire) :	
Code postal * :	
Localité *:	
Pays * :	
Courriel *:	
Téléphone:	
Fax :	

*Champ obligatoire

Je souhaite adhérer/renouveler mon adhésion à l'AIDP en qualité de :

☐ Membre bienfaiteur ☐ Membre collectif (université, institut, etc.) ☐ Groupe national		90 €
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	Je ne souhaite pas recevoir la Revue Internationale de Droit Pénal ☐	40 €
☐ Retraité ☐ étudiant ☐ jeune pénaliste* ☐ membre d'un pays à cotisation adaptée*		40 €
Je souhaite faire partie de l'Association française de droit pénal (groupe national français)* ☐		10 €
Je souhaite faire partie du groupe national de mon pays de résidence * ☐		(1)

* Voir information sur www. penal.org et page suivante (1) nous avertirons le groupe national de votre souhait.

Je paie de la façon suivante :

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Renseignements d'identité

✓ Remplir lisiblement et en caractère d'imprimerie les données d'identité.
✓ Il est impératif de donner une adresse email, les informations de l'Association étant diffusées par courrier électronique

Type d'adhésion

Membre bienfaiteur : Vous souhaitez soutenir financièrement l'association. Vous recevrez une carte de membre valant reçu fiscal
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Groupe national : Les adhérents de l'AIDP se sont regroupés dans de nombreux pays en groupes nationaux, qui ont leurs propres activités scientifiques. Chaque groupe national, en sus de la cotisation de ses membres, doit payer à l'AIDP une cotisation qui lui donne droit à participer au Conseil de Direction à recevoir deux exemplaires de la revue.
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Adhésion à l'Association française de droit pénal : Vous pouvez adhérer en même temps à l'AIDP et à l'AFDP, qui est le groupe national français de l'AIDP, pour un supplément de cotisation de 10 €. Renseignez-vous sur les activités de l'AFDP à l'adresse suivante : www.francepenal.org
Adhésion au groupe national de votre pays de résidence : si vous cochez la case, nous transmettrons vos coordonnées au groupe national de votre pays de résidence. Il vous tiendra informé de ses activités, et le cas échéant, vous réclamera une cotisation spécifique. Consultez la liste des groupes nationaux sur le site de l'AIDP et mettez-vous en rapport avec la personne contact.
Cotisation adaptée : Si vous résidez dans un pays figurant sur la lite des pays à « cotisation adaptée », vous pouvez bénéficier d'une cotisation adaptée à prix réduit, mais qui comprend l'ensemble des services d'une cotisation de membre individuel, y compris l'abonnement à la Revue Internationale de Droit Pénal. Voir la liste des pays concernés sur www.penal.org, rubrique Qui sommes nous ? >Adhésion.

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Les informations recueillies sont nécessaires pour votre adhésion. Elles font l'objet d'un traitement informatique et sont destinées au seul secrétariat de l'association. En application des articles 39 et suivants de la loi du 6 janvier 1978 modifiée, vous bénéficiez d'un droit d'accès et de rectification aux informations qui vous concernent. Si vous souhaitez exercer ce droit et obtenir communication des informations vous concernant, veuillez vous adresser au secrétariat de l'association. Vous pouvez, si vous le souhaitez, vous opposer à la publication de votre nom dans l'annuaire des membres figurant sur le site internet

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ASOCIACIÓN INTERNACIONAL DE DERECHO PENAL IAPL

Membership application

Last name*:	
First name*:	
Gender:	Male ☐ Female ☐
Address *:	
State/Province (if necessary) :	
Zip Code * :	
City *:	
Country * :	
Email *:	
Téléphone:	
Fax :	

*Mandatory field

I wish to apply for/renew my/ membership to the International Association of Penal Law as :

☐ Benefactor Member ☐ Collective Member (University, institute, etc.) ☐ National Group		90 €
☐ Individual Member	I wish to receive the International Review of Penal Law ☐	65 €
	I do not wish to receive the International Review of Penal Law ☐	40 €
☐ Retiree ☐ Student ☐ Young penalist* ☐ Reduced-fee country member*		40 €
I wish to apply for membership to the National Group of my country of residence * ☐		(1)

* See information on www. penal.org and on next page (1) Check with the national group for any membership fee

I pay the membership fee as follows :

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INSTRUCTIONS

Personal details

✓ Fill in legibly in capital letters your personal details.
✓ It is necessary to provide an email address, as information on the Association's activities are disseminated by electronic mail.

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Benefactor Member: You wish to provide extra financial support to the Association. You will receive a Membership card which can be used as a certificate for tax purposes.
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Young Penalist : AIDP/IAPL members under the age of 35 may join the Young Penalist Group, which carries out its own activities and elect representatives to the organs of the AIDP/IAPL.
Joining the National Group of your country of residence: If you tick in this option, we will submit to the National Group of your country of residence your contact details. It will keep you informed of the scientific activities of the National Group, and may claim a specific membership fee (usually modest). Check online (www.penal.org) the existence of a National Group in your country and the contact details.
Reduced-fee countries: If you are residing in a country listed on the "reduced-fee" country list, you will be entitled to full membership, including subscription to the International Review of Penal Law, for a limited membership fee. You can check the list on the AIDP/IAPL website www.penal.org, then click on "about us" > "membership".

Payment instructions

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Personal data is collected for the purpose of your membership application. They are subject to electronic data processing and are destined to the secretariat of the association. In accordance with Article 39 et seq. of the Law of 6 January 1978 (as amended), you are entitled to access to, and rectification of, your personal data. If you wish to exercise this right and get access to your personal data, please contact the secretariat of the association. You may also oppose the publication of your name in the directory of members which is posted on the website.

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