

CROSS-ROAD OF CRIMINAL JUSTICE AND RECONCILIATION IN POST-CONFLICTIVE SOCIETIES

by

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A. INTRODUCTION

There are authors and human rights advocates who argue that criminal trials are inevitable in a transitional democracy getting over an armed conflict or the era of a repressive regime. According to them, it is not only an option but a moral and legal obligation of the state and, if its support is necessary, the international community to ensure that persons committing serious violations of human rights and humanitarian law cannot avoid to be called to account¹. In line with the general and fundamental conceptions of justice, it is the duty of state institutions to call to account those persons responsible. But what if the political circumstances are not appropriate for accomplishing this obligation, if the internal criminal justice system is broken down by the conflict and the function of international criminal judicial bodies could only be rather symbolic as they are not able to run numerous trials? Besides, one should also consider the extent to which criminal jurisdiction facilitates a smooth transition from a conflictive state of a country to democracy.

Accordingly, the present study is dedicated to the question of advantages and disadvantages ensured by criminal proceedings in a transitional situation where long-term consolidation and reconciliation are the common interest of local people. The first chapter discusses the advantages, such as individualization of guilt, public and official acknowledgment to the victims or efficient deterrent effect. However, it can be mentioned in advance that these features shall be handled in a properly critical way from the point of view of reconciliation. Their weak points must be emphasized which lead to the conclusion that criminal judicial bodies cannot solve all the problems related to criminal responsibility and

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¹ Jeremy Sarkin and Erin Daly, *Too many questions, too few answers: reconciliation in transitional societies*, 35 COLUM. HUM. RTS. L. REV. 661, 712 (2003-2004).

the desire of the community of both the former perpetrators and the victims to leave their past behind. Therefore, the second part of the article concentrates on the questions of how another institution of transitional justice, namely, a truth commission can make the “transitional machine” more complete and proper to address the aim of reconciliation and how the relation of these two institutions should be regulated in order to achieve a higher efficiency of transitional justice.

B. CRIMINAL JUSTICE AS A CONTRIBUTOR TO RECONCILIATION

The possible role and effects of accountability in a transitional period depend on the concrete circumstances characterizing the situation. There are no recipes on how “to cook” an optimal transition and “the dessert” of reconciliation. On the other hand, there are general conclusions and assumptions that can be drawn based on past experiences. Justice Goldstone emphasized five positive contributions to justice that can be ensured by criminal proceedings and in this way to reconciliation: individualization of guilt, public and official acknowledgement to the victims, an accurate recording of history, efficient deterrence, and finally, the disclosure of the role of state institutions in the conflict or human rights violations². In case of international criminal tribunals the presence of the attention of the international community is an additional factor.

The leaders who were earlier the representatives of a country or community, become criminals in a trial. In this way, Nuremberg replaced the responsibility for war crimes from the whole group of German people on individuals who could really be held responsible for atrocities committed during the World War II³. The same individualizing effect can be achieved on the level of the members of the community by the domestic criminal trials. Simply to say, one cannot suppose anymore that the neighbor of the neighbor is also a criminal just because they live next to each other, if the justice system does not confirm it. Obviously, the pure advantage of individualization can be achieved only if the judicial system works in a proper way, and in a post-conflictive society it is far not evident.

Victims of past abuses need not only an empty gesture of apology, but an official acknowledgement of all the terrifying events the memories of which haunt them from night to night. After the publication of the Final Report of the South African Truth and Reconciliation

² Richard Goldstone, *Justice as a tool for peace-making: truth commissions and international criminal tribunals*, 28 N.Y.U.J. INT'L L. & POL., 485, 488-490 (1995-1996).

³ *Id.* at 489.

Commission, President Mandela apologized publicly to victims on behalf of the government.⁴ This nice gesture was not enough for the real solution of problems. One of its main reasons was the lack of sufficiently broad political support for the strict accomplishment of criminal proceedings⁵.

Fair trials of those who were not granted an amnesty could have been a sufficient official acknowledgement of past events. Furthermore, in case of criminal proceedings, the realization and proper regulation of broad participation of victims can even more contribute to the healing of their wounds. Past international criminal tribunals did not concentrate enough on this issue, but the establishment of the International Criminal Court (hereafter “ICC”) brought a change in the approach toward this matter. The Rome Statute and the Rules of Procedure and Evidence ensure the possibility for the victims to participate widely throughout the process. It can be illustrated also by the establishment of the Victims and Witnesses Unit.⁶ Those victims who appear before the Court benefit from the “recovery” measures, including expertise in post trauma rehabilitation and the measures taken for their protection. Besides, the Trust Fund established for the benefit of victims and their families gives a kind of reparative mandate to the ICC.⁷

The truth to reveal after a change of regime or an armed conflict is a delicate matter of transition. It is true that without proper education and knowledge of history, a healthy society is impossible to be built, and all the dark spots of the past can undermine the future of such a society. The words of Justice Goldstone cannot be debated: “*public exposure of the truth is the only effective way of ensuring that history is recorded more accurately and more faithfully than otherwise would have been the case. The Nuremberg Trials have made the work of Holocaust deniers far more difficult*”⁸. Nevertheless, it is not obvious whether the immediate disclosure of facts would facilitate reconciliation⁹.

The deterrent effect of criminal trials and their role in revealing the contribution of institutions to the abuses raise some further questions. There is the common idea that criminal

⁴ *South Africa: The South African Truth and Reconciliation Commission* in STRATEGIC CHOICES IN THE DESIGN OF TRUTH COMMISSIONS, available at: www.truthcommission.org/commission.php?lang=en&cid=3&case.x=42&case.y=7.

⁵ See further details in the next chapter.

⁶ Yet, this possibility is ensured only to those who can be witnesses before the Court. For example, it is hard to imagine that an average Ugandan farmer would ever travel on his own expenses to the Hague in order to listen to a proceeding that could help him to understand the past. In this regard, the positive effect of the ICC processes on reconciliation is limited.

⁷ Jürg Lindenmann, *Transitional justice and the International Criminal Court: some reflections on the role of the ICC in conflict transformation* in PROMOTING JUSTICE, HUMAN RIGHTS AND CONFLICT RESOLUTION THROUGH INTERNATIONAL LAW, 315, 328 (2007).

⁸ GOLDSTONE, *supra* note 2, at 489.

⁹ See further arguments in the next chapter.

jurisdiction is the most efficient tool for prevention, and it is already shown related to the function of the ICC as well.¹⁰ However, under certain circumstances accountability can result in contrary consequences - it can contribute to a renewal of violence. Considering the other aspect, when the role of state institutions is highlighted by a domestic court, the question immediately can be posed as to who will examine the role of the judiciary in past abuses as without its silence they could not have occurred.

The investigations of an international criminal tribunal or the ICC prove that the international community pays attention to the development of the transitional situation. It is especially significant in countries where the judicial system is broken down and there is no way to call to account those who bear the greatest responsibility. In this way, the proceedings can contribute to the actual negotiations in a highly positive manner. The domestic actors of public life who work on the transition to democracy no longer depend on the poor facilities within the boundaries of their country, and they can have a stronger hand even in deciding which parties can sit at the negotiating table¹¹. In addition, those former political or military leaders who would hinder the positive outcome of the negotiation process can be “knocked out” both from the course of the transitional discourse and the future political arena. According to Jürg Lindenmann, the involvement of the ICC in situations where there is a strong public opinion that the international community failed to intervene in order to prevent further abuses is particularly important as it proves that the international community “cares”¹². I would approach this issue from another point of view. International criminal jurisdiction cannot appear as a subsequent excuse for the omission of the intervention in the proper time.

C. POTHOLES ON THE ROAD OF CONTRIBUTION

While there are arguments that the function of criminal courts is the most efficient tool for prevention and abolishment of collective guilt and replacement with individual responsibility, others see criminal jurisdiction as vengeful, continuing a cycle of hatred¹³. Furthermore, the deterrent consequence of accountability can still be debated. It is far not sure

¹⁰ According to the opinion of the International Center for Transitional Justice, the more successful the ICC works, the more likely it is to have a deterrent effect on a short- or medium-term level. There are such claims made by some parties related to the Democratic Republic of Congo. See Paul Seils and Marieke Wierda, *The International Criminal Court and Conflict Mediation*, 19 (International Center for Transitional Justice, 2005) available at: www.ictj.org/en/news/pubs/index.html.

¹¹ *Id.* at 19.

¹² LINDENMANN, *supra* note 5, at 327.

¹³ Laura M. Olson, *Provoking the dragon on the patio, Matters of transitional justice: penal repression vs. amnesties*, 88 INTERNATIONAL REVIEW OF THE RED CROSS 275, 291 (2006).

that the powerful political forces driven by ideological factors would ever be affected by a future prosecution. Furthermore, it can even hinder the negotiation process making the leaders of repressive regimes more reluctant to contribute to a political consolidation¹⁴. Modern transitions are developed rather in the way of negotiations than a military victory of one side of the internal conflict. Accordingly, there is no place for “victor’s justice”. In many cases the former military or political forces remain in power which means a high risk of the revival of the conflict as a result of too much pressure for criminal proceedings.

Further characteristics and consequences of criminal proceedings can urge us to examine what role they can really play in reconciliation. They are time-consuming, expensive and fighting interests of the prosecution and defense side result in a simplification of the truth revealing activity. The prosecution examines the facts relevant to the case and charges, just as the defense tries to extract parts of the truth which are useful as arguments. Criminal courts do not have the possibility of analyzing statements of victims in such a number that would be necessary to draw an overall picture of the past. It leads to a partial truth. On the other hand, if the trials are conducted in a way to serve as history lessons as well, it can easily create show trials. Therefore, the main function and aim of trials cannot be to reveal the truth on a large scale, but to examine the facts and events limited to the cases¹⁵.

Even the justice that trials ensure is partial. They serve the interest of victims and their desire for accountability of the accused, but they cannot consider the situation of the perpetrator. As a result, the community of the victim will be affected but not the one of the perpetrator. Therefore, criminal prosecution does not contribute to the reconciliation in this latter group of the society. Furthermore, with regard to the subject of criminal proceedings, it must be emphasized that they concentrate on individuals and institutions, but do not consider the possible role of judiciary in the conflict. This situation makes it necessary to establish an independent truth revealing body such as an impartial truth commission. On the other hand, there are suggestions that in the case of the ICC it could be useful for reconciliation if the Office of the Prosecutor as an international, objective examiner of facts would issue a summary report of its findings following the model of independent prosecutors in the United States who submit such conclusive reports after the closing of their work¹⁶.

Another aspect of the issue is that trials usually create an “us versus them” dynamic. It can cause an impression that those criminals who sit before the court are guilty for all the

¹⁴ Charles Villa-Vicencio, *Why perpetrators should not always be prosecuted: where the International Criminal Court and Truth Commission meet*, 49 EMORY L. J. 205, 210 (2000).

¹⁵ *Id.* at 211-212.

¹⁶ Priscilla B. Hayner, UNSPEAKABLE TRUTHS-FACING THE CHALLENGE OF TRUTH COMMISSIONS, 212 (2002).

alleged events. Although if we consider the responsibility and prosecution of politicians, it is clear that they could not have been in those decision-making positions without the contribution of average citizens. In South Africa, for instance, after the fall of the apartheid regime, subjects of the high-profile trials, such as Magnus Malan (former minister of defense) or Eugene de Kock (former head of secret assassination unit) would not have been possible without the votes of middle class suburban housewives and white businessmen for the National Party¹⁷.

Considering the South African example one must face another possibility that can occur and that does not serve the interest of reconciliation, namely, the negative outcome of these high-profile proceedings. Magnus Malan and his 19 co-accused fellows were acquitted, although their activity to establish hit squads in order to kill political opponents was proven. In 2002, a number of other acquittals occurred in cases of politically motivated crimes. Wouter Basson, the head of the apartheid's chemical and biological weapons program, was acquitted by the Pretoria High Court on all charges of murdering anti-apartheid activists, although there were 150 witness statements as evidence¹⁸. In the same year, President Mbeki granted pardon to a number of other persons who were confined in prisons for politically motivated crimes.¹⁹ The reasons for these unreasonable acquittals and pardon were of a political nature. Some argue that the main aim was to facilitate the governance of the country by putting an end to trials about apartheid, and that it is not anymore about giving up justice for a more noble aim of transition to democracy, but about making it easier to manage the affairs of the state. In 1994 and 1995, at the time of change of regime civil society, which originally opposed the idea of any kind of amnesty, it could accept the conditional amnesty in order to achieve a higher aim of smooth transition, but in 2002 there were no morally acceptable reasons for granting *de facto* general amnesty. The common opinion of the population is well mirrored by the reaction of the non-governmental organization, Jubilee South Africa about the Malan case: "*the trial revealed only that apartheid's powerful military and secret service bosses still have much to hide and still have the means to obstruct the wheels of justice*"²⁰. These kinds of opinions do not support the belief that a strong ground can be created for long-term consolidation and reconciliation.

¹⁷ *Id.* at 101.

¹⁸ Jeremy Sarkin, *To prosecute or not to prosecute?* in THE PROVOCATIONS OF AMNESTY: MEMORY, JUSTICE AND IMPUNITY 237, 249 (2003).

¹⁹ *Id.*, at 253-254.

²⁰ *Id.*, at 250.

On the other hand, if we consider the issue of “lower level” perpetrators, we have to face the reality that in some post-conflictive situations there is no possibility to accomplish criminal trials in all the relevant cases. The best example might be Rwanda. Around 650,000 Hutu people were involved in the killings in 1994, who should have been called to account by a non-existing domestic criminal judicial system, not to mention the fact that most of these people were not only perpetrators but also victims of a well-organized system of genocide used as tools. In the course of the conflict the country was destroyed. There were no institutions working to enforce law. Many court buildings were wrecked, the few qualified legal professionals were either killed, participated in the genocide or fled the country²¹. In such situations an alternative form of justice must be found in order to avoid a long-term catastrophe continuing even after the conflict ceases. In these cases strict reliance on the legal obligation of criminal justice can result in further decline of the affected country. Thus, in order to avoid it, alternative forms of justice shall be employed.

D. HOW TO RECONCILE CRIMINAL COURTS AND TRUTH COMMISSIONS?

Rwanda is a good example from another point of view as well. Truth telling is a central element of most traditional African justice systems which have the main aim to reintegrate both the perpetrators and the victims into the society, their local community²². In this region the restoration of balance in the community is much more important than the punishment of the guilty as the traditional unit of the African society is the group and not the individual²³. In these cases the main goal of reconciliation can be better served by alternative forms of justice, as in Rwanda the *gacaca* process, or in other situations the establishment of truth commissions which do not concentrate on the faceless state which was “attacked” by the violation of law, but rather on individuals and communities who were directly affected by the crime. At the same time, these processes prefer the general desire of the whole population for peace and stability “sacrificing” the possible personal interest of the victim for accountability of the perpetrator.

A major argument against truth commissions is that their function is incompatible with the notion of justice as their process rejects prosecution and, therefore, can be seen as a threat to the interest of justice. It is true that not to call to account former perpetrators would

²¹ Erin Daly, *Between Punitive and Reconstructive Justice: the Gacaca Courts in Rwanda*, 34 NYU. J. INT'L L. & POL. 355, 364-366 (2001-2002).

²² VILLA-VICENCIO, *supra* note 12, at 211.

²³ SARKIN and DALY, *supra* note 1, at 671.

undermine also the newly born democracy. Accordingly, blanket amnesty shall be refused under any circumstances. Furthermore, reconciliation processes cannot be used with the aim to disguise general amnesty as it was the idea of Mario Enriquez, former minister of defense of Guatemala: “*We are fully in support of a truth commission. Just like in Chile: truth, but no trials*”²⁴. Impunity would undermine also reconciliation as it could encourage the victims to take revenge and the perpetrators to go on with violent acts. Nevertheless, there are alternative solutions beside trials which do not allow the denial of past events, but help the society to pay attention rather to the future than to the past.

This approach can be seen in the function of the ICC as well, as Article 53 entitles the Prosecutor to decide not to investigate if it would not be in the interest of justice. In this context the notion of justice shall be comprehended in a broad manner. It shall be understood as a public interest. For instance, if trials would directly contribute to the prolongation of political instability or the renewal of the violence, it could hardly be interpreted that it is in the interest of justice²⁵. On the other hand, the suspension of the proceeding is possible only if the Prosecutor sees another mechanism in the country which can properly ensure accountability, and it is a hard question whether the process of truth commissions would ever be acceptable in this regard.

It is important to see that truth commissions are not second alternatives for criminal courts, but a better kind of institution to address reconciliation. These two institutions have different aims and different tools for achieving justice, and in this way, they can work simultaneously supporting each other’s function. Truth commissions can play a significant educational role in the field of human rights, but they probably cannot change the views of the abusive leadership. In this way, the parallel function of the two institutions can be the best solution for handling a post-conflictive situation. In the case of Sierra Leone, it seemed to be the most optimal solution as well. The Special Court dealt with the cases of individuals who bore the greatest responsibility for past events, and the “lower level” criminals fell under the authority of the Truth and Reconciliation Commission.

The Sierra Leone example is also good to illustrate how important it is to regulate the relation between truth commissions and criminal courts. It shall always be decided on a case by case basis as different circumstances require different solution, but the less optimal situation is where this issue is not regulated at all, such as in the case of Sierra Leone. The Act

²⁴ Enriquez gave this statement in 1994 at a meeting with human rights advocates. See HAYNER, *supra* note 14, at 86.

²⁵ SEILS and WIERDA, *supra* note 8, at 12.

on the establishment of the Commission declared its absolute independence. Besides, the priority of the Special Court to the national judicial bodies ensured by its Statute could not apply to the Commission as it was not a judicial body. In this way, they were working totally separately from each other that led to the duplication of work, waste of time and financial resources. On the other hand, people living in Sierra Leone were confused about the relation and separation of the two institutions. For example, it happened that someone who ordered a taxi told the driver he was going to the Special Court, and the driver took him to the office of the Commission²⁶.

One of the most significant questions related to the co-operation of the two bodies was the regulation of exchange of information. Despite the theoretical independence, the government gave a narrow discretionary power to the Court to ask information from the Commission. In this case three conditions had to be fulfilled: the information requested had to be specific, essential to a fair determination of the innocence of the accused and it could not reasonably be obtained from any other source²⁷. The problem was that it was not clarified who was entitled to determine whether these conditions were met.

This regulation served the so-called “conditional information sharing model”, but in practice the lack of concrete determination of conditions caused free exchange of information mainly towards the Special Court²⁸. It was a significant obstacle related to the participation of ex-combatants to the reconciliation process. Many of them were afraid that their statements given to the Commission would be used against them, or after these statements they would be summoned by the Special Court as a witness in the proceeding of their commanders whom they were still depended on.

Beyond Sierra Leone there have been only a few places where the proceedings before the truth commission were connected to criminal trials, such as in Bolivia and Argentina, where criminal trials could have been commenced as a result of truth commission investigations²⁹. Moreover, special alternatives can be considered, such as the example of Ethiopia where not a truth commission was expected to accomplish investigations that eventually could have been used by the criminal court, but on the contrary, the Special

²⁶ Abdul Tejan-Cole, *The Complementary and Conflicting Relationship between the Special Court for Sierra Leone and the Truth and Reconciliation Commission*, 5 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW, 313, 323 (2005).

²⁷ *Id.*, 327.

²⁸ *Ex-Combatant Views of the Truth and Reconciliation Commission and the Special Court in Sierra Leone*, (PRIDE: Post-Conflict Reintegration Initiative for Development and Empowerment, 2002) available at: www.ictj.org/downloads/PRIDE%20report.pdf, 18.

²⁹ Priscilla B. Hayner, *Fifteen Truth Commissions – 1974 to 1994: A Comparative Study*, 16 HUM. RTS. Q. 597, 604 (1994).

Prosecutor's Office was entrusted with publishing a truth-commission-like report about the abuses committed during the Mengistu regime. However, finally the SPO dropped the plan of publishing the report as it decided to concentrate only on prosecutions³⁰.

E. FINAL REMARKS

It is clear that there is no general model available for all the transitional situations. At the same time, balanced and efficient cooperation of criminal courts and truth commissions can be established by determining the fundamental aims of transitional justice, considering the political and social circumstances given by the concrete case, analyzing the possible solution-alternatives and realizing the most optimal one. In this way, a cooperative simultaneous function of the two institutions can serve common interests in the field of fund-raising, witness-protection, investigations, interpretation or the proper education of local people on their mandate.

On the other hand, it is important to emphasize the possible necessity of both criminal courts and truth commissions, and that in most situations even their simultaneous and efficient work is not enough for long-term consolidation. Fundamental change in mind of people, proper reparations to the victims, economic development and democratic changes in the structure of institutions are inevitable as well in order to reach real reconciliation.

In this spirit let me quote the language from an article published by Erin Daly and Jeremy Sarkin:

*“[T]he transformation of the society from one that accepted or supported human rights abuses into one that would resist them will require much more than a short-term solution like a truth commission, or a particularized response like prosecution. The question of deterrence, then, is closely linked to the issue of democracy”*³¹.

³⁰ Priscilla B. Hayner, *Past Truths, Present Dangers: The Role of Official Truth Seeking in Conflict Resolution and Prevention* in INTERNATIONAL CONFLICT RESOLUTION AFTER THE COLD WAR, 338, 348 (2000).

³¹ SARKIN and DALY, *supra* note 1, at 697.