

American University Washington College of Law

Digital Commons @ American University Washington College of Law

Articles in Law Reviews & Other Academic Journals

Scholarship & Research

Spring 2012

Session Five: Expert Panel on Fighting Impunity Remarks of Professor Diane F. Orentlicher

Diane Orentlicher

Follow this and additional works at: https://digitalcommons.wcl.american.edu/facsch_lawrev



Part of the [Criminal Law Commons](#), and the [International Law Commons](#)

Remarks of Professor Diane F. Orentlicher*

INTRODUCTION

It is an honor to join this distinguished group. While my remarks will focus on key challenges ahead, I want to first mention several relevant considerations that are reflected in the United Nations' Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, which the French jurist Louis Joinet drafted in the 1990s and which I was appointed by the UN Secretary-General to update in 2004.¹ These Principles address, among other subjects, the duty of governments to preserve memory in terms that are highly pertinent to this conference. Principle 3 begins: "A people's knowledge of the history of its oppression is part of its heritage and, as such, must be ensured by appropriate measures in fulfillment of the State's duty to preserve archives and other evidence concerning violations of human rights and humanitarian law and to facilitate knowledge of those violations..." Principle 4 separately addresses "the imprescriptible right of victims and their families to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victims' fate."

In updating the Principles, I thought it important to make this larger idea of preserving memory very concrete. Of special relevance to this conference, I believed it was important, among other things, to insist that governments, whatever else they do to establish accountability for serious violations, whatever their timetable for addressing those violations, have an inalienable responsibility to *preserve evidence*.

* Diane F. Orentlicher is professor of international law and co-director of the Center for Human Rights and Humanitarian Law at Washington College of Law. From 1995 to 2004, she served as faculty director of the law school's War Crimes Research Office, which has provided legal assistance to international criminal tribunals since 1995. Described by the *Washington Diplomat* as "one of the world's leading authorities on . . . war crimes tribunals," Orentlicher has lectured and written extensively on the scope of states' obligations to address mass atrocities and on the law and policy issues relating to international criminal tribunals and universal jurisdiction. She has served in several public positions, including most recently as Deputy for War Crimes Issues in the U.S. Department of State, upon appointment by Secretary of State Hillary Rodham Clinton. She has previously served as an Independent Expert and consultant to the United Nations in various capacities relating to the UN's efforts to combat impunity. In September 2004, for example, Orentlicher was appointed by the United Nations Secretary-General as Independent Expert to update the UN's Set of Principles for the protection and promotion of human rights through action to combat impunity. She previously served as Special Advisor to the High Commissioner on National Minorities of the Organization for Security and Cooperation in Europe.



As the field of transitional justice has matured, we have a better appreciation of the fact that both the capacity and will of societies to address violations of the past may evolve significantly, and in unforeseen ways, over time—sometimes over a long, long period. (One speaker this morning described how he was unable to come to terms with his own torture for 11 years—and then, pursuing justice became critical.) Thus, for example, prosecutions for past violations may not occur in the immediate aftermath of a transition from repression to democratic governance; often they take place after the passage of time, and the resulting breathing room for democratic consolidation, has made it easier to reckon with crimes of the past.

This pattern has brought into sharper focus the critical challenges of reconstructing evidence of crimes, including torture, that may have occurred years earlier.

The other panelists know more than I do about advances in techniques for reconstructing evidence long after violations have taken place. What I would like to highlight is several practical challenges that are also relevant and which I observed in my recent work in what is now called the Office of Global Criminal Justice in the State Department.

CHALLENGES AHEAD

One challenge that we encountered repeatedly is to ensure the deployment of forensics experts to countries that are prepared to deal with human rights crimes quickly enough for the experts to be able to do an effective job, and this was particularly important with respect to torture. In a number of situations where the U.S.

government was supportive of a country's efforts to document recent instances of torture, the time that it could take to assemble and deploy a team of forensics experts could have a significant impact on how confidently the team could reach conclusions about the occurrence or extent of torture. In some instances with which I am familiar, forensics teams were able to put to rest doubts about whether torture really had occurred, but they were unable to reach as extensive conclusions as they could have if they had been deployed just two months earlier.

A related issue that we encountered in many countries still in a state of armed conflict had to do with context-appropriate forensics capacity. For example, in a country like the Democratic Republic of Congo (DRC), where sexual violence has reached staggering proportions, having context-appropriate rape kits that can be used in a timely way is vitally important. Developing local capacity to use such forensics tools is equally important.

By the same token, sometimes it is important to encourage societies going through significant ruptures to *wait* until qualified forensics experts can arrive on the scene to assist them in documenting crime scenes. I am sure many of you followed—some of you may have been involved in—a situation that led Human Rights Watch to call upon the Transitional National Council in Libya to wait to exhume mass graves in Abu Salim to ensure that evidence of the 1996 massacre there was not destroyed. Again, *preserving* evidence may need to be a priority in a context where it may take time to deploy an expert forensics team, and perhaps even more time before it is possible to use the forensics evidence in court.

I want to make a final point, which I suspect has been made many times today and yesterday: It is critically important in all of these efforts to ensure that whatever technology we deploy, we must use it in a way that fully respects the psychological and social needs of torture survivors. Their welfare has to be front

and center in the way we use our evolving repertoire of tools. One model has evolved out of pressing needs in the Democratic Republic of Congo, where a hospital that specialized in treating survivors of sexual violence developed a legal services program in the hospital. I was curious about this because providing legal services was not a role I would have expected this particular hospital to provide. The doctor who launched the initiative explained that the women whom he treated needed medical attention most urgently following their experience of rape. After their medical needs were addressed, they urgently needed psychological and social support. And once those needs were addressed, they focused intensively on their economic and social situation. Then, the doctor told me, once these rape survivors had gone through those successive cycles of recovery, very often they needed justice. But they were not able to identify that need until their earlier needs had been addressed.

By that time, many of this doctor's former patients had found it difficult to seek justice in a supportive environment *outside* the hospital, but they knew there was a supportive, sensitive environment *in* the hospital. And out of this experience, the hospital decided to create a legal services program that would enable rape survivors to seek justice within a supportive, sensitive environment. Helpfully in terms of preserving evidence of rape so that it would be available when women were ready to seek justice, the doctors who treated these patients had been able to document the nature of the violence the women had endured when they came to the hospital for medical treatment of their injuries.

This example is an extraordinary response to an extraordinary situation, which arose out of the peculiar needs of a war-ravaged society. It would be challenging to replicate this model elsewhere, but I think it is a useful illustration of how one particularly caring, innovative doctor was able to address the particular challenges surrounding rape in a context-specific, sensitive and effective fashion. Thank you.

Remarks of Suzanne Jabbour

I want to raise something now. I put on the hat of the Subcommittee on the Prevention of Torture (SPT). I want to highlight a little bit the Optional Protocol of the UN Convention Against Torture (UN CAT) because it's a big relationship between documentation and the optional protocol as an operational treaty body. This operational treaty body breaks new ground within the UN human rights system, based on two mechanisms: the SPT and the National Preventive Mechanism (NPM). The NPM is composed of experts, forensic doctors, psychiatrics, mental health professionals, judges, and lawyers. We should lobby to have states ratify this protocol because we guarantee a very, very essential mechanism on the national level that can document and detect torture. For this reason, my only concern is really to put in mind when the Optional Protocol

gives a legal framework for a specialist and for a national mechanism to have access to all places of detention, and to interviewing prisoners and to document torture and, through that documentation, to identify whether torture is practiced systematically. For this reason, one of the main recommendations in my opinion is to work in parallel on the Istanbul Protocol and to lobby for the ratification of the Optional Protocol because like this we can guarantee a NPM to follow all these cases. Not only to follow, but to give the recommendations to the national government and report on violations. For this reason, one of my recommendations is to lobby for the ratification of the Optional Protocol, and to keep states parties tied to the requirement of the Optional Protocol. That's what I need to mention in these last few minutes.