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PRESENTATION



This fifth issue of *Sur – International Journal on Human Rights* examines a broad spectrum of issues. First, two international human rights protection bodies are studied: (i) the recently created UN Human Rights Council and the main obstacles it faces (Duran), and (ii) the International Criminal Court, or more specifically the role of the frequently neglected parties in criminal cases – the victims – in this Court (González). Indigenous issues are tackled once again, this time focusing specifically on the protection of the right to cultural identity in the Inter-American System (Chiriboga). Another paper makes a critical analysis of post-conflict justice in Sub-Saharan Africa, questioning the models imposed by foreign nations (Bosire). Finally, three topics are addressed relating to human security: (i) democratic policing in the Commonwealth Pacific (Prasad), (ii) the democratization of public security in Brazil (Cano), and (iii) the impact of the Bush administration on the international doctrine of states sovereignty (Farer).

We would like to thank the following professors and partners for their contribution in the selection of articles for this issue: Alejandro Garro, Christophe Heyns, Emilio García Méndez, Fiona Macaulay, Flavia Piovesan, Florian Hoffmann, Helena Olea, Jeremy Sarkin, Josephine Bourgois, Juan Salgado, Julia Marton-Lefevre, Julieta Rossi, Katherine Fleet, Kwame Karikari and Roberto Garreton.

Created in 2004 to promote debate on human rights and dialogue across the southern hemisphere among activists, professors and staff of government agencies, *Sur – International Journal on Human Rights* is published by *Sur – Human Rights University Network*, an initiative of *Conectas Human Rights* (a Brazil-based international non-governmental organization).

Besides being available online at www.surjournal.org, approximately 12,000 copies of the journal have been printed between 2004 and 2006 and distributed free of charge in three languages – Portuguese, Spanish and English – in over 100 countries. The critical debate has, therefore, already enjoyed an encouraging start. Aiming to move away from a homogeneous view of human rights in the global south, the journal addresses issues that reflect the diversity of the conflicts and challenges related to the protection of human rights in the Southern Hemisphere nations. This diversity of the debate stems from the diversity of the geographical, historical and cultural context in which these rights are (or are not) upheld.

Our intention is to continue to broaden this debate. As an illustration, of the approximately 100 countries that receive the journal, the following have already submitted contributions in the form of articles: South Africa, Germany, Argentina, Brazil, Colombia, Egypt, Ecuador, United States, Hungary, India, Mexico, Namibia, Nigeria, Kenya and United Kingdom. We have also received contributions from the staff of intergovernmental agencies, such as the United Nations and the Organization of American States. In order to elicit responses to the calls for papers already submitted, and to develop an even richer dialogue, we hope to receive articles primarily from all the nations where the journal is read. Therefore, we are calling for contributions particularly from the following countries that are still missing: Albania, Algeria, Angola, Australia, Austria, Azerbaijan, Bangladesh, Belarus, Belgium, Bolivia, Bosnia and Herzegovina, Burundi, Cameroon, Chile, China, Costa Rica, Croatia, Congo, Denmark, El Salvador, Ethiopia, Philippines, Finland, France, Gambia, Ghana, Greece, Guatemala, Guinea-Bissau, Iceland, Israel, Italy, Kyrgyzstan, Laos, Liberia, Macedonia, Malawi, Malaysia, Mozambique, Montenegro, Morocco, Nepal, Nicaragua, Niger, Norway, Netherlands, Palestine, Panama, Pakistan, Paraguay, Peru, Poland, Porto Rico, Portugal, Dominican Republic, Romania, Russia, Rwanda, Serbia, Sierra Leone, Sudan, Sri Lanka, Swaziland, Sweden, Tanzania, Thailand, Trinidad and Tobago, Turkey, Uganda, Uruguay, Uzbekistan, Vanuatu, Venezuela, Vietnam, Zambia and Zimbabwe.

Herewith we renew our request for a wider and more meaningful debate.

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CARLOS VILLAN DURAN

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ABSTRACT

The Human Rights Council was founded with a provisional status, since only within the period of a year will it decide on the future of the system of special procedures, the individual complaints procedure through extra-conventional protection mechanisms and the Sub-Commission on the Promotion and Protection of Human Rights. Some decisions, however, have already been taken, such as the creation of a “universal periodic review mechanism” that will serve to evaluate the human rights situation in all countries. Furthermore, some additional changes relating to the new Council also need to be made. To ensure that NGOs keep their advisory status, articles 68 and 71 of the UN Charter need to be amended, while permanent observer status in the Human Rights Council should be granted the seven committees created by international treaties.

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KEYWORDS

Human Rights Council – Commission on Human Rights – Reform of the United Nations



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LIGHTS AND SHADOWS OF THE NEW UNITED NATIONS HUMAN RIGHTS COUNCIL

Carlos Villan Duran

Introduction

The second Summit of Heads of State, held within the framework of the United Nations General Assembly, approved on 16 September 2005 the creation of a “Human Rights Council” that will be responsible for “promoting universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner”; addressing situations of “gross and systematic violations” of human rights and “making recommendations thereon”; and also promoting “effective coordination and the mainstreaming of human rights within the United Nations system”.¹

Nevertheless, lack of agreement prevented a better clarification of the mandate, modalities, functions, size, composition, membership, working methods and procedures of the new Human Rights Council. The Heads of State entrusted the President of the General Assembly with the task of continuing negotiations on all these details.² The negotiations culminated, at least partially, on 15 March 2006, in the adoption of an important General Assembly resolution that establishes the first rules of procedure for the Human Rights Council³ on the basis of an agreement on the minimum parameters.

However, negotiations will proceed since the Human Rights Council was established with a provisional status. It now has a year to decide what to do about the three key issues it has inherited from the Commission on Human Rights: the system of special procedures, the individual complaints procedure through extra-conventional protection mechanisms, and the future of the Sub-

See the notes to this text as from page 15.

Commission on the Promotion and Protection of Human Rights.⁴ Furthermore, it was also agreed that the General Assembly will review the status of the Human Rights Council “within five years” of its creation.⁵

Membership criteria

According to the resolution that was finally adopted, the Human Rights Council will have its headquarters in Geneva and replace the Commission on Human Rights.⁶ Unlike the latter body, the Council was founded as a subsidiary organ of the General Assembly, to which it will report annually, making recommendations concerning the promotion and protection of human rights.

Besides the ambiguity of the expression “make recommendations”, it is clear that these recommendations should be expressly directed to the General Assembly, which leads us to lament the exclusion of any liaison between the new Human Rights Council and the Security Council. In this vein, the General Assembly’s very resolution is contradictory, since it acknowledges the existence of a close relation between gross human rights violations and the maintenance of international peace and security.⁷

Disregarding the recommendations made to him by the High-Level Panel on Threats, Challenges and Change,⁸ the Secretary General proposed that the Commission on Human Rights (53 States) be replaced with a smaller and permanent Human Rights Council whose members would be elected by the General Assembly by a two-thirds majority.⁹ As such, the Secretary General’s proposal was in line with the preferences manifested by the United States and some of its allies.

Finally, it was decided that the Human Rights Council would be composed of 47 States, based on equitable geographical distribution.¹⁰ They would be elected for a period of three years in a secret ballot¹¹ and by a majority of the members of the General Assembly. There would be no permanent members of the Human Rights Council, since no State may run for reelection immediately after serving two consecutive mandates.

Although membership of the Human Rights Council is formally open to all United Nations Member States, the same resolution innovates by introducing three changes designed to prevent the problems of excessive politicization in the composition of the former Commission on Human Rights. Nevertheless, the effectiveness of these changes appears doubtful.

First, when electing members of the Human Rights Council, “Member States shall take into account the contribution of candidates to the promotion and protection of human rights and their voluntary pledges and commitments made thereto”.¹² This clause is drafted in excessively ambiguous terms,¹³ since it is the result of long negotiations during the course of which more objective and better-defined criteria were proposed, such as requiring State candidates to ratify the seven basic human rights treaties.

Second, one provision enables the General Assembly to suspend by a two-thirds majority any member of the Council “that commits gross and systematic violations of human rights”.¹⁴ While this clause may be innovative, its practical efficiency will be limited, since it requires a qualified majority – which it is extremely difficult to achieve – to determine that a State has committed systematic human rights violations. It would be preferable for this decision to come from an independent expert (special country rapporteur), thereby preventing the inevitable politicization that a vote of this nature would produce within the General Assembly.

Third, the members of the Council “shall uphold the highest standards in the promotion and protection of human rights, shall fully cooperate with the Council and be reviewed under the universal periodic review mechanism during their term of membership”.¹⁵ As a matter of fact, this clause is redundant since it places the same generic obligations on the Members of the Human Rights Council that all States have already assumed as Members of the United Nations. Added to this, as we shall see later, the periodic review mechanism runs the risk of becoming a purely rhetorical examination conducted between peers (ie, between the States themselves).

Although the Human Rights Council was intended to be classified as a principal and permanent organ of the United Nations, with the same political visibility as the Security Council, ECOSOC and the General Assembly, after lengthy negotiations it was downgraded. In fact, we have already mentioned that the Human Rights Council was established as a subsidiary organ of the General Assembly.¹⁶ Neither will it be permanent, since it “shall meet regularly throughout the year and schedule no fewer than three sessions per year, including a main session, for a total duration of no less than ten weeks”.¹⁷ Moreover, as with the Commission on Human Rights, the Human Rights Council may, when needed, hold special sessions “at the request of a member of the Council with the support of one third of the membership”.¹⁸

Responsibilities and functions

As the Summit of Heads of State had already asserted, the General Assembly reiterates here that the Human Rights Council “shall be responsible for promoting universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner”.¹⁹ More specifically, the Human Rights Council shall:

- address situations of violations of human rights, including gross and systematic violations;
- promote the coordination and the mainstreaming of human rights within the United Nations system;

- enhance the promotion and protection of all human rights, including the right to development;
- promote human rights education;
- provide advisory services with the consent of Member States concerned;
- serve as a forum for dialogue on thematic issues on all human rights;
- contribute to the development of international law in the field of human rights;
- promote the full implementation of human rights obligations undertaken by States;
- facilitate the follow-up to the goals and commitments related to human rights emanating from United Nations conferences and summits;
- prevent human rights violations;
- respond promptly to human rights emergencies; and
- supervise the work of the Office of the United Nations High Commissioner on Human Rights.²⁰

It should be remembered that all these functions were already performed *de jure* or *de facto* by the Commission on Human Rights; therefore, the additional advantage of the Human Rights Council is its foreseeable greater political visibility (by being a subsidiary organ of the General Assembly instead of reporting to ECOSOC) and its greater number of regular sessions (at least three per year). The minimum duration of the regular sessions will also increase from six to ten weeks per year.

The universal periodic review mechanism

A criterion by which the Human Rights Council will evaluate each State's fulfillment of their human rights obligations and commitments will be a "universal periodic review". According to the resolution we are examining here, this mechanism will be "based on objective and reliable information", and will be undertaken by Member States of the Human Rights Council themselves. Furthermore, the procedure ensures "universality of coverage and equal treatment with respect to all States"; and shall be based on an "interactive dialogue, with the full involvement of the country concerned and with consideration given to its capacity-building needs".²¹

But the mechanism as it stands now fails to resolve four basic issues: First, it does not identify how States will measure the fulfillment of their human rights obligations. It would have been more logical at least to stipulate that the evaluation be based on the obligations assumed under the United Nations Charter, the Universal Declaration of Human Rights and the specific obligations contracted by each State upon ratifying human rights treaties. This would have

assured the continuation of the well established work conducted by the Commission on Human Rights.

Second, neither is it clear how the Human Rights Council will be provided with “objective and reliable information” on the real situation in each country. For example, the High Commissioner suggested in her plan of action that this information could be provided by her own Office, in the form of an “annual thematic global human rights report”.²²

In our opinion, it would be preferable for this information to be contained in an annual report on the human rights situation in all United Nations Member States, for this report to be presented before the Human Rights Council by a commission of independent experts²³ (perhaps the Sub-Commission itself) and for this commission to work in close proximity with the system of special rapporteurs and working groups currently existing within the framework of the Commission on Human Rights, and with the oversight bodies established by international human rights treaties.

The aforesaid commission of experts should also enlist the technical support not only of the Office of the High Commissioner for Human Rights, but also the other specialized²⁴ and subsidiary²⁵ organizations of the United Nations system, and the departments of the United Nations Secretariat²⁶ that enjoy a broad presence in all countries across the world. An annual report drafted in this way would definitively avoid selectiveness among countries, guarantee a fair evaluation of all States and also constitute a real step forward in the coordination of the entire United Nations system in matters dealing with human rights.

Third, the same resolution limits itself to stating that the evaluation shall be conducted “by the Human Rights Council Member States themselves”, although it does not specify whether this will be done in a public session (subjected to the scrutiny of accredited observers, including human rights non-governmental organizations) or a closed session. If, in practice, the Human Rights Council decides to conduct this evaluation behind closed doors, the procedure would be a mere repetition of the infamous “1503 procedure” set up by ECOSOC in 1970 to conduct “dialogue” behind closed doors with States in violation of human rights, and which produced no effective results.

Fourth, and finally, the proposed mechanism specifies that the evaluation be conducted for the purpose of identifying the needs of each State in relation to the development of their institutional capacity, instead of identifying the real degree of fulfillment of their international human rights obligations. As such, the international community would be sacrificing an international inspection mechanism that was already being used by Commission on Human Rights, by albeit imperfect system of thematic rapporteurs and country rapporteurs.

Preserving the achievements of the Commission

The Human Rights Council proposed by General Assembly Resolution 60/251 does not sufficiently preserve the record of achievements made by the Commission on Human Rights throughout its long existence of more than 60 years. The next few years need to be utilized to the fullest to review the state of the Human Rights Council so as to preserve and improve this record in four ways:

First, the Commission on Human Rights did a remarkable job of progressive codification and development of International Human Rights Law, which the future Human Rights Council should continue and could even improve upon. We should not forget that only in 2005 did the Commission on Human Rights successfully complete the codification of the “Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law”.²⁷ The Commission on Human Rights also took note of the “Set of principles for the protection and promotion of human rights through action to combat impunity” as guidelines to help States develop effective measures to tackle impunity.²⁸ Finally, a Working Group of the Commission on Human Rights approved on 23 September 2005 the draft “International Convention for the protection of all persons from enforced disappearances”.²⁹

The Human Rights Council is expected to make the definitive approval of this important draft convention against disappearances a matter of priority, since figuring among its functions is to make recommendations to the General Assembly “for the further development of international law in the field of human rights”.³⁰

However, it is rather worrisome that Resolution 60/251 does not preserve the current codification architecture of the Commission on Human Rights, in which the Sub-Commission on the Promotion and Protection of Human Rights plays a vital role by acting as an panel of independent experts that, having closer contact with the needs of civil society, should advise the intergovernmental body (previously the Commission on Human Rights, now the Human Rights Council) on the priorities and the matters to be codified and developed progressively in the field of International Human Rights Law.³¹ The weak reference to the fact that the Human Rights Council will maintain “expert advice”³² is clearly insufficient to assure the continuity of the work of the Sub-Commission.

Second, there should be no discussion about the continuation of the extremely valuable system of special rapporteurs and working groups (currently 17 country mandates and 31 thematic mandates) of the Human Rights Council, nor about the procedure for individual complaints that was

painstakingly crafted within the framework of extra-conventional protection. This procedure was developed with the commitment of various special rapporteurs and working groups, particularly the thematic mandates, taking its inspiration from the effectiveness of the Working Group on Arbitrary Detentions. Given the lack of an agreement between States, negotiations were extended for another year,³³ causing uncertainty to continue to hover over the nerve center of the extra-conventional protection system.³⁴

Third, after lengthy negotiations, the General Assembly now acknowledges the crucial importance of human rights NGOs. As such, they will continue to benefit from at least the same participation arrangements with the future Human Rights Council that they now enjoy with the Commission on Human Rights. Until now, the advisory status of NGOs – determined in Articles 68 and 71 of the UN Charter – has linked them to the Economic and Social Council (ECOSOC), while the practical aspects have been regulated in accordance with the rules of procedure established by Resolution 1996/31 of ECOSOC.³⁵

Also pending is the problem concerning the legislative technique employed by the General Assembly in its Resolution 60/251, which is in stark contrast to that established in Articles 68 and 71 of the UN Charter. As a result, by establishing the Human Rights Council as a subsidiary organ of the General Assembly, it will be necessary to modify these terms of the Charter to extend the advisory status of NGOs to the General Assembly and its subsidiary organs. Whatever the outcome, the United Nations requires the endorsement of civil society, so consequently its legitimate representatives need urgently to be admitted into the deliberations of the General Assembly and, by extension, its new Human Rights Council and also the Security Council.

Fourth, and finally, the main oversight of the new Human Rights Council – unlike, for example, national human rights institutions – is the conventional system of human rights protection. In fact, Resolution 60/251 makes only a single reference to this important protection system, and a negative one at that: the universal periodic review mechanism “shall not duplicate the work of treaty bodies”.³⁶

On the contrary, it would be highly desirable for the upcoming review of the status of the Human Rights Council to consider the coordination of its work with these various bodies. Along these lines, it would be desirable to establish permanent institutional working relations that include the recognition of a permanent observer status in the Human Rights Council for the seven UN treaty committees, since both protection systems (conventional and extra-conventional) are complementary and pursue the same objective: the international protection of human rights.

Conclusions

The Human Rights Council was evidently founded with a provisional character, since after a one year period decisions will have to have been made concerning the three basic issues inherited from the Commission on Human Rights, namely: the future of the special procedures, the individual complaints procedure through extra-conventional protection mechanisms and the Sub-Commission on the Promotion and Protection of Human Rights. In addition, both the General Assembly and the Human Rights Council itself will review its status within five years.

Consequently, these opportunities should be seized in the coming years to ensure that:

- the Human Rights Council is classified as a principal and permanent organ of the United Nations, having a universal composition and enjoying the same political visibility as the Security Council, ECOSOC and the General Assembly.
- the Human Rights Council and the Security Council develop a direct, horizontal and fluid working relationship, in virtue of the acknowledgement of the close relationship existing between gross human rights violations and the maintenance of international peace and security.
- provisionally, while the goal of a universal composition for the Human Rights Council is not achieved, State candidates should be required to have ratified at least seven basic human rights treaties and their corresponding optional protocols.
- the decision whether or not a State has committed systematic human rights violations, for the purposes of its suspension as a Member State of the Human Rights Council, should come from an independent expert (special country rapporteur).

Concerning the “universal periodic review mechanism”, it should be specified that:

- the evaluation of each State shall be conducted based on the obligations assumed under the United Nations Charter, the Universal Declaration of Human Rights and the specific obligations contracted upon ratifying the human rights treaties.
- the source of information shall be an annual report on the human rights situation in all United Nations Member States, to be prepared by a commission of independent experts – potentially a conveniently renewed version of the Sub-Commission itself.
- the Human Rights Council shall hold public sessions, subjected to the scrutiny of human rights NGOs.
- the main objective of the periodic review among peers shall be to evaluate the human rights situation in each country and, subsequently, identify appropriate measures of technical training and institutional development.

Additionally, the Human Rights Council should clarify the doubts surrounding four key issues:

First, the progressive codification and development of International Human Rights Law. It should immediately approve the draft International Convention for the Protection of all Persons from Enforced Disappearances. It should also expedite the codification of the draft Declaration on the Rights of Indigenous Peoples and the proposed optional protocol to the International Covenant on Economic, Social and Cultural Rights. Looking to the future, it should preserve the codification architecture inherited from the Commission on Human Rights, in which the Sub-Commission on the Promotion and Protection of Human Rights used to play a vital role by maintaining close contact with civil society.

Second, the continuity of the valuable system of special rapporteurs and working groups of the Human Rights Council (currently 17 country mandates and 31 thematic mandates). The Human Rights Council should immediately, in 2006, renew the mandate of 21 of these special procedures, many of which are qualified to receive individual complaints through the extra-conventional protection system.

Third, it should assure that human rights NGOs continue to enjoy the same participation arrangements as with the Human Rights Council. For this to occur, it will be necessary to amend Articles 68 and 71 of the UN Charter.

Fourth, the seven committees established by international human rights treaties should be granted the status of permanent observers in the Human Rights Council, so as to assure a permanent and institutionalized working relationship between the two international human rights protection systems (conventional and extra-conventional).

NOTES

1. General Assembly, Resolution 60/1 entitled "2005 World Summit Outcome", of September 16 2005, paragraphs 157-159.

2. *Ibid.*, paragraph 160.

3. General Assembly, Resolution 60/251, approved on March 15, 2006 by 170 votes in favor, 4 against (United States, Israel, Marshall Islands and Palau Island) and 3 abstentions (Byelorussia, Iran and Venezuela). The budget implications of this resolution were an additional appropriation of 4,328,700 dollars (doc. A/60/721, 15 March 2006, paragraph 4).

4. General Assembly, Res. 60/251, paragraph 6.

5. *Ibid.*, paragraph 1 *in fine*. Meanwhile, the Human Rights Council itself shall also "review its work and

functioning five years after its establishment and report to the General Assembly" (paragraph 16).

6. The Human Rights Commission shall be abolished by ECOSOC on 16 June 2006 (paragraph 13 of Res. 60/251). According to paragraph 15, the elections of the first members of the Human Rights Council shall be held on 9 May 2006 and that the first session of the Council shall be convened on 19 June 2006.

7. As established in preambular paragraph 6 of Res. 60/251: "Acknowledging that peace and security, development and human rights are the pillars of the United Nations system and the foundations for collective security and well-being, and recognizing that development, peace and security and human rights are interlinked and mutually reinforcing, [...]."

8. The so-called "Panyarachun Report" defended that the Commission on Human Rights should continue to exist, although membership should be made universal, that is, to embrace the 192 Member States. *Cfr.* Doc. A/59/565, of 2 December 2004, paragraph 285. In the longer term, the same Panel considered that the Commission should be upgraded to become a Human Rights Council, a main freestanding Charter body like the Security Council (*Ibid.*, paragraph 291).

9. Doc. A/59/2005, "In larger freedom: towards development, security and human rights for all", of 21 March 2005, page 67, paragraph 8 (e).

10. Paragraph 7 of Resolution 60/251 establishes the geographical distribution. After the first election held on 9 May 2006, the Human Rights Council is configured as follows: Group of African States: 13 seats (Algeria, Cameroon, Djibouti, Gabon, Ghana, Mali, Mauritius, Morocco, Nigeria, Senegal, South Africa, Tunisia and Zambia); Group of Asian States: 13 seats (Bahrain, Bangladesh, China, India, Indonesia, Japan, Jordan, Malaysia, Pakistan, Philippines, Republic of Korea, Saudi Arabia and Sri Lanka); Group of Eastern European States: 6 seats (Azerbaijan, Czech Republic, Poland, Romania, Russian Federation and Ukraine); Group of Latin American and Caribbean States: 8 seats (Argentina, Brazil, Cuba, Ecuador, Guatemala, Mexico, Peru and Uruguay); Group of Western European and other States: 7 seats (Canada, Finland, France, Germany, Netherlands, Switzerland and the United Kingdom of Great Britain and Northern Ireland).

11. The secret ballot is an important new development since it enables States to vote consciously, free of the usual political pressure from large powers. The risk becoming politically illegitimized by the international community is presumably what led the United States to announce that it would not be presenting its candidacy, even though this announcement is in line with its vote against the creation of the Human Rights Council (General Assembly, Res. 60/25).

12. General Assembly, Res. 60/251, paragraph 8.

13. An ambiguity that was exploited by State candidates in the first election, which only published their "conquests" in the field of human rights and made fairly hollow pledges.

14. *Ibid.*, paragraph 8 *in fine*. At least 26 of the States elected on 9 May 2006 (*vide supra*, footnote 10) have been found to have committed gross and systematic violations of numerous of human rights.

15. *Ibid.*, paragraph 9.

16. *Ibid.*, paragraph 1. The Human Rights Council is established with a provisional status. As we have already seen, it is stated that "the Assembly shall review the status of the Council within five years".

17. Ibid., paragraph 10. Nevertheless, this represents some progress in relation to the Commission on Human Rights, which was authorized to meet only once each year in regular session for six weeks.
18. Ibid., paragraph 10 in fine.
19. Ibid., paragraph 2.
20. Ibid., paragraphs 3-5.
21. Ibid., paragraph 5.e). It also determines that the Human Rights Council shall develop the modalities and necessary time allocation for the universal periodic review mechanism within one year after the holding of its first session.
22. *Vide doc. A/59/2005/Add.3*, 26 May 2005, paragraph 86.
23. One valuable example is the Committee of Experts on the Application of Conventions and Recommendations, of the ILO, made up of 20 independent experts. This commission reports annually to the International Labor Conference on the fulfillment of international labor conventions by each Member State.
24. ILO, UNESCO, FAO, WHO.
25. UNDP, UNICEF, UNHCR, WFP, Peacebuilding Commission.
26. In particular the Department of Peacekeeping Operations or the Department of Humanitarian Affairs.
27. Commission of Human Rights, Res. 2005/35, of 19 April 2005, Annex. These principles were endorsed by ECOSOC and by the General Assembly towards the end of 2005.
28. Commission of Human Rights, Res. 2005/81, paragraph 20, of 21 April 2005. These principles had been updated by Professor Diane Orentlicher, an independent expert. The principles may be consulted in doc. E/CN.4/2005/102/Add.1, of 8 February 2005.
29. The text of the upcoming Convention is available on the website of the High Commissioner: <www.ohchr.org>, accessed on 15 August 2006. This project is expected to be formally approved by the Human Rights Council in June 2006 and then by the General Assembly in December 2006.
30. General Assembly, Res. 60/251, paragraph 5.c).
31. See, for example, decision 2005/114 of the Sub-Commission.
32. General Assembly, Res. 60/251, paragraph 6.
33. Ibid., paragraph 6 *in fine*.
34. The Commission on Human Rights was due to renew in 2006 the mandate of 21 of these special procedures, although the premature suspension of its sessions in March 2006 prevented it from pronouncing on this extremely important matter, leaving the decision in the hands of the Human Rights Council.
35. Ibid., paragraph 11 in fine.
36. Ibid., paragraph 5.e).

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The opinions expressed in this paper are the exclusive responsibility of the author and do not necessarily reflect the views of the CICC.

ABSTRACT

The International Criminal Court (ICC) offers an innovative and complex system of justice that takes into account the rights of victims. Although these rights may not be absolute, since they are subject to the guarantees of a fair and impartial trial, the Court recognizes victims as legitimate parties in its proceedings. Nevertheless, this system represents a sizable challenge that the Court has already faced in its early investigations and at the outset of its first case. Throughout this paper, I shall explain the role of victims in the ICC's criminal justice system, their rights established in the Statute and other regulations governing the proceedings of the Court, as well as the Court's interpretations of them in its first rulings. Furthermore, I shall clarify the framework established by the Court to fulfill this important mandate.

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KEYWORDS

International Criminal Court – Victims – Rights of Victims – Right to Participation – Right to Protection – Right to Reparations



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THE ROLE OF VICTIMS IN INTERNATIONAL CRIMINAL COURT PROCEEDINGS: THEIR RIGHTS AND THE FIRST RULINGS OF THE COURT

Paulina Vega González

To everyone's surprise, even the most ardent of optimists, the International Criminal Court (hereinafter referred to as "ICC" or "Court") is now a reality. Less than eight years since the adoption of the Statute of the International Criminal Court¹ (hereinafter referred to as "Rome Statute" or "Statute"), it has embarked on its first investigations and its first case.² Given this situation, it is necessary to address one of the more innovative aspects of this nascent international criminal justice system: the rights of victims in the proceedings of the Court. Therefore, the chief objective of this paper is to give the reader a general overview of the role of victims and the interpretation of the Court in its first rulings.

Recognition of the rights of victims is one of the greatest advances made by the international criminal justice system. These rights represent a novel development and also a significant challenge that the Court has already faced in its early hearings. However, little has been written about the topic,³ even though as each day goes by its importance is recognized more by both ICC employees and scholars in the field of international criminal law.

For the purpose of clearly spelling out the role of victims in the ICC criminal justice system, I first propose to identify which rights are established in the Statute and the other regulations governing the proceedings of the Court, as well as the Court's interpretation of them in its first rulings. I shall then move on to address the framework adopted by the Court to fulfill its important mandate towards victims of the gravest crimes against humanity.

See the notes to this text as from page 37.

Including the rights of victims: a novel development and a challenge for the International Criminal Court

The inclusion of the rights of victims in the Statute is an innovative development for international criminal justice, since unlike what we might think about the criminal courts that preceded the ICC, namely the Nuremburg and Tokyo military tribunals and the ad hoc tribunals for the former Yugoslavia and for Rwanda, there is no precedent, either in their statutes, in practice or in case law, relating to the inclusion of victims' rights to the likes of which we find in the Rome Statute. In these tribunals, the victims were not considered a legitimate and independent part of the proceedings, which is why they were not granted their own space and their participation was limited to testifying as witnesses.

Therefore, prior to the adoption of the Rome Statute, or even the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, discussions on the inclusion of participation by victims in proceedings were part of a heated debate among delegates during negotiations to draft the Statute.⁴ This is due to the fact that the role of victims in criminal proceedings was not fully understood by all the delegations of participating States; and as such there was no real certainty about what kind of agreement would finally be reached by the States upon approval of the Rome Statute.

For some nations, such as France, Argentina, Colombia and Guatemala, the role of victims in ICC proceedings was easier to grasp, since their national legislation, to a greater or lesser degree, allows victims to appear in criminal proceedings as "civil parties" or "civil plaintiffs" and, as such, they play an independent role instead of being represented by the Prosecutor. This is why these countries were better able to understand the demands of civil society organizations,⁵ which insisted that an independent role for victims be recognized in ICC proceedings.

However, if the rights of victims in the criminal process is a relatively unexplored subject in Latin American countries, even though they share the same Roman-Germanic legal system, or civil law, for nations that use the Anglo-Saxon legal system, or common law, this concept is totally alien.

The Statute strikes a balance between these existing legal systems, establishing a mixed system for its proceedings, in which we can find some elements deriving from civil law and others that are derived from the Anglo-Saxon system. This mix has resulted in an innovative system of justice that recognizes the importance of the victims in the struggle against impunity and that grants them an independent role. This recognition is enshrined in the Preamble to the Statute, where States Parties are said to be mindful that

“during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity”. Nevertheless, the exercise of this role and these rights is still limited by the rights of the defense and the guarantees of a fair and impartial trial, as we shall see in more detail in the sections that follow.

The rights of victims can be found scattered throughout the various pieces of legislation that govern the proceedings of the Court, namely: the Statute, which establishes the principal rights; the Rules of Procedure and Evidence;⁶ the Regulations of the Court;⁷ and the Regulations of the Registry of the Court.⁸ These instruments contain more than 115 provisions that make reference to victims,⁹ a number that can only reflect the sheer complexity of this system that dictates precisely how the rights assured them can be exercised, and how the Court, through its various organs, is organized to fulfill the important mandate attributed to it towards victims in criminal cases.¹⁰

The rights of victims

As I have already mentioned, it is the Rome Statute that establishes the rights of victims. Nevertheless, before embarking on an analysis of these rights, it is first important to clarify the Court’s concept of a victim so we can understand who is considered to be entitled to these rights. Rule 85 defines victims as follows:

For the purposes of the Statute and the Rules of Procedure and Evidence:

- “Victims” means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;
- Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.

This rule makes little headway in its definition of the characteristics the sustained harm should present or whether the person needs necessarily to have been affected directly or indirectly.¹¹ However, from its wording we can conclude that, in principle, any person can be recognized by the Court as a victim if they are considered to have sustained some harm as a consequence of the commission of the crime of genocide, a crime against humanity or a war crime, in accordance with the definition given in the Statute, if this crime falls under the jurisdiction of the Court *ratione personae*, *loci* or *ratione temporis* and if the Court is shown that the harm suffered is the result of the aforesaid conducts.

The rights of victims can be classified into three main categories: (1) the right to participation, (2) the right to protection and (3) the right to

reparations. From these rights, which we shall call “primary”, are derived “subsidiary” rights, which will be explained in the sections ahead. Nevertheless, as we have already seen, these rights are not absolute, since to assure a fair and impartial trial in which the legal rights and guarantees of the accused are respected, the Court is vested with the authority to decide how the rights of victims can be best exercised, that is, in a way that does nothing to jeopardize a fair and impartial trial. In other words, the exercise of these rights is conditional on the decisions of the judges, who in each case will need to ensure on the one hand that the trial is fair and impartial and on the other that the rights of the victims are exercised.

It is vital to recognize the obligation of the Court to strike this necessary balance between the rights of the accused and the rights of the victims. The Court should, therefore, permit and facilitate the exercise of victims’ rights in an effective manner or justify why restrictions have been placed on the exercise of these rights.¹²

What follows is an explanation of the primary rights categories, after which I shall analyze the interpretation of the rights of victims made in the first ever ruling of the Court’s Pre-Trial Chamber I in the case of the Democratic Republic of Congo.¹³ This is considered to be the first judicial precedent on the rights of victims in the ICC.

Right to participation

The right of victims to participate in the proceedings of the Court is the primary right granted by the Statute and its basis is found in article 68 (3), which establishes:

Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

The text of this provision presents the various elements that need to be considered to understand the scope of this right. These elements will be analyzed in the light of rules 89 to 93 and the various provisions of the Regulations of the Registry.

First, victims have the right to present their opinions and concerns and have them considered when their personal interests are affected by a given act

of the Court. To exercise this right, victims must submit a written application to the Registrar of the Court, in accordance with rule 89 (1), in which they must express their intention to exercise the right to participation and give the reasons why they consider that they should be recognized as victims in a given situation or case.

For the purposes of facilitating the exercise of this right of victims, the Registry has developed standard applications forms for submitting requests to participate.¹⁴ These forms should be distributed by the Registry in places where the Court conducts its investigations and, to the extent possible, be made available in the language spoken by the victims,¹⁵ who should preferably use the forms provided and assure that they give all the information requested on it by the Court.¹⁶ The Registry should assist victims to properly complete the forms and provide education and training for this purpose to the victims, the people who work with the victims or groups of victims at the location of the crime.¹⁷

The applications to participate should also, to the extent possible, be submitted at the start of the stage of proceedings in which they wish to participate, and be in one of the Court's working languages, that is, English or French. These applications will be transmitted by the Registry to the relevant Chamber together with a report on all the applications that were received, for the purposes of facilitating the decision of the Chamber.¹⁸ It is this Chamber that will decide whether the applicants qualify as victims in accordance with rule 85.

To facilitate the decision of the Chamber, the Registry may request additional information to that already presented on the application form, in accordance with regulation 86 (4).¹⁹ The request for additional information may also come from the Chamber to help it make its decision.

Once the Court has these applications at its disposal, it will determine who qualifies as victims (and, therefore, who will be allowed to participate in the proceedings) and also the appropriate manner of this participation, in accordance with rule 89.²⁰

When can victims exercise this right?

The right to participation may be exercised during any of the stages of the Court's proceedings, namely: the investigation, conducted exclusively by the Office of the Prosecutor; the process, that begins with the identification of the suspect and the request for a detention order, or with the presentation of the accused before the Court for a hearing to confirm the charges, a stage that includes the appeal; and finally the reparations, should this stage be held separately, following the pronouncement of the conviction.

In all these stages, there are provisions making explicit reference to the rights of victims. For instance, in the investigation stage, victims may deliver information to the Prosecutor to initiate investigations *proprio motu*, in accordance with article 15 (3); they may also present observations to the Pre-Trial Chamber when the Prosecutor submits an authorization request for an investigation. In the process or trial stage as such, victims may submit their observations, in accordance with article 19 (3),²¹ should the jurisdiction of the Court or the admissibility of the case be challenged. Finally, in the reparations stage, victims may, in accordance with article 82 (4), appeal an order for reparations.

In the face of this, we can expect there to be different groups of victims in the different stages of the Court's proceedings, since situations are analyzed in which crimes were presumably committed that fall within the jurisdiction of the Court and from which the suspects will at some point have to be singled out to finally convict those found guilty of the wrongdoing. This raises the possibility that, to begin with, in the investigation stage, there will be a first group of victims, the "victims of the situation". In the second stage, the group will be narrowed down to those who claim to be "victims of the facts" charged against the suspect of the crimes submitted by the Prosecutor for trial. Finally, a third group, the "victims of the convicted person", will be those who can establish that they have suffered harm caused by the facts for which the accused was convicted.

This was the complex situation the Court faced in its first rulings, one that will eventually cast doubt, sooner or later, over what kind of justice the Court can dispense to victims that do not fall into the final group. The situation would be exacerbated if the public knew that the Prosecutor will only focus on the trials and investigations of those people who had a greater degree of responsibility in the crimes. This will prompt a scarce number of trials in which we can expect there to be a large number of victims.

Nevertheless, returning to the subject of exercising the right to participation, victims should, to the extent possible, submit their participation applications before the start of the stage of proceedings in which they wish to express their observations. To make sure they do this, the Court should publicize the start of the investigation or the Court proceedings, particularly in places frequented by the victims, and as such assure that they file their participation applications at the right time.

Once the application has been filed, the relevant Chamber will decide whether the information provided by the applicants satisfies the necessary requirements listed in rule 85 concerning the situation or the case to which their application refers. The Court shall then decide, should it recognize the status awarded the victim, on the form of participation and whether the

victim's legal representative should act on their behalf. The decision of the Chamber will be communicated to all parties and may later be modified in accordance with rule 91 (1).

All applications by victims are to be conveyed to the Prosecution and the Defense. Nevertheless, victims may request that certain information be kept secret to protect their safety, while the relevant Chamber will decide whether the request is justified and on the appropriate measures to be taken.

Legal representation

Legal representation is closely linked to the right to participation, since this right should be exercised on certain procedural occasions by legal representatives.²² Consequently, a subsidiary right to participation is the right of the victim to freely choose legal counsel.²³ These representatives must meet certain requirements to be acceptable to the Court, such as having at least 10 year's experience.²⁴ The same qualifications are also required of the counsel for the defense, in line with rules 22 and 90 (6) of the Rules of Procedure and Evidence.

The same consideration is provided for the assistants to counsel, for the purposes of enabling the person closest to the victims to be part of their legal representation before the Court.²⁵ Therefore, anybody who matches the established requirements should fill out the respective forms, providing all the relevant information, and request their authorization as a representative from the Registry of the Court, explaining their preference to represent the victims, the accused, or both.²⁶

Additionally, the Court anticipated that the number of victims in each situation will be high and, in order to safeguard the integrity of the trial and to expedite the proceedings, but without jeopardizing the participation, it created the figure of a common legal representative for victims.²⁷ We can expect this modality to be widely used in proceedings, particularly in the trial stage, when the need for the victims or groups of victims to choose a common representative can be established by the Court in conjunction with its decision on their application to participate in the proceedings.²⁸

The court plays an active role concerning the legal representation of victims. While not as extensive as its role with the legal representation of the defense, it is obliged to assist victims exercise their rights. In doing so, the Registry of the Court should help with the choice of a legal representative,²⁹ particularly when the victims or groups of victims are unable to freely choose a common representative. Consequently, the Registrar should always consider the views of the victims at all times.³⁰

The implications for victims of the high costs of participating in the

proceedings of the Court are well known. By and large, victims participating in international tribunals receive assistance from organizations that also have only limited financing for this task. In light of this fact, the Court has taken provisions, albeit in only a limited way and in accordance with regulations 83 and 84 (Regulations of the Court) and rule 90 (5) (Rules of Procedure and Evidence), to provide financial assistance to victims to cover the expenses arising from legal representation. Victims must be informed about the possibility of receiving free legal assistance,³¹ the scope of which shall be determined by the Registry in consultation with the relevant Chamber. To access this assistance, the Registrar has prepared an application form to determine the means of the applicant and the victim, so it can decide whether or not to provide either full or partial payment of legal assistance. This decision may be reviewed by the Presidency if requested by the victim.³²

Notification and publicity of proceedings

Another subsidiary right to participation is the right to notification. Once victims are recognized as such by the Court, in a situation or a case, either directly or through their legal representatives, they have the right to be notified and informed of, among other matters: the progress of the proceedings;³³ the decisions of the relevant Chambers; the dates of the hearings; and the filing of appeals by the parties.

Both the publicity for the proceedings and the notification for the victims are fundamental to assure that they can exercise their right to participation. This importance is recognized, for example, in regulation 87 of the Regulations of the Court, which establishes the explicit obligation of the Prosecutor to notify victims, in accordance with rule 50 (1) and rule 92 (2) (Rules of Procedure and Evidence). It is worth pointing out that this obligation also results from the right of victims to request the Prosecutor to initiate investigations *proprio motu*. As such, victims have the explicit right to be notified of the decisions taken by the Prosecutor.³⁴ In the same way as the Office of the Prosecutor, in accordance with article 15 of the Rome Statute, the Registry may assist with this notification, when so requested by the Office of the Prosecutor.³⁵

Furthermore, the obligation to notify and provide adequate publicity to the proceedings of the Court results generically from rules 92 (8) and 96 (1) (Rules of Procedure and Evidence). This obligation of the Court is outlined in detail in the Regulations of the Registry,³⁶ which once again recognizes the importance of the information being accessible to the victims to ensure they may exercise their rights.

Finally, it is also important whilst on the subject of the right to

participation to mention the power vested in judges to reject a participation application if they consider that the person does not satisfy the necessary requirements to qualify as a victim before the Court. This provision is accompanied by the right of the victim to file a new application at a later stage, in accordance with rule 89 (2) (Rules of Procedure and Evidence), and, similarly, the right to withdraw an application for participation, should they so wish, at any time.³⁷

Right to protection

The right to protection is another important right of victims before the Court. It is based on article 68 (1) and article 43 (6) of the Rome Statute. This right, just like the right to participation, is regulated by the Rules of Procedure and Evidence³⁸ and several provisions of the Regulations of the Court and Regulations of the Registry.

According to article 68 (1) of the Statute, these measures are designed to protect “the safety, physical and psychological well-being, dignity and privacy of victims”. As such, there are two key approaches to the right to protection: general preventative measures on the one hand and direct or concrete measures on the other. The former need to be adopted by all organs of the Court to reduce the risks that inevitably arise from a victim’s involvement with the Court, either as a consequence of the investigations or due to a victim exercising one of their rights or testifying as a witness. Meanwhile, the latter measures are to be taken on a case-by-case basis, when a real risk is identified that requires special attention.

The general preventative measures are applied at two different instances, since they must be implemented both at the seat of the Court and also in the various places where it conducts its activities. Although the Court as an institution is responsible for their implementation, it is primarily the job of the Registry³⁹ to adopt measures, such as the necessary provisions in the territories where an investigation is taking place.⁴⁰ The Registry is also responsible for a victim support program that should include, among other things, psychological support, social assistance and advice whenever and wherever the victim is engaged with the Court.⁴¹

Besides the support program, the confidentiality afforded all communications between the victims and the Court, primarily when submitting their applications,⁴² is another of the general measures that the Court has established to assure the victims’ right to safety. It is important to mention that while these applications must be disclosed to the Prosecution and the Defense in the interests of a fair trial, in accordance with rule 87 (2) (b) (Rules of Procedure and Evidence), access to the information they contain

may be restricted by the Court to protect the safety of the victims should the Court determine that such a risk exists.⁴³ To guarantee this confidentiality, the Court may request the Registry to use pseudonyms, facial or voice distortion, videoconferences or to withhold certain information from the public, among other provisions.⁴⁴

The responsibility for the right to protection lies with all the organs of the Court. In some cases, there are specific provisions that require certain organs to take particular steps or to refrain from taking them if they jeopardize the safety of victims. One example of this is the choice of how to inform the victims,⁴⁵ since all the necessary precautions need to be taken to avoid the risks that could arise as a result of their participation in the proceedings of the Court.

Moving on to the individual or personalized protection measures the Court may order, these seem to be reserved exclusively for victims who actually appear before the Court, either by exercising one of their rights or if they are called to testify as witnesses. This is established in the Regulations of the Registry,⁴⁶ which states that the Prosecutor or the legal representative should complete the proper forms requesting the provision of assistance services and inclusion in the protection program maintained by the Registry.⁴⁷ Some of the services offered by this program are: relocation, accompanying support persons and the refunding of extraordinary expenses, among others.⁴⁸

The relocation of victims⁴⁹ is the better known of these individual measures. Nevertheless, we should only expect it to be applied on rare occasions, not as a general protection measure, due to budget and logistical constraints. Concerning the accompanying support persons provided for by the Court, their purpose is to enable victims to approach the Court with more confidence and exercise their rights or testify in its proceedings. The accompanying support person must be authorized by the Registry observing a number of criteria concerning the circumstances of the victim, and objective factors, such as the age of the victim or the existence of some special need.⁵⁰ When determining the suitability of the accompanying person to provide support, the Registry should not pass judgment on whether the person actually requesting the support qualifies as a victim, since the evaluation should ideally be more general and less rigorous. Additionally, when victims come forward at the behest of the Court, the Registry will be responsible for providing the necessary logistical arrangements, such as transport and accommodation,⁵¹ for the purpose of assuring, to the extent possible, their safety.

Furthermore, the Registry has the obligation to maintain a secure electronic database with information on witnesses and victims who appear before the Court and persons at risk, so as to continue their protection.⁵² As

such, the Registry plays an active role in the adoption of protective measures to assure the safety and physical and psychological well-being of victims.⁵³

The right to request reparations

Another of the primary rights of victims in the Court is to claim reparations for the harm sustained as a result of crimes that fall within the jurisdiction of the Court. This right is independent from the right to participation. Therefore, victims or groups of victims who do not wish to participate in Court proceedings, or who did not do so due to lack of information or any other reason, may still exercise their right to request reparations. This right is grounded in article 75 of the Rome Statute.

Just like the right to participation, the right to request reparations is set out in the Rules of Procedure and Evidence⁵⁴ and in the Regulations of the Court and of the Registry. As such, victims wishing to request reparations should do so in writing and preferably using the standard forms developed by the Registry specifically for this purpose, in line with regulation 88 of the Regulations of the Court. Using these forms, victims are required to provide information on the harm sustained, the type of reparations requested and, when possible, the identity of the accused and witnesses, if they are known, among other details. In this process, the Registrar plays an active role to assure that this right is exercised, which is why it can lend assistance obtaining any additional information necessary to justify the decision of the Court and, moreover, help victims complete their requests. The Court, based upon these requests, upon the request of the Prosecutor or on its own motion under exceptional circumstances, may determine in its ruling the scope and extent of the harm sustained by the victims while also explaining the basis for its decision.

According to article 75 (1) of the Rome Statute, the Court will establish principles relating to reparations, which will include restitution, compensation and rehabilitation. The Court, to back up its rulings and develop its reparation principles, is expected to draw on existing international standards on the subject, such as the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*,⁵⁵ as well as the rulings and case law established by international human rights systems.

This means the Court may order the convicted person to make reparations for the harm caused from his or her own assets, while it may also use the Trust Fund for the benefit of victims and their families to cover the reparations. It may award reparations on an individualized basis, a collective basis or, when appropriate, a combination of both, depending on the specifics of the case in hand.⁵⁶

The Court's first interpretations on the rights of victims

In the investigation initiated by the Prosecutor on 23 June 2004 relating to the situation in the Democratic Republic of Congo (hereinafter referred to as "DRC"), a group of six victims individually submitted their application for participation in the proceedings. The Court's decision on these applications gives us its first interpretation of the extent of victims' rights, particularly the right to participation and some of the provisions outlined in previous sections.

What follows is a rundown of the most important aspects of this decision by the Pre-Trial Chamber I (hereinafter referred to as "Chamber" or "PTC I"), which was charged with analyzing the situation in the DRC.⁵⁷ It is worth noting that, before this decision, the Chamber had already handed down other rulings in which it interpreted other provisions related to the rights of victims, namely: it decided on the application of protective measures for victims;⁵⁸ requested additional information;⁵⁹ ordered the calling of a hearing,⁶⁰ among other things.

The decision of the PTC I involved three key questions: (1) whether the right to participation for victims in the proceedings of the Court, in accordance with ICC regulations, includes the investigation stage; (2) if it does permit the participation of victims in the investigation stage, what form should this participation take; and (3) whether the six applicants meet the criteria for being considered victims in the proceedings of the Court.⁶¹

To answer the first question, the PTC I examined the claim made by the legal representative of the victims, submitted together with their applications for participation and emphasizing that these had been presented based on article 68 (3) of the Rome Statute. It also considered the memorandum of the Office of the Prosecutor, which challenged the applicability of this article in the investigation stage, claiming that the proceedings to which the article refers do not include this stage; that the participation of victims during the investigation stage is inappropriate; that the applicants had failed to show that their personal interests had been affected.⁶² The Chamber also considered the arguments of the ad hoc defense counsel.

Concerning the first question, the Chamber examined the text of article 68 (3) of the Rome Statute in both English and French, the Court's two working languages, and concluded that the term "proceedings" does not exclude the stage of investigation and, therefore, that this article gives victims a general right of access to the Court at this stage.⁶³ The Chamber also recognized the independent role granted victims to present their interests and it drew on rulings handed down by regional human rights tribunals to illustrate the importance of the role of victims in criminal proceedings for claiming their rights.⁶⁴

Therefore, the Chamber decided that article 68 of the Statute is also applicable to the stage of investigation⁶⁵ and that the participation of victims does not *per se* jeopardize the appearance of integrity and objectivity of the investigation.⁶⁶ It indicated that what could eventually jeopardize this integrity is the form of the victim's participation, which is why the Chamber determined that it will take such measures that are necessary, whenever victims' rights are exercised, to preserve the integrity of the proceedings. Among these measures, the Chamber appointed an ad hoc counsel for the DRC situation to represent the interests of the defense⁶⁷ during this stage, and also decided to restrict the access of victims to all non-public documents contained in the record.⁶⁸

On the second matter – whether the applicants had shown that their personal interests had been affected at the stage of investigation – the Chamber considered that the interests of victims are affected in general at this stage, since this is when they clarify the constitutive facts of crimes that fall within the jurisdiction of the Court and identify the alleged perpetrators. As such, the participation of the applicants can serve both these purposes and also, in due course, to request reparations for the harm suffered.⁶⁹ Nevertheless, the Chamber also recognized the distinction between situations and cases, which is why in the investigation stage, applicants need to meet the definition of victims set out in rule 85 (Rules of Procedure and Evidence) only in relation to the situation in question. In the trial stage, however, in which the cases are better defined, applicants need to meet the definition established in the same rule, but in relation to the specific cases.⁷⁰ Therefore, the decision of the Chamber is only effective for the investigation stage in relation to the situation in the DRC. This confirms what was mentioned at the beginning of the paper about the possibility of their being different groups of victims, with numbers declining as the proceedings progress.

Added to this, the Chamber interpreted that the status of victim may be awarded to applicants in the stage of investigation if a single instance of harm is definitively proven⁷¹ and there are “grounds to believe” that the alleged harm was caused by the commission of any crime within the jurisdiction of the Court.⁷²

On the subject of the standard forms prepared by the Registry to request participation in the proceedings, the Chamber decided that their use is not compulsory and that applications may be submitted by an organization that has the consent of the victim.⁷³ Therefore, after analyzing each of the victims' applications, the Chamber decided that the applicants ought to be recognized as victims in the stage of investigation, that their participation ought to be permitted during this stage and it also dictated the manner of this participation: victims were permitted to present their views and concerns, file documents and request the Chamber to adopt specific measures.

It is important to mention that, on 23 January 2006, the Office of the Prosecutor requested authorization from the Chamber to appeal this decision before the Appeals Chamber, since it considered the interpretation of the Chamber on the rights of victims to be incorrect.⁷⁴ In response to this request, the representative of the victims presented its own observations that were conveyed to both the Office of the Prosecutor and to the ad hoc defense counsel. All these submissions were analyzed by the PTC I, which in its decision rejected the request of the Prosecutor.⁷⁵ Finally, with the start of the trial of Mr. Thomas Lubanga Dylo, a case deriving from the situation in the DRC, three victims presented requests to be recognized as such in this case,⁷⁶ although this decision of the Chamber, on the date this article was completed, was still pending.⁷⁷ In its decision, the Chamber will have to determine whether the victims authorized to participate in the stage of investigation now meet the criteria of rule 85 (Rules of Procedure and Evidence) for the case in question.

The framework of the Court to fulfill its mandate towards victims

The Court organized its structure in such a way as to fulfill its mandate towards victims that is derived from the various provisions already examined in the previous sections. The Court, independent of the actions taken by each of its organs to respond to their obligations *vis-à-vis* victims, created a specific structure under its Registry, since this is the body primarily responsible for facilitating and lending assistance to victims who wish to exercise their rights. Therefore, this section will address primarily the structure of the Registry and, in a similar vein, the creation of independent organs that are linked to this mandate of the Court.

The Registry has two principal offices to address this mandate: the Victims and Witnesses Unit (VWU) and the Victims Participation and Reparations Section (VPRS). What follows is an explanation of the tasks attributed to each of them.

The Victims and Witnesses Unit

The Victims and Witnesses Unit (hereinafter referred to as “Unit”) is provided for in article 43 (6) of the Statute. Its main function is to ensure the security of victims and witnesses, and all other persons who may be at risk on account of the testimony given by the witnesses. This protection, as we have already seen, begins with the Court promoting and adopting institutional policies to assure the physical and psychological well-being of victims, and it also includes

specific measures to reduce the potential risks victims face as a consequence of appearing before the Court.

The Unit has the responsibility, moreover, to recommend that all organs of the Court in contact with victims adopt the necessary measures to guarantee their right to protection,⁷⁸ as well as to prevent the contact of victims and witnesses with the Court from being in itself a traumatic experience. As such, it gives special consideration to victims of crimes of sexual violence and to minors who appear before the Court.⁷⁹

Furthermore, to the extent possible, the Unit coordinates its activities with the functions of the Office of the Prosecutor to help ensure that victims who appear before the Court are treated with dignity and the suffering they have experienced is taken into consideration.

Finally, this Unit is responsible for implementing the protection measures and programs mentioned in the section on the right to protection, and it should make recommendations to the Registrar on the adoption of certain measures based on an examination of the risk. For this reason, it may present observations, upon request by the relevant Chamber, that provide insight to help clarify the situation of risk in which victims find themselves on account of their involvement with the Court.⁸⁰

The Victims Participation and Reparations Section

The Victims Participation and Reparations Section (hereinafter referred to as “Section”) was created based on regulation 86 (9) of the Regulations of the Court for the purpose of helping victims fully exercise their rights to participation and to request reparations. Therefore, it is responsible for providing the necessary assistance to victims in all stages of proceedings.

To fulfill this duty, the Section has developed informative material and a guidance booklet to help victims exercise their rights; it has prepared standard forms to apply for participation and reparations; and it is responsible for holding training and awareness-raising seminars for victims and their representatives, particularly in places where the Court is intervening. Consequently, it aims to help victims make an informed use of their rights and understand their scope; contribute towards a better understanding of the mandate of the Court; and, at the same time, prevent victims from entertaining false expectations about what the Court can do for them.

The Section is responsible for processing the applications that are received, conveying the information they contain to the relevant Chamber and compiling the report already referred to in the section on participation.

It is also responsible for helping victims choose common legal representatives, which, once again, has already been referred to in this paper. Finally, the Section may, upon request, present its observations to the Chamber on any matter that will help the Court decide on the applications of victims.

The Trust Fund for the benefit of victims and their families

States Parties decided to establish in the Rome Statute a Trust Fund (hereinafter referred to as “Fund” or “Trust Fund”) for the benefit of victims of crimes within the jurisdiction of the Court and their families to help the Court perform its reparatory function. The Fund was instituted by article 79 of the Statute, which establishes its independence in relation to the Court. The Fund, created by the Assembly of States Parties to the Rome Statute (hereinafter referred to as “Assembly” or “ASP”) on 9 September 2002,⁸¹ may obtain its funds from three sources, namely: (1) the seized assets of the accused/convicted persons, collected through fines and forfeitures; (2) reparation orders; and (3) the voluntary contributions from States or institutions, organizations and individuals.⁸²

The Assembly approved recently, on 3 December 2005, the Regulations of the Fund,⁸³ which govern the mandate for providing reparation and assistance for victims. This Fund has a Board of Directors formed by five individuals of high moral character that, on an honorary basis, are responsible for handling the money and for the smooth running of the Fund. Moreover, the Assembly established a secretariat to oversee the daily workload of collecting funds and preparing proposals for activities and projects that will serve to comply with the reparation orders of the Court or that may be adopted with the use of the voluntary contributions for assistance to victims, inasmuch as the regulations permit.

Although this Fund is an independent organ that complements the work of the Court, States Parties established, in the regulations, an operating procedure that respects the autonomy of this organ but subjects it to the decisions of the respective Chambers at different junctures, before it can carry out its activities assisting victims.

At this point in time, we do not yet know the scope that the members of the Board of Directors will give the activities of the Fund in their interpretation of its mandate, nor the point of view that the Court will adopt on this function. It should be remembered that the Fund was established for the benefit of victims of crimes within the jurisdiction of the Court and their families. We can, therefore, anticipate that a broad

interpretation of its mandate would allow it to cover victims of the situation and become part of the question on how to address the problem of different groups of victims. Nevertheless, a more restrictive interpretation would presume that the Fund should only benefit the victims of the person convicted by the Court, with all the admonition that this type of interpretation would imply.

The Office of Public Counsel for Victims

The Regulations of the Court provide for the creation of an Office of Public Counsel for Victims.⁸⁴ This office is independent from the Registry of the Court⁸⁵ and its duty is to provide support and assistance to victims and their legal representatives when appearing before the Court. The services provided by the Office include specialized legal advice and research, and appearing before a Chamber in respect to specific issues, all for the purpose of ensuring that victims exercise their rights before the Court.

The Office is expected to facilitate the work of victims' legal representatives in proceedings before the Court, when victims are recognized as such in a situation or a case. The Office is responsible for maintaining the list of counsel and assistants authorized to act before the Court, a list that should be made available to victims, as expressed in previous sections. The members of this Office may even assume the representation that is covered by the Court through financial assistance, which is referred to in the section on legal representation.

In other words, the main function of the Office is to bridge the gap between the victims and their representatives and the Court, since the latter's location in the city of The Hague implies a natural distance from the victims of situations and cases that are under investigation. For these reasons, employees of the Office are even expected to attend the hearings and conduct the defense or the presentation of the observations and interests of the victims.

Finally, it is worth mentioning that, on an operational level, the different organs of the Court, through different facilities, units or sections, meet in working groups to resolve issues related to victims and to coordinate, to the extent possible, their actions at the location of the crime and inside the Court. This practice is of utmost importance, since in theory it should improve the liaison between the Office of the Prosecutor and the Registry, as these are the two organs that will establish the initial contact with victims, as a result of the investigation or the publicity and training measures at the location of the crime. From this first contact, the Court should conduct itself with the necessary sensitivity and in such a way that its actions do not add to the risks of victims.

Conclusions

The International Criminal Court offers an innovative and complex system of justice that considers victims' rights and regards victims as an autonomous part of the proceedings. While these rights may not be absolute, since they are subject to the guarantees of a fair and impartial trial, they should be considered a breakthrough in the international criminal justice system proposed by the Court. This breakthrough presents a new challenge for the Court, which should be managed in such a way as to legitimize its actions.

To deliver all these rights and permit victims to exercise them, the Court, through its various organs, needs to take the necessary steps to ensure they are upheld. Therefore, the Court undertakes, to the extent possible, the task of helping victims understand the importance of their role in securing justice. This will only be achieved by launching a publicity and awareness-raising campaign that enables victims to understand the jurisdiction of the Court, its mandate and its limitations, one that emphasizes that this system of justice recognizes and guarantees their rights. The Court should also understand the needs of the victims so it can respond to them and raise their confidence in international justice as a useful tool in the processes of reconciliation and peace, one that can help in the difficult task of reconstructing the social fabric affected by heinous crimes.

In this vein, the first rulings of the Court have set precedents that by and large meet the expectations placed upon it concerning the exercise of victims' rights. And we can expect these judicial precedents to become enriched as the proceedings progress and the Court deliberates on other cases. Civil society organizations, meeting in the form of the Victims' Rights Working Group, will lend continuity to all victim-related subjects in the ICC and they still lobby for the Court to adopt the measures necessary to live up to the responsibility entrusted to it towards victims.⁸⁶

Furthermore, the Court has sparked debate over the need for national legislations that have not already done so to consider including the rights of victims in their criminal procedures independently, as well as taking the necessary steps to ensure they are exercised, and as such not let the Court be the only place where victims can have their rights recognized and respected.

NOTES

1. UN, Doc. A/CONF.183/9, adopted on 17 July 1998 and entering into force 1 June 2002.
2. The Court is currently conducting investigations on situations in Uganda, Darfur (in Sudan) and the Democratic Republic of Congo. Investigations into the latter situation have led to the first case, No. 01/04-01/06, "The Prosecutor v. Thomas Lubanga Dyilo". For more information, go to the official ICC website, <www.icc-cpi.int>, accessed on September 12, 2006.
3. One of the few articles written in Spanish on the topic is penned by Gilbert Bitti and Gabriela Gonzalez, "La participación de las víctimas ante la Corte Penal Internacional", in José Guevara and Tarciso Del Maso, *La Corte Penal Internacional: una visión Iberoamericana*, Mexico, Editorial Porrúa, 2005, pp. 669-684.
4. To consult the texts of the preparatory work of the Conference of Plenipotentiaries and post-Conference developments, go to <<http://www.un.org/spanish/law/icc/>>, accessed on September 12, 2006.
5. Various civil society organizations, primarily those in the area of human rights, have lent continuity to the negotiations that led up to and followed the adoption of the Rome Statute. The Coalition for the International Criminal Court coordinated the efforts of these organizations and nowadays they continue working to ensure that the ICC is a fair, effective and independent institution. For more information on the work of the Coalition, go to <www.iccnw.org>, accessed on September 12, 2006.
6. International Criminal Court, Doc. ICC-ASP/1/3 (Part II-A), adopted by the Assembly of States Parties on September 9, 2002.
7. International Criminal Court, Doc. ICC-BD/01-01-04, adopted by the International Criminal Court on 26 May 2004 and modified (ICC-BD/01-01-04/Rev.01-05) on 9 March 2005.
8. International Criminal Court, Doc. ICC-BD/03-01-06, adopted by the International Criminal Court on 6 March 2006. This document was only available, on the date this paper was published, in English and French. The translation of these regulations in the Spanish version of this paper was done by the author and should not be considered an official translation.
9. Some of the provisions that make explicit reference to the victims are: Statute articles: 15 (3), 19 (3), 68 (3), 64, 65 (4), 82 (4), 43 (6), 75 (3), 79, 82, 76 (3), 57 (3) (e) and 93 (1) (k); rules: 16, 49, 50, 59, 81 (3), 85, 87 (2), 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 101 (1), 107, 119 (3), 131 (2), 132 (1), 143, 144 (1), 148, 150, 151 (2), 156 (2), 217, 218 (4), 219, 221, 223 and 224; regulations: 2, 21, 24, 32, 38, 39, 41, 42, 50, 54 (o), 56, 79, 80, 81, 82, 83, 85, 86, 87, 88, 101, 116 and 117; regulations: 2, 18, 21 (2), 28 (2), 36 (3), 43 (3), 47, 51 (d), 64 (4), 65 (4), 79 (2), 80, 81 (1), 82, 83, 84, 88 (1), 89, 90 (1), 91, 92, 93, 94, 95, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 109, 110, 112, 113, 114, 115, 116, 118, 122 (2) (d) and 163 (3); however, many other provisions in these pieces of legislation also apply *mutatis mutandis*.
10. The texts of these instruments may be consulted on the website of the Court <http://www.icc-cpi.int/about/Official_Journal.html>, accessed on September 12, 2006, in its official and working languages. For the purposes of this paper, "articles" refers to the provisions contained in the

Rome Statute; "rules" to the provisions contained in the Rules of Procedure and Evidence; "regulations" to the provisions of the Regulations of the Court; and "regulations" to the provisions of the Regulations of the Registry.

11. The precedent for this definition was the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, adopted by General Assembly resolution 40/34 of 29 November 1985, and which defined victims as: "persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power. 2. A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term "victim" also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization": http://193.194.138.190/spanish/html/menu3/b/h_comp49_sp.htm, accessed on September 12, 2006.

12. "[...] the 'victims' guaranteed right of access to the Court entails a positive obligation for the Court to enable them to exercise that right concretely and effectively. [...]", International Criminal Court, ICC-01/04-101-tEN-Corr, par. 71. Available at: www.icc-cpi.int/library/cases/ICC-01-04-101_tEnglish-Corr.pdf, accessed on September 14, 2006.

13. International Criminal Court, Doc. ICC-01/04-101-tEN-Corr.

14. In the Spanish version of the Regulations of the Court, these standard forms are called "modelos-tipo".

15. International Criminal Court, Regulations of the Registry, Doc. ICC-BD/03-01-06, regulation 104.

16. According to regulation 86 (2), the information to be provided by the applicant includes: general information about the victim, a description of the harm suffered, a description of the incident, the reasons why they consider their personal interests were affected, the stage of the proceedings in which they wish to participate and whether they have legal representation, among others.

17. International Criminal Court, Regulations of the Registry, Doc ICC-BD/03-01-06, regulation 105.

18. Ibid, regulation 109.

19. Ibid, regulations 107(3) and (4).

20. The status as a victim recognized by the Court refers only to the proceedings of the Court and in no way affects a person's status as a victim in a different jurisdiction, such as on a national level or as recognized by a different international body.

21. Some Spanish-speaking authors have labeled the rights to participation contained in articles 15 (3) and 19 (3) as "specific rights", in contrast to the "general right" granted by article 68 (3). Rome Statute, Gilbert Bitti and Gabriela Gonzalez, op. cit., page 673.

22. See as an example rule 91 (2), International Criminal Court, Rules of Procedure and Evidence, Doc. ICC-ASP/1/3 (part II-A), which establishes that "2. A legal representative of a victim shall be entitled to attend and participate in the proceedings in accordance with the terms of the ruling of the Chamber and any modification thereof given under rules 89 and 90. International Criminal Court, Rules of Procedure and Evidence, Doc. ICC-ASP/1/3 (part II-A). This shall include participation in hearings unless, in the circumstances of the case, the Chamber concerned is of the view that the representative's intervention should be confined to written observations or submissions. The Prosecutor and the defense shall be allowed to reply to any oral or written observation by the legal representative for victims".
23. International Criminal Court, Rules of Procedure and Evidence, Doc. ICC-ASP/1/3 (part II-A), rule 90 (1).
24. *Idem*, Regulations of the Court, Doc. [ICC-BD/01-01-04/Rev.01-05](#), regulation 67.
25. *Ibid.*, regulation 68.
26. *Ibid.*, regulations 69, 70, 71, 72 and 73. International Criminal Court, Regulations of the Registry Doc. ICC-BD/03-01-06, regulation 122.
27. International Criminal Court, Rules of Procedure and Evidence Doc. ICC-ASP/1/3, rule 90 (1).
28. *Idem*, Regulations of the Court Doc. [ICC-BD/01-01-04/Rev.01-05](#), regulations 79 and 80.
29. *Idem*, Regulations of the Registry Doc. ICC-BD/03-01-06, regulation 112.
30. *Idem*, Regulations of the Court Doc. [ICC-BD/01-01-04/Rev.01-05](#), regulation 79 (2) and (3).
31. *Ibid.*, regulations 83, 84 and 85.
32. International Criminal Court, Regulations of the Registry Doc. ICC-BD/03-01-06, regulation 113.
33. *Idem*, Rules of Procedure and Evidence Doc. ICC-ASP/1/3 rule 16 (1) and *IDEM*, Regulations of the Registry Doc. ICC-BD/03-01-06, regulations 102 and 103.
34. This obligation to notify the victims is bound by article 53 (1) and (2) and article 15 (3), which regulate the powers of the Prosecutor (International Criminal Court, Rome Statute, Doc. A/CONF.183/9).
35. International Criminal Court, Regulations of the Registry, Doc. ICC-BD/03-01-06, regulation 102.
36. *Ibid.*, regulation 103.
37. *Ibid.*, regulation 101.
38. International Criminal Court, Rules of Procedure and Evidence Doc. ICC-ASP/1/3, rules 17, 18, 87 and 88.
39. *Idem*, Regulations of the Registry Doc. ICC-BD/03-01-06, regulations 79 to 96.

40. Ibid., regulation 93.
41. Ibid., regulations 83 and 89.
42. Ibid., regulation 97.
43. Ibid., regulation 99.
44. Ibid., regulation 94.
45. International Criminal Court, Rules of Procedure and Evidence, Doc. ICC-ASP/1/3, rule 50.
46. Idem, Regulations of the Registry, Doc. ICC-BD/03-01-06, regulation 80 (1).
47. Ibid., regulation 96.
48. Ibid., regulation 80.
49. International Criminal Court, Rules of Procedure and Evidence, Doc. ICC-ASP/1/, rule 16.
50. International Criminal Court, Regulations of the Registry, Doc. ICC-BD/03-01-06, regulation 91.
51. Ibid., regulations 81 and 82, respectively.
52. Ibid., regulation 88.
53. Ibid., regulation 100.
54. International Criminal Court, Rules of Procedure and Evidence Doc. ICC-ASP/1/, rules 94 and following.
55. UN General Assembly, Resolution Doc. 60/147. Resolution approved by the UN General Assembly on 16 December 2005.
56. International Criminal Court, Rules of Procedure and Evidence Doc. ICC-ASP/1/3, rule 97.
57. International Criminal Court, ICC-01/04-101-tEN-Corr. The public version of the decision of the Pre-Trial Chamber I, of 17 January 2006, is available in English and French only, at the previously stated electronic address: *Op. cit* 12.
58. Idem, ICC-01/04-73. Available at: <www.icc-cpi.int/library/cases/ICC-01-04-73_English.pdf>, accessed on September 14, 2006.
59. Idem, ICC-01/04-101-tEN-Corr, par. 4.
60. Ibid., par. 8.
61. Ibid., par. 22.
62. Ibid., par. 25.
63. Ibid., par. 46.
64. Ibid., par. 51 and 53.
65. Ibid., par. 54.

66. Ibid., par. 57.
67. Ibid., par. 70.
68. Ibid., par. 76.
69. Ibid., par. 63.
70. Ibid., par. 66.
71. “[...] Pre-Trial Chamber I considers, moreover that the determination of a single instance of harm suffered is sufficient, at this stage, to establish the status of victim.” Ibid., par. 82.
72. “[...] at the situation stage, the status of victim may be accorded only to applicants in respect of whom it has ‘grounds to believe’ that they meet the criteria set forth in rule 85 (a) of the Rules.” Ibid., par. 99.
73. Ibid., par. 102, 104 and 105.
74. International Criminal Court, ICC-01/04-103. Available at: <www.icc-cpi.int/cases/RDC/s0104/s0104_docOTP.html> and <www.icc-cpi.int/updates4.html>, accessed on September 14, 2006.
75. Idem, ICC-01/04-135. Available at: <www.icc-cpi.int/library/cases/ICC-01-04-135_tEnglish.pdf> and <www.icc-cpi.int/cases/RDC/s0104/s0104_doc.html>, accessed on September 14, 2006.
76. Idem, ICC-01/04-144-Conf-Exp-tEN, ICC-01/04-145-Conf-Exp-tEN and ICC-01/04-146-Conf-Exp-tEN, respectively. Available at: <www.icc-cpi.int/library/cases/ICC-01-04-01-06-319-tEnglish.pdf> and <www.icc-cpi.int/library/cases/ICC-01-04-151_English.pdf>, accessed on September 14, 2006.
77. All the decisions related to the situation in the DRC and to the proceedings of cases deriving from it may be consulted on the ICC website: <http://www.icc-cpi.int/cases/current_situations/DRC.html>, accessed on September 14, 2006.
78. International Criminal Court, Rome Statute Doc. A/CONF.183/9, article 68 (4).
79. Idem, Rules of Procedure and Evidence Doc. ICC-ASP/1/3, rules 17 and 18.
80. International Criminal Court, ICC-01/04-101-tEN-Corr, par. 12.
81. International Criminal Court, Resolution ICC-ASP/1/Res. 6.
82. Idem, Rules of Procedure and Evidence, Doc. ICC-ASP/1/3, Rule 98.
83. International Criminal Court, Resolution ICC-ASP/4/Res. 3.
84. International Criminal Court, Regulations of the Court, ICC-BD/01-01-04/Rev.01-05, regulation 81.
85. Idem, Regulations of the Registry, Doc. ICC-BD/03-01-06, regulation 115.
86. For more information, go to <www.vrwg.org>, accessed on September 12, 2006.

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ABSTRACT

This work intends to present an approximation between the concept and the nature of the right to a cultural identity for indigenous peoples and national minorities, and to subsequently look at the ways international regulations protect this right in its distinct modalities. Finally, there is an intent to construct this right from the treaties of the Inter-American System for the promotion and protection of Human Rights, with the purpose of contributing to the justiciability of at least a part of this right.

Original in Spanish. Translated by Alex Ferrara.

KEYWORDS

Cultural Identity – Indigenous Peoples – National Minorities – Inter-American System – Justiciability



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THE RIGHT TO CULTURAL IDENTITY OF INDIGENOUS PEOPLES AND NATIONAL MINORITIES: A LOOK FROM THE INTER-AMERICAN SYSTEM

Oswaldo Ruiz Chiriboga

It is difficult to see how a civilization can hope to benefit from the lifestyle of another, unless it is willing to renounce its own individuality.¹

Introduction

I have agreed to locate within one concept the ethnic-cultural groups, the indigenous peoples and the national, ethnic, religious or linguistic minorities (in the future referred to as “national minorities”). I am aware of some differences among them, which should have deserved the adoption of differentiated international regulation. Nevertheless, as far as this paper is concerned, they will be considered indistinctively, and their similarities will be emphasized, leaving the reader the task of making opportune distinctions.

An approximation of the concept and nature of the right to a cultural identity

In order to discuss and elaborate on the right to cultural identity, it is necessary to resort to definitions that have been given for culture; both traditional and popular culture; diversity of culture; cultural pluralism and cultural patrimony; and to first recognize that none of these concepts has been amply defined and they continue to be debated by cultural identity specialists.

The United Nations Educational, Scientific and Cultural Organization (UNESCO) has defined culture as:

See the notes to this text as from page 64.

*the distinctive traits, including the total spiritual, material, intellectual and emotional traits that characterize a society or social group, and that include, in addition to arts and literature, their ways of life, the manner in which they live together, their value systems, and their traditions and beliefs.*²

The culture of a society or group is no longer uniquely an accumulation of their works and knowledge, and it is not limited to their cultural heritage but encompasses the demands on their way of life, which include their educational system, their means of diffusion, their cultural skills and their right to information.³

In a UNESCO recommendation for the safekeeping of traditional and popular culture (1989), it was further defined by as

the total of the creations that emanate from a cultural community founded on their traditions, as expressed by a group or individuals and which respond to the expectations of the community, while giving expression to their cultural and social identity; the standards and values that are transmitted orally, whether by imitation or other methods. Their forms include, among others; the language, the literature, the music, the dance, the games, the mythology, the rites, the customs, the handicrafts, the architecture and other arts.

In the Preamble of the aforementioned Recommendation it was affirmed that traditional or popular culture “is part of humanity’s universal heritage and forms a powerful measure of approximation among existing peoples and social groups as an assertion of their cultural identity.”

Cultural diversity refers to “the manifold ways in which cultures or groups and societies find expression. These expressions are transmitted among groups and societies as well as within them.”⁴ Such cultural diversity “is as necessary to humankind as biodiversity is to all living organisms, and constitutes a common patrimony of humanity which should be recognized and consolidated for the benefit of present and future generations.”⁵

In this sense, States have an obligation to protect and promote cultural diversity and to adopt “policies that favor the inclusion and participation of all citizens to ensure, in this way, the cohesion of the society; peace, and the vitality of civil society.”⁶ In this way, “cultural pluralism constitutes a political response to the realities of cultural diversity.”⁷

Cultural identity itself has been conceptualized as the entirety of the cultural references by which a person or a group can be defined, manifested, and wishes to be known; it implies liberties that are inherent to individual dignity in a permanent way, and integrates cultural diversity, both individually and universally, in memory and in plan.⁸ It is “an inter-subjective representation which orients the way people feel, comprehend and act in the world.”⁹

Cultural heritage is an integral part of cultural identity, and must be understood as “everything that forms part of the characteristic identity of a people, and which, if desired, can be shared with other peoples.”¹⁰ Cultural heritage is subdivided into tangible and intangible heritage. The first one relates to “the property, both movable and immovable, which has great importance to the cultural patrimony of the people”;¹¹ while the second includes the

*uses, representations, expressions, knowledge and techniques – together with the instruments, objects, artifacts and the cultural spaces that are inherent to them – that communities, groups and, in some cases, even individuals are recognized as an integral part of the cultural heritage. This is intangible cultural heritage, which is transmitted from generation to generation, and is constantly being recreated by communities and groups in the function of their surroundings, and in their interactions with nature and their history, and infuses them with a sense of identity and continuity, thus promoting respect for cultural diversity and the creativity of humankind.*¹²

Also included are traditions and oral expressions, customs and languages, as well as the performing arts such as music, theatre, festivities and dance; social and ritual customs; knowledge and customs related to nature and the universe, such as traditional medicine and pharmacopoeia; cuisine, the common law, clothing, philosophy, values, code of ethics and all the other special abilities and material aspects related to the culture, such as tools and habitat.¹³

It can be concluded from all that has been said that the right to cultural identity (from here on RCI) basically consists of the right of all ethnic-cultural groups and their members to belong to a determined culture and to be recognized as different; to maintain their characteristic culture and their cultural patrimony, both tangible and intangible; and not be forced to belong to a different culture or to be unwillingly assimilated by it.

Nevertheless, the cultural identity of a group is not static; it possesses a heterogeneous conformation. Its identity flows and has a dynamic process of reconstruction and reevaluation that is produced by continual discussions on both an internal level and through the contact with—and the influence of—other cultures. Within each ethnic-cultural group, there is a confusion of subgroups (ancestors, young people, women, people with disabilities) that continually retake, readapt or reject certain features and cultural traditions of their group, together forming “an integral part of the processes of ethnic reorganization that is made possible through their persistence.”¹⁴ In the same way, when they come into contact with other cultures, cultural groups may adopt certain practices or features of the alien culture, and then incorporate these features in their own identity.¹⁵

In this sense, the RCI also consists of change, adaptation and incorporation of cultural elements from other cultures and peoples, provided that this takes

place with the intelligence of the whole group, willingly, and with absolute freedom. Difficulty or impossibility of access to these mechanisms could lead the group into stagnation and exclusion, placing their physical and cultural survival in danger. It is because of this that some authors hold that the strengthening of cultural identity doesn't have as its only objective the conservation of cultures, but impels them to display their potentialities in both the present and the future, permitting the exercise of their cultural rights, the establishment of fairer channels for dialogue and participation in decision-making, and preventing a process of dominating interaction among different cultures.¹⁶

It should be obvious, that due to its own nature, RCI is an autonomous right, unique in its own way (at least conceptually), but at the same time it is a "synthesizer right", encompassing (and permeating) all the individual as well as collective rights, and requires the fulfillment and effective exercise of all human rights; and, reciprocally, their fulfillment is dependent upon the enforcement of many other internationally protected human rights.¹⁷

As much as the subject matter is rights, the Colombian Constitutional Court (from here on CCC) acknowledged that the RCI "is projected in two dimensions[:] one collective and the other individual", but, according to the Court, the subject matter is endowed with an appropriate singularity. This is not to say that "under the guarantees of individual manifestations such identity should not be safeguarded, since individual protection could be necessary for the materialization of the collective rights of indigenous people to which the individual belongs." "As has been said" (adds the Court) "this embraces two types of protection for cultural identity[,] one is direct, as it pertains to the protection of the community on the subject matter of rights; the other is indirect, and protects the individual in order to safeguard the identity of the community (Decision T-778/05)."¹⁸

The case of the Inter-American Court of Human Rights is distinct, as even though it interpreted the social dimensions of certain human rights individually recognized at the American Convention on Human Rights (from here forward the IACHR),¹⁹ it declared that damages can be solely against "members of the community" and not against the community as a whole. This derives from the provision stated in the IACHR article 1.2),²⁰ "which clarifies in this international instrument the management of a connotation for the concept of 'person': human being, the individual, the holder of rights and freedoms".²¹

I consider, nevertheless, that there should be a reformulation in the interpretation of the aforementioned article in order to accept the community as holder of the right. Finally, the reason for the adoption of this article was to impede the exclusion of any individual from the protection of the IACHR

through exposing the character of the person; a situation which has no connection to the communal conception of the rights held by ethnic-cultural groups, and which sustains and moderates individual rights. Moreover, we should consider that the limited conception of IACHR article 1.2 presents a range of practical difficulties in litigation on the rights of these ethnic-cultural groups before the bodies of the Inter-American System. For example, it is necessary to individualize and register every member of the community before a case is submitted (a procedure that falls upon the victims themselves or their representatives); a catalogue that can never be complete, due to marriages, deaths, births, displacements, and others; a list which is produced each day in the heart of the community, all of which makes the individualization difficult, costly and, in the long run, useless. Also, individualization of victims can go against their own culture, as, for example, ancestors and future generations are not counted as “members”, although included by some groups as part of their communities. A further problem arises as only those listed members are considered as victims of violations of individual rights,²² excluding those who, for whatever reason, do not appear on the list. Finally, individualization is also useless because of the kind of reparations that can be obtained. For instance, the indigenous community Yakye Axa was required to individualize their members, so later they could obtain recognition of their right to communal property from the International Court of Human Rights, which would have been perfectly feasible without individualization. Summing up, individualization of the members of a community is not useful or adequate, neither is it just.

Now then, the principal guarantee of RCI, as of any other human right, is the State in which we encounter the respective ethnic-cultural group. However, as cultural diversity “constitutes the common patrimony of humanity”,²³ the international community also has responsibility for its protection. This was clearly evident, for example, with the adoption of the Hague Convention for the Protection of Cultural Property in the Case of Armed Conflict (1954) and its two Protocols, and by the Convention for the Protection of World Cultural and Natural Patrimony (1972). In the same way, there is a growing concern regarding third person aliens and of state authorities found to be in control or possession of property that is important to the identity of a culture. In that respect and within the framework of the 31st General Conference of UNESCO, held in Paris in 2001, the Director General suggested the adoption of a declaration to point out that “the authorities which are effectively in control of a territory, whether recognized or not by the other States of the international community, as well as the people and institutions that are in either temporary or long-term control of important cultural sites and movable cultural property, are apparently responsible for their protection.”

For the purpose of the present work, we concentrate on the obligations of

the State, whose noncompliance, by action or omission, imparts international responsibility. Because of this it is necessary to remember that:

[this is] a basic principle of the law of international responsibility of the State, sheltered by the International Law on Human Rights, that this responsibility can be generated by the acts or omissions of whichever organ, power or agency of the state, regardless of its hierarchy, that violates internationally recognized rights. Moreover, [...] any unlawful act which violates human rights and which is not initially directly imputable to a State, for example, if the author of the transgression is a private citizen, or cannot be identified, this can impart international responsibility to the State, not for the deed itself, but for the lack of due diligence to prevent the violation.²⁴

However, the State cannot be compelled to protect and promote the cultural identity of every group encountered within its territories. This right is uniquely applied to ethnic-cultural groups and excludes immigrants, for example. Kymlicka²⁵ offers a reason for this separation, when he supposes that, although national minorities and indigenous peoples may wish to continue being distinct from the main culture in which they live, they have not infrequently been incorporated into other societies against their will, and therefore demand diverse forms of autonomy as well as self-government, to ensure their survival as a group. Besides, immigrants, apart from the fact that they are generally dispersed, have left their respective cultures of their own free will,²⁶ and, therefore, have voluntarily renounced part of their culture. “Even though they sometimes work to obtain greater recognition of their ethnic identity, their objective is not to become a separate, self-governing nation, parallel to the society of which they form a part, but to modify the institutions and laws of this society, so that it becomes more permeable to cultural differences.”²⁷ Briefly, while the right to cultural identity and, consequently, the right to be different do apply to the national minority group, there should also be a search for fairer integration terms on the part of the main culture, in a beneficial manner, to permit the minority group to maintain certain characteristics of their own cultural identity.

In summation, RIC is the right of indigenous peoples and national minorities, as well as their members, to conserve, adapt and even voluntarily change their own culture; it includes all internationally recognized human rights, which it both depends upon and to which it gives sense, and it deserves the protection of individuals, the international community, and above all, the State.

Inter-American System of Human Rights

As previously mentioned, the principal focus of this article is the protection of the RCI since it forms part of the Inter-American System of Human Rights,

integrated by the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights, organs principally entrusted with the application and interpretation of the ACHR and the American Declaration of Rights and Duties of Man (ADRDM).

One of the considerations that characterize and at the same time reveal the importance of IASHR is the capability to receive petitions and denunciations on human rights violations from individuals or groups. As we can see, many indigenous communities have gained protection through the organs of the System, and recognition of the violations committed against them. However, the System is still limited because it doesn't have an instrument linked specifically to the dedication of the differentiated rights of ethnic-cultural groups. The rights that have a direct reference to culture appear in Article XIII of the ADRDM and in Article 14 of the Additional Protocol to the American Convention on Human Rights regarding Economic, Social and Cultural Rights, the "San Salvador Protocol" (hereafter SSP).

These two instruments present some difficulties in international lawsuits on cultural rights. In the first place, the Inter-American Court of Human Rights lacks the authority to directly apply the ADRDM within its contradictory competence.²⁸ Secondly, the SSP does not grant jurisdiction to either the Inter-American Court of Human Rights or the IACHR to recognize contentious cases involving the violation of economic, social and cultural rights that are so dedicated, excepting the right to education and the right to syndical liberty.²⁹ For these reasons, we should restrict the dispute to the IACHR decisions. In the following, some ideas will be outlined on how to use this treaty to protect the RCI.

Interpretation of the IACHR

The rules of interpretation of the IACHR are contained in its own article 29, which states:

no provision of this Convention may be interpreted in a sense to:

- a. permit any party of the State, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized by this Convention, or to restrict them to a greater extent than is herein provided for;*
- b. limit the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of any other convention to which one of the said states is a party;*
- c. exclude other rights or guarantees that are inherent to human beings or that are derived from a representative democratic form of government; and*
- d. exclude or limit the effect that the American Declaration of the Rights and Duties of Man may have, as well as other international acts of the same nature.*

The interpretation principles contained in this article, as well as those established by the Vienna Convention on the Law of Treaties (1969), allow the IACHR bodies to make an evolutionary interpretation of international instruments, since “treaties on human rights are living instruments, the interpretation of which should be part of the evolution of time and actual life conditions.”³⁰

In this respect, the Inter-American Court of Human Rights has stated that:

*the corpus juris of the International Human Rights Law is formed by aggregating international instruments with a variety of legal contents and effects (treaties, conventions, resolutions and declarations). Its dynamic evolution has had a positive impact on International Law, in the sense that it affirms and develops the expediency of the latter to regulate the relationships among States and human beings under their respective jurisdictions. Therefore, this Court must adopt a criterion that is adequate for consideration of the questions under analysis and that marks the evolution of the fundamental rights of human beings in contemporary International Law.*³¹

We must also take into account that the formulation and scope of rights should be widely interpreted, while limitations to them require a restrictive interpretation.

Paragraph (b) of IACHR article 29 has particularly literal importance, which has been interpreted by the Inter-American Court of Human Rights in the sense that:

*if both the American Convention and another international treaty are applicable to the same situation, the rule that most favors the human being should prevail. If the Convention itself states that its regulations have no restrictive effect over other international instruments, least of all should such restrictions—present in those other instruments but not in the Convention—limit the exercise of the rights and liberties that the Convention recognizes.*³²

Due to these previous considerations, the Court considered it useful and appropriate to utilize other international treaties distinct from ACHR to interpret its provisions at the present time, considering the evolution that had occurred in the international law on human rights.³³

Similarly, interpretation of regulations contained in ACHR should also rely on the contributions offered by the internal jurisprudence of member States of IASHR, especially in cases concerning the rights of ethnic-cultural groups, still in gestation in the international arena, but with a broader unfolding in internal legislations and jurisprudence.

Finally, the doctrines of the most competent authors of the diverse nations also constitute, according to article 38 of the International Court of Justice Statute, auxiliary measures for international law, and a source for the interpretation of the ACHR.

The Inter-American Court of Human Rights and IACHR cannot omit to incorporate these advances, since only in this way will full sense be given to the rights they guard, and the protective rules of human rights reach their full effect. In the words of Medina:³⁴

the national and international contributions to human rights are divulged in a melting pot, where they produce a synergy with a result in which human rights reappear, enlarged and more complete. It is here, in this melting pot, that the interpreters of the rules of human rights must come to fulfill their labor.

On the basis of what has been said so far, let us analyze the ACHR to construct through its provisions the protections of the RCI for ethnic-cultural groups.

The RCI in the American Convention on Human Rights

The RCI is not expressly declared by the ACHR, but requires of its construction a departure from the rights to which this body of standards is declared. The first intention of such a construction of the RCI is found in the Partially Dissident Vote of Judge Abreu Burelli in the Case of the Indigenous Community of the Yakye Axa vs. Paraguay:

With respect to the American Convention, the right to cultural identity, even if not expressly established, is found to be protected in the treaty due to the evolutionary interpretation of the contents of the rights codified in its articles 1.1 [an obligation to respect rights], 5 [the right to personal integrity], 11 [protection of reputation and dignity], 12 [freedom of conscience and religion], 13 [liberty of thought and expression], 15 [the right to assembly], 16 [freedom of association], 17 [protection of the family], 18 [the right to have a name], 21 [the right to private property], 23 [political rights] and 24 [equality before the Law] in the aforementioned treaty, depending on the facts of the specific case. That said, the right to cultural identity was not necessarily affected every time there was an injury to reputation.

To this list, let me add Articles 8 [legal guarantees] and 14 [the right of rectification or reply] from this same instrument.

The right to personal integrity

*There are times when nothing can be done, but I still attend my patients out of consideration, because they weep with me to be cured when they have no money, and when I see them so sad, I treat them with my whole heart.*³⁵

The RCI is supported by the protection offered by article 5 of the ACHR (right to personal integrity), according to which personal integrity includes physical, psychological and moral integrity.

Regarding physical integrity, article 5 of the ACHR, together with article 10 (the right to health care) of the SSP relate to the RCI as they both embrace the right of ethnic-cultural groups and their members to preserve, use and protect their traditional medicines and healing practices, and demand that public health services be appropriate from a cultural point of view, that is, that treatments alien to their culture should not be given without their free and informed consent, and preventive care should take into account their traditional healing practices and medicines.

With respect to psychological and moral integrity, we convert and refer to the ICHR decision in the case of the *Moiwana Community vs. Suriname*, relating to the massacre of 39 of their members during a military operation in 1986. Investigations carried out by State justice did not produce the results expected for the crimes, which remain unpunished. According to their Community customs, if one of their members has been offended, their relatives are obligated to search for justice for the committed offense. If the offended party has died, it is believed that his/her spirit will not be able to rest until justice has been done.³⁶ In addition, due to the facts of this case, the *Moiwana Community* were not able to appropriately honor their dead, which is considered a “profound moral transgression”, and this would offend their ancestors and provoke “illnesses of a spiritual origin”.³⁷

The ICHR took these elements into account, and considered that the right to personal integrity of the members of the Community had been violated, due to the “shame and indignation of having been abandoned by the Suriname criminal justice system and the anger they must feel due to their relatives having died so unjustly in the attack”.³⁸

Another exemplary result is in the case of the *Guarani-Kiowah*, a village with 26,000-members in the State of *Matto Grosso do Sul* in Brazil, in which a continuous phenomenon of suicides occurred, and in a proportion 30 times higher than the national average, caused by the deep depression suffered by the natives after they had been deprived of their traditional territories.³⁹

As we can observe, for many indigenous communities the rupturing of bonds with their ancestors, the fragmentation of their relationship with the land and its natural resources, and the forced desertion of their cultural practices, produces severe suffering which, undoubtedly, has affected their rights of psychiatric and moral integrity.

Freedom of conscience and religion

I offer five male beings [...] we must know. The first is God, Three in One, who are four, whom one calls the Creator of the Universe. Is this, by chance, the same that we have

named Pachacámac and Viracocha? [...] The second is the one known as “Adam”, the Father of all other men. The third is called “Jesus the Christ” (on whom we heap all our sins) [...] the fourth is called the ‘Pope’. The fifth is Carlos, and he is the prince and lord “of the entire world”. And then, what authorization can Carlos require from the Pope, who is no greater lord than he?⁴⁰

The quoted paragraph cited evidence of the contradictions that Atahualpa discovered in the reasoning of an opinion imposed upon him by the representative of a religion different from his own. From that time until today, a process of destruction of the religions of the indigenous people has unfolded and, consequently, of their cultural identity as well.

A symbolic form of imposition of power that was very useful for the Europeans during their invasion of the American continent was the destruction of the temples and sacred places of the indigenous peoples, followed by the erection of great churches and cathedrals in the same place. The Europeans intended to destroy the symbols of the indigenous communities, along with their self-esteem and their culture, and in this way convert them into concentrations of slave-workers in the service of their torturers.

The negation/elimination of religion disrupts the perceptions of origin that each person has about themselves, including their conception of the world. It weakens bonds among members of the group, dilutes the influence of traditional authorities, and facilitates the unlawful appropriation of sacred objects or places.

In a case submitted before the CCC⁴¹ it was denounced that the Yanacona Indigenous Community was preventing certain members of the Iglesia Pentecostal Unida de Colombia (Colombian United Pentecostal Church - IPUC) from the performance of religious rites within the Community. The plaintiffs alleged a violation of their right to freedom of conscience and religion. The majority of the Community members were members of the cult of Catholicism, and only a few had embraced the Evangelic cult proclaimed by the IPUC. The latter had begun to ignore the traditional Community rules and authorities. When making a decision, the CCC pointed out that:

The jurisprudence of the Court has recognized the right of ethnic and cultural integrity, in the sense that it is also fundamental to the right of cultural survival, because of which, if the members of the indigenous community who profess an evangelical religion ignore the authority of the town’s Council and refuse to continue with the production and development practices established by the community, they go against the way of life that the indigenous authority is trying to preserve; each time they extend their religious beliefs to other fields of the social life there is an evident conflict and a rupture of the pacific relationships of the members being defended [...].

It is in this dimension, that the exercise of the autonomy recognized by

the Constitution makes indigenous authorities take preventative and corrective measures – the expected consequence - when confronting the aforementioned religious incident, so that it does not acquire the transcendence to disarrange the values or the essence of the Yanacona culture. [...] Catholicism has been assimilated and accepted by the majority of the native defense, because it does not oppose their rules, customs or the ways of life they have developed since the year 1700. Neither has it constituted a factor of ignorance by the traditional authorities. That was the low extreme against the case of the propagation of the evangelical protestant religion.

The veneration or admiration towards the idea of God is an assemblage of individual conviction, and cannot violate the consensual social order that the community has secularly established. Including, together with the mobility and vitality enjoyed by the development of any social group, is a valid estimate for a possible future where the way of thinking of the IPUC could be recognized by the Yanacona majority, who will bend to the culture and the identity of the Yanacona community and not vice versa, as it was claimed in this case. In other words, the cultural values, uses, customs and traditions of this people, in the measure that they are not fixed or immutable, can be filtered, affected, and transformed by both endogenous and exogenous evolutionary forces, signaling that, collectively, it is possible to have a spirit open to all possibilities, when preserving the dynamic identity which constitutes the cornerstone of the indigenous community.⁴²

As we can observe in this extensive quotation, two facets of the RCI have been presented. On one side, we recognize that the Community and its members have the right to preserve their own culture, form of organization and religion (threatened by the evangelical religious practices), and on the other side, we cannot deny that evangelicalism could be accepted and assimilated by the Community, if this is their proposal of identity and not the reverse, as happened with Catholicism, which was adapted and incorporated by the Community as its own identity.⁴³

Therefore, the protection that is offered by article 12 of the ACHR (freedom of conscience and religion) to the RCI, is rooted in the right of ethnic-cultural groups and their members to preserve, express, divulge, develop, teach and exchange their practices, ceremonies, traditions and spiritual customs, both in public as well as in private. It also covers the right that they not be induced or forcefully converted and that no beliefs should be imposed on them against their will. This article, interpreted together with articles 21 (the right to private property) and 22 (the right of circulation and residence) of the same Convention, grants them the right to maintain and accede to their religious, sacred and cultural places, and to use, keep watch over and to recuperate their objects of worship. Finally, in conjunction with article 24 (equality before the law) of the ACHR

they are entitled to demand from the State the same possibilities and benefits that are received by the religion of the majority; for example, recognition of religious holidays, and permission for their members to be absent to take part in religious ceremonies when employed by public or private organizations, or when interned in institutions of health or in penal centers.

Freedom of expression and the right to reparations

One of the little paradoxes of history is that no multi-lingual empire of the old world ever dared to be so despotic as to impose a single language on its united population, something that is done by the liberal republic 'which defends the principle that all men are created equal'.⁴⁴

According to article 13 of the ACHR, freedom of thought and expression includes the right to “research, receive and divulge information and ideas of all genius, without regard to frontiers, whether by speech, writing, or in printed or artistic form, or by any other proceeding”. This right we can interpret as the faculty to manifest one’s own culture and identity.

One of the principal forms of the expression of culture is language, so much so that our liberal States for many years now have adopted the motto: one solitary nation, one single language. That axiom signified a slow loss, by degrees, of indigenous languages and the consequent undermining of their cultural identities. In the same way, “the choice of one language as the national and official language necessarily placed those whose mother tongue had not been selected at a disadvantage, while it conferred a privilege on those who spoke the chosen idiom”.⁴⁵

The ICHR had the opportunity to make a pronouncement on the protections of the right that freedom of expression offered to speak one’s mother tongue in the Case of López Álvarez vs. Honduras. In this case, the victim was an indigenous garífuna in the custody of a Honduran penitentiary center. The authorities of that penitentiary had forbidden all the imprisoned garífunas from conversing in their mother tongue “for security reasons”. The ICHR declared that the State had violated the right to freedom of expression and the right of equality to Mr. Lopez, and that such prohibition had “affect[ed] his personal dignity as member of the [garífuna] community”, seeing that the “mother tongue represents an element of identity”.⁴⁶ In the same manner, the Court considered that “language is one of the most important elements of identity to a people, precisely because it guarantees the expression, dissemination and transmission of their culture”.⁴⁷

But freedom of expression is not reduced only to the spoken word; article 13 of the ACHR mentions “artistic forms” of expression and leaves this right

open “to any proceeding” by which a person expresses themselves. This is of vital importance to indigenous people, because if “occidental man thinks in words, indigenous men think in symbols, acts and rites”.⁴⁸ Therefore, all forms by which a culture expresses its identity are valid and merit international protection.

On the other hand, the protection the ACHR offers in article 14 (the right to rectification) is rooted in the right of ethnic-cultural groups to correct or solicit correction of any imprecise or incorrect information about their culture and history that appears in any educational text, electronic page, private or public document, periodical publication, cinematic production, radio or television broadcast, inclusive of official history records.

Political rights

*We know the laws, but, for a good solution, we had better consult with the indigenous people.*⁴⁹

According to article 23 of the ACHR, political rights are divided into three extensive groups: (a) participation in the management of public affairs, (b) the right to choose and be chosen within free and democratic conditions, and (c) the right to have access, in conditions of equality, to the public offices of the country.

The guarantee of such rights does not exclusively depend on the facility of the rules by which they are formally recognized, but requires the State to adopt the necessary measures that attain their actual force and exercise, and which take into account the special features of each population group.

In this sense, States should take into account that indigenous peoples need a great degree of self-determination and control over their political destiny for the preservation of their culture. The right to choose their representatives and to participate in every type of decision that affects them (or could affect them) signifies a means of cultural survival to indigenous peoples, and requires measures by the state necessary to guarantee that such participation is significant and effective. In this respect, the Committee for the Elimination of Racial Discrimination (CERD) of the U.N. pointed out that States should take the necessary measures to enable members of indigenous populations to be elected by their comitias,⁵⁰ since indigenous populations have very low rates of political representation⁵¹ and do not have equality of possibilities to participate at every level of power.⁵² Therefore, the CERD recommended the creation of distinct mechanisms to coordinate and evaluate the diverse policies of protection for the rights of the indigenous communities, to permit their actual and adequate participation in the public life of the nation.⁵³

The absence of political representation has had a direct effect on decisions at the state level regarding the use and administration of public resources. Actually,

one of the main reasons indigenous peoples suffer from marginality and poverty is precisely because of the violation of their right to self-determination and participation at local, regional and national levels.⁵⁴

The direct participation of indigenous peoples in the management of public affairs should be done from their own institutions and in accordance with their values, uses, customs and ways of organization. In a case presented to the ICHR, the indigenous organization of the Yatama on the Nicaraguan Atlantic Coast presented a violation claim to the ACHR for, among other reasons, a legal restriction stipulating that participation in elections could only be done through political parties. The international Tribunal considered that the concept of a political party was alien to the uses, customs and traditions of the indigenous organizations of that country, and implied “an impediment to the full exercise of the right to be elected” (par. 218).⁵⁵ In addition, the ICHR disputed the restriction that political participation could only be fulfilled by parties, and not through groups with a different organization, among which are those of indigenous peoples. This restriction is contrary to the right to equality as well as political rights, “as they limit, more than is strictly necessary, the full scope of political rights and become an impediment for the effective participation of citizens in the management of public affairs” (par. 220).⁵⁶

In the cited case, the issue of electoral districts was also discussed. Nicaraguan Electoral Law directed that every political group must present candidates at least in 80% of circumscribed municipal electoral districts. In that way, the Yatama were forced to present candidates in municipalities where an indigenous population didn't exist, and with which it had “no connection or interest” (par. 222).⁵⁷ The ICHR considered this a disproportionate requisite, as it was “unjustly limiting political participation”, and that it did not take into account that the indigenous could not rely on support for presenting candidates in certain municipalities or would have no interest in seeking support. (par. 223).⁵⁸

To avoid the problem just mentioned, (and several other similar problems), it is thought that States should draw their electoral districts in such a way that ethnic-cultural minorities would constitute a majority within their territories. Several indigenous populations are not only divided among national borders, but also by different provinces, departments or municipalities within the same State and, in each such division, they are a minority.

Some effort has been made to avoid this. The U.S. has drawn districts (a little inappropriately in certain cases) with the sole purpose of creating majorities of Latin or African descendents. The U.S. Supreme Court accepted these districts “in consideration of the political discrimination historically suffered by Blacks and Mexican-Americans [...] and of the residual effects of such discrimination on those groups”.⁵⁹

Other countries have reserved political seats to assure representation and

participation in their parliaments for specific minority groups. For example, in Jordan, for Christians and Circassian populations; in Pakistan, for non-Muslim minorities; in New Zealand, for the Maoris; in Colombia, for the indigenous as well as for African descendants; in Slovenia, for Hungarians and Italians, among others.

Moreover, there must be guaranteed representation of ethnic-cultural groups in every social organization that has the power to interpret or modify the extent of their rights. In this sense, the CERD demonstrated concern for the insufficient representation of the indigenous and other minorities within the police, the judicial system and other public institutions of Argentina.⁶⁰

Finally, the political participation of indigenous peoples and their members is not limited to representation (through designation or election) in the social organizations of the State. It is clear that such representation (while necessary) is, to a greater or lesser extent, insufficient for the protection of their interests and rights. Because of this, indigenous peoples also have the right to obtain previous free and informed consent on every matter that concerns them; only in this way are they permitted “to speak for themselves [,] to take part in decision-making processes [...] and to [make] useful contributions to the country in which they live”.⁶¹

The CERD connected the right to consultation with that of political participation,⁶² and urged States to “guarantee that members of indigenous communities enjoy equal rights regarding their effective participation in public life and that no decision directly related to their rights and interests should be taken without their informed consent”.⁶³ Likewise, the CCC pointed out that the right to consultation constitutes “the measure through which [...] their physical and cultural integrity shall be protected”.⁶⁴

Consequently, the RCI of ethnic-cultural groups and their members, as seen through article 23 (political rights) of the ACHR, is rooted in the recognition of their right to take part freely at every level of decision-making within public institutions, regarding policies and programs that concern them; to be consulted in each case of new legislative, or administrative, or any other kind of measure that may affect them; to decide on their own priorities for development, as well as on any question related to their internal affairs; to maintain and develop their own political and economic systems; and maintain and develop their own decision-making institutions. Together with article 13 (freedom of thought and expression) of the ACHR, this protects their right to receive clear, true and timely information on every aspect of their concern, permitting their deliberation, both individually and collectively.

The right to property

*My people venerate each nook of the Earth, each brilliant pine needle, each sandy beach, each cloud of mist in the jungle shadows, each clearing in the forest, each insect that buzzes; the thoughts and customs of my people, all of these things are sacred.*⁶⁵

The earth and the natural resources that exist on the earth are the essence of the cultural identity of indigenous peoples and their members, to the point that a Special Report on indigenous communities by the United Nations indicated that “The very concept of “indigenous” embraces the notion of a distinct and separate culture and way of life, based upon ancient knowledge and traditions which are fundamentally linked to a specific territory.”⁶⁶ The Report added that:

*the protection of cultural and intellectual property is fundamentally linked to the realization of the territorial rights and self-determination of indigenous peoples. The traditional knowledge, as much as the values, autonomous or self-governing, social organization, the management of ecosystems, the maintenance of harmony among the people and respect for the land is based upon the arts, songs, the poetry and literature that each generation of indigenous children must learn and renew. These rich and varied expressions of the specific identity of each indigenous population provide the necessary information to maintain, develop and, if necessary, restore indigenous societies in all of their aspects.*⁶⁷

Likewise, in the following account, an official Report indicated that the gradual deterioration of indigenous societies could be attributed to the lack of recognition for their relationship with the lands, air, water, the coastal seas, frost, flora, fauna and the other natural resources linked to their culture.⁶⁸

Many other specialists of the distinct supranational organisms (both universal and regional), as well as diverse treatise authors and experts have extensively analyzed the implications that the land has to indigenous peoples. Therefore (and due to the brevity of the present work), this theme is not profoundly dealt with here. However, due to its relevance, some Inter-American System decisions should be reviewed.

The ICHR had the possibility to analyze the cases of the communities *Awas Tingni vs. Nicaragua*, *Yakye Axa vs. Paraguay* and *Moiwana vs. Suriname*, in which it was recognized that the close relationship the indigenous people maintain with the land and its natural resources, and which qualified as the fundamental base of their culture, spiritual life, integrity and economic survival, and was necessary to preserve their cultural heritage and transmit it to future generations. This conclusion was reached soon after the evolutionary interpretation of article 21 (the right to private property) of the ACHR. The Court, in the cases that have been cited, considered that this article did not only refer to the civil conception of property, but that it also could (and must) be interpreted in such a way that it protected the communal property of the land and its natural resources. Moreover, in the case of the *Yakye Axa*, the ICHR interpreted that article 21 of the ACHR also safeguarded “embodied elements” that arise from the relationship of the

indigenous with their territories, as well as every piece of furniture or object, material or immaterial, susceptible to have value (not solely economical value). Within these categories basically enter every tangible or intangible element of cultural patrimony of the indigenous peoples.

In this way, the protection offered by article 21 of the ACHR to the right of cultural identity could be interpreted as embracing the rights to both use and enjoyment of property, material as well as immaterial, and implies the right to maintain, use, control, recover and protect their cultural patrimony, both material and immaterial, as well as every type of product or fruit of their cultural and intellectual activity, their own procedures, technologies and instruments, as well as the places where their culture is expressed and developed.

The protection offered by ACHR article 21 is seen to reinforce that of article 12 (freedom of conscience and religion), if the cited property had religious or spiritual significance; and by articles 5 (the right to personal integrity) of the ACHR and article 10 (the right to health care) of the SSP, if they were used in addition to the traditional medicine or healing practices.

Finally, if article 11 (the protection of honor and dignity) of the ACHR, which confers the right to suffer no arbitrary interference in private life, in the family and in the domicile, in conjunction with article 21 of the same instrument, it can be concluded that indigenous peoples would have the right to prevent in their territories the presence of third parties alien to their communities, but all the more if they change or affect the indigenous culture, identity, way of life or resources. This interpretation is summarized in articles 4 (the right to life) and 5 (the right to personal integrity) of the ACHR and article 10 (the right to health care) of the SSP, if the presence of strangers puts at risk the health and life of the members of the communities.⁶⁹

Judicial guarantees

Our production is called arts and crafts, yours as industry.

Our music is known as folklore, yours as art.

Our standards are called customs, yours as law.⁷⁰

Article 8 (judicial guarantees) of the ACHR sets the guidelines for what is called “due legal process”, which consists of the right of every person to be heard, with all due guarantees and within a reasonable period of time, by a competent, independent and impartial judge or tribunal, previously established by Law, for the substantiation of any accusation made against any person or to determine the persons rights and obligations.

Until now, the ICHR has interpreted the cited article, in which reference is made to indigenous peoples, signaling that “it is essential that States grant an

effective protection, one that takes into account their particular features, while considering their economic and social characteristics, as well as their special situation of vulnerability, their customary law, values, practices and customs”.⁷¹ However, for the purposes of the present study, we will interpret article 8 of the ACHR in such a way that it protects the indigenous RCI through the recognition of the customary indigenous law.

This law is an integral part of the culture of these people and a key element of their ethnic identity, to the point that authors such as Sierra⁷² come to and affirm that: “a community which has lost its law has lost an important part of its identity”.

The indigenous law embraces systems of regulations, procedures and authorities that regulate the social life of their communities, and that permit them to resolve their conflicts in accordance with their own world vision, values, necessities and interests.⁷³ It takes into consideration, in addition, that indigenous cultural practices (such as the system of cognition, religious conceptions and the link to the land) are present when it is time for justice to be administered.

The lack of attention of the indigenous peoples to their customary laws and the submission of their cases to the justice of the State could lead to the violation of several judicial guarantees established through article 8 of the ACHR. Also, for example, this article includes the right to be heard by a competent court. Competence refers to the special circumference, secular, material and personal, as defined previously by the Law, within which a judge can exercise his faculties. The customary law of various indigenous peoples previously defined which authorities are to be charged with resolving the conflicts that are presented, on whatever subject, among members of each community. To ignore this would be to submit indigenous people to a court that is different from their “natural arbitrator”.

Finally, the lawsuit against an indigenous person who has already been judged by the indigenous justice system would constitute a violation of the right not to be judged twice for the same crime. In fact, a case in Ecuador in which three members of the indigenous La Cocha Community who had assassinated another member of the same community were judged by an indigenous council. This council found the three accused men guilty and imposed punishment by nettle upon them,⁷⁴ banishment from the community for two years, an indemnification of six thousand state dollars as well as requiring them to walk on stones. Some time later, the Public Ministry learned of the murder that had been committed by the three indigenous men and, ignoring the fact that the three men had been judged and punished previously, presented an accusation before a penal judge. However, the State judge considered that the penal process had no merit, since the maxim of [non bis in idem] not to be tried for the same crime twice principle would be violated, and decreed the nullification of the entire criminal process against the men.⁷⁵

Equality before the Law

*I no longer know if this is discrimination, because I've suffered it for as long as I can remember. Surely even in the belly of my mother I was discriminated against.*⁷⁶

The right to equality, according to the criteria of the ICHR,

*is deduced directly from the united yet personified nature of mankind and is inseparably linked to the essential dignity of the individual, in front of which it is incompatible in every situation that a given group has the right to privileged treatment because of supposed superiority. It is equally incompatible to the notion that a group may be considered inferior or be treated with hostility or in any way that jeopardizes the enjoyment of rights which are accorded to others and recognized in one way or the other as liable to punishment. It is not admissible to create differences of treatment among human beings that do not correspond with their unique identical nature.*⁷⁷

In the same way, in its recent 18th Advisory Opinion, the Court considered that “the principle of equality before the law, equal protection before the law and non-discrimination belong to the *jus cogens*, because the whole legal structure of national and international public order rests on this, and this is a fundamental principle that permeates all laws”.⁷⁸

On the part of the IACHR it was found that

*Within international law generally, and inter-American law specifically, a special protection for indigenous peoples may be required if they are to exercise their rights fully and equitably with the rest of the population. Additionally, it may be necessary to establish special measures and protections for indigenous peoples to guarantee their physical and cultural survival, a right protected in various international instruments and conventions.*⁷⁹

Such “protections” or “special measures” are intended to overcome the specific obstacles and the conditions that logically hinder the effective achievement of equality for ethnic-cultural groups in a way that ensures their physical and cultural survival.⁸⁰ For this reason, “legislation alone cannot ensure human rights”, since, even if there is a favorable legal framework, it is “not enough to acknowledge protection of their rights, if not accompanied by the policies and actions of the State”.⁸¹

Regarding the RCI, article 24 of the ACHR obligates all States to offer the same possibilities for preserving each of their own cultures to every existing cultural group within its borders. As already discussed, the choice of an official

language entails disadvantages to those who do not speak the chosen language; the same disadvantages apply to other aspects, such as the law, wearing apparel, religion, the model of development, etc. The majority culture is what is reflected in the native country symbols, national holidays, public institutions and methods of communication. The rest of the cultures are obscured.

It must be acknowledged that there have been advances in recent years as at least now inter-cultural relationships are subjects of discussion, but such relationships are still asymmetric, and it isn't enough to recognize the existence of a different culture if it is a false recognition and doesn't permit the development of conditions of equality.

Other rights

Briefly, the RCI of ethnic-cultural groups and their members can also find protection in articles 17 (the right to a family) and 18 (the right to a name) of the ACHR.

The protection of article 17 (the right to a family) of the ACHR is based on the right of these groups and their members to preserve their own forms of family organization and kinship; and not to be the object of arbitrary influences on the cultural life of their family and community; and to demand that States carry out "special programs of family formation to contribute towards the creation of a stable and positive environment in which children [whether indigenous or not] can perceive and develop the values of understanding, solidarity, respect and responsibility".⁸²

For its part, the protection of article 18 of the Convention (the right to a name) includes the right to give communities, places and persons names in their own language, and to preserve them. The attribution or the unwanted exchanging of traditional names for others that belong to a different culture "constitutes, at least, acts of imposition and cultural aggression".⁸³

Final thoughts

I am aware that the catalogue of human rights secluded in the ACHR is not sufficient to accommodate all the transgressions to indigenous peoples and national minorities; but realistically, I believe that we have not yet linked a treaty within the circumference of the Americas to justly develop these rights. The Project of the American Declaration on the Rights of Indigenous Peoples, as well as the similar document of the United Nations, are yet under discussion, and it looks as if it will be thought about for a long time. Moreover, even if - from an optimistic point of view- cited Declarations were passed promptly, they would be a mere enunciation (certainly very valid, although insufficient)

of rights, still far from constituting a binding treaty or agreement. In summation, the 169th WHO Covenant goes on being the only binding instrument linked to indigenous peoples. A similar situation is presented with the rights of national minorities and their members, solely recognized in Declarations (with the exception of article 27 of the ICCPR – the International Covenant on Civil and Political Rights).

With this panorama, we must seek alternative ways at an international level to guard the validity of the rights of ethnic-cultural groups. The way analyzed in this work is, in my judgment, the closest we have in our Americas, as well as the one to so far yield the best results (as far as litigious cases are concerned), both in the juridical discussions as well as in the reparations that have been ordered. Nevertheless, nothing provides the necessary guarantees that the organs of the System will go on “stretching” the ACHR and the rest of the American treaties (or are disposed to), in order to cover every dimension of the RCI, and so we can’t really consider this a solid and finished process. We should therefore go on constructing differentiated rights according to each group since each of the national legislations utilize, as far as possible, the international human rights organisms, and demand their universal implementation. The right to a cultural identity will not be fully recognized until this process is concluded.

NOTES

1. C. Lévi-Strauss, «Raza e historia» in *Raza y cultura*, ERCIones Cátedra, Madrid, [1952], 2000, p. 96. http://64.233.187.104/search?q=cache:GrEPcSpoH4EJ:www.findarticles.com/p/articles/mi_m1310/is_2001_Dec/ai_82066713+Levi-Strauss+how+civilization+benefit&hl=en&ct=clnk&cd=1
2. Preamble to UNESCO’s Universal Declaration on Cultural Diversity (2001).
3. UNESCO, Recommendation concerning mass participation and contribution to cultural life, in Janusz Symonides, “Derechos culturales: una categoría descuidada de derechos humanos”, *Revista Internacional de Ciencias Sociales*, n. 158, December, 1998, available at <<http://www.unesco.org/issj/rics158/titlepage158spa.html>>, access on August 12, 2006.
4. UNESCO, Convention on the Protection and Promotion of Diversity of Cultural Expression, Art. 4.1, 2005.
5. UNESCO, Universal Declaration of UNESCO on Cultural Diversity, 2001, Art. 1.
6. *Ibid.*, Art. 2.

7. Ibid., Art. 2

8. Draft Declaration on Cultural Rights, 1998, Art. 1.

9. Villoro quoted by A. Donoso Romo, «Comunicación, identidad y participación social en la educación intercultural bilingüe», in *Revista Yachaykuna*, Instituto Científico de Culturas Indígenas, 2004, No. 5, Quito, p. 6-38, available at <<http://icci.nativeweb.org/yachaikuna/>>, consulted on Aug. 17, 2006.

10. E.I. Daes, *Estudio sobre la protección de la propiedad cultural e intelectual de los pueblos indígenas*, Subcomisión de Prevención de Discriminaciones y Protección a las Minorías, Comisión de Derechos Humanos, E/CN.4/Sub.2/1993/28, 1993, par. 24.

11. Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954, Art. 1.

12. Convention for the Safeguarding of the Intangible Cultural Heritage 2003, Art. 2.1.

13 See, the Recommendation on the Safeguarding of Traditional Culture and Folklore (1989) and the Convention to Safeguard Intangible Cultural Heritage (2003).

14. W.Assies, «Pueblos indígenas y reforma del Estado en América Latina», in Assies, Willem, van der Haar, Gemma y Hoekema, André, *El reto de la diversidad*, Colegio de Michoacán, México, 1999, p. 26.

15 Accordingly, Lévi-Strauss's warnings should be considered (Strauss, "Raza y cultura" en *Raza y cultura*, Ediciones Cátedra, Madrid, [1983] 2000, p. 105-142), in the sense that every culture should offer some resistance to the exchange with other cultures, since, otherwise, it would soon have nothing of its own to exchange.

16. L. Villapolo Herrera, "Indígenas modernos. La identidad cultural frente a la interculturalidad y la globalización", in *Encuentro Sudáfrica-Guatemala. Sociedades en transición, experiencias en salud mental, niñez, violencia y post conflicto*, ECAP, Guatemala, First edition., 2001.

17. Accordingly, article 4 of UNESCO's Universal Declaration on Cultural Diversity states that "the defense of cultural diversity is an ethical imperative, inseparable from respect for human dignity. It implies a commitment to human rights and fundamental freedoms, in particular the rights of persons belonging to minorities and those of indigenous peoples." In the same sense, the ICHR considered that "so that an ethnic group can survive, preserving its cultural values, it is essential that their members can enjoy each and every right acknowledged by the American Convention on Human Rights, as their effective operation as a group can be thus ensured, all of which includes the preservation of a cultural identity of its own." (Informe sobre la población nicaragüense de origen miskito, par. 14). Finally, article 2.1 of the Convention on the Protection and Promotion of Diversity of Cultural Contents (UNESCO, 2005) states: "Cultural diversity can be protected and promoted only if human rights and fundamental freedoms, such as freedom of expression, information and communication, as well as the ability of individuals to choose cultural expressions, are ensured."

18. In a case on aboriginals' exemption from military service, the Colombian Court declared that with reference to military service "aboriginals are not protected individually but within their territorial and identity context. It is therefore concluded that the protection introduced by the Law addresses the ethnical community." The Court pointed out that the purpose of the exemption was "to protect

the ethnical group as such, and to subsequently protect the aboriginals who live among aboriginals and as aboriginals.” (Sentence C-058/95).

19. See for example, the social dimension of the right to freedom of speech in IACHR Case *Canese vs. Argentina*, Sentence August 31, 2004, Series C N° 111 par. 77; Case *Herrera Ulloa vs. Costa Rica*, Sentence July 2, 2004, Series C N° 107, par. 108, and Case *Ivcher Bronstein vs. Perú*, Sentence September 4, 2001, Series C N° 84, par. 146; and the collective dimension of freedom of association in IACHR, case *Huilca Tecse vs. Perú*, Sentence March 3, 2005, Series C N° 121, par. 69.

20. Art. 1.2 of the IACHR- “To the effects of this Convention, every human being is considered a person.”

21. Case *Yatama vs. Nicaragua*, Judge García Ramírez vote, Sentence June 23, 2005, Series C N° 127, par. 6.

22. This has forced the IACHR to “leave the door open” so that other members of the community can be individualized in the future.

24. Inter-American Court of Human Rights, Case 19 *Comerciantes vs. Colombia*, Sentence June 12, 2002, Series C N° 93, par. 140.

25. W. Kymlicka, *Ciudadanía multicultural*, Buenos Aires, Paidós, 1995/1996.

26. The quoted author admits there are cases like those of refugees, who have left their homeland against their will. Regarding this, he states: “the best refugees can expect, being realistic, is to be treated as immigrants [...] This means that, in the long run, refugees are victims of an injustice, as they did not reject their national rights voluntarily. But this injustice was committed by the government of their country, and it is not clear whether we can ask, on a realistic basis, redress from the hosting governments.” (W. Kymlicka, *Ciudadanía multicultural*, Buenos Aires, Paidós, 1995/1996, p.140).

27. W.Kymlicka, op. cit., p. 26.

28. Although it can be used to interpret the rights dealt with in the ACHR (treaty on which it has full jurisdiction).

29. See SSP article 19.6. However, there are certain litigation strategies, such as the ones examined by Melish (T. Melish, *La protección de los Derechos Económicos, Sociales y Culturales en el Sistema Interamericano de Derechos Humanos: Manual para la presentación de Casos*, Orville H. Schell, Jr. Center for International Human Rights, Yale Law School, Centro de Derechos Económicos y Sociales, Quito, 2003.), which will not be dealt with here due to space reasons.

30. ICHR, Advisory Opinion OC-16/99, par. 114.

31. Advisory Opinion OC-18/03, par.120.

32. Advisory Opinion OC-5/85, par. 52.

33. The ICHR has particularly used WLO Agreement No. 169 (*Yatama vs. Nicaragua*, *Yakye Axa vs. Paraguay* and *Moiwana vs. Suriname* Cases), the Convention on the Rights of the Child (*Villagrán*

Morales and others vs. Guatemala and *Gómez Paquiyauri vs. Peru* Cases), Minimum Rules for the Treatment of Prisoners (*Tibi vs. Ecuador* and *Instituto de Reeducción del Menor vs. Paraguay* Cases), among other international instruments that do not form part of the ISHR.

34. C. Medina Quiroga, *La Convención Americana: Teoría y jurisprudencia. Vida, integridad personal, libertad personal, debido proceso y recurso judicial*, Centro de Derechos Humanos, Facultad de Derecho, Universidad de Chile, Santiago, 2003.

35. Galdino Hernández Castellanos, traditional mixteco doctor. Available at < http://cdi.gob.mx/index.php?id_seccion=743>, consulted on September 21, 2005.

36. ICHR legal decision, Case of the *Moiwana Community vs. Suriname*, Sentence February 8, 2006, Series C, N° 145, par. 95.

37. *Ibid.*, par. 99.

38. *Ibid.*, par. 96.

39. IACHR, Report on Brazil, 1997.

40. Atahualpa addresses Priest Valverde through his interpreter Felipillo, Gracilazo de la Vega quoted in Ruiz, 2004.

41. Sentence T-1022/01.

42. *Ibid.*

43. For instance, The Virgin Mary is dressed as a Community woman, she has a house, cattle and property managed by an administrator, she goes out to work on the backs of her followers and "raises money for her own celebration" (CCC, Sentence T-1022/01).

44. Jonson quoted in W. Kymlicka, *Ciudadanía multicultural*, Buenos Aires, Paidós, 1995/1996, p. 31.

45. J. Martínez Cobo, *Conclusiones, propuestas y recomendaciones del estudio del problema de la discriminación contra los pueblos indígenas*, United Nations, New York, 1987, par. 125.

46. ICHR, Case of *López Álvarez vs. Honduras*, Sentence February 1, 2006, Series C, N° 141, par. 169.

47. *Ibid.*, par. 171.

48. N. Pacari, "Pluralidad jurídica: una realidad constitucionalmente reconocida", in *Justicia indígena. Aportes para un debate*, Judith Salgado comp., Universidad Andina Simón Bolívar, Quito, 2002.

49. Esteban López, Community leader, ICHR, Case of *Yakye Axa vs. Paraguay*, Sentence June 17, 2005, Series C, N° 125, par. 152.

50. The Committee for the Elimination of Racial Discrimination (CERD), 50th Session, Mexico, A/52/18, 1997, par. 319.

51. The Committee for the Elimination of Racial Discrimination (CERD), 52nd Session, New York, Panama, A/52/18, 1997, par. 342.
52. The Committee for the Elimination of Racial Discrimination (CERD), 46th Session, Guatemala, A/50/18, 1995 par. 305.
53. The Committee for the Elimination of Racial Discrimination (CERD), 51st Session, New York, Colombia, A/51/18, 1996, par. 51.
54. Minority Rights. *Indigenous Peoples and Poverty: The Cases of Bolivia, Guatemala, Honduras and Nicaragua*, available at <http://www.minorityrights.org/Dev/mrg_dev_title12_LatinAmerica/mrg_dev_title12_LatinAmerica_pf.htm>, accessed on September 22, 2005.
55. Case of *Yatama vs. Nicaragua*, Sentence June 23, 2005, Series C, N° 127.
56. Ibid. Something similar happened in a case presented to CCC, in which it was alleged that exclusion of an indigenous candidate due to age was incompatible with the cultural identity of the indigenous people she represented, since within her people's world vision her age was sufficient for the exercise of her rights, including that of political representation (Sentence T-778/05).
57. Ibid.
58. Ibid.
59. *White v. Register* (412 U.S. 755), citado en IACHR, Informe anual, 1973.
60. CERD/C/65/C0/1, 10/12/2004, par. 17.
61. Guía para la aplicación del Convenio 169 de la OIT.
62. Botswana A/57/18, 01/11/2002, par. 292-314.
63. (Recomendación General XXIII relativa a los derechos de las poblaciones indígenas, 1997, A/52/18).
64. C-169-01.
65. Quoted by F. Zohra Ksentini in, "Human Rights and Environment", Special Rapporteur's Report, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Commission on Human Rights, E/CN.4/Sub.2/1994/9, 1994.
66. E. I. Daes, *Study on the Protection of Cultural and Intellectual Property of Indigenous Peoples, enas*, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Commission on Human Rights, E/CN.4/Sub.2/1993/28, 1993, par. 1.
67. Ibid., párr.4.
68. E. I. Daes, *Indigenous Populations and their Relationship with the Land*, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Commission on Human Rights, E/CN.4/Sub.2/2000/25, 2000.
69. For example, in 1967, in Brazil it was made public that 15% of the Yanomami population (15

thousand aboriginals) died due to illnesses introduced by miners, against which they had no natural defenses (IACHR, Report on Brazil, 1997).

70. Quoted in O. Correas, "La Teoría General del derecho frente al derecho indígena" in *Crítica Jurídica*, Instituto de Investigaciones Jurídicas, UNAM, 14, 1994.

71. Case of the Yakye Axa vs. Paraguay, Sentence June 17, 2005, Series C, N° 125, par. 63.

72. M.T. Sierra, "Autonomía y pluralismo jurídico: el debate mexicano", in *América Indígena*, Instituto Indigenista Interamericano, Volume LVIII, No. 1-2, Mexico, 1998, p. 25.

73. R. Yrigoyen Fajardo, Raquel "El debate sobre el reconocimiento constitucional del derecho indígena en Guatemala", in *América Indígena*, Instituto Indigenista Interamericano, Volume LVIII, No. 1-2, Mexico, 1998, pp. 81-114.

74. Nettle is a plant that causes itching and burning when in contact with the skin; it is frequently used as punishment among Ecuadorian aboriginals.

75. Cotopaxi Third Criminal Court, September 10, 2002.

76. Testimony of an indigenous Wichi woman. Available in Aranda D., "el apartheid del Impenetrable", available at <<http://argentina.indymedia.org>>, accessed on June 21, 2004.

77. Advisory Opinion, OC-4/84, par. 55.

78. OC-18/03, par. 101.

79. Report on Ecuador, 1997, p. 122.

80. The International Convention on the Elimination of Every Form of Racial Discrimination (1965) acknowledges this when it point out in article 2(2): "States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of ensuring them the full and equal enjoyment of human rights and fundamental freedoms [...]". Art. VI.1 of the American Declaration Project on the Rights of Indigenous peoples, gets to the same conclusion, together with articles 6.3 and 9.2 of the Declaration on Race and Racial Prejudices (1982).

81. IACHR , 2001 Report on Paraguay, par. 28. See also, Committee on Economic, Social and Cultural Rights, General Observation No. 3: "the adoption of legislative measures, as explicitly foreseen in [PIDESC], is not, by itself, a limit to the obligations of the State Parties" (par. 4).

82. SSP, article 15.

83. J. Martínez Cobo, *Conclusions, Proposals and Recommendations of the Study on the problem of discrimination against indigenous populations*, United Nations, New York, 1987, par. 470.

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ABSTRACT

From Sierra Leone to South Africa, calls for prosecutions, truth seeking, reparations and institutional reform are increasingly common as countries seek to address human rights abuses. While transitional justice measures are thought to contribute towards ending impunity and advancing reconciliation, the effectiveness of such interventions are thought to depend largely on the capacity of state institutions at the administrative, judicial, and political and security level. In African countries, despite the realities of institutional deficiencies, poor governance, and poverty, transitional justice measures continue to be laden with high expectations. The paper looks at obstacles that have been encountered in a number of countries in Africa , in the hope of cultivating modest expectations.

Original in English.

KEYWORDS

Transitional Justice – Truth Commissions – Reconciliation – Institutional Reform



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OVERPROMISED, UNDERDELIVERED: TRANSITIONAL JUSTICE IN SUB-SAHARAN AFRICA¹

Lydia Kemunto Bosire

Introduction

Calls for prosecutions, truth-seeking, reparations, and institutional reform are increasingly common in countries seeking to confront past human rights abuses. These approaches, it is argued, are necessary to combat impunity and advance reconciliation.² Currently, at least 12 sub-Saharan African countries are in some stage of implementing transitional justice measures, yet there has been no comparative analysis of the overwhelming limitations facing these efforts.³ For those tasked with designing such strategies in the future, such an analysis would be valuable in helping to set realistic expectations.

Using a comparative lens, this paper explores the challenges encountered during efforts to pursue justice in a number of sub-Saharan African countries in transition.⁴ For example, in many cases domestic prosecutions are neither systematic nor timely, partly because of the poor judicial capacity. Truth-seeking and reparations measures, often implemented in contexts of political compromise and limited resources, can appear to lack good faith. In the near-absence of trials and reparations, many victims are left without redress, particularly as efforts to vet human rights abusers continue to be slow and uneven, and perpetrators remain in positions of power.

The paper draws primarily from the experiences of the Democratic Republic of the Congo (DRC), Ghana, Rwanda, Sierra Leone, South Africa and Uganda. The selection of cases is deliberate, motivated by the fact that the countries under examination employ an explicit discourse of combating

See the notes to this text as from page 95.

impunity and fostering reconciliation, and define themselves (or are defined) as being in transition.⁵ Similarly deliberate is the choice to restrict the cases to sub-Saharan Africa, partly because of a unique combination of factors characteristic of these states.⁶ While the precise sources of challenges to transitional justice in Africa should be empirically examined, the weakness of the African state offers a possible preliminary explanation: measures may not have their intended outcomes (such as combating impunity or advancing reconciliation) if the assumptions underlying the implementation of such measures (such as a coherent, legitimate state, an independent civil society, and citizens with political agency) do not hold.

In addition, many of the conflicts that preceded the transition are not neatly contained within borders. One of the impacts of porous borders is that national measures for combating impunity are often incomplete. Further, poverty and/or unequal distribution of income and resources have often been cited as contributing factors to, as well as consequences of, conflict and dictatorship. Transitional justice measures can seek to clarify, and have an impact on, these root causes of violence and abuse. Further, the economic dimensions of conflict and repression can have consequences for the demand for reparations and the possibilities of reconciliation. Finally, these countries have been in transition from the 1990s to the present, an era when the human rights field has been more interventionist,⁷ which means that countries are generally under more pressure to implement measures that (appear to) address impunity.

This paper presents a background and genealogy of transitional justice, then turns to the many obstacles confronted by attempts to implement transitional justice in the form of prosecutions, truth-seeking, reparations, and institutional reform. Subsequently, the paper explores how the sequence of, and demand for, transitional justice measures is affected by definitions of “victim” and “perpetrator”, the use of amnesties, the nature of demobilization, disarmament, and reintegration (DDR) programs, and the understanding of reconciliation.

It concludes that the unmet expectations of transitional justice efforts are partly due to a default resort to an institutionally demanding understanding of transitional justice that is not congruent with the quality and capacity of state institutions in times of transition. Transitional justice measures in Africa continue to be laden with high expectations, notwithstanding the mitigating realities of institutional deficiencies, poor leadership, poverty, and the chasm between the government and the people.⁸ In order to be more effective, the gap between expectations and reality must be narrowed by cultivating modest expectations about what justice-seeking measures can deliver; assessing realistically the institutional conditions necessary for their successful implementation; and investing in meaningful institutional reform (and

sometimes institution building). Otherwise, alternative, complementary, nonstate avenues for advancing reconciliation—including localized, informal initiatives with little demand on state institutions, or regional initiatives through the African Union—should be pursued.

Background and genealogy⁹ of transitional justice

Transitional justice has been defined as “a field of activity and inquiry focused on how societies address legacies of past human rights abuses”¹⁰ in an effort to combat impunity and advance reconciliation during a period of definitive change in the political landscape. Regime change can come by negotiation with an outgoing regime, where the new government sacrifices more ambitious goals on matters of combating impunity in the interest of peace, stability, and reconciliation. However, new regimes are increasingly making decisions to address the past, and often use measures including prosecutions, truth-seeking mechanisms, institutional reform, and reparations programs.

Prosecutions are considered the mainstay of justice. By their punitive nature, prosecutions can help restore the primacy of the rule of law and make it clear that its breach carries consequences. The punishment of criminals is one way to provide “effective remedies” to victims, and primarily that obligation falls on domestic courts. In cases where the domestic judiciary is unwilling or unable to prosecute, internationalized judicial processes can constitute an alternative resort.¹¹ However, in contexts of widespread human rights abuses, prosecutions can be insufficient in achieving accountability, partly because they approach human rights abuses on an adversarial, case-by-case basis, and can be costly and lengthy. At best, trials paint an incomplete picture of the past and offer equally incomplete justice.¹² In addition, emphasizing perpetrators and crimes can leave victims unacknowledged on the margins. To remedy some of these shortcomings, prosecutions can be complemented by other, more victim-centric measures.

Truth-seeking mechanisms can operate alongside trials by providing an opportunity for society to gain a broader understanding of past atrocities. With a long history in Latin America and made popular in Africa by the South Africa Truth and Reconciliation Commission (TRC), truth commissions can give victims an opportunity to talk about their experiences, and allow perpetrators to acknowledge responsibility. Truth-seeking efforts can acknowledge that victims have a right to know the truth about the abuses they suffered, and that the government has a duty to facilitate a process for establishing a historical record. Government-sanctioned truth commissions have become fairly common mechanisms for establishing a socially acceptable version of history, validating the experiences of many victims.¹³ There can

also exist unofficial, civil society–run commissions or projects with similar goals, which can act as “replacements, complements, or precursors” to official commissions.¹⁴

Truth-seeking mechanisms may develop a widely recognized definition of “victim”, which may facilitate other mechanisms, such as reparations programs. As mentioned above, the state has a duty to remember the victimization of its citizens. Such remembrance can constitute symbolic reparations. But broader reparations programs—restitution, compensation, and rehabilitation—are, under international law, a state obligation to victims as a “materialization of recognition of responsibility”.¹⁵

Both trials and truth-seeking mechanisms can shed light onto the institutional deficiencies that led to the abuses, thereby tasking the new administration with matters of vetting as well as broader issues of institutional reform. As part of larger institutional-reform measures, vetting should involve using individual, case-by-case merits rather than collectively dismissing people by virtue of their association or politics. In other situations, compromised institutions can be significantly altered or even abolished, and new bodies set up as a way to prevent recurrence.

These measures of transitional justice can be intimately linked. For example, evidence gathered from truth-seeking processes can be used to support prosecutions and determine beneficiaries for reparations programs. For maximum impact, some observers have recommended implementing transitional justice measures in an integrated package rather than as unrelated efforts. Failure to do so can minimize the credibility of the measures: it has been suggested that reparation programs executed without a detailed exploration of causes and effects of human rights abuses can be unsatisfactory, just as reparations awarded without any attempt at judicial accountability can be seen as tainted.¹⁶

Over the years, transitional justice initiatives have exhibited different priorities.¹⁷ In what is called “Phase I” of transitional justice—the post–World War II period and the Nuremberg trials—the focus of transitional justice was international criminalization and subsequent criminal prosecutions.¹⁸ Various instruments, such as the Genocide Convention, were put into place, setting a precedent that individuals could no longer justify human rights abuse in the name of institutional culture or response to orders. In this phase, the perpetrator was at the center of the quest for justice.¹⁹

During the Cold War, the pursuit of transitional justice largely stagnated.²⁰ This lasted until “Phase II”, which encompasses the transitions that took place following the decline of the Soviet Union. In the various political upheavals in the Southern Cone countries, the opening of the Stasi Records in Germany, and the lustration in Czechoslovakia, local and

politicized conceptualizations of justice associated with state building were implemented. Justice moved beyond prosecutions and included little-explored mechanisms, such as truth commissions, reparations, vetting, and other restorative justice measures, making transitional justice more “communitarian” and a “dialogue” between perpetrators and victims.²¹ In this period, the truth commission experiment in Argentina soon gained wide use in Latin America and later was made popular by South Africa.

The creation of the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993 marked the beginning of yet another political landscape, “Phase III”, where increased frequency of conflict moved the application of transitional justice and the call for combating impunity from the exception to the norm. The year 1994 saw the creation of the International Criminal Tribunal for Rwanda (ICTR), and soon afterward the Rome Statute for the International Criminal Court (ICC) was promulgated. The ripple effects from these three mechanisms have been felt across the world, particularly in a number of peace agreements that have referred to international trials and tribunals. The Arusha Accord for Burundi, the Linas-Marcoussis agreement for Côte d’Ivoire, the agreement between the government of Sierra Leone and the UN for the Special Court, and the Inter-Congolese Dialogue (ICD) for DRC all requested creation of international or hybrid prosecutorial mechanisms.²² In this phase, there is constant reference to humanitarian and human rights law, as well as an “entrenchment of the Nuremberg Model”, particularly by the creation of the ICC as a permanent court to prosecute genocide, war crimes, and crimes against humanity.²³

Transitional justice developments in Africa

Challenges

Unlike countries such as Chile and Argentina, in which transitional justice measures were administered following relatively clear instances of regime change, most of the cases under examination in Africa implement these measures following negotiated transitions, without a clear break with the past and/or with ongoing conflicts.²⁴ The Lomé Accord of 1999 for Sierra Leone was the third peace agreement aimed at ending the conflict and establishing democracy. Similarly, the Ghana National Reconciliation Commission (NRC) was the latest in a succession of accountability measures implemented by various governments starting from the coup that overthrew Kwame Nkrumah in 1966. The DRC and Uganda currently have different degrees of ongoing conflict while they are in the process of implementing various transitional justice measures.

A number of important questions arise: what constitutes a “transition”

in Africa? Is the transition marked simply by the political choice to use of the rhetoric of justice and reconciliation, even in a context of minimum breach from the past, perhaps in order to “create the democratic possibility to re-imagine the specific paths and goals of democratization”?²⁵ Can a country have a succession of transitions and apply transitional justice measures each time?²⁶ Are these measures appropriate even in contexts of weakly institutionalized states without a history of Western-style democratic tradition?²⁷ Or is it possible that new governments adopt the now-common language of transitional justice to compete for resources on an international stage? Without offering answers to these questions, this discussion points to the possibility that the “moment of transition” may be clearer in academic analysis than in reality. This can increase the difficulty of assessing when country is “ripe” for transitional justice. If measures are used under inappropriate conditions, there can be an (undesirable) increased likelihood of recurrence, which would devalue the measures.²⁸

Notwithstanding this lack of clarity about *when* to implement transitional justice (and whether the state possesses adequate institutions for such implementation), states have an obligation duty to combat impunity and “provide victims with effective remedies”.²⁹ The countries examined in this paper have undertaken a variety of transitional justice measures seemingly to fulfill this obligation, yet impunity remains widespread as their implementation meets many obstacles. While the challenges discussed below may not be exclusive to African states, they can appear more pronounced, partly because of the coincidence of weak states, unclear transitions, and a frequent resort to transitional justice measures.³⁰

Prosecutions

Making perpetrators accountable is central to the fight against impunity. In addition to acting as a potential deterrent for future abuses, prosecutions can repair victims, reaffirm the rule of law, and contribute toward reconciliation.³¹ In theory, prosecutions in domestic courts should take on the main responsibility for dealing with perpetrators, while other transitional justice measures, such as reparations, truth commissions, and institutional reform, are designed to complement such trials. In cases of widespread human rights abuse, it is even more important—despite the judiciary being at its weakest—to demonstrate that impunity is not tolerable. To this end, prosecuting those most responsible, and cases that illustrate patterns of abuse, can be important to show the gravity of human rights abuses as well as their systematic perpetration.³²

Unlike cases like Greece, where there were systematic prosecutions following a transition, few trials for human rights abuses have been held in

Africa, and even then with many difficulties, notably in Ethiopia and Chad.³³ Frequently, poor legal capacity can be a major impediment to domestic prosecutions. In the DRC, the history of the judiciary in the entire post-colonial phase has been marked by a lack of independence, integrity, and infrastructure. This is compounded by the fact that Congolese law does not proscribe genocide, war crimes, and crimes against humanity: these violations are addressed only in military courts, where their definitions do not conform to international standards.³⁴ Even with the recently implemented criminal justice program in Bunia, Human Rights Watch has described a situation where perpetrators of grave human rights abuses are prosecuted for minor crimes, in a contexts characterized by “inadequacy of existing criminal law [and] the lack of police resources required for investigation”.³⁵

Post-genocide Rwanda found many legal professionals dead or in exile, as well as a vacuum in the judicial structures. The court’s incapacity to carry out prosecutions was (and continues to be) further compounded by the sheer number of perpetrators. In 2000, Rwanda is said to have had more than 125,000 persons in detention—a number that would be overwhelming to any judiciary, even in the developed world. Many of these individuals may have served *de facto* jail terms without ever being convicted, an issue that raises great concern about the state of justice. In an effort to speed the court processes regarding to the tens of thousands of detainees who are awaiting trial, traditional *Gacaca* courts have been set up to hear cases from various categories of perpetrators, and apportion punishment appropriately.³⁶ However, many standards of international justice consider the system to be flawed and ill equipped to address international crimes of genocide.³⁷

In Sierra Leone, the post-war domestic judiciary was very weak and partisan. According to one report, following the civil war the judiciary had “collapsed and institutions for the administration of justice, both civil and criminal, [were] barely functional... administration of justice outside Freetown [was] almost non-existent”.³⁸ The establishment of the Special Court for Sierra Leone was partly a response to this disintegration of the domestic judicial system.

In a number of states where the necessary technical capacity and political will do not exist, there is a constant call for international trials, even when there is clear indication that the possibility to set up such tribunals—according to the then Assistant Secretary General for Legal Affairs at the UN—does not exist.³⁹ In the DRC, the ICD resolved to request the UN Security Council for the formation of an International Criminal Court for the DRC to examine the atrocities that have taken place in the conflict that has engulfed the country.⁴⁰

In Rwanda and Sierra Leone, the reach of internationalized tribunals has also been limited because of technical and political constraints of a different nature. For example, the ICTR, while being a commendable

prosecutorial platform committed to prosecute as many masterminds of the genocide as possible, has indicted only 80 people, convicted 20, and acquitted 3. Given a limited time mandate, the Tribunal has recently reached an agreement with the government of Rwanda to repatriate some convicts back for trials, amid much controversy. The situation of limited reach of international prosecutions is also true of Sierra Leone's hybrid-tribunal experiment, which aims at convicting those "most responsible" for the conflict and human rights abuses, and has indicted 13 people. Other issues plague these two efforts, such as the difficulty of ensuring these courts have a significant impact on the domestic judicial system.⁴¹

Meanwhile, the governments of Central African Republic, the DRC, and Uganda, and the Security Council with regard to Sudan, have made referrals to the ICC, but the Court can examine only crimes committed after July 1, 2002, the date the Rome Statute entered into force, potentially leaving many grievances unaddressed and disappointing victims.⁴² Additionally, the ICC's investigations can be affected by such factors as the court's own limited capacity, security of the country, and the possibility of state cooperation. Also limiting ICC jurisdiction is the American Servicemembers' Protection Act of 2002, which prohibits military assistance to member states of the ICC unless such states sign bilateral agreements ("Article 98" agreements) with the United States, removing ICC jurisdiction from U.S. personnel present in their countries.

In addition to the technical and legal limits discussed above, cultural factors have also been cited as a reason that some post-conflict states shy away from prosecutions. In some cases, expressed preferences for locally owned accountability mechanisms do not include prosecutions by formal courts.⁴³ In Uganda, for example, Acholi leaders do not support the timing of the ICC referral, fearing that pursuit of prosecutions could remove the incentives from the LRA rebels to disarm.⁴⁴ Instead, they want to use traditional measures to bring reconciliation to the region ravaged by the LRA. A recently completed population survey of Northern Uganda, however, indicates that victims do not see justice and peace as mutually exclusive. While they want the war to end, they do not want the LRA perpetrators to get away with impunity.⁴⁵

Truth-seeking measures

Truth-seeking mechanisms attempt to fulfill victims' right to truth and give the community as complete a version of history as possible. Prosecuting all perpetrators is not possible because of the many challenges identified above, institutions such as truth commissions are often established to help patch this "impunity gap".⁴⁶ Beyond acknowledging victims, truth commissions can help identify perpetrators, establish an accurate account of history, and

recommend reparations, institutional reform, and prosecutions. They also often give the victim a platform to confront perpetrators and sometimes offer perpetrators an opportunity to come forward and provide their account of events, acknowledge their atrocities, and, in rare cases, apologize.

The ability of truth commissions to meet their goals (one of which is often reconciliation) is vested as much in the process of truth-seeking as in the final report. For this reason, commissions must be seen to be moral, just, representative, consultative, credible, and open to public scrutiny. This pertains to all aspects of the commission's work and at all stages, including drafting legislation, choosing commissioners and staff, and handing over the final report.⁴⁷

The first challenge in many post-conflict situations is that truth-seeking processes are increasingly designed during a negotiation for peace, marginalizing the voice of victims and civil society organizations, and possibly reducing ownership and credibility.⁴⁸ In the DRC the truth commission was proposed by members of the ICD as part of the peace negotiations.⁴⁹ The proposed institution, with all its far-reaching aspirations, was born out of an elite (and perhaps morally questionable) consultation in which victims did not participate broadly, with potential consequences of disconnecting parts of the country from the embryonic process.⁵⁰

The second challenge pertains to the selection of commissioners, who ideally should be widely respected persons of unparalleled morals chosen through an open process.⁵¹ In many cases, however, the process is compromised. For the DRC, the ICD resolution stated that the commissioners should be "Congolese of great moral and intellectual probity and possessing the necessary skills to carry out the mandate of the commission", selected "by consensus from the ranks of the components according to the criteria established by the Dialogue: moral probity, credibility [...]".⁵² Despite these provisions, the commissioners were nominated by their political parties with no regard for the ICD criteria or the consensus described in the truth commission resolution.⁵³ In Sierra Leone, the national commissioners of the truth commission were seen as sympathizers of the ruling Sierra Leone People's Party (SLPP). This view was further reinforced when, contrary to the recommendation of the truth commission that the president of the republic "unreservedly apologize to the people for all actions and inactions of all governments since 1961",⁵⁴ Chairman Bishop Joseph Humper supported the president's refusal to apologize. Further, at one point, the Bishop thanked the Civil Defence Force (CDF) militia, known for widespread abuses of human rights, for its work in defending the country.⁵⁵ All these political inclinations may have led to observers viewing the Commission as partial.

It is a common expectation that a truth commission will contribute toward restoring the dignity of victims. This may not be always the case:

depending on how they are structured, truth-seeking processes can be traumatizing or even revictimizing. The Ghana NRC's judicialized hearings caused considerable discussion: victims gave testimony under oath, which was followed by commissioners' questions, and subsequently cross-examination by the alleged perpetrators (if present). Following such a cross-examination (either by the alleged perpetrator or his or her lawyer), the alleged perpetrator received a platform to tell his or her side of the story. While the process played an important role in the attempt to reach an objective truth, some observers have commented that giving powerful perpetrators a platform to cross-examine victims and possibly dispute their stories may not have contributed to the process of dignifying the victim.⁵⁶ Similarly, the Oputa Panel of Nigeria also allowed alleged perpetrators to cross-examine victims.

Another challenge facing truth commissions—and transitional justice measures in general—is that of high ambition, which can lead to disappointing victims' expectations. Truth commissions often articulate lofty goals beyond their means and sometimes even beyond political feasibility. Increasingly, truth commissions are seeking many different objectives. Contrast the mandate of the Chilean truth commission, which sought only to resolve disappearances and killings, with the mandate of the DRC truth commission to decide the “fate of the victims of the said crimes, for hearing them, and taking all the necessary measures to compensate them and completely restore their dignity”.⁵⁷

Related to this is the fact that at the issuance of a final report, the truth commission ceases to exist, often leaving no means by which the aspirations enshrined in the recommendations can be made widely known, much less followed up by the government. In both Ghana and Sierra Leone, the final, multivolume reports were not immediately made public, which raised concern. If the population does not see the report and is not fully informed, it is difficult for them to hold the government accountable with regard to the recommendations.⁵⁸ The very form of the report as a written document can be inaccessible in victim communities with high illiteracy rates.⁵⁹ Even where the report is made public, such as South Africa, very few members of the general public read it.⁶⁰

Reparations programs⁶¹

Under international law, there exists an obligation for states to give “prompt reparation” to victims of violations of international human rights proportional to the harm suffered.⁶² Reparations serve at least three aims: to recognize victims as citizens who are owed specific rights, communicating a message that a violation of such rights deserves action from the state; to contribute to establishment of civic trust among citizens and between citizens and state institutions; and to build social solidarity where the society empathizes with the victims.⁶³

It is important to point out that reparations can never restore victims fully to the *status quo ante*, and can be only a part of a package of transitional justice measures that may include institutional reforms, prosecutions, and truth-seeking. In the absence of such an integrated approach, observers have remarked that reparations are likely to be seen as an attempt at buying acquiescence (if not accompanied by prosecutions) or as inadequate gestures of little long-term consequence (if not coupled with institutional reform).⁶⁴

Reparations often run up against shortage of resources, and international donors cannot be counted on for payments.⁶⁵ In South Africa, the Committee for Reparations and Rehabilitation (CRR) assessed interim payments for victims with “urgent medical, emotional, educational and material/or symbolic needs”, as well as final reparations. Many challenges were associated with interim reparations. For example, they were paid out very late, almost two years after the CRR’s recommendations were sent to the government. They were also negligible in amount, disempowering to victims, and a frequent source of friction and tension in the community, especially between those who received them and those who did not.⁶⁶ After a long wait, final reparations were eventually allocated in amounts significantly lower than the CRR recommended, with the government making a one-time payment of approximately \$5,000 rather than a series of payments over six years.⁶⁷

The Sierra Leone TRC recommended reparations for amputees, the wounded, women who suffered sexual abuse, children, and war widows because these victims suffered multiple violations and were deemed in “urgent need of a particular type of assistance to address their current needs, even if this only serves to put them on an equal footing with a larger category of victims”.⁶⁸ To the universe of potential beneficiaries (not predetermined), the Commission recommended that reparations be delivered in “packages” containing medical and psychological care, education, and skills-training programs. Given that the quality of public services in Sierra Leone is extremely poor, the benefits to victims were held hostage to the existing institutions’ capacity to deliver.⁶⁹ More important, the truth commission recommended creating a Special Fund for War Victims, which would take care of amputees, children, and women affected by the war and be established within three months of the publication of the Final Report. As of this writing, the recommended timeline has passed and the fund has not been established.

When designed without consideration of other transitional justice measures—especially those aimed at perpetrators—reparations’ contribution to reconciliation can be eroded. In countries emerging from conflict, reparations can serve to fill the justice gap created from nonprosecution of perpetrators. Yet because prosecution efforts are seen as essential to maintaining peace and stability, they are often prioritized; while reparations,

if ever implemented at all, come years later. In Sierra Leone, observers have reported that the post-war near-exclusive focus on perpetrator and ex-combatant rehabilitation (in the obvious interest of peace) alienated victims, who raised the issue many times during truth commission hearings.⁷⁰ This neglect of victims is especially notable in the context of general amnesty, where the right to seek judicial redress is unavailable.

Another challenge to reparations programs is that they are often designed at the last minute. The Sierra Leone TRC did not consider reparations until very late in its work, under a resource and time crunch. As a result, consultation was limited to government departments and Freetown-based NGOs. Similarly, in South Africa, “Reparations seem to have been promoted in principle by most actors as a just and necessary part of the transition, but discussion of the details of reparations was always delayed until later in the process”.⁷¹

Finally, the ICC envisions a Trust Fund for Victims that will benefit victims and their families.⁷² Unfortunately, this Fund will be encumbered by many challenges. Some have observed that the Fund does not translate well as a reparations program, given that it separates reparations and responsibility. Further, the Fund may not necessarily be in a position to attract more funds from international sources than cash-strapped national reparations programs, and given the few numbers of victims whose cases will come before the ICC, the proposed individualization of assessments of reparative benefits can appear to introduce discrimination among victims.⁷³ Many raised concerns point to the likelihood that the Fund (and by association, the ICC) will raise expectations that it cannot meet.⁷⁴

Vetting

Under the larger rubric of institutional reform, vetting is increasingly implemented to address human rights abuses. Defined as a “formal process for the identification and removal of individuals responsible for abuses from public office”,⁷⁵ vetting is becoming an integral part of the process of restoring trust in organs of the state, in an attempt to ensure that the structures that facilitated human rights abuses in the past no longer exist.

Personnel reform should be carried out in a manner that is perceived as just, while respecting the rights of individuals and refraining from drastic depletion of essential institutional capacity.⁷⁶ Ideally, the reform process should involve assessment of the institutional capacity of institutions such as the judiciary and the security organs; assessment of existing staff capacity and qualifications; designation of standards of desired personnel composition of each particular sector; and ongoing public consultation about the entire process. The complex nature of vetting has presented many challenges to the transitional justice landscape.⁷⁷

Vetting can be hindered by the state's inability to carry out the purely technical and procedural task of accessing employee records to evaluate their integrity and competence. According to one report, virtually no infrastructure for public administration exists in the DRC, and in the absence of such basics as personnel files, the difficulty of assessing employee integrity is immense, sometimes impossible. In Sierra Leone, the prewar period was characterized by "institutional collapse, through the weakening of the army, the police, the judiciary and the civil service".⁷⁸ In such a context, accessing credible personnel records can be difficult, which may be one of the reasons why the TRC resolved not to carry out any vetting based on past records for fear that it could easily be "abused for political ends and used for purposes of settling scores and pursuing vendettas". Instead, the Commission made forward-looking recommendations on governance.⁷⁹

A related issue is one of political will to bring about necessary personnel change in institutions. Stemming from the often negotiated and incomplete nature of the transition, a new government can find itself unable or unwilling to carry out vetting for human rights abuse. Settlements were structured to remove perpetrators from the battlefield. The pragmatic nature of this compromise increased the perception of entrenched impunity, putting to serious question the government's commitment to reform. In the DRC, where many government officials are implicated in human rights abuses, some observers note that the parliament would not be willing to pass a suicidal vetting law.

The security sector, often most implicated in human rights abuse, can offer particular reform challenges. In Sierra Leone, the post-independence years were marked by misuse of security forces to quell political opposition "in the name of national security".⁸⁰ The security sector and the army were significantly implicated in the war, and according to the Final Report, the army was responsible for the third most institutional violations of human rights. The CDF forces, formed in part because of distrust between the population and the army, were responsible for another large portion of human rights abuses. The Final Report recommends that the government "strengthen and restructure" the security sector, although, such strengthening will call for a level of resources that can allow institutionalization, professionalization, and paying salaries regularly.

Other issues affecting transitional justice

A number of issues arise that can have a direct impact across all the transitional justice measures discussed above. These include the definitions of "victim" and "perpetrator," the use of amnesties, the design of DDR programs, and the meaning of reconciliation.

Definitions

The types of crimes to which transitional justice strategies are intended to respond to define the parameters of who is classified as “victim” and “perpetrator.” In South Africa, “The task of defining ‘victim’ and ‘perpetrator’...was the single most important decision that determined the scope and depth of the Commission’s work”.⁸¹ The narrow definition of violence the truth commission adopted excluded structural violence, in turn ensuring that a broader group of beneficiaries of apartheid—the white population—was not held accountable.⁸² A “victim” was defined as the individual (and immediate family thereof) on whom “gross violations of human rights”⁸³ were perpetrated, which may have resulted in “physical or mental injury, emotional suffering, pecuniary loss or a substantial impairment of human rights”.⁸⁴ Underlying the perpetration had to be a political motive. By using this definition, the TRC ignored the political motive of the apartheid system, effectively acknowledging “only those violations suffered by political activists or state agents,” which excluded entire victimized communities.⁸⁵ Other categories of people who are not normally designated as victims include the internally displaced population, which in the Great Lakes region numbers more than 10 million.⁸⁶

Perpetrators can have different degrees of responsibility in orchestrating, perpetrating, or supporting human rights abuses.⁸⁷ There are a number of situations where the definition of “perpetrator” is not entirely straightforward, leading to categories of individuals with a “morally and legally ambiguous status.” For example, there are cases where wrongdoers or individuals who have benefited from others’ crimes later resist and fight against the repressive regime; those who formerly resisted and fought the regime eventually collaborate with the regime; victims, under duress, collaborate and facilitate the work of perpetrators; etc.⁸⁸ For these and other reasons, a number of countries have devised new approaches for treating perpetrators who embrace this ambiguity.

Ambiguity can also apply to victims. Many child soldiers involved in human rights abuses in Africa were abducted and forced to commit atrocities.⁸⁹ In Sierra Leone, UNICEF worked closely with the UN Mission in Sierra Leone (UNAMSIL) to design recommendations on how the Special Court should deal with children who committed crimes.⁹⁰ In Uganda, where the abducted children from the Acholi community fill the ranks of the LRA, the ICC affirms, “Many of the members of the LRA are themselves victims”.⁹¹ In Sierra Leone and DRC where there has been extensive use of child soldiers, or in other situations where female ex-combatants have been raped or general combatants are chronically ill or disabled, many perpetrators are also victims.⁹²

Defined broadly, perpetrators and beneficiaries of human rights abuses can include institutions, states, and nonstate actors, even extending outside

national boundaries. In the DRC, many companies have been implicated as fueling conflicts and the abuse of human rights, but there exists no clear way to address their infractions.⁹³ Sierra Leone has corporations similarly involved in the exploitation of resources that continue with their work with almost complete impunity, even though the Final Report finds that the diamond industry fueled the war. Broadening the definition of “perpetrator” can have implications for both the demand for institutional reform and the awarding of reparations. For example, the state may not be as willing to pay reparations when abuses can be directly attributed to other parties. In South Africa, the victim-support group Khulumani sued a number of corporations for their roles in facilitating apartheid.⁹⁴ In Rwanda, the government has attributed some responsibility for the genocide to the French.⁹⁵

A (political) issue arises, when defining “perpetrator,” as to whether agents opposing a repressive regime should be treated as equal perpetrators as agents of the regime. In South Africa, where a number of observers found no moral equivalence between the atrocities committed by the apartheid regime and those carried out by the African National Congress (ANC) liberation fighters, the truth commission’s treatment of the two sides led to dissatisfaction. In Sierra Leone, Chief Sam Hinga Norman was indicted by the Special Court for acting as the “principal force in establishing, organizing, supporting, providing logistical support, and promoting the CDF,” even though the CDF was established to defend the population against the RUF rebels.⁹⁶ Many Sierra Leoneans saw Norman as a hero and were disillusioned by the indictment on war crime charges. In Rwanda, some observers have noted the government’s lack of acknowledgement of the crimes committed by the Rwandese Patriotic Front (RPF) against the *Interahamwe* and defeated Hutu forces.⁹⁷ This silence, they note, creates a crack in the government rhetoric of justice and national reconciliation.

The definition of “victim” can also be politicized. In Ghana, pre-NRC redress measures were carried out to selective, partisan, and incomprehensive rehabilitation for victims. The identity of the victims seemed to change with every administration, with each selectively rehabilitating victims who were political allies. In an attempt to do things differently, the NRC sought to unify the groups by adopting a nonpartisan approach to rehabilitation and consulting broadly with civil society in an attempt to fulfill its mandate of creating an “accurate historical record,” drawing on the experiences of both alleged victims and perpetrators.⁹⁸

Amnesties

Widespread use of amnesty denies victims a right to redress, which can increase the urgency, or sequence, of other measures of transitional justice. Equally common is nonprosecution, even without formal promises of

amnesty. Justifications are varied: trials can provoke violent reactions in cases where the military is still strong; necessary evidence can be scant or unavailable; the new state's capacity to investigate and prosecute may be weak because of loyalty to the outgoing regime; and the costs of prosecutions may be high.⁹⁹

There is a growing trend, consistent with international law and norms, of excluding genocide, war crimes, and crimes against humanity from amnesties. A similar exception is observed in Sierra Leone, where the Lomé Accord extends "absolute and free pardon" to all armed factions, and even extends the guarantees of immunity to "former combatants, exiles and other persons, currently outside the country" for any crimes perpetrated in the war, promising to "ensure that no official or judicial action" will be taken against them.¹⁰⁰ The Special Representative of the Secretary-General added a reservation that the UN would not respect an amnesty given for crimes against humanity and war crimes, opening a way for the Special Court's mandate to prosecute those who "bear the greatest responsibility for serious violations of international humanitarian law".¹⁰¹

A number of cases have amnesties conditioned, in principle, on a number of factors, chief among them truth-telling. However, given past experience, it is unclear the extent of prosecutions that can result from cases of denied amnesty, given the weakness of the state. In South Africa, leaders of the transition popularized the "truth for amnesty" exchange with a promise that those denied amnesty for political crimes would be prosecuted afterward. With the apartheid government controlling the security forces, such a compromise resulted from necessity. However, many assert that there has been a *de facto* blanket amnesty in South Africa as the first conviction for a person denied amnesty was issued in February 2004,¹⁰² and, according to some observers, the particular case was chosen because of ease of prosecution rather than because it would serve to illustrate any patterns of abuse. There continue to be speculations of further "reopening" of the amnesty process; in other words, hearing more cases that were not brought forth by the deadline of the Amnesty Committee of the TRC to determine whether to grant amnesty. Some observers fear that this move will further entrench impunity, as it seems to be prioritizing *not* prosecuting those whose amnesties were denied, but rather extending even further amnesty to those who may have not received it the first time. Despite the disappointed expectations associated with the South African model of a truth-for-amnesty process, the DRC's peace agreement provides for a similar process where the truth commission is given the power "propose to the competent authority to accept or refuse any individual or collective amnesty application for acts of war, political crimes and crimes of opinion".¹⁰³

Uganda's President Museveni issued an amnesty to the LRA with the Amnesty Act of 2000, contingent on soldiers affiliated with the LRA coming forth and disavowing combat.¹⁰⁴ The amnesty, defended by leaders of the communities most affected by the conflict and other actors, is seen as a "vital tool for both conflict resolution and longer-term reconciliation".¹⁰⁵ It applies to "any Ugandan" who may have been a combatant, promising that if such people come forth they "shall not be prosecuted or subjected to any form of punishment for...any crime committed".¹⁰⁶ Further, traditional leaders from the area most affected by the conflict have been mounting an international campaign in support of full amnesty, asking for the use of traditional cleansing ceremonies to reintegrate all levels of the LRA. However, the lack of redress occasioned by the amnesty has prompted increasing discussions about other transitional justice measures, including truth, trials, and reparations.¹⁰⁷ Overall, the constant application of amnesty can be seen to entrench impunity.

Demobilization, disarmament, and reintegration programs

DDR programs are central to the security of any post-conflict situation, as they can affect the security where other transitional justice measures are to take place, as well as the willingness of victims and witnesses to collaborate with any such processes. Security, in turn, can increase or decrease the government's willingness to take risks by establishing measures for accountability. At least 7 of the 12 sub-Saharan African transitions have emerged out of violent conflict, with large numbers of combatants. During the transition, former combatants should be rehabilitated and presented with adequate incentives to join civilian life. DDR programs are considered central to stable transitions because they can reduce security fears by centralizing the use of arms in the state.¹⁰⁸ DDR programs should be implemented as holistic measures with local ownership and investment, executed with a special attention to the needs of children, women, victims, and noncombatant civilians.¹⁰⁹ They should also give as much priority to reintegration and rehabilitation as to disarmament and demobilization, the former of which is arguably crucial in developing civic trust.

Ineffective, incomplete, or badly designed DDR programs have an obvious result of increasing the insecurity of the environment in which transitional justice mechanisms are implemented, in turn affecting such factors as the political capacity of a new regime to consider prosecutions; the motivation of witnesses to come forth to testify either before truth commissions or courts; and the boldness and reach of vetting and institutional reform programs. In both Sierra Leone and Liberia, former combatants who have been re-recruited into the conflicts ongoing in Côte d'Ivoire and Guinea,

combatants have cited incomplete and/or disappointing DDR programs as part of the reason for their re-armament.¹¹⁰

In assessing DDR options for the Great Lakes region, the World Bank has cited the regional nature of the conflict involving Rwanda, Uganda, and the DRC as particularly challenging, as it has led to a “security dilemma” in which no government is willing to reduce its defense (both regular and irregular), thereby posing a challenge to comprehensive disarmament initiatives.¹¹¹ Further, some armed groups are based in foreign countries, adding the need for repatriation to an already complicated process. According to the head of disarmament for the UN Mission in the DRC (MONUC), the former Rwandese armed groups now known as FDLR (*Forces Democratique de la Liberation de Rwanda*) continue to frustrate the disarmament efforts, partly because of their uncertainty regarding to the fate awaiting them in Rwanda (where some officers, for example, could be prosecuted for their roles in the 1994 genocide).¹¹²

DDR programs can seem incompatible or in tension with transitional justice goals; the programs divide societies into combatants and noncombatants, and often face the moral dilemma of appearing to reward perpetrators.¹¹³ In Sierra Leone, most of the DDR work was complete—and benefits apportioned to ex-combatants—before any measures to address victims were put in place. While ex-combatants were not fully satisfied with the program—there were complaints that combatants who shared weapons were not able to receive benefits—the stronger complaint was from victims who perceived that wrongdoers received more both during and after the conflict.¹¹⁴ Currently, years after the ex-combatants received their “rewards,” victims’ reparations benefits are nowhere near being determined. It would not be unreasonable for victims to expect reparations of comparable value to DDR benefits, the (likely) nondelivery of which could increase social fractures.¹¹⁵

Social reintegration of combatants into the community can be a crucial step toward reconciliation. However, DDR programs can work against social reintegration, especially if designed as a process of buying back of weapons with a focus on demobilization and disarmament, at the expense of reintegration of combatants into the community.

Reconciliation

Most transitional justice efforts in Africa describe themselves as centrally pursuing reconciliation—a multidimensional, contested notion. As such, the definition of “reconciliation” will affect the design of the transitional justice measures and ultimately form one of the bases upon which the success

of these efforts will be judged. Various understood, reconciliation is considered by some to be a prerequisite as well as an outcome of democracy, development, and respect for the rule of law. Others associate the term with such notions as healing, forgetting, forgiveness, co-existence, and apology. This contested notion is described as fundamentally involving establishment of trust:

Reconciliation, minimally, is the condition under which citizens can trust each other as citizens again (or anew). That means that they are sufficiently committed to the norms and values that motivate their ruling institutions, sufficiently confident that those who operate those institutions do so in the basis of those norms and values, and sufficiently secure about their fellow citizens' commitment to abide by these basic norms [and] values.¹¹⁶

Reconciliation, then, can be seen as more than a sum total of the impact produced by the implementation of transitional justice measures.¹¹⁷

Strong moral leadership has been variously cited as playing a key role in the South African transition process, which is thought to have set in motion a process of national reconciliation. Yet many (African) countries do not have uncompromised and trust-inspiring leaders like Archbishop Desmond Tutu and President Nelson Mandela to give moral leadership to their transitions, a fact that can affect the credibility of any initiatives they support.¹¹⁸ In the DRC, the appointment of former warlords to serve as generals in the army brought "serious questions about the Congolese government's commitment to justice and human rights," and would detract in obvious ways from the establishment of trust between state institutions and the population.¹¹⁹ In Sierra Leone, Chief Hinga Norman, responsible for establishing and organizing the CDF, served in the government until his indictment for war crimes charges.¹²⁰

Elsewhere, reconciliation is understood as integrally linked to economic development. In cases where inequitable distribution of resources and abject poverty constitute some of the root causes of war, continuing economic marginalization can make sustaining the transition difficult to accomplish. In reference to Rwanda, former World Bank president James Wolfensohn recommended that there "must" be an economic component to the reconciliation process in Rwanda¹²¹ to put flesh on the rhetorical bones. However, Africa has had no cases in which the reconciliation project been integrally linked with social and economic development. Some experts have maintained that redistribution of wealth was beyond the scope of the South Africa TRC.

A key difficulty that confronts efforts toward the establishment of

civic trust is the blurred distinction between the political project of reconciliation and localized, culture-specific, interpersonal reconciliation. In South Africa, part of the difficulty of assessing the TRC's contribution to reconciliation stems from the lack of clarity about the meaning of the term.¹²² Restoring interpersonal relationships and bringing healing (individual reconciliation) can be a distinctly different undertaking from a political project of establishing state institutions with a respect for rule of law and human rights that ensures co-existence (national reconciliation).¹²³ Stemming from the fact that neither the interim constitution nor the National Unity and Reconciliation Act provided a "clear definition" of reconciliation, the term was imbued with different meanings at different times. While Archbishop Tutu and others raised public expectations of the TRC's ability to deliver interpersonal reconciliation, the Commission's Act was a tool framed to deliver impersonal, political reconciliation.¹²⁴ In Sierra Leone, large sections of some communities did not come before the truth commission—despite being disproportionately affected by the war—because culturally, they did not believe that talking about the conflict before the nationally directed project could lead to (interpersonal) healing and reconciliation.¹²⁵ Here, many victims appeared more concerned with social reintegration of ex-combatants than with a public accounting of atrocities as a way of reconciliation, as propounded by the truth commission.¹²⁶

While many scholars would say that transitional justice measures are necessary in the pursuit of reconciliation, some countries consider themselves reconciled in a manner that questions these assumptions. In rural Angola and Mozambique, war was regarded as a contamination, and those involved in its atrocities were ritually and *nonverbally* cleansed of their crimes before being embraced in the community. These rituals were on a distinctly local, rather than national, level, and through them former perpetrators were treated as reconciled with their communities.¹²⁷ In Namibia, the government declared the country reconciled following the apartheid years, choosing a distinctly different route than the truth commission of neighboring South Africa.¹²⁸

Does that mean these countries will revisit their past at some point in the future, because of the lack of justice-seeking measures in their reconciliation processes? Given the oft-illegitimate nature of the state, should informal or memory- or culture-based reconciliation initiatives be seen as an end in themselves, or as contributing to the establishment of enabling conditions for more ambitious, national justice goals? Would separating the notions of justice and reconciliation allow justice to be pursued to the fullest degree possible (which sometimes may mean not at all, and with no

clear detriment) without drawing into the conversations the contested notion of reconciliation? While the answers to these questions are unclear, it is possible to make a case for a broader imagination when addressing impunity and reconciliation in Africa, outside the implicit assumptions about the nature of the state and the agency of the citizens.

Searching for explanations

There is a growing trend for post-conflict and -dictatorship African states to engage in the rhetoric of, and establish mechanisms aimed toward, combating impunity and advancing reconciliation.

Evidently, many of the established initiatives are riddled with problems and have often fallen very short of their stated objectives. Around the world, but especially in Africa, prosecutions for human rights abuse are neither prompt nor widespread, partly because of limited technical, legal, and political capacity. With very few exceptions, trials have been foregone in transitions, and amnesties (including *de facto* amnesties) are widespread. Internationalized prosecutions, including referrals to the ICC, are increasingly called upon in an effort to remedy the shortcomings of domestic trials, but even their reach is inherently limited.

In part to patch the impunity gap created by limited prosecutions, states are increasingly supporting truth-seeking and reparations measures that, in the contexts of limited resources and political compromises, can be seen as lacking in good faith, and often promise more than they can deliver, disappointing victims. In fact, conditions for the successful implementation of a truth-telling mechanism may not exist in many of the countries under exploration.¹²⁹ Similarly, institutional-reform efforts through vetting human rights abusers have also been slow and uneven, despite the fact that such reform is thought to provide one of the necessary guarantees for nonrecurrence of human rights abuses.

Why does impunity continue to be widespread in Africa, despite the frequency with which transitional justice measures are implemented? Why have transitional justice strategies faced many difficulties and often fallen short of meeting their stated objectives?¹³⁰ Is there anything particular about the African context that makes the measures possibly inappropriate? Is there a minimum amount of democratic tradition and institutional strength necessary for transitional justice measures to be successful (perhaps conditions similar to those in Eastern Europe and Latin America, from where the measures originated)? A possible preliminary explanation is that the difficulties encountered by justice measures in Africa stem in part from the weakness of state institutions.¹³¹

The nature of state institutions

Transitional justice is typically understood within the legal framework of state responsibilities, with an underlying assumption of a model of an institutionalized state with its organs “unconstrained by the dynamics of social pressures” in a society composed of citizens whose relations are mediated by the law rather than other means, such as kinship.¹³² Transitional justice measures, then, primarily seek to establish or restore trust between the state and citizens who conform to certain parameters. However, despite all appearances, the African state is often “vacuous and ineffectual”, a deliberately and instrumentally informalized entity in which an entrenchment of the rule of law may not often correspond with the logic of politics.¹³³ In other words, efforts toward formalizing the state and establishing conditions where citizens can be “sufficiently committed to the norms and values that motivate their ruling institutions”—as transitional justice measures seek to do—can run counter to the practices of a state in which the rulers benefit from an informal equilibrium.¹³⁴ In states with weak institutions, one of the unintended consequences of some measures of transitional justice is that they can provide “a veneer of legitimacy for governments that actually shun democratization and the rule of law”, enabling leaders to “pay lip service to human rights principles” without substantive change in the business of politics.¹³⁵

With this in the background as a possible reading of the condition of the African state, it is possible to see why implementing transitional justice measures, with origin in very particular institutional contexts, could lead to uncertain outcomes and even fall drastically short of expectations. In this reading, poor institutionalization is fundamental to the underperformance of transitional justice measures. In conditions with few legitimate rules and institutions, prosecutions and vetting programs can clash with the patronage logic of the informal state, along which much of politics is ordered. The act of putting in place a public, truth-seeking process may not necessarily be seen as a good-faith effort in critical self-examination but rather an embrace of the currency of accountability and human rights—much like the inconsequential ratification of various international human rights instruments—which can reduce development assistance conditionality. And while there are calls for a revisit to the models of National Conferences, which facilitated a number of African transitions in the early 1990s by fostering national dialogue about past failings and future directions of the state (including power-sharing recommendations), it is worth underlining that their outcomes were also equally mixed.¹³⁶

While identifying the possible origins of difficulties facing transitional

justice does not provide obvious solutions, it points to the opportunity for post-conflict interventions to focus on building the capacity of the state and its institutions in order for it to be able to deliver justice and human rights—an intervention described as “paradoxical”, given that elsewhere, human rights interventions were intended to curb, rather than strengthen, the reach of state institutions.¹³⁷ Put simply, there exists a minimum degree of state institutionalization above which state policies, including transitional justice measures, can be most effective.¹³⁸ Transitional justice measures cannot be implemented in “an institutional desert”.¹³⁹ Critics talk about this institutional minimum as existing beyond the achievement of most countries in transition, a manifestation of the paradox that justice institutions are likely to be most successful in highly functioning states and where the “demonstration effect” of justice measures is least needed.¹⁴⁰ If institution building were taken to be an important entry point, then sequencing, length of time, as well as resources given for implementation of transitional justice measures (especially now that they are increasingly appearing in peace negotiations) would reflect the long-term and complex reality.

Moreover, a conscious recognition of the centrality of institutionalization to the success of transitional justice could allow for a tempering the high expectations placed on such measures, as well as a possible legitimization of a broader exploration of initiatives outside the state-centric, often legal, search for justice and accountability. For example, in cases where the government’s good faith to foster trust can be in question, perhaps because of its own perceived contribution to the abuse of human rights (e.g., Uganda, Sudan); or because it has implemented some transitional justice measures in the past (thereby possibly creating skepticism among the population about the utility of such measures); or where the war took a largely local rather than political character (e.g., Mozambique), localized, informal processes seeking to establish trust can be more meaningful.¹⁴¹

Local approaches through culture and the arts

Because transitional justice can contain elements of law, psychology, memory, politics, anthropology, and culture,¹⁴⁰ possible interventions can be thought of as lying on a continuum with one end consisting of the mostly institutional, legalistic measures and the other the more informal, cultural approaches to accountability. Given that this paper has pointed out the institutional weaknesses of many African states, an effective alternative might be to confront past atrocity and human rights abuse at the localized and cultural end of the spectrum, possibly through the arts and cultural activities on the level of society.

While this paper has not examined this question in any depth, many theorists and practitioners in other contexts have explored these alternative approaches. In Latin America, for example, often under the heading of “collective memory”, scholars and practitioners have sought to understand and endorse ways of dealing with the past that are not dependent on state institutions and public policy.¹⁴³ These include theater, photography exhibits, and films that have tried to explore the complicated questions of *why* and *how* past atrocity could have been committed, while at the same time attempting to contribute to a societal dialogue around human rights.¹⁴⁴

Human rights memorial museums of conscience, such as the District Six Museum in South Africa or the Rwanda Genocide Museum, are also increasingly common ways of attempting to building communal dialogue about the past.¹⁴⁵ These efforts attempt to claim public space and create physical reminders, conversation starters, or provocative history lessons about what happened and why. They operate on the level of local culture, and they demand that society remember what happened. Like other transitional justice approaches, they aim as much at the future as the past.¹⁴⁶

Regional approaches

Even with appropriate sequencing of transitional justice measures and a legitimate, institutionalized state, the insufficiency of national mechanisms because of cross-regional implications of conflicts would still present a huge challenge. It would be difficult for the DRC to have a comprehensive truth commission when many implicated persons are across the border in Rwanda or Uganda. Similar cross-border challenges exist in the case of Sierra Leone and with regard to perpetrators of Liberian origin, the most visible of whom is Charles Taylor.

It is possible that multinational, regional mechanisms with a new source of legitimacy, such as the instruments of the African Union, may present one opportunity to address these challenges.¹⁴⁷ For example, the Constitutive Act of the African Union condemns genocide, war crimes, and crimes against humanity; the Peace and Security Council of the African Union enshrines power to recommend an intervention in a state perpetrating those crimes; the New Partnership for African Development (NEPAD) acknowledges the importance of “post-conflict reconciliation” in development; and the Conference for Security, Stability, Development and Cooperation in Africa (CSSDCA), adopted by the OAU in 2000, states the importance of combating impunity and prosecuting perpetrators.¹⁴⁸ However, it is unclear whether the African Union has the capacity to meet these tasks; many actions of member states are vastly discrepant from these declarations.¹⁴⁹

Ways forward

This paper raises a number of issues with profound implications on the capacity of post-conflict and -dictatorship Africa to genuinely embark on and sustain inclusive, legitimate initiatives to transform society. Despite the severity of the challenges described where transitional justice efforts have fallen short of their stated objectives, including creating an environment where citizens can learn to trust the state and addressing conditions that led to or fuelled conflict or authoritarian rule, it is still an important undertaking.¹⁵⁰ The critical perspective of the paper is not aimed at discounting the importance of implementing these measures, but rather at adding sobriety about the gap between reality and expectations and calling for a critical re-examination of assumptions underlying the implementation of now-staple transitional justice interventions.¹⁵¹ After all, it is very likely that other African countries considering similar transitional justice initiatives will be frustrated by the lack of an enabling environment and come up against challenges very similar to those discussed in this paper.

As much as transitional justice measures are implemented in order to strengthen state institutions, their practical success depends on the prior existence of functioning state institutions. This conclusion calls for a thorough assessment of the institutional basis of countries in transition prior to embarking on transitional justice, cultivation of extremely modest expectations about what can be delivered, and an exploration of alternative and/or complementary paradigms for combating impunity and advancing reconciliation in Africa. Ultimately, Africans as must demand a prioritization of reform—or (re)construction—of state institutions, and the international community should be prepared to back up such demands with appropriate resources.

NOTES

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1. A fuller version of this paper has been published by the International Center for Transitional Justice, <www.ictj.org>, access on August 18, 2006. This paper was written by Lydiah Bosire, Program Associate at the International Center for Transitional Justice (ICTJ). The paper was guided by discussions a Canadian International Development Agency (CIDA)–funded meeting in Bellagio in April 2004 with leaders of African NGOs from countries in transition. The meeting included Louis Bickford, Alex Boraine, E. Gyimah-Boadi, Brian Bright Kagoro, Matthew Kukah, Jennifer McHugh, Paul Nantulya, Surita Sandosham, Paul Simo, Graeme Simpson, Noel Twagirumungu, and Nansata Saliah Yakubu. Thanks to Louis Bickford, Pablo de Greiff, Roger

Duthie, Kelli Muddell, and Marieke Wierda for comments. Louis Bickford and Sarah Rutledge provided editorial assistance. The views herein are the responsibility of the author and do not necessarily reflect those of the ICTJ.

2. Transitional justice is frequently defined as comprising prosecutions, truth-seeking initiatives, reparations measures, and institutional reform. Reconciliation, an often-stated objective of transitional justice, is a contested notion that is variously understood, although at its core it is thought to constitute the establishment of civic trust, based on shared norms among citizens and between citizens and governing institutions. See P. de Greiff, "The Role of Apologies in National Reconciliation Processes: On Making Trustworthy Institutions Trusted", In *The Age of Apologies*, Mark Gibney and Rhoda Howard-Hassmann, eds., forthcoming. Other frequently cited objectives of transitional justice include advancing "accountability" (not just criminal accountability) and combating "impunity". While transitional justice measures are thought to contribute in different degrees to these goals (prosecutions can be thought to contribute more to justice and accountability and reparations more to reconciliation, etc.) there is a great deal of overlap to the extent that these objectives are sometimes used interchangeably.

3. These countries include Burundi, Côte d'Ivoire, the Democratic Republic of the Congo, Ghana, Kenya, Liberia, Nigeria, Rwanda, Sierra Leone, South Africa, Sudan, and Uganda. Other countries whose transitions are of interest include Angola, Chad, Ethiopia, Mozambique, and Namibia.

4. "African" is used interchangeably with "sub-Saharan Africa", and should be understood to exclude North Africa.

5. Being "in transition" does not mean that the countries are necessarily en route to democracy. For more on the potentially misleading nature of "democratic teleology" implicit in a linear understanding of transition, see T. Carothers, "The End of the Transition Paradigm," *Journal of Democracy*, vol. 12, n.1, January 2002.

6. See P. Chabal & J. P. Daloz, *Africa Works: Disorder as Political Instrument*, Bloomington: Indiana University Press, 1999. See also B. Manby, "The African Union, NEPAD and Human Rights: The Missing Agenda", *Human Rights Quarterly* 26, 2004, at 983–1027, and M. Tshiyeme, "Inventing the Multination: Would a United States of Africa Work?" *Le Monde Diplomatique*, Sept. 2000.

7. Thanks to Vasuki Nesiah for this point: V. Nesiah, "Truth vs Justice," in Jeff Helsing and Julie Mertus, eds., *Human Rights and Conflict*, New York: US Institute of Peace, 2005.

8. Neither "the people" nor other categorizations used in this paper, such as "victims" and perpetrators", is a monolithic block of interests.

9. It is noteworthy that this genealogy is by no means comprehensive, and it presents a very particular understanding of transitional justice. There are many possible understandings of what constitutes justice in times of transition, including local and context-specific definitions that may lead to a different genealogy.

10. *Macmillan's Encyclopedia of Genocide and Crimes Against Humanity*, Oct. 2004. See also N. Kritz, *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, Washington, D.C.: US Institute for Peace, 1995.

11. L. Joinet, "The Administration of Justice and the Human Rights of Detainees—the question of

the impunity of perpetrators of human rights violations (civil and political),” revised final report prepared by Mr Joinet pursuant to Sub-Commission decision 1996/119, E/CN.4/Sub.2/1997/20/Rev.1, Oct. 2, 1997. These principles were revised by Diane Orentlicher and presented to the UN Commission on Human Rights. See D. Orentlicher, “Report of the Independent Expert to Update the Set of Principles to Combat Impunity,” UN Doc. E/CN.4/2005/102, 2005, and “Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity,” UN Doc. E/CN.4/2005/102/Add.1, 2005.

12. Even the best-funded prosecutorial measures, such as the International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR), have limited reach and impact.

13. See P. B. Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions*, New York: Routledge, 2001.

14. See L. Bickford, “Unofficial Truth Projects,” manuscript; and L. Bickford, “Memoryscapes,” in Ksenija Bilbija, Jo Ellen Fair, Cynthia E. Milton, and Leigh A. Payne, eds., *The Art of Truth-Telling about Authoritarian Rule*, Madison: University of Wisconsin Press, 2005.

15. See P. de Greiff, *Repairing the Past: Compensation for Victims of Human Rights Violations*, forthcoming.

16. Ibid.

17. Transitional justice has a history dating back to the Athenian democracy of 411 and 403 B.C. See J. Elster, *Closing the Books: Transitional Justice in Historical Perspective*, New York: Cambridge University Press, 2004, pp. 1–23. Following the Athenian experiments, Elster finds no other “significant” episodes of transitional justice until the mid-twentieth century, where the end of World War II ushered in modern transitions to democracy.

18. Ruti Teitel’s analysis begins with the modern transitions, rather than those of Athens in antiquity. For more on the genealogy of transitional justice, see “Human Rights in Transition: Transitional Justice Genealogy,” *Harvard Human Rights Journal*, vol.16, n. 69, Spring 2003, p. 71.

19. Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* 9 December, 1948, 78 U.N.T.S. 277 (*entered into force* 12 January 1951). Of interest is the fact that this period served to solidify the modern understanding of human rights and what constituted victims and perpetrators, in a manner—sometimes contested—that continues to affect the perception of such rights.

20. The notable exception is the promulgation of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, *opened for signature* 26 November 1968, 754 U.N.T.S. 73 (*entered into force* 11 November 1970), as well as the adoption of the Convention on the Suppression and Punishment of the Crime of Apartheid of 30 November 1963, 1015 U.N.T.S. 243 (*entered into force* 18 July 1976).

21. See R. G. Teitel, *supra* note 18, p. 81.

22. There is even a suggestion of creation of a permanent truth commission to explore international conflicts, as well as “other kinds of international wrongdoings and problems,” particularly colonialism and third-world debt. See T. Forsbert and T. Teivanen, “Past Injustice in World Politics Prospects of Truth-Commission-Like Global Institutions,” *Crisis Management Initiative*, Helsinki, 2004, p. 26.

23. Teitel states that in this phase of the transitional justice genealogy, transitional justice is generously applied to the extent that it is not clear the “threshold minimum beyond which historical, psychological, or religious inquiry ought to be characterized as justice-seeking”. See *supra* note 18, p. 89.
24. While Rwanda did not undergo a negotiated transition, the continued existence of active, armed opposition in neighboring countries affects the political decisions taken with regard to implementing transitional justice initiative.
25. In other words, the transition is nonteleological, and the justice measures increase options rather than solidify movement of a country in a given direction. See V. Nesiiah, “Truth vs Justice,” in Jeff Helsing and Julie Mertus, eds., *Human Rights and Conflict*, New York: US Institute of Peace, 2005, p.2. According to Thomas Carothers, the very idea of “transition” is confusing, as “many countries that policy makers and aid practitioners persist on calling ‘transitional’ are not in transition to democracy”. See *supra* note 5, p. 6.
26. Or, in cases such as Angola, Mozambique, and Namibia, choose not to apply any of the transitional justice measures (at least at an official, governmental level).
27. Many African states find themselves grappling with state-building as much as with accountability. One remarks that the issue of a vacuous state “did not appear to be an issue in Southern Europe or Latin America, the two regions that served as the experimental basis for the formation of the transition paradigm.” See Carothers, *supra* note 5, p. 9.
28. Repeated use of transitional justice measures can increase the population’s cynicism about their usefulness. Thanks to Pablo de Greiff for this point.
29. Orentlicher, *Updated Set of Principles*, *supra* note 11, at Principle 1.
30. These preliminary suggestions do not sufficiently explain the challenges facing transitional justice in Africa. Outside Africa, the two states that may have similar experiences are Haiti and Timor-Leste.
31. In particular, prosecutions aspire to change the “reward structure” associated with various actions, such that the existence of punishment for an action would reduce the likelihood of repetition. See Elster, *supra* note 17, p. 204.
32. See P. Seils, “A Promise Unfulfilled? The Special Prosecutor’s Office in Mexico”, June 2004, at 18, available at <www.ictj.org>, access on August 18, 2006. However, in cases where violence is more widespread in the community, holding those “most responsible” accountable may not be very meaningful for victims who continue to see their perpetrators at large.
33. See Human Rights Watch, “Chad: The Victims of Hissène Habré Still Awaiting Justice”, 17, no. 10(A), July 2005. See also Human Rights Watch, “Ethiopian Dictator Mengistu Haile Mariam”, 1999; Amnesty International, “Accountability Past and Present: Human Rights in Transition”, April 1995.
34. See F. Borello, “A First Few Steps: A Long Road to a Just Peace in the Democratic Republic of the Congo”, Oct. 2004, pp. 20–26, available at <www.ictj.org>, access on August 18, 2006. See also Human Rights Watch, “Democratic Republic of Congo: Confronting Impunity”, Jan. 2004.
35. See Human Rights Watch, “Making Justice Work: Restoration of the Legal System in Ituri,

DRC”, Sept. 2004. By prosecuting individuals for crimes significantly minor to those for which they responsible, “the judicial system in Ituri is undermining its own credibility and placing its legitimacy at risk.”

36. See S’Fiso Ngesi & Charles Villa Vicencio, “Rwanda: Balancing the Weight of History,” In Eric Doxtader and Charles Villa-Vicencio, eds., *Through Fire with Water*, Rondebosch: Institute for Justice and Reconciliation, 2002, pp. 19–23.

37. The system, while flawed, may be a preferable alternative to the detention without trial, which is the *de facto* state of affairs.

38. See Amnesty International, “Sierra Leone: Ending Impunity—an Opportunity not to be Missed”, July 2000.

39. Ralph Zacklin states that it is “impossible” to envision tribunals being set up for Liberia, the DRC, or Côte d’Ivoire, despite the abhorrent nature of the atrocities committed, and despite the fact that the Arusha Accord for Burundi and the Linas-Marcoussis agreement for Côte d’Ivoire both ask for judicial accountability. See R. Zacklin, “The Failings of Ad Hoc International Tribunals,” *Journal of International Criminal Justice*, Number 2, 2004, p. 545.

40. Inter-Congolese Dialogue, Resolution no. DIC/CPR/05, March 2005. With regard to the criminal justice program in Bunia, Human Rights Watch has remarked that one of its challenges is “the absence at the governmental level of a clear policy for fighting impunity”. See “Making Justice Work,” *supra* note 35.

41. See International Center for Transitional Justice, “The Special Court for Sierra Leone: The First Eighteen Months,” March 2004, available at <www.ictj.org>, access on August 18, 2006. See also Z. Bangura, “Sierra Leone: Ordinary Courts and the Special Court”, Open Society Justice Initiative, Feb. 2005, p. 57.

42. For more on the ICC, see Rome Statute for the International Criminal Court, UN Doc. A/CONF.183/9, 1998 (entered into force 1 July 2002).

43. With regard to Zimbabwe, Brian Kagoro remarked that among some groups in Zimbabwe, if the state were to prosecute a perpetrator, the community in which the perpetrator belongs would feel targeted by unfair rules of the distant state. Instead, there is a preference for bolstering the local means of accountability, where the communities determine the appropriate sanctions for wrongdoers.

44. For more on the challenges that may result from an ICC referral of the LRA, see Refugee Law Project, “Whose Justice: Perception of Uganda Amnesty Act 2000: Potential for Justice and Reconciliation”, Feb. 2005.

45. See International Center for Transitional Justice and the Human Rights Center, “Forgotten Voices: A Population-Based Survey on Attitudes about Peace and Justice in Northern Uganda”, July 2005, available at <www.ictj.org>, access on August 18, 2006.

46. See “Report of the Secretary-General on The Rule of Law and Transitional Justice in Conflict and Post Conflict Societies,” UN Doc. S/2004/616, 2004, at xiv, para. 50. See also Hayner, *supra* note 13.

47. See Orentlicher, Updated Principles, *supra* note 11, Principles 6–13. See also “Report of the Secretary General on The Rule of Law,” *id.* para. 51.

48. For more on the relationship between civil society and truth commissions, see International Center for Transitional Justice, "Truth Commissions and NGOs: The Essential Relationship," April 2004, available at <www.ictj.org>, access on August 18, 2006.
49. See Resolution DIC/CPR/04, available at <www.drcpeace.org/docs/finalreport1_1.pdf>, access on August 18, 2006.
50. The TRC is tasked with a 10-point ambitious set of goals, including establishing truth and the rule of law, birthing a "new political consciousness", and bringing about reconciliation. See DIC/CPR/04, *id.* at para. 6.
51. See A. Boraine, *A Country Unmasked: Inside South Africa's Truth and Reconciliation Commission*, New York: Oxford University Press, 2000, pp. 71–72.
52. See DIC/CPR/04, *supra* note 49, para. 10.
53. A section of the law provides for appointment of 13 more commissioners, though even then political parties retain control. The proposed changes in the composition of the commission are not likely to redeem the credibility of the commission. See Borello, *supra* note 34, pp. 41–42.
54. Sierra Leone Truth and Reconciliation Commission, "Witness to Truth: Final Report of the Truth and Reconciliation Commission for Sierra Leone," vol. 2, Chapter 2: "Reparations", para. 197.
55. Rosalind Shaw, "Rethinking Truth and Reconciliation Commissions: Lessons from Sierra Leone", United States Institute for Peace, Special Report 130, Feb. 2005, p. 5.
56. However, others have stated that the victims do achieve victory, their testimony compelling a (most likely) socially elevated perpetrator to come before the NRC. In addition, some people find the formal, court-like setting empowering.
57. See DIC/CPR/04, *supra* note 49. See also *Loi no. 04/018 du 30 Juillet 2004 portant organization, attributions et fonctionnement de la commission verite et reconciliation, 1er Aout 2004, Article 41 (on file)*.
58. In Sierra Leone, it is noteworthy a version of the report for children and another in video were made widely available in a relatively prompt manner.
59. The Sierra Leone TRC proposed to have "popular" and "children" versions of the Final Report, both which would be in written form. They also had a video version.
60. This is very different from the Argentinean commission's final report, which was a bestseller (although this does not necessarily mean that it was widely read). Thanks to Priscilla Hayner for this point.
61. In the cases under examination, only South Africa has implemented a reparations program, the challenges of which are discussed in detail below. Sierra Leone proposed a reparations program. For detailed analysis of reparations programs, see de Greiff, *supra* note 15.
62. See UN, "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", C.H.R. res. 2005/35, UN Doc. E/CN.4/2005/ L.10/Add.11, April 19, 2005, para. 11.

- 63.** See de Greiff, *supra* note 15.
- 64.** For more elaboration on the important variables on the design of reparations programs, see *Ibid.*
- 65.** However, the ICC is considering a Trust Fund for Victims.
- 66.** See C. J. Colvin, "Overview of the Reparations Program in South Africa," in de Greiff, *supra* note 15. See also A. Crawford-Pinnerup, "An Assessment of the Impact of the Urgent Interim Reparations" in *From Rhetoric to Responsibility: Making Reparations to the Survivors of Past Political Violence in South Africa*, Brandon Hamber and Thloki Mofokeng, eds., Johannesburg: Center for the Study of Violence and Reconciliation, 2000.
- 67.** The government allowed the payment of final reparations of a total of US\$80 million, much less than the \$400 million the TRC recommended. This low payment may have political reasons over and above the resource shortage.
- 68.** Sierra Leone TRC Final Report, *supra* note 54, "Reparations", paras. 57, 58.
- 60.** However, this is the most pragmatic approach to reparations in a country such as Sierra Leone, where asking for reparations measures any broader (especially in the form of cash awards) would be unrealistic and never would be carried out. Interview with Howard Varney, May 2005.
- 70.** For example, a victim before the TRC stated, "What puzzles me is that the perpetrators are cared for and those of us who are victims are left out". For more on the resentment of victims toward perpetrators, see Sierra Leone TRC Final Report, *supra* note 54, "Reparations", para. 38.
- 71.** See Colvin, *supra* note 66.
- 72.** For more on the Trust Fund for Victims, see "Resolution on the Establishment of a Fund for the Benefit of Victims of Crimes Within the Jurisdiction of the Court, and of the Families of such Victims" (Resolution ICC-ASP/1/Res.6), adopted at the 3rd plenary meeting, on 9 September 2002, by consensus.
- 73.** In other words, (while the actual operation of the Fund is still unclear) there is a possibility that out of a village of people who suffered war crimes, only a few victims whose cases are heard before the ICC can receive reparations. In the resource-poor environments from which the ICC's first cases are likely to emerge—such as Uganda, the DRC, or Sudan—such a "privilege" of some victims over others could create resentment.
- 74.** For more on anticipated challenges for the Trust Fund, see P. de Greiff & M. Wierda, "The Trust Fund for Victims of the International Criminal Court: Between Possibilities and Constraints," in *The Right to Reparation for Victims of Gross and Systematic Human Rights Violations*, Marc Bossuyt, Paul Lemmens, Koen de Feyter, and Stephan Parmentier, eds., Brussels: Intersentia, forthcoming.
- 75.** See UN, Report of the Secretary General, para. 52. Vetting is one part of a multipronged approach of broader institutional reform strategies that can include, among other things, turning formerly repressive and abusive institutions into institutions that respect the rule of law and treat citizens with dignity, and reviewing repressive legislation.
- 76.** The focus on personnel reform is best explained by Alexander Mayer-Rieckh, "Vetting,

Institutional Reform and Transitional Justice: An Operational Framework”, International Center for Transitional Justice and UN Development Programme, forthcoming. See also UN, Report of the Secretary General, para. 53.

77. Mayer-Rieckh gives a detailed operational strategy for vetting, which includes a four-prong strategy of assessing individual capacity, individual integrity, organizational capacity and organizational integrity. *Id.*

78. Sierra Leone TRC Final Report, *supra* note 54, “Findings”, para. 49.

79. *Ibid.*, at “Recommendations”, paras. 259–262.

80. Sierra Leone TRC Final Report, *supra* note 54, “Findings”, para. 61.

81. See Mahmood Mamdani, “Amnesty or Impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa (TRC),” *Diacritics* 32:3–4, Fall/Winter 2002, at 33.

82. According to Mahmood Mamdani, this limited definition of perpetrators came from the narrow manner in which “gross violations of human rights” were defined—where the Commission chose to focus on “conflicts of the past” in an individualized manner to the extent that the apartheid, the crime against humanity, was reduced to a contextual backdrop. For more on this discussion, see *ibid.*, at 33–59.

83. The Promotion of National Unity and Reconciliation Act, 1995, Chapter 1 (ix).

84. *Ibid.*, at Chapter 1 (xix).

85. Mamdani, *supra* note 81, at 38.

86. Numbers from the Global IDP project, 2001, available at www.idpproject.org. See also The World Bank, “Greater Great Lakes Regional Strategy for Demobilization and Reintegration,” Report No. 23869-AFR, March 25, 2003, at 2.

87. Jon Elster identifies four categories of individuals who commit wrongs: those who issue orders, those who execute the orders, those who act as intermediate links between the orders and the executions, and those who facilitate wrongdoing. See *supra* note 17, at 118. The determination of the gravity of crimes committed by perpetrators in itself—in other words, what constitutes “masterminding” or “facilitating”—can be a difficult task partly because of its subjective nature.

88. *Ibid.*, at 99–115.

89. See “Cape Town Principles and Best Practices on the Recruitment of Children into the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa,” April 27–30, 1997.

90. See Letter dated 31 January 2001 from the President of the Security Council addressed to the Secretary-General, UN Doc. S/2001/95, stating that it would be “extremely unlikely that juvenile offenders will in fact come before the Special Court.”

91. See International Criminal Court, “President of Uganda refers situation concerning the Lord’s Resistance Army (LRA) to the ICC,” The Hague, Jan. 29, 2004. The LRA has abducted more than 10,000 children. See Human Rights Watch, “Stolen Children: Abduction and Recruitment in Northern Uganda,” 15, No.7(a), March 2003.

92. See IRIN, "Burundi: Demobilisation of child soldiers begins," Jan. 26, 2004. For child soldiers in the DRC, see Amnesty International, "DRC: Children at War," AFR62/034/2003, Sept. 9, 2003. In Liberia, UN Agencies estimate that more than 15,000 children have been used in the fighting.

93. For more on the role of companies in the DRC conflict, see UN, "Final report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo," S/2002/1146, Oct. 16, 2002.

94. *Khulumani et al. v. Barclays National Bank Ltd. et al.* The lawsuit was filed in New York against 22 corporations that invested in apartheid South Africa. Businesses never appeared before the TRC, and South Africa does not have a law that can hold corporations to account for human rights abuses. The suit was subsequently dismissed because an affidavit filed by the ministry of justice on behalf of the government of South Africa. Presently, Khulumani has launched an appeal. Interview with Marjorie Jobson, Chairperson of Khulumani Board, Johannesburg, May 2005. Also See Cohen, Milstein, Hausfeld & Toll, *International Lawsuit Filed on Behalf of Apartheid Victims*, P.L.L.C., available at <www.cmht.com/cases_cwapartheid1.php> and at <<http://khulumani.net/content/category/4/7/63>>, access on Sept. 11, 2006.

95. BBC News, "Rwanda Inquiry into French Role," Aug. 1, 2004.

96. See the Special Court for Sierra Leone, *The Prosecutor v. Sam Hinga Norman*, Case No. SCSL-03-1, available at <www.sc-sl.org/normanindictment.html>, access on Sept. 11, 2006. See also Sierra Leone TRC Final Report, "Findings," supra note 54, at para. 332.

97. See, e.g., see International Federation for Human Rights, "Victims in the Balance Challenges ahead for the International Criminal Tribunal for Rwanda," No. 329/2, Nov. 2002, at 16.

98. Even then, because of historical precedent, supporters of the Jerry Rawlings regime as well as the Armed Forces Revolutionary Council felt targeted by the NRC, and feel this is yet another partisan undertaking.

99. For example, in Ghana, following a decade of military rule, an amnesty-entrenching 1992 constitution was voted into existence by a referendum, in the interest of "peace and stability." At this time, the military government was still powerful. These permanent measures ensured that such persons as former president Jerry Rawlings would not be prosecuted. See Eric Darko, "Ghana NRC: Looking Back and the Way Forward," forthcoming. For more reasons why amnesties can be undertaken as a political choice, see Paul van Zyl, "Justice Without Punishment: Guaranteeing Human Rights in Transitional Societies," in *Looking Back/Reaching Forward: Reflections in the Truth and Reconciliation Commission of South Africa*, Charles Villa-Vicencio and Wilhelm Verwoerd, eds., Cape Town: UCT Press, 2000, at 42-47; and Diba Majzub, "Peace or Justice?" Amnesties and the International Criminal Court," *Melbourne Journal of International Law* 3, Oct. 2002, 251-252.

100. Lomé Peace Agreement, Part 3, Article IX.

101. UN, "Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone," Article 1. Interestingly, the Sierra Leone TRC concluded, "The international community has signaled to combatants in future wars that peace agreements containing amnesty clauses ought not to be trusted and, in so doing, has undermined the legitimacy of such national and regional peace initiatives." See Sierra Leone TRC Final Report, supra note 54, "Executive Summary" at para. 68.

- 102.** Conversations with Madeline Fullard about the case of Gideon Nieuwoudt (see Center for Studies of Violence and Reconciliation, Press Release, Feb. 11, 2004). For more on the case, see U.S. Department of State, "South Africa: Country Practices on Human Rights Practices—2004," released by the Bureau of Democracy, Human Rights, and Labor, Feb. 28, 2005, Section 4, available at <www.state.gov/g/drl/rls/hrrpt/2004/41627.htm>, access on Sept. 11, 2006.
- 103.** See Borello, *supra* note 34, p. 43.
- 104.** The Amnesty Act, 2000.
- 105.** See Refugee Law Project, "Whose Justice? Perceptions of Uganda's Amnesty Act 2000: The Potential For Conflict Resolution and Long-Term Reconciliation," Feb. 2005, p. 5.
- 106.** Amnesty Act 2000, Part II 3(1).
- 107.** See "Forgotten Voices," *supra* note 45, pp. 22–36.
- 108.** See "Greater Great Lakes," *supra* note 86, at 13. In Sierra Leone, it has been said that the incomplete nature of DDR in both 1997 after the Abidjan Agreement and in 1998–1989 played a part in the collapse of the peace processes.
- 109.** *Id.* at 57–58.
- 110.** See also Human Rights Watch, "Youth, Poverty and Blood: The Lethal Legacy of West Africa's Regional Warriors," 17 no. 5A, March 2005, p. 4.
- 111.** See "Greater Great Lakes," *supra* note 86, p. 14.
- 112.** See Peter Swarbrick, "DDRRR: Political Dynamics and Linkages" in *Challenges of Peace Implementation: The UN Mission in the Democratic Republic of the Congo*, Mark Malan and João Gomes Porto, eds., Pretoria: Institute for Security Studies, Nov. 2003, 166–167.
- 113.** While there exists a distinction between "perpetrators" of human rights abuses and "former combatants" (some of whom may not have committed abuses), absent information to the contrary, many victims can conflate the two concepts.
- 114.** See *supra* note 54, "Reparations," para. 37.
- 115.** See *supra* note 54, "Reparations," para. 74.
- 116.** See de Greiff, *supra* note 2.
- 117.** Pablo de Greiff offers that even if trials, truth-seeking, vetting, and reparations were all executed with some degree of success, the society would not automatically be reconciled. *Id.*
- 118.** The issue of moral leadership is separate from, but related to, vetting discussed above.
- 119.** See Human Rights Watch, "DR Congo: Army should not appoint war criminals," Jan. 14, 2005.
- 120.** The former defense minister, to whom Chief Norman reported during the civil war, is the current president of Sierra Leone.
- 121.** Government of Rwanda, "President Kagame Commends Rwanda-World Bank Relationship," available at <www.gov.rw/government/071602.html>, access on Sept 11, 2006. The World Bank President stated, "To stop the anger and bitterness, you must build hope."

122. For a longer discussion about these two dimensions of reconciliation, as well as the challenges that arise when they are confused with each other, see Tristan Anne Borer, "Reconciling South Africa or South Africans? Cautionary Notes from the TRC," *African Studies Quarterly* 8:1, Fall 2004. For a broader treatment of the subject and the various ways in which it may be understood, see de Greiff, *supra* note 2.

123. The two dimensions of reconciliation can contribute to each other in obvious ways. National/political reconciliation and constitutionalism can enable interpersonal reconciliation, but the prerequisite of such a political reconciliation is not that individuals in the political space like each other and be reconciled, but that their relationships are mediated by uniformly applicable laws. Borer makes an important recommendation about processes being explicit and clear which type of reconciliation they pursue, to avoid confusion.

124. Borer, *supra* note 122, p. 32.

125. See Shaw, *supra* note 55.

126. In other words, it is possible that sections of the population understood the reconciliation advanced by the national truth commission of the interpersonal level, and found it unable to meet their expectations, or even contrary to their cultural practices.

127. See Alcinda Honwana, *Children of War: Understanding War and War Cleansing in Mozambique and Angola*, in *Civilians in War*, Simon Chesterman, ed., Boulder, Colo.: Lynne Rienner Publishers, 2001. See also Alcinda Honwana, "Sealing the Past, Facing the Future: Trauma Healing in Rural Mozambique," in Jeremy Armon, Dylan Hendrickson and Alex Vines, eds., *The Mozambican Peace Process in Perspective*, Accord Series, London: Conciliation Resources, 1998.

128. See Paul Conway, "Truth and Reconciliation: The Road Not Taken in Namibia," *Online Journal of Peace and Conflict Resolution*, 5.1, Summer 2003, pp. 66–76.

129. See "Truth Commissions and Transitional Justice: A Short Guide," Amnesty International Dutch Section, Sept. 2003, p. 9.

130. This is not to assume that recent transitional justice initiatives in countries such as Haiti or Timor-Leste have fared better than those assessed herein.

131. There are many more problems with international justice, of which transitional justice is a subset, that obviously significantly influence the manner in which transitional justice is implemented in Africa. The broader problem includes holding justice in poor countries hostage to international funding and politics. See Charles T. Call, "Is Transitional Justice Really Just?" *Brown Journal of World Affairs* XI:1, Summer/Fall 2004. It is also important to point out that the discussion of the "weak state" does not confine the responsibility for this condition to the state itself. It is possible for a state to be weak because of many actions including those of third parties such as multinational companies. Thanks to Yasmin Sooka for this point.

132. See Chabal, *supra* note 6, pp. 5–6.

133. *Ibid.*, p. 14, 136.

134. See de Greiff, *supra* note 2.

135. It appears that countries and leaders want accountability, if only for the fact that it increases

their international legitimacy and respectability. On the other hand, they are unwilling to pay the price for a meaningful processes, for such reasons as lack of economic resources, political will, and adequate infrastructure to aid reform are all too common, as are processes whose authenticity is questionable, given the culpability of those involved in designing/implementing the accountability strategies. Chabal, *supra* note 6, at 37. There are various motivations for this, one of which is to access international funding. After all, governments are not known to fall on account of their human rights records. See also Jack Snyder and Leslie Vinjamuri, "Trials and Errors: Principle and Pragmatism in Strategies of International Justice," *International Security*, vol. 28, n. 3, Winter 03/04, pp. 33, 42.

136. Dominique Bangoura, "National Conferences: The Only means for Overcoming Crises," *African Geopolitics* 17 (Winter 2004–2005).

137. See Manby, *supra* note 6, p. 1024.

138. Transitional justice stakeholders cannot get away from the fact that state infrastructure is critical for the success of their work. Similar to the argument made in development of a "poverty trap"—a threshold below which countries cannot take advantage of trade or investment because of disease, low savings, and poverty—one can find an analogy in post-conflict countries with relation to transitional justice. Below a certain institutional minimum (this could be thought of as the degree of institutionalization corresponding to the conditions in the countries in which transitional justice was first established, although its precise nature is a matter of empirical research, beyond the scope of this paper), transitional justice measures can be implemented, but they cannot be expected to yield desired outcomes. Above that minimum, however, they are able to contribute sustainably to establishing the rule of law and justice, as envisioned in the theory. Similar to development, below the minimum, the international community can be seen as having a responsibility to help the country break out of the trap by investing in basic public and legal infrastructure, ensuring police salaries are paid on time, etc. Thanks to Roger Duthie for pointing out the parallels. For more on poverty traps, see Millennium Project, "Investing in Development: A Practical Guide to Achieving the Millennium Development Goals," UNDP: New York, 2005, pp. 32-43.

139. See Snyder, *supra* note 135, p. 12.

140. *Ibid.*, p. 25.

141. This should not be taken to be an endorsement of the approach of Mozambique, but rather a broadening of the sets of options to be explored in transitions. For more on various local initiatives and their potential contribution to reconciliation, see Roger Duthie, "Transitional Justice at the Local Level," manuscript.

142. Thanks to Roger Duthie for this point.

143. See the collection of books edited by Argentine scholar Elizabeth Jelin for the Social Science Research Council's project on Collective Memory and Repression in the Southern Cone, available at <www.ssrc.org/fellowships/coll_mem/memory_volumes.page>, access on Sept 11, 2006.

144. While these approaches do not depend on state institution, they may require a basic infrastructure that protects freedom of expression, and may also benefit from public policies which make resources available to artists and civil society.

145. See Valmont Layne, "The District Six Museum," in *Transitional Justice and Human Security*, in Alex Boraine and Sue Valentine, eds., Cape Town: International Center for Transitional Justice and Japanese International Development Agency, 2006.

146. This is not to imply that cultural measures will necessarily be partial and free of politicization. See Bickford, Louis, "Memory, Museums, and Memorials: Building a New Future," in *Transitional Justice and Human Security*, id.; and Ksenija Bilbija, Jo Ellen Fair, Cynthia E. Milton, and Leigh A. Payne, eds., *The Art of Truth-Telling about Authoritarian Rule*, Madison: University of Wisconsin Press, 2005.

147. See Tshiyeme, *supra* note 6.

148. The Constitutive Act of the African Union, adopted 11 July 2000 Article 4(h); Protocol Relating to the Establishment of the Peace and Security Council of the African Union, adopted by the 1st Ordinary Session of the Assembly of the African Union, Durban, 9 July 2002, Article 7(e); New Partnership for Africa's Development, adopted by the 37th Summit of the OAU in July 2001, para. 74; CSSDCA Solemn Declaration, adopted by the thirty-sixth Ordinary Session of the OAU Assembly of Heads of State and Government, Lomé, Togo, July 2000, AHG/Decl.4 (XXXVI) 2000. See especially items (k) under the sub-heading "security" and (l) under the sub-heading "stability" under the Plan of Action.

149. See Manby, *supra* note 6, pp. 1005–1011.

150. Undertaking measures that *appear* to be address root causes by undertaking a variety of public processes without actually doing so can be problematic: peace processes have been known to backfire, and countries in transitions have proceeded to have new cycles of repressions and abuse.

151. Such assumptions underlie, for example, the low international funding patterns for these mechanisms, the sequencing of initiatives, etc.

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ABSTRACT

Nine island countries make up the Commonwealth Pacific - Fiji, Kiribati, Nauru, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu, and Vanuatu. Across the region, issues around policing and importantly police reform are key governance priorities, as well as being human rights concerns. Policing in this particular region contends with large geographical distances within countries often spread over many islands, heterogeneous societies, violent crime, and sporadic political crises. The police must be equipped to meet these myriad challenges in support of democracy and human rights. This paper seeks ways to strengthen democratic policing in Commonwealth Pacific countries, by examining accountability over the police in particular. It outlines the legal frameworks, and institutional processes and mechanisms already in place to hold the police accountable - a key element of democratic policing. Focusing mainly on police accountability, the aim of this paper is to describe how entrenched democratic policing is in the countries of the region, and also highlights strategies to better solidify democratic policing.

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KEYWORDS

Accountability – Human Rights – Democratic Policing



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STRENGTHENING DEMOCRATIC POLICING AND ACCOUNTABILITY IN THE COMMONWEALTH PACIFIC

Devika Prasad

Introduction

Nine island countries make up the Commonwealth Pacific – Fiji, Kiribati, Nauru, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu, and Vanuatu. Across the region, issues concerning policing and, importantly, police reform are key governance priorities, as well as human rights concerns. Policing is a central and vital function of the state, vested with the duty to ensure an environment of safety and security. Policing in this particular region contends with large geographical distances within countries often spread over many islands, heterogeneous societies, violent crime, and sporadic political crises. The police must be equipped to meet these myriad challenges in support of democracy and human rights.

The only legitimate policing is one that helps create an environment free of fear and conducive to the fulfilment of people's human rights, particularly those that promote unfettered political activity, which is the hallmark of democracy. Unfortunately, the post-independence histories of many Pacific countries have shown that the police are not consistently unbiased and rights-affirming. Police agencies in many of these countries have played a central role in violent government overthrows, protracted internal conflicts, and suppression of democracy. These experiences have led to extensive police reform initiatives across the Commonwealth Pacific, some led by international donor agencies and others by national governments. In this way, this region offers varied examples of policing problems as well as insights into reform of the police.

See the notes to this text as from page 129.

Democratic nations need democratic policing. The police reform initiatives occurring across the Pacific are tremendously encouraging and have set an immensely important precedent for strengthening good governance and democracy across the region. But entrenching sustainable police reform requires a shift from “regime” policing to “democratic” policing. Regime policing, embedded as a tool of colonial rule in many Commonwealth countries, is characterised by the police answering predominantly to the regime in power and not to the people; controlling rather than protecting the public; and steadfastly remaining outside the community. In contrast, democratic policing grounds itself on an approach founded on principles of accountability, transparency, participation, respect for diversity, and the protection of individual and group rights. Democratic policing not only protects democratic institutions and supports an environment where democratic rights and activities can flourish, but also embodies democratic values in its own institutional processes and structures. Ongoing police reform initiatives in the Pacific go some way to democratise the police from within, but perhaps a greater push is needed to establish the protection of democratic and human rights as a central practice of policing.

This paper seeks ways to strengthen democratic policing in Commonwealth Pacific countries, by focusing police accountability in particular. It outlines the legal frameworks, institutional processes and mechanisms already in place to hold the police accountable – a key element of democratic policing. With the information available and analysis provided, this paper describes how entrenched democratic policing is in the countries of the region, and also highlights strategies to better solidify democratic policing.

Problems in policing

Challenges to cement democratic policing in the region are complex and sizeable. Many of the Commonwealth Pacific countries are struggling with chronic crime and violence, fuelled by the widespread circulation of illegal small arms. Many of the countries in the region have had turbulent post-independence political histories. Just a superficial overview: Fiji has experienced three coups d'état since the late 1980s; the Solomon Islands government was toppled in 2000 by paramilitary police acting with militia groups; violent crime and endemically bad governance haunt Papua New Guinea; the stability of democracy in Vanuatu repeatedly contends with shifting political alliances; and democracy has yet to take root in Tonga. Across the region, governance and control institutions are weak, while the security sector tends to be powerful and highly militarised, resulting in fragile democracies prone to crises. Alarming, during the most turbulent periods in the Fiji and the Solomon Islands, civilians were largely abandoned and left to fend for themselves, with any semblance of police

protection conspicuously absent. In the Solomon Islands particularly, following the coup in 2000, the police disintegrated as a functioning organisation and police officers were pulled in different directions – either officers were biased, co-opted into the ethnically driven militancy, or just entirely unable to take action. The charged environment meant that police officers could not carry out investigations in territory controlled by a rival ethnic group, or simply did not act due to fear of reprisal. The police organisation of Papua New Guinea, called the Royal Papua New Guinea Constabulary (RPNGC), has consistently come under the radar over the last five years due to incidents and allegations of brutality, excessive use of lethal force and cover-ups leading to impunity for its officers. Worryingly, much of the police brutality in Papua New Guinea seems to occur in the course of routine policework, as reflected in the reports of international observers and human rights organisations.

Police reform initiatives

Along with grave policing problems, the Commonwealth countries of the Pacific also provide lessons in police reform. There are a number of police reform projects in place at present, domestically in some countries, as well as region-wide. Many of the reform programmes are driven by international donor assistance, particularly from the Australian and New Zealand governments, though there are specific domestic initiatives as well. Whether as an external donor-driven programme or a national government initiative, police reform is usually included as one aspect of a broader *sector-wide* reform programme, and is often associated with reform of the judiciary or key government supervision bodies such as the Ombudsman or Auditor General. The agenda for police reform in the region includes, among other things, replacement of outdated police acts with legislation that provides a sound basis for modern democratic policing; organisational restructuring to make the police less militaristic and hierarchical; revamping the training curricula to reflect new skills requirements and human rights standards; and providing technology to police officers to enhance their performance. As always, these initiatives for reform must be underpinned by the guarantee of increased accountability – both internally in police organisations, and through external means.

The nuts and bolts of democratic policing

The ongoing reform programmes are contributing to bring elements of democratic policing to the Pacific police organisations. Democratic policing is both a process – the way the police do their work – and an outcome. The democratic values of the Commonwealth lay down a sound framework for this.

A 'democratic' police organisation must:¹

- **be accountable to the law, and not a law unto itself.** The police, like all government agencies and employees, must act within the law of the country and within international laws and standards, including human rights obligations. Police officials who break the law must face the consequences, both internally through the disciplinary systems within police organisations, and externally, in the criminal justice system.
- **be accountable to democratic government structures.** The police are an agency of government, and must report to the government their adherence to governmental policy and for their use of government resources. However, the police are expected to remain politically neutral and to enforce the law without bias. They remain primarily accountable to the law of the country, and not merely to the political party, that holds power.
- **be transparent in its activities.** Accountability is facilitated by greater transparency. In a democratic system, most police activity should be open to scrutiny and regularly reported to outside bodies. This transparency applies to information about the behaviour of individual police officers as well as the operation of the police organisation as a whole.
- **give top operational priority to protecting the safety and rights of individuals and private groups.** The police must be accountable to the people, and not just to governments, for their decisions, actions and performance. The police should be responsive to the needs of individual members of the community – especially to people who are vulnerable; instead of merely to orders issued by the government.
- **protect human rights, especially those that are required for the sort of unfettered political activity characteristic of a democracy.** Democratic policing implies policing in a manner which is supportive and respectful of human rights, and which prioritises the protection of life and dignity of the individual. It also requires the police to make a special effort to protect the freedoms that are characteristic of a democracy – freedom of speech, freedom of association, assembly and movement, freedom from arbitrary arrest, detention and exile, and impartiality in the administration of law. Prioritising the protection of human rights in policework calls for the skilful exercise of professional police discretion.
- **adhere to high standards of professional conduct, while delivering a high-quality service.** Police are professionals, with huge powers, in whom the public place enormous trust. Hence police behaviour must be governed by a strong professional code of ethics and conduct, against which they can be held accountable for the way that they conduct themselves. At the

same time, the police are a service organisation, and they must deliver their services to the community at the highest possible level of quality, and be accountable for the results they deliver.

- **be representative of the communities it serves.** Police organisations, which reflect the populations they serve, are able to better meet the needs of those populations, and to earn the trust of vulnerable and marginal groups who most need their protection. Recruitment by the police must aim to create a more representative and diverse police institution, especially where the communities are heterogeneous.

Critical to strengthening democratic policing is the principle that the police should be held accountable: not just by government, but by a wider network of agencies and organisations, working on behalf of the interests of the people, within a human rights framework. An effective system of police accountability – in line with the checks and balances that shape democratic systems of governance – is characterised by multiple levels of accountability. Commonly, accountability over police organisations comes from four sources:

- **government (or ‘state’) control** – The three branches of government – legislative, judicial and executive – provide the basic architecture for police accountability in a democracy. In fact, across the Commonwealth, police leaders answer directly to elected public representatives in the executive branch, for instance Ministers responsible for police. Police chiefs are often required to appear before the legislature to answer questions. Where there is a strong and independent judiciary, cases may be brought against the police in courts that can result in fresh jurisprudence and policy guidance on accountability issues or increased channels for redress.
- **independent external control** – The complex nature of policing and the vast powers accorded to the police require that additional controls are put in place. In any democracy, at least one independent civilian supervision body adds tremendous value in extending accountability of the police towards those outside police and government circles. Institutions such as Human Rights Commissions, Ombudsmen and public complaints agencies can play a valuable role in overseeing the police and limiting police abuse of power.
- **internal control** within the police organisation, in the form of disciplinary systems, training and supervision, proper systems for recording performance or crime data are required in any police organisation. The challenge in many Commonwealth jurisdictions is that internal policies and procedures are simply not implemented properly, or in some cases, not implemented at all.

- **social control** or ‘social accountability’ – in a democracy, the police are publicly held accountable by the media, as well as by individuals and by a variety of groups (such as victims of crime, business organisations, local civic or neighbourhood groups). In this way, the role of holding the police accountable is not merely left to the democratic institutions that represent the people, but ordinary people themselves play an active part in the system of accountability. There are only a small number of institutions that facilitate this type of accountability in the Commonwealth, rather, it is expected that police and communities will negotiate appropriate – and diverse – arrangements.

Police accountability in the region

The police agencies of Commonwealth countries in the region are centralised forces; they are all constitutionally established and governed by Police Acts. All of them are led by a Commissioner of Police, who in turn reports to a designated Minister responsible for police. Importantly, the Commissioner of Police is responsible for day-to-day administrative, operational and financial matters. It is only in Tonga where this may not be the case – Section 8 of Tonga’s Police Act vests the “command, superintendence and direction” of the police in the Minister of Police, “who may depute the Superintendent of Police to exercise this responsibility on his behalf”.² In this case, the Minister is responsible to Cabinet. By and large, this region’s police agencies come under the purview of the Ministries of either Home Affairs, Internal Security or in the cases of the Solomon Islands and Tonga, a specific Minister for Police.

Legal frameworks of accountability

The need for the police to be accountable is clearly recognised in international law. Numerous United Nations declarations and treaties have defined norms of accountability, and these are reflected in Commonwealth, regional and domestic standards. The Commonwealth countries in the Pacific are all members of the United Nations and thereby recognise the UN system of international laws and standards along with Commonwealth declarations and communiqués. While the Pacific does not have regional standards that speak direct for police accountability, a regional organisation called the Pacific Islands Forum that seeks to enhance cooperation between member states, of which almost all are also Commonwealth members, has produced Forum declarations to strengthen regional governance and security, with implications for policing.

While international instruments provide a significant framework for democratic policing, in day-to-day practice, national Constitutions, Police Acts

and other relevant legislation are more immediately pertinent to the conduct of individual officers and police organisations as a whole. Across the Commonwealth, Constitutions are the supreme law of the land, establish the structure of states, and reflect national aspirations. Notably, across the region, by and large, the police, through the Police Commissioner, are accorded operational autonomy through the Constitution (with Tonga as the exception). Police Acts and supporting legislation (such as Police Rules or Regulations) set out the objectives of policing, create the structure and hierarchy of the police organisation, and define the functions and powers of the police. As such, it is vital that national legislation establish a sound and sturdy foundation of accountability to entrench democratic policing domestically.

International, Commonwealth and Pacific regional standards

Various United Nations conventions and standards provide clear principles to moderate the conduct of police officers, by placing specific legal obligations on law enforcement officials, providing channels for accountability and redress, and guiding the exercise of difficult police powers such as the use of force. Unfortunately, Commonwealth Pacific governments have not exhibited a good track record of signing on to international human rights treaties, which means, largely, they have not adopted international standards into domestic practice.³ The Commonwealth, as expressed in the documents since the 1991 Harare Declaration (the most significant of the Commonwealth statements, membership to the Commonwealth requires countries to abide by this declaration) is committed to the development of democratic institutions that respect the rule of law and principles of good governance. Democratic policing is one such institution. Existing regional declarations, which have all come out of the Pacific Islands Forum, do not address accountability or human rights standards; their focus is largely on facilitating cooperative, trans-national law enforcement.

Constitutional framework around police

Most of the Constitutions of the region have been amended numerous times, due to political tensions or crises, or the introduction of new states in growing federations. For instance, the Constitution of Fiji was significantly amended in 1997, and the Constitution of the Solomon Islands is currently undergoing a thorough review.

Importantly, the Constitutions establish accountability frameworks – made up of both processes and structures – that apply directly to the police. In addition to establishing specific accountability mechanisms, constitutional provisions

also guide such important processes as the appointment of the police chief, pinpoint responsibility for certain disciplinary actions, and lay down legal and rights guarantees which must be respected by the police. It is tremendously important that human rights are constitutionally protected and independent oversight institutions such as human rights commissions and ombudsman offices are given a constitutional basis, as Constitutions are more difficult to amend than normal legislation.

Fundamental rights and liberties

The Constitutions of this region entrench fundamental rights and liberties, and require that they be protected by all agencies of the state. Relating to the exercise of police powers, in Fiji, Papua New Guinea, Vanuatu, Kiribati, and Tuvalu, the Constitution includes the rights to life, personal liberty, protection from inhuman treatment, and protection of law as fundamental rights, among others. Notably, in the interest of a smooth criminal justice system, the right to secure the protection of law sets out internationally accepted fair trial principles, such as the presumption of innocence until proven guilty, the right to an adequate defence, and fair, impartial proceedings. The Constitutions of Fiji, Papua New Guinea, the Solomon Islands, and Kiribati contain a specific section on the rights of arrested or indicted persons, which include such necessary directives to law enforcement officials such as informing persons of the reasons of their arrest, that they be promptly released if not charged, allowing access to a lawyer of their choice, and to be treated with dignity and respect. Freedom from arbitrary search and seizure is also enshrined in almost all of the Constitutions. This kind of constitutional safeguard goes further in directing the police to practice democratic policing.

Police acts

Many of the Police Acts across the region are in the process of being revised, as part of the Law & Justice sector reform programmes conducted by international donor agencies. This is entirely necessary, as the current Acts retain colonial and heavily militaristic underpinnings. The concept of democratic policing implies an approach based on norms and values derived from democratic principles and a Police Act that is shaped by these democratic norms and human rights standards can lay a firm foundation for democratic policing. Taking examples from the most progressive police legislation in the Commonwealth, key elements of a strong legal framework for democratic policing and effective accountability include:

- a human rights mandate in the definition of police duties and functions;

- fair, adequate and strong internal disciplinary systems;
- cooperation between internal and external mechanisms of police accountability;
- at least one independent, preferably civilian-dominated, agency to investigate public complaints against the police;
- multiparty supervision over the police by elected representatives in parliaments, legislatures or local councils;
- mandatory interaction between the police and the public.

Generally, the Police Acts in the Pacific do not make reference to the protection of human rights and civil liberties but focus on the functions of the police related to colonial style “maintenance of law and order”. As stated above, basic fundamental rights and liberties are enshrined in the Constitutions of the region, but this is only one step in the protection of human rights. It is equally important that violations of human rights by police officers in the course of their duty are held as offences in the Police Act. The current Acts all predate the creation of external, civilian dominated supervision bodies, which means that the law governing the police relies almost exclusively on internal police disciplinary systems to investigate police misconduct.

Working of disciplinary regimes as laid down in Police Acts: problems and challenges

Internal processes of accountability represent the first line of defence against police misconduct and also the degree of commitment of a police force to maintain accountability and exert effective supervision. Disciplinary offences of police officers appear in the Police Acts and supporting legislation such as Police Regulations, Police Rules, or Police Service Commission Regulations – in fact, the supporting legislation usually holds a more exhaustive list than the Police Act. In almost all of the police organisations of these countries, disciplinary processes follow a similar pattern – discipline for junior officers is imposed primarily through senior officers and the Commissioner of Police, and the “gazetted” or senior officers are dealt with through the Service Commissions (autonomous government bodies dominated by representatives of the executive branch who exercise disciplinary control over senior police officers, and also have input in the appointment of the Police Commissioner). Papua New Guinea is one exception where the disciplinary regime appears to be uniform irrespective of rank; and in Tonga, the Minister of Police exercises full disciplinary control over the police. Discipline is largely realised through police investigating and punishing other police, and civilian supervision is marginalised due to overburdened external oversight bodies. All police forces

have procedures and processes in place for conducting internal and disciplinary inquiries, with disciplinary action ranging from oral warnings, fines, demotions, suspensions, to dismissals. An abiding rule across most jurisdictions is that an officer equal or senior in rank to the officer in question must carry out the inquiries, and also that the officer is given a fair hearing. In addition to disciplinary action, criminal prosecution can also be initiated depending on the nature and severity of the offence.

One major problem that runs through all the Police Acts is that they do not always articulate distinctions between “minor” and “major” offences, leaving that distinction up to the discretion of officers themselves. For instance, in Vanuatu, the Police Act establishes punishments – a fine, confinement to barracks for 14 days, reprimand – ⁴ which can be imposed by senior officers when dealing with disciplinary offences by junior officers without prescribing which offence fits each punishment. The Police Commissioner can review the decision, and has the power to impose even harsher punishments (though only after giving the implicated officer the opportunity to be heard), including dismissal from the Force, reduction in rank, loss of seniority, or a fine not exceeding 15 days pay.⁵ This basic pattern stands in Fiji, Kiribati, and the Solomon Islands – though there are provisions for officers to appeal any final decision externally, generally to the Service Commission. In Papua New Guinea, the Commissioner and assigned “disciplinary officers” are accorded the authority to decide what constitutes a minor or a serious offence for junior officers, seemingly on a case-by-case basis – ⁶ though the **penalties** for “minor” and “serious” offences defined in the Police Act. The considerable discretion given to senior officers in disciplining junior officers can be left open to abuse, without a clear and fair legislative basis outlining the severity of different offences. It is important to establish definitions and categories of misconduct, and the corresponding disciplinary sanctions in law and policy, as well as to implement channels for appeal.

In addition, in particular areas, disciplinary provisions are harsher for junior officers. Almost all of the Police Acts contain a section which holds any police officer “other than a gazetted officer” liable to punishment for the commission of an offence under the Act. The implicated officer can be arrested without a warrant by any officer of a rank higher than his own and brought before a more senior, preferably gazetted, officer. In Fiji, the Commissioner of Police is vested with the power to impose punishments for any inspectorate officer⁷ and any subordinate officer – ⁸ including dismissal – following proper investigation by designated gazetted officers and subject to the agreement of the Disciplined Services Commission. In contrast, Section 21 of the Police Service Commission Regulations allows gazetted officers some leeway to escape formal proceedings

with respect to minor acts of misconduct. If the Commission decides that disciplinary proceedings are not required, the officer will simply receive a letter of warning. A copy of the letter will be attached to the officer's annual confidential report, which carries weight in internal decisions involving promotions. In Papua New Guinea, Section 27 of the Police Act denies junior officers any right to appeal findings of guilt or penalties imposed for serious offences.

There are also larger contextual problems with these disciplinary regimes. For instance, the Police Acts of Fiji, the Solomon Islands, Vanuatu, Kiribati, and Tonga list desertion and mutiny as major disciplinary offences for police officers. The section is similarly worded in all of the Police Acts. Military-style offences like mutiny and desertion have no place in a modern, accountable and democratic police service. The offences are leftovers from the regime-style policing employed by colonial governments and indicate both a disturbing tendency towards partiality and an inappropriate level of militarization of the police. In a similar vein, the Police Acts of Fiji, Vanuatu, Kiribati, and the Solomon Islands⁹ all contain a provision that allows the Head of State to unilaterally declare, when faced with what s/he considers a grave threat to the defence or internal security of the country, that the police will be used as a military or internal security force and in doing so will comply with military orders. A danger here is that the decision to invoke a state of emergency is left to the sole discretion of the executive, with no input from Parliament or any other governmental agency. Also, taking the vast differences in the roles of the military and the police into account, subjecting the police to military rules and law (even for a short time) may inadvertently "militarise" individual officers and perhaps instil a greater proclivity in officers to resort to brute force. Inevitably, there will also be complications over the lines of accountability and supervision when the police falls within the military fold.

Accountability processes and mechanisms

The success of police reform initiatives rests on the institutionalisation of accountability with effective methods. Police accountability is not absent in the Commonwealth Pacific, and there are processes and mechanisms in place that work to hold the police accountable in the different countries of the region. CHRI advocates that the basics of sound accountability are vigilant internal processes coupled with the necessary control by other branches of government and at least one independent civilian supervision body. The following section contains an appraisal of the extent to which this model of sound accountability has developed in the Commonwealth Pacific, by examining a selection of key accountability processes and mechanisms.

Police accountability to the Executive

Across the Commonwealth Pacific, key representatives of the executive branch of government play specific and important roles in governing and supervising the police. Importantly, the highest position in the police hierarchy – the Commissioner of Police - is appointed by the Head of State. As mentioned above, the police in all of these countries answer directly to a specially designated Minister, who is part of the executive wing of government and can be seen as the political spokesperson, or head, of the police. In addition, the structure of Pacific states includes Service Commissions. Through these processes and mechanisms, the police leadership particularly shares a close relationship with the executive branch of government. It is important to scrutinise select aspects of the police-executive relationship, to determine how far truly democratic control is practiced.

Appointment of the Commissioner of Police

The power to hire and fire the head of the police is a key accountability device and must be supplemented by transparent and fair procedures and supervision by effective accountability instruments, to prevent any inappropriate relationships of patronage from developing. In this light, it becomes important that the Head of State be not granted **sole power** to appoint the Commissioner. Across the Pacific, one trend in appointment procedure is that the Head of State decides either in consultation with, or at the recommendation of, the Service Commission, but this is by no means the only procedure employed to appoint the Commissioner. In the Solomon Islands and Vanuatu, the Head of State appoints the police chief after consulting the Police Service Commission. In Kiribati, the President, acting in accordance with the advice of Cabinet after consultation with the Public Service Commission, appoints the Police Commissioner. In Tuvalu, the Chief of Police is appointed by the Head of State on the advice of Cabinet, given after consultation with the Public Service Commission. There are other sources of appointment as well. In Fiji, the Constitutional Offices Commission appoints the Police Chief following consultation with the Minister responsible for Police. In Tonga, the Minister of Police with the approval of Cabinet recruits and appoints every police officer, including the Superintendent of Police. And in Papua New Guinea, the Commissioner of Police is appointed by the National Executive Council (NEC), which is a constitutionally established body representing the executive. Unlike the Service Commissions, the NEC is not an independent entity with a specific mandate related to the police.

It is positive to note that the legal basis of the appointment procedure in much of the Pacific does not grant the Head of State sole discretion to pick the

police chief, requiring consultation with other entities. Tonga and Papua New Guinea are the exceptions here, where appointment is made by only one source. In Tonga, it is a dangerous precedent that the Minister is empowered basically to handpick, not just the Superintendent of Police, but also all police staff. This leaves room wide open for police officers depending for their job security on the patronage of the Minister. Serious breaches of law and accountability arise out of precisely these kinds of inappropriate relationships of patronage. With reference to the practice in Papua New Guinea, Transparency International (an international anti-corruption organisation) argues that, since the appointment comes from the National Executive Council, this implies that the Commissioner is a political appointee.¹⁰ Between 1997 and 2002, the Papua New Guinea police had five different police commissioners. Division 4 of the Constitution, that contains special provisions in relation to the police force, specifically states that the police force is subject to the control of the National Executive Council through a Minister, further diluting the independence of the police leadership.

Even in the other countries, where at least the decision is collaborative, and the police is accorded operational autonomy in the law, appointment of the Commissioner is still made only by government bodies representative only of the executive branch, with the complete absence of any civilian, public input. In other Commonwealth jurisdictions, appointment of the Commissioner is significantly more collaborative, requiring input from civilian control bodies. In the Australian state of Queensland, for example, the Commissioner of the Queensland Police Service is appointed by the Governor, “on a recommendation agreed to by the chairperson of the Crime and Misconduct Commission”,¹¹ which is an independent police supervision agency. The agreement of the Minister for Police for the State also has to be sought. While there are no universal formulas, the power to appoint the Commissioner must, at minimum, be prescribed by clear and fair procedures, and where possible, by the input of independent institutions such as Service Commissions or civilian control bodies. The highest police post must also be protected by secure tenure.

Service commissions

Service Commissions, predominant in the Commonwealth Caribbean and Pacific small states, are autonomous government bodies that supervise disciplinary and management matters in the public sector and in some cases specifically police agencies. Experience in many Commonwealth countries shows that many instances of illegitimate political interference in policing arise through politicians manipulating disciplinary or management powers for political purposes. Service Commissions were established precisely to limit undue political interference in selection, promotion, transfer and removal of police

officers – and thereby act as mechanisms of accountability. In some cases, they also double as appeal mechanisms for police officers seeking redress from internal disciplinary or labour disputes.

Service Commissions were envisaged as government bodies with an independent voice. Their role involves appointing, dismissing and generally disciplining senior-level police officers. In this respect, their appointing authority and composition – as measures of independence - become important in gauging the extent to which they can truly represent buffer bodies. Wherever they exist in the Pacific, members of Service Commissions are appointed by the Head of State, and are predominantly public servants. In almost all cases, there is space for what are seemingly independent members, though there are no given criteria to match the best people to the job. Without objective criteria, there is a greater possibility that personal preferences will carry too much weight. In Fiji for instance, the Disciplined Services Commission consists of a chairperson and two other members appointed by the President. In Tuvalu, the Public Service Commission consists of a chairperson and three other members. In both cases, the law is silent on the desired qualities and experience of the “other members”. It is also true that in all of the Pacific countries, a constitutional provision to maintain the independence of Service Commissions does exist, establishing that a person is disqualified for appointment to any Service Commission if s/he is a Member of Parliament, holds any public office, or a position deemed to be of “a political nature”. This is an important provision that strengthens the envisaged objective that the Service Commissions are not subject to any other control or authority.

In comparison with newer models of Service Commissions in Commonwealth countries like Nigeria and Sri Lanka however, the Pacific model does fall short. In both Nigeria and Sri Lanka, the Police Service Commissions include citizen representation and have wider powers to shape policy. Importantly, both Commissions can invite public complaints against the police and have the power to conduct the corresponding investigations. This is a key benchmark in strengthened democratic policing. None of the mandates of the Pacific Service Commissions allow them to accept complaints from the public; therefore, acts of police misconduct which affect the public (more serious acts, such as brutality and corruption and other human rights violations) are not “disciplined” by the Commissions.

Internal accountability mechanisms

In addition to addressing police discipline and misconduct specifically through the chain of command, some of the Pacific police organisations also have specialised internal disciplinary units. These units provide a forum to receive

complaints from the public against police officers; and importantly also facilitate police complaining about and investigating other police. Known as either offices of professional responsibility, internal affairs, or ethical standards departments, these units generally receive complaints from the public and police officers and carry out investigations to decide what, if any, disciplinary action to take in individual cases.¹² Some may examine only specific categories of misconduct complaints, such as corruption or brutality.

It is difficult to make conclusive comments on the strengths and weaknesses of internal disciplinary units due to lack of information. The Solomon Islands experience reveals how larger conflicts can drastically jeopardize internal policy accountability. In other cases, it may be that disciplinary processes and procedures are just not adhered to. In Papua New Guinea, a Review Committee tasked to appraise the police found that the Constabulary's Disciplinary Manual as well as the disciplinary provisions of the Police Act are simply not enforced, which means the disciplinary processes in place are not being utilised – the Committee proceeds to recommend that the Commissioner issue a directive to instruct all Constabulary staff to immediately put the existing Disciplinary Code into effect.¹³ This negligence leads only to the complete ineffectiveness of the disciplinary system and severe lack of public faith - as many as 85% of complaints against the police go unresolved.¹⁴ In the Pacific, shortcomings within internal discipline systems result from political pressure exerted to protect certain individuals. Problems may also stem from a serious lack of capacity within the police themselves, including a shortage of good investigators to collect evidence. For instance, the Administrative Review Committee in Papua New Guinea recommended strengthening the resources and skills available to the Internal Affairs department staff, particularly by recruiting individuals with significant experience in conducting investigations. Looking across similar jurisdictions in the Commonwealth, in the Pacific, it may be that the most common problems stem from the way discipline is managed within the police. Three interrelated factors play the biggest part in this: lack of commitment to disciplinary systems among senior officers, opacity about the way these systems work, and a clash between disciplinary systems and the prevailing “culture” in many police organisations which is often negative towards questions of discipline.

External oversight: human rights commissions and ombudsman offices

Internal management mechanisms – if well implemented – can be a powerful way of holding police organisations to account. But on their own, they are not enough. No internal discipline system can completely prevent incidents of police

misbehaviour, and even the best-managed systems will never command the full confidence of the public. Recognising this reality, many countries across the Commonwealth have sought to balance internal accountability mechanisms with some system of external, non-police (civilian) supervision. With one system complementing and reinforcing the other, this approach creates a web of accountability in which it becomes increasingly difficult for police misconduct to take place without consequences. External accountability systems also create channels for public complaints to be pursued independently of the police, helping to end impunity for corrupt and abusive elements within Commonwealth police organisations.

In the Pacific, there are no established agencies dedicated solely to the investigation and supervision of complaints against the police. Existing control bodies - human rights commissions and ombudsman offices - investigate cases of police misconduct as part of larger mandates to uncover human rights abuses, corruption and maladministration on the part of government agencies. In Fiji, there is a Human Rights Commission and Office of the Ombudsman, while Papua New Guinea, the Solomon Islands and Vanuatu all have Offices of the Ombudsman. All of these bodies are constitutionally established, and some are additionally governed by their own legislation. The Human Rights Commission of Fiji is the only national Human Rights Commission among the Commonwealth Pacific countries. The project of the Constitution of the Solomon Islands makes provision for the creation of a Human Rights Commission, though the constitutional reform process is still in progress.

Section 42 of Fiji's 1997 Constitution establishes a national human rights commission, and the Fiji Human Rights Commission Act was approved in 1999. The Fiji Human Rights Commission has emerged as a leading player among civil societies in the Pacific by proving itself to be independent and active. In part, this is due to the fact that the legal basis accorded to the Commission abides by the minimum requirements prescribed by the Paris Principles – ¹⁵ a set of internationally recognised standards laid down to guide states in the setting up of strong and effective national human rights institutions – providing minimum requirements for a truly empowered National Human Rights Institution, and also applying equally to any supervision agency. Much of how effectively Ombudsman Offices and Human Rights Commissions perform depends on an autonomous and well-embedded status for them in national legal architecture.¹⁶

Fiji's Human Rights Commission Act 1999 is designed to ensure the Commission's independence and effectiveness by prescribing a broad, flexible mandate, equipping the Commission with extensive powers and meeting the necessity of adequate funding. Under this legal framework, the Fiji Human Rights Commission is mandated to protect and promote the human rights of

all persons in the Fiji Islands, following the Paris Principles. As mentioned earlier, the full gamut of human rights to be enjoyed by every person in Fiji is laid down in the constitutional Bill of Rights. The Bill of Rights is progressive, covers a full range of civil and political, as well as economic, social and cultural rights, and also stipulates that any other consistent rights and freedoms conferred by common and customary law, even if they do not appear in the Bill of Rights, must also be protected. Thus the Commission is obliged to protect and promote a wide range of human rights. The 1999 Act assigns both reactive and proactive powers to the Commission – which is again a very positive legal precedent for establishing vigilant control. Section 7 of the Act requires the Commission to promote human rights in several important ways, such as making public statements on the state’s human rights obligations, educating public officials on their human rights responsibilities to promote better compliance with international standards, to encourage ratification of international human rights instruments and to advise the Government on its reporting obligations also, to make recommendations on the implications of any proposed legislation or policy for human rights, and to publish guidelines for the avoidance of acts or practices that may be inconsistent with human rights. More directly in terms of supervising police and other government agencies, under the same section, the Commission has the following proactive powers:

- to invite and receive representations from members of the public on any matter affecting human rights;
- to inquire generally into any matter, including any enactment or law, or any procedure or practice whether governmental or non-governmental, if it appears to the Commission that human rights are, or may be, infringed thereby;
- to investigate allegations of contraventions of human rights and allegations of unfair discrimination, of its own motion or on complaint by individuals, groups or institutions on their own behalf or on behalf of others;
- to resolve complaints by conciliation and to refer unresolved complaints to the courts for decision;
- the Commission may, from time to time, in the public interest or in the interests of any person or department, publish in any manner it thinks fit, reports relating generally to the exercise of its functions or to any particular case or cases investigated under this Act.

The Commission is accorded full investigative capacity – it is allowed to make any enquiries it believes to be necessary, and can summon any person or demand any piece of information it may require in the course of investigation. For the purposes of an investigation, the Commissioner and Commission have the same

powers as a judge of the High Court with respect to the production of documents, and the attendance and examination of witnesses.

Importantly, the Act is also designed to ensure independence of the Commission's staff. The appointing authority is informed by diverse voices - the members of the Commission are appointed by the President on the advice of the Prime Minister, following consultation with the Leader of the Opposition and the standing committee of the House of Representatives for matters concerning human rights. Section 8 of the Act specifically states that in advising the President, the Prime Minister must have regard not only to the personal attributes of applicants, but also to "their knowledge or experience of the different aspects of matters likely to come before the Commission". Further, a person is not qualified to be a Commissioner if s/he is a Member of Parliament, a member of a local authority, or an office holder in any political party. All Commissioners are legally prohibited from actively engaging in politics or business for profit.

From 1999, Fiji's Human Rights Commission has received approximately 700 requests for assistance, most complaints involving alleged abuse by police and prison officers.¹⁷ The Commission has conducted many training sessions with the police to spread awareness of human rights within the force. Recently, the Commission launched a handbook for the disciplined forces of Fiji (including the police) entitled "National Security and Human Rights",¹⁸ and provides guidelines on the legal obligations and accountability arrangements relevant to the conduct of the country's security agencies.

The general mandate of Ombudsman offices across the region is to investigate complaints of maladministration across government agencies, and by and large, these agencies are empowered with sufficient powers in law. The existing Offices of the Ombudsmen consistently do their best to live up to their role as watchdog bodies and guardians of government accountability, but they face an acute shortage of resources, funding, technical knowledge, and at times government obstruction. Papua New Guinea, Fiji, Vanuatu and the Solomon Islands all have an office of the Ombudsman. In countries like Papua New Guinea and Vanuatu, the Ombudsman is the sole independent control body and thereby an important channel for members of the public to seek accountability and redress.

In Papua New Guinea, the Ombudsman Commission includes both the office of the ombudsman and the office implementing the Leadership Code.¹⁹ The recent move of the Papua New Guinea Ombudsman to set up a dedicated Human Rights Unit points to the trend of Ombudsman bodies enlarging their traditional anti-corruption, maladministration mandate to include complaints of human rights violations. On paper, the Ombudsman in Papua New Guinea, Vanuatu and the Solomon Islands has the power to initiate

investigations on its own, and has jurisdiction over a wide range of official bodies, as well as substantial powers of investigation. In Vanuatu, the Ombudsman can investigate all public servants, public authorities and ministerial departments, except the President of the Republic, the Judicial Service Commission, the Supreme Court and other judicial bodies. Constitutional provisions allow for inquiries to be initiated at the discretion of the Ombudsman, upon receiving a complaint from a member of the public, or at the request of a minister, a Member of Parliament, of the National Council of Chiefs or of a local government council. The Ombudsman has full authority to request any Minister, public servant, administrator, and authority concerned to provide any information or documents related to an inquiry. The Ombudsman in the Solomon Islands holds the power of summons accorded to a magistrate. In Papua New Guinea, the Office can consider deficiencies in the law and challenge official decisions.

In some ways, the law also limits the scope of Ombudsman powers. For instance, the Ombudsman Commission of Papua New Guinea cannot inquire into the “justifiability” of National Executive Council (NEC) decisions,²⁰ ministerial policy or court decisions.²¹ The NEC is the body that appoints the Police Commissioner, and the sole external watchdog over the government is prevented from challenging this decision. In all of these countries, the Ombudsman has no powers to enforce its recommendations, though in Vanuatu the Office can submit special reports to Parliament concerning action taken on its findings. The watchdog function of the Ombudsman is also hampered by a severe lack of resources, in terms of funding, staff, infrastructure and the required technical knowledge, particularly for the Ombudsman and Leadership Code Commission of the Solomon Islands and the Ombudsman Offices in Fiji and Samoa.²² Lack of investigative skills, legal capacity, or essential personnel means most Ombuds offices cannot cope with the caseload. Limited operational autonomy can also play a part in crippling independent supervision. The Ombudsman of the Solomon Islands has been sorely disabled by being administered by the Prime Minister’s Office. After repeated and ignored appeals to the Prime Minister’s Office for separate office space, the Solomon Islands Ombudsman closed its own office for the bulk of 2003. At that time, there was a massive backlog of cases dating from 1999. In 2004, Transparency International commented: “at present the Leadership Code and Public Service Commissions and the office of the Ombudsman are all administratively within the Prime Minister’s Office. This makes them all extremely exposed to political pressures, either direct and immediate, or more gradual, such as the resource pressure that has been applied to all of them over a period of years”.²³

As a fiercely individualistic office in these countries, the efficacy of the Ombudsman is often dependent on “personality”. The first Ombudsman of

Vanuatu, Marie Noelle Ferrieux-Patterson, the first Ombudsman of Vanuatu, enjoyed tremendous public confidence for her fierce campaign against corruption, despite strong opposition. During her tenure, not only did the Office of the Ombudsman vigorously publish public reports, it used innovative ideas to ensure that they were disseminated widely. As Vanuatu's literacy levels were at 50-60%, the Office of the Ombudsman used radio and public speaking to disseminate information contained in the published reports. Since 1996, the release of every new public report was followed by a press release and an interview with the official(s) implicated in the report on Radio Vanuatu. She also initiated radio campaigns against domestic violence by encouraging women to report incidents to the police and also to report police inaction to the Ombudsman's Office. In a 1997 report, she criticised the police as incompetent and doing too little too late.²⁴ This report revealed persistent slackness, indiscipline, arrogance and ignorance of legitimate duty by members of all ranks of the police. Despite her good work and public support, the government refused to renew her contract in 1999. After her successor finished his term in August 2004, it took the government over eight months to fill the vacancy for the sole external control agency in the country.

In contrast, one Ombudsman in the Solomon Islands did not produce any annual report between 1991 and 1995, though the office did deal with complaints. An Ombuds office is also sometimes flooded with administrative matters, which can mean less time and resources to spend on complaints against the police. In the Solomon Islands, an estimated 60% of the 8062 cases handled by the Ombudsman's office since establishment in 1981 have been brought by public servants as grievances of employment and workplace relations within the public service.²⁵ In practice, most complaints come from public service employees themselves. While this is a positive step to clean up the endemic corruption steeped in most Pacific governments, it deflects the attention of the Ombudsman from controlling agencies such as the police, whose supervision is increasingly being relegated to external donors rather than to national bodies.

It is heartening that many Pacific governments recognise the need for an external, independent civilian agency, even if many are yet to function as effectively as they should. The existence of such bodies mandated to carry out autonomous investigations into allegations of police abuse can send the message that the police will be held accountable for wrong-doing. It is clear that a well defined and broad legal mandate is important to cement the independence and powers of an effective supervision body. However, the most essential factor is the necessary political will to truly bring about reform and the strong leadership of both the police and control bodies to build an accountable and responsive policing system.

Conclusion

Clearly, policing in the Commonwealth Pacific cannot be seen in isolation from the larger political, economic and social context of each country. The complexity of the problems of political instability, chronic violence, crime, and social strife all impact on policing. In some cases, this combined effect led to serious breakdowns in policing and required external intervention to restore peace and a climate of security.

Fortunately, police reform has reached the Pacific, and many governments have demonstrated their commitment by putting reform initiatives into motion, whether through domestic strategies or international donor assistance. These are very encouraging moves toward establishing elements of democratic policing, but there remains much work to be done to establish the practice of democratic policing in the Commonwealth countries in the Pacific.

To truly achieve democratic policing in practice, accountability mechanisms particularly will have to be implanted in legal and policy frameworks. Reform will not be durable without the establishment of new, independent accountability institutions, legal reform to consolidate the values and processes of democratic policing, and invigorated internal accountability procedures. With the requisite will and effort, and using the current momentum to move forward, democratic policing can become a reality for citizens of the Commonwealth Pacific.

NOTES

1. This section is adapted from D. Bayley, *Democratising the Police Abroad: What to Do and How to Do It*, National Institute of Justice, US Department of Justice, Washington, 2001, pp 11-15; Bruce D. & Neild R., *The police that we want: a handbook for oversight of police in South Africa*, Center for Study of Violence and Reconciliation, Johannesburg, and Open Society Justice Initiative, New York, 2004; and C.E Stone & H.H. Ward, *Democratic policing: a framework for action*, *Policing and Society*, Vol. 10, number 1, 2000, p 36.

2. Tonga Police Act, Section 9.

3. Nauru is the *only* country in the Commonwealth Pacific that has signed both the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment (CAT). Solomon Islands is the only signatory in the Pacific to the International Covenant on Economic, Social and Cultural Rights (ICESCR). The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) has been signed by Fiji, Vanuatu, Kiribati, Papua New Guinea, Samoa, the Solomon Islands, and Tuvalu –

leaving out Tonga and Nauru. Fiji, Papua New Guinea, Nauru, the Solomon Islands and Tonga have signed the Convention on the Elimination of All Forms of Racial Discrimination (CERD). While Fiji has not signed on to many core international human rights treaties, the domestic Bill of Rights allows the application of international human rights conventions where relevant, and perhaps without ratification.

4. Vanuatu Police Act, Section 59(1).

5. Vanuatu Police Act, Section 62(1).

6. Papua New Guinea Police Act, Section 21(1), entitled *Dealing with minor offences*, reads "Where the Commissioner, or a disciplinary officer, has reason to believe that a member of lesser rank has committed a disciplinary offence which, in the opinion of the Commissioner or that officer, could properly be dealt with under this section..." and Section 23(1), *Dealing with serious offences*, states "where there is reason to believe that a member of the Force has committed a disciplinary offence other than an offence that is or is intended to be dealt with as a minor offence, it shall be dealt with as a serious offence".

7. Fiji Police Act, Section 32A(a).

8. Fiji Police Act, Section 32A(b).

9. Kiribati Police Act, Section 8; Vanuatu Police Act, Section 5; Solomon Islands Police Act, Section 6; Fiji Police Act, Section 6.

10. Transparency International, *National Integrity Systems 2003: Papua New Guinea*, p. 27.

11. Police Service Administration Act 1990 (Queensland, Australia), Section 4.2(1).

12. In the Solomon Islands, it was previously the Criminal Investigation Department (CID) that handled all allegations of corruption by police officers. During the prolonged internal conflict which radically factionalised the police force, the CID was absolutely railroaded and disabled in its work. The CID was refashioned into the Professional Standards Unit, which was established in 1998 within the police. The Unit investigates complaints and allegations and recommends disciplinary action to be taken by the Police Commissioner or senior officers, as well as the Police and Prison Services Commission. The Fiji Police also has a Professional Standards Unit, and in Papua New Guinea a dedicated Internal Affairs department investigates shootings by the police and addresses public complaints.

13. Government of Papua New Guinea and the Institute of National Affairs, *Report of the Royal Papua New Guinea Constabulary Administrative Review*, 2004, p. 78

14. S. Dinnen, "Building Bridges: Law and Justice Reform in Papua New Guinea", *State, Society and Governance in Melanesia*, Discussion Paper 02/2, Canberra, 2002.

15. United Nations, Principles Relating to the Status and Functioning of National Institutions for the Protection and Promotion of Human Rights (The Paris Principles), 1993, available at <<http://www.ohchr.org/english/law/parisprinciples.htm>>, access on March 10, 2006.

16. According to the Paris Principles, their effectiveness will also hinge on the width and clarity of their mandate, the scope of their investigative powers, the composition and competence of their leadership and staff, and the adequacy and sources of financing.
17. United States of America, Bureau of Democracy, Human Rights and Labour, *Country Reports on Human Rights Practices 2002: Fiji*, United States Department of State, 2003.
18. Fiji Human Rights Commission, *National Security and Human Rights Handbook, 2003*, available at <http://www.humanrights.org.fj/pdf/inside_pages_changes.pdf>, access on 10 March 2006.
19. The Leadership Code is an anti-corruption tool set up to monitor the wealth and assets of public figures, compelling particularly leaders in the public service to submit an annual return to a delegated Leadership Code Commission detailing sources of income and a statement of wealth. This is an accountability instrument particular to the Pacific countries, and is hugely relevant for the endemic corruption in ruling circles in most countries of the region. Generally, police chiefs fall under the definition of leader.
20. Section 219(3).
21. Section 219(5).
22. Centre for Democratic Institutions and Tony Regan of the State, Society and Governance in Melanesia Project, *Evaluation of the Accountability and Corruption in Melanesia Workshop*, p. 1.
23. Transparency International, *National Integrity Systems: Solomon Islands*, 2004, p. 11.
24. Transparency International, *National Integrity Systems: Solomon Islands*, 2004, p. 24.

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ABSTRACT

In the 1980s and 1990s, violent crime in Brazil rose markedly and the issue of public security took center stage on the social and political agenda. The current scenario shows the failure of traditional policies to control crime and violence, which are generally reactive, militarized and repression-based. Many shortcomings could be identified in the traditional model: a lack of planning and of investment, flawed training, an authoritarian legacy, human rights abuses, institutional corruption, and so on. Despite this many supporters of the traditional paradigm continue to advocate not only its continuation but also the intensification of old policies, which are half-hearted, according to them. In addition to this failing but nonetheless prevailing model, several innovative initiatives have arisen within Brazil on several levels, some of which are identified and analyzed in this article. These examples should inform reflection on how a new democratic public security paradigm could be set up in Brazil.

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KEYWORDS

Democratic Public Security – Crime Prevention – Human Rights



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PUBLIC SECURITY POLICIES IN BRAZIL: ATTEMPTS TO MODERNIZE AND DEMOCRATIZE VERSUS THE WAR ON CRIME

Ignacio Cano

Introduction

In Brazil the term normally employed in order to refer to this issue is “public security”, rather than “citizens’ security”, which is the term normally used in other countries of the region. The notion of “citizens’ security” in Brazil is actually associated with a specific paradigm that is more democratic and community-oriented, and linked to the notion of citizenship.

Brazil, like other countries in the region, is facing a crisis in public security, with high crime rates that increased markedly over the 1980s and 1990s. Until the 1970s, crime was basically thought of as a policing problem; as in other countries, the left-wing thought that the end of dictatorship and the restoration of democracy would somehow solve the issue. The topic of criminality was seen as a “right-wing” issue, pertaining to defenders of law and order, and any emphasis on the question was seen as suspect. As a result there was no reflection and much less any concrete proposal from progressive sectors to offset the mere demand for order by conservative groups.

However, the marked advance of criminality put the issue of public security firmly on the political and social agenda, once and for all. The failure of traditional policies to control crime and violence has created space for innovative reforms and proposals. Some voices have even been raised, calling for a total paradigm shift in public security. The idea of a more democratic public security with a greater emphasis on prevention, the emergence of new players, the notion of community police or simply a police force that combines efficiency with a respect for human rights, are all symptoms of the new period of debate and effervescence.

See the notes to this text as from page 149.

In Brazil, public security is essentially the responsibility of the states. Each state has its police forces—The Civil Police and the Military Police—and its Tribunal of Justice, under the federative model. The Federal Police, in turn, is small in scale—smaller than many state police forces—and the federal criminal justice system is restricted in its jurisdiction to specific crimes. For this reason the role of the federal authority has been to use funding in order to encourage interventions in states that meet given technical and political requirements.

Municipalities, in turn, mainly play a role in prevention, although the expansion of the so-called *Guardas Municipais*—municipal guard forces—has included repression tasks.

Citizens' perceptions of increasing insecurity have in recent years led to pressure on all authorities to take steps in the field of public security, regardless of their official mandates. However, the financial difficulties faced by the states have hindered significant investment, creating an increase in municipal and federal powers in this field.

Federal policies

Among agencies of the federal government in this area, the Federal Police stands out, with its responsibilities of providing surveillance of frontiers and customs posts and its involvement in federal crimes. Its restricted manpower, only a few thousand officers in all of Brazil, hampers the efficient fulfillment of all its functions.

The National Anti-Drugs Secretariat (*Secretaria Nacional Anti-Drogas*), linked to the Presidency of the Republic, and traditionally managed by military personnel,¹ carries out tasks in the field of prevention that often overlap with those of other government agencies.

Two elements have historically limited the federal role in this sphere. The first has been the fear of raising suspicions among state governments of interventionist intentions by the federal government, going against the spirit of the federative pact, especially in such a sensitive area. The second was the fear among federal administrations of becoming deeply involved in a complex issue in which failure would involve a high political price to be paid.

However, as has been stated, the crisis in public security has led to a social demand for public authorities to intervene more actively. In 2000, shortly after the well-known incident involving the number 174 bus in Rio de Janeiro,² the Fernando Henrique Cardoso administration launched its National Plan for Public Security (*Plano Nacional de Segurança Pública*). The coincidence between the dates is not accidental but reflects the trend for public powers to formulate immediate replies to periods of crisis in public security, rather than choosing a planned approach based on overall data and indicators.

The National Plan contained a series of 15 commitments and 124 concrete steps by means of which the federal government pledged to intervene against violence, above

all urban violence. Some actions were the exclusive responsibility of the federal authority while others were to be carried out jointly with state and municipal authorities. Critics accused the Plan of simply reclassifying many actions already being carried out, or in the pipeline, linking them at that moment to the field of security.

One of the major initiatives was the setting-up of a National Public Security Fund (*Fundo Nacional de Segurança Pública*) to fund state and municipal projects meeting given requirements—efficiency, accountability, respect for human rights—that the federal government deemed to be its priorities. The idea that began to take shape was that the federal government would induce reform-driven public policies at state level through selective funding, without wounding anyone’s sensibilities. The National Public Security Secretariat (*Secretaria Nacional de Segurança Pública*—SENASP) of the Ministry of Justice, a body whose performance had till then been very discreet, was reorganized and strengthened in order to monitor and carry out its new tasks.

One of the 124 actions within the National Plan was the so-called PIAPS, the Plan for the Integration and Monitoring of Social Programs for the Prevention of Urban Violence (*Plano de Integração e Acompanhamento de Programas Sociais de Prevenção à Violência Urbana*), actually set up in 2001, under the President of the Republic’s Institutional Security Cabinet. One of its special features was that it did not enjoy its own funding, but acted to coordinate initiatives stemming from a range of ministries that had the powers to prevent violence. It was thus a cross-cutting program to coordinate and enhance the results of several government agencies. It simultaneously set out to cooperate with the three levels of public power—the federal, state and municipal levels—and boost local networks. It focused principally on children and young people up to the age of twenty-four.

In its first year, 2001, PIAPS prioritized the metropolitan regions of São Paulo, Rio de Janeiro, Vitória and Recife, exactly where the highest levels of deadly violence occurred in Brazil. The following year it included Cuiabá, Fortaleza and the Federal District. The program attempted to link projects coming from 16 sectors of the federal government, both ministries and secretariats, within a prevention paradigm, through improving quality of life, respect for fellow human beings and access to citizens’ rights. Theoretically these initiatives were in coordination with local agents, either directly with local governments or with non-governmental organizations and civil society. The goal was to establish formal agreements between central government and the municipal and state governments. The projects to be funded were chosen by federal government technical personnel. However, conception and execution of the projects fell to the agencies putting them forward—whether municipal or non-governmental—who did not need to comply with predetermined technical criteria.

In January 2003 the new government abandoned PIAPS for other programs in the field of security.

When running for the presidency, Luiz Inacio Lula da Silva drew up a National Public Security Plan and foregrounded the issue during the electoral campaign. After

being elected, his administration set up its so-called Single Public Security System (*Sistema Único de Segurança Pública*—SUSP), aiming to provide operational linkage among interventions by the states of the federation, and their respective police forces, in each region of Brazil. After a series of political crises, SUSP ran out of political support and much of the plan remained only on paper.

Even the National Secretariat has been unable to live up to the expectations created around it, after being set up. The lack of strict political criteria regarding the state programs funded by it and successive cuts in its budget have considerably weakened its role as a promoter at state level of policies to be carried out through the Fund. This year, for example, the initial budget of roughly US\$180 million, insufficient in itself for a country the size of Brazil and the task it is supposed to carry out, has been cut twice and is now only a little over one-quarter of the original amount.

The Federal Police has in recent years devoted itself to well-planned and highly-publicized actions to dismantle high-level organized crime nuclei in several states. One highly successful example has been the investigation of several cases of corruption among its own members, which has earned it an image of being a less corrupt force than the state forces. However, recent scandals in the Rio de Janeiro Superintendency have tarnished this image. The Federal Police has been accused of overstepping the mark and above all of seeking publicity during its actions against organized crime.

Gun control is one area in which the federal authorities have managed to advance, both by bringing in the Weapons Law of 1997, which made illegal possession of a weapon, formerly a misdemeanor, now a crime, as well as by the enacting of the “Statute for Disarmament” in 2003.

State Policies

The states are the major players in the field of public security. Each state has its own Military Police, a uniformed force whose task is to carry out ostensive patrolling and the maintenance of order, and Civil Police, whose mission is to investigate crimes that have been committed. This means that neither force carries out the “complete cycle” of public security, from prevention to combating crime, which leads to problems of overlap and of rivalry between them.

State-level security policies—if they can be called that, given their lack of planning, goals and assessment—are generally reactive in nature and based on repression of crime rather than on crime prevention. State governments frequently react to cases with political repercussions, especially when they are high-profile cases in the press, so as to provide a short-term response. When the case leaves the front pages, initial steps dwindle. The press thus has a great deal of power to guide measures adopted by public bodies. Interventions are rarely planned on the basis of specific goals.

Among the most common shortcomings in the field of public security, we may highlight:

- insufficient investment, leading among other consequences to poor wages for the lower ranking police officers. These salaries force officers to moonlight in other jobs, often in private security firms, causing high levels of stress and a trend toward the privatization of public security;
- poor training for police officers, above all the lower-ranking ones;
- an authoritarian legacy: the Police was a body that protected the State and the elites who ran it, against citizens who might be seen as a threat to the *status quo*, the so-called “dangerous classes”. The transition from a citizen-controlling police model to one in which the police protects people, is gradual and remains incomplete. Furthermore the Brazilian State retains traces of its oligarchic past, such as special jails for people with university degrees;
- insistence on warfare as a metaphor and point of reference for public security operations. The goal thus remains in many cases to annihilate the “enemy”, often ignoring the social costs. The problem of public security sometimes appears to be an issue of caliber, or as a knot which will be undone when the police achieves superior firepower to its enemy. As a result, public security is highly militarized in its structures, doctrines, training, strategy and tactics. Public security operations in poor areas resemble military operations in enemy territory: invasions, check-points and so on;
- in this context it is no surprise that there should be countless abuses of human rights, above all concerning the use of force. Shoot-outs in poor communities produce a high death rate, including accidental victims. There are also frequent allegations of torture of prisoners and convicts;
- conflict with poor communities, above all in places where organized crime is strong. Young people living in these areas see the police as their enemy, and among some of the police this view is mutual. Studies show that there are communities where the inhabitants are more frightened of the police than of drug dealers, whose despotism is more predictable;
- countless cases of police corruption, ranging from small bribes to get off traffic fines, to protection of drug dealers. Abuse of force is often linked to cases of corruption (see Mingardi’s³ study of the São Paulo Civil Police and the recent case of the massacre in the Baixada Fluminense⁴ area of Rio de Janeiro in March 2005).

Despite this long list of shortcomings, there have been modernizing reform attempts in recent years. They are still exceptions to the rule, but represent the possibility of a future paradigm shift in Brazilian Public security. The following list is not exhaustive nor does it intend necessarily to put forward the most important topics, since it was drawn up merely to illustrate. Among experiments, the following are worth pointing out:

- community policing projects in several states, usually bringing positive results,

at least with regard to the image of the police in its relations with the community. However, there has been no significant reduction in crime rates. The most important element is actually a shift in the relationship between the police and the community. In any case, no state has adopted the community policing model as the general model for the Military Police;

- The setting-up of Police “Listeners” (*Ouvidorias*) or Ombudsmen in several states. Their task is to hear reports of abuses committed by police officers and guarantee the anonymity of the informant if necessary. Tip-offs are referred to the Departments of Internal Affairs or “*Corregedorias*” to be investigated, and the *Ouvidoria* keeps track of the investigation. The Department publishes a periodical report on the accusations it has received and operates as an awareness-raising and mobilization tool in the matter. However, lack of follow-up communications with the members of the public who make denunciations and the low proportion of cases that lead to punishment of the accused, have caused a considerable degree of dissatisfaction among accusers, as is borne out by studies of three *Ouvidorias*. There has been little institutional buy-in, as yet, and performance depends greatly on the individual *Ouvidor* involved. *Ouvidorias* rarely have their own staff or budgets, and many operate within the same buildings as the Security Secretariats, which goes against their need for confidentiality;
- The use of geo-referencing technology to map areas and times when there is a high rate of crime, so as to guide preventive patrolling to these hot spots. Classical studies assessing the impact of patrolling, such as that in Kansas City in 1972, have in fact concluded that non-specific patrolling with neither a spatial nor temporal focus cannot reduce criminality. The Belo Horizonte Military Police, among others, is using geo-referencing;
- Pilot-programs to reduce deadly violence in outlying areas with a high homicide rate. Such programs include the GPAE of Rio de Janeiro and “Fica Vivo” (*Stay Alive*) in Belo Horizonte. They are a novelty in Brazil, because crimes against life, unlike crimes against property and kidnappings, have never been a priority in Brazilian public security policies. This is because, among other reasons, homicide victims are mainly from lower-income groups with no political influence, and without any say, unlike the middle and higher classes.

The GPAE program (Special Area Policing Group—*Grupo de Policiamento em Áreas Especiais*) was first implemented in the Pavão-Pavãozinho-Cantagalo complex of slums in 2000 and later extended to a further three poor communities in Rio de Janeiro. Replacing the traditional strategy of sporadic incursions with exchanges of shots, the police remains permanently in the community, tries to develop close relations with the local inhabitants, and focuses activities on reducing gun-related incidents rather than combating crime in general.

Additionally the police strives to help the community take part in social programs to help prevent violence, particularly programs for youth. It is a damage reduction initiative that is partly inspired on the Boston Cease Fire initiative. The results show that, given certain conditions, it is possible to reduce shoot-outs and insecurity in the affected communities. However, the experience was not deemed a new model of policing for problem communities, but only a special case.

The ‘*Fica Vivo*’ program has been implemented in recent years within a Belo Horizonte slum with high levels of violence. It blends police intervention with social programs, especially for young people. Results are apparently positive concerning homicide reduction.

- improvements in handling police intelligence, through the computerization, rationalization and filing of tip-offs and intelligence data. The Civil Police of most Brazilian states lacks an efficient information system and a digitized, centralized program to collect tip-offs, which hinders the spread of information. Intelligence data, for example, tend to “belong” to the officer who obtains them, who, on leaving the district, takes the information with him or her. In the case of the state of Rio de Janeiro, the ‘*Delegacia Legal*’ program, set up in the late 1990s by the state government, substantially changed officers’ modus operandi. In addition to improving infrastructure and premises, such as by building modern open-plan police stations resembling offices that did away with closed rooms where abuse and torture could be carried out, and by eliminating cells inside the police stations, the initiative aimed to alter the daily investigation setting in order to make it more efficient. First contact with people making tip-offs was carried out by grant-receiving university students, which enhanced the treatment given to local population, and ostensibly freed up officers to concentrate on their investigative mission. Tip-offs were recorded in a centralized information system leading to several major advantages. Information circulates more quickly and can be accessed in real time, facilitating the production of criminal data. Officers cannot delete a file once it has been created. In the past corruption was made easier because files could be destroyed. When an officer is transferred to another unit, all the information remains in the unit of origin. The integrated system is of enormous assistance in the monitoring activities of the Department of Internal Affairs, which has real-time access to files about the quality of each officer’s work. This procedure as well as the fact that the computerized system will not work if information is not entered correctly, has greatly enhanced the quality of data processed. Institutional resistance and difficulty in changing some negative routines, such as 24-hour shifts, have restricted the impact of the program, but there is no doubt that its implementation has been a watershed when one analyzes the performance of the state civil police in Rio de Janeiro;

- attempts to integrate the operations of the military and civil police forces. The Constitution of 1988 establishes the separation of the two police forces, which is why it remains impossible for the time being to unite the two forces.⁵ As a result, some states have taken steps to integrate the work of the two forces in practice. The state of Pará, for example, set up a joint Academy for the two police forces, without, however, unifying them, so that sharing experiences from the early stages of training would help overcome distrust and divergences.

Other states such as Minas Gerais and Rio de Janeiro have set up joint security areas for the two forces, thus ensuring that the geographical jurisdictions of the two institutions—military police battalions and civil police precincts—overlap for the first time, in an attempt to promote joint operations. To date, this initiative has only enjoyed modest success.

Municipal Policies

Introduction

Local authorities are increasingly important players. Although the overwhelming majority of security duties lie to the state sphere, popular pressure and the improving economical situation of some municipalities vis-à-vis states has favored local intervention.⁶

Municipalities generally tend to become involved in prevention programs, both as a function of their natural vocation as well as because they do not tend to possess the traditional enforcement apparatus, such as police officers, prisons and so on. The slow paradigm shift in public security swings between greater efforts in prevention and the exclusive use of repression. Despite the advantages of a preventive approach, prevention programs are usually complex and often yield results only in the mid- or long-term.

Over the last 15 years, municipalities have exercised a growing number of public security interventions, sometimes as the result of initiatives stemming from other public spheres—as in the case of PIAPS, mentioned above, but mostly as the result of their own initiatives. In this case, the municipalities seek funding from other agencies, which does not change the fact that the initiative was local.

On some occasions the decision to launch a municipal program is triggered by some violent event that has repercussions within the municipality. There are a range of interventions. For example, there may be the setting up or expansion of a municipal guard force, the installation of alarms or cameras at key positions in the town, or the introduction of social projects. Although these interventions include crime suppression components in some cases, most initiatives have to do with prevention.

Several municipalities from inland São Paulo state, both mid-sized and larger, have launched this type of initiative with the available funds and a local administration

that is reasonably technically competent. It can be seen that when neighboring municipalities carry out prevention plans there is a greater likelihood that others will follow the same path. Brazil's National Public Security Fund is a fund that the Federal Government uses to finance some state-level public security projects, as well, secondarily, as municipal projects. Although the Fund aims at state security, many municipal projects have requested funding from the Ministry.

In fact, although the projects that arise in the municipalities suggest a haphazard situation, the general picture may be considered more favorable than that of the large national security plans. This is the case because the national plans are prone to pendulum swings, delays or stalemates, and may collapse or peter out rapidly when political conditions change. Actually, most programs show an alarming lack of continuity. On the other hand the appearance of spontaneous local initiatives may hold brighter long-term prospects despite the uncertainties that mark the projects in each municipality. The initiatives coming out of some municipalities, especially the smaller ones, may suffer from technical drawbacks and may not possess the homogeneity and linkage of a well-implemented national program. However, national programs do not usually achieve the universality and outreach that they are designed for, and run a permanent risk of interruption.

The capacity for liaison between municipalities to face the challenge is interesting. Among advantages in this option are economies of scale in technical investments, especially in smaller municipalities. Planning, supervision and assessment of programs can be carried out by a single technical team hired for this purpose by the towns in a given region. There are also methodological advantages when it is a single program that is applied in a group of municipalities. For example, one can use a larger sample, and treat some places as control groups and others as experimental groups, and so on. Another point that underscores the importance of inter-municipal linkage is the movement of criminals. When there is a greater crackdown on crime in one particular place, criminals often move to other places, change their modus operandi, or target different types of people. For this reason any assessment of a local intervention against criminality must take into account the chance that crime may increase in neighboring areas. This happened, for instance, in Diadema, a district of Greater São Paulo, when a "prohibition" style law was brought in, and which will be examined below. The measure helped reduce the rate of violent incidents in Diadema, while the rate simultaneously increased in neighboring regions. This conclusion was made possible by crossing data from several municipalities, and led administrators to the conclusion that some inhabitants of Diadema had begun to frequent other nearby towns in search of fun that was no longer available in their own town. The advantages of inter-municipal intervention are clearer in metropolitan regions where problems are shared and where the movement of victims and criminals is more intense.

One example of an attempt at inter-municipal coordination is the setting up of the Public Security Metropolitan Forum (*Fórum Metropolitano de Segurança Pública*)

in greater São Paulo. The forum brings together the municipal secretariats or their equivalents with representatives of the state-level government to plan joint initiatives, share experiences and exchange information.

Institutional architecture of municipalities

As the core competence of public security had always fallen to the states, there were no municipal security structures. As municipalities took upon themselves this responsibility, they eventually created agencies, normally secretariats, whose mission was to coordinate all the relevant programs. In some cases, above all in the state of São Paulo, these are municipal public security secretariats. In other cases they adopt a different nomenclature, or former secretariats acquire new roles.

Among municipalities where former secretariats were restructured to take on new roles is Vitória, the capital city of the state of Espírito Santo. Diadema, in Greater São Paulo, is a municipality that set up new bodies to deal with public security.

Vitória is the center of a densely populated metropolitan nucleus that has been hard hit in recent years by one of Brazil's highest homicide rates. Additionally, the state of Espírito Santo has always been traditionally deemed one of the places where organized crime has put down the deepest roots, affecting large sectors of the Legislative, Executive and Judicial branches, to the point where federal intervention has been requested. Paradoxically, alongside such negative traits, Vitória has also stood out owing to the efforts of its local government, over several administrations, to reduce crime and the feeling of insecurity. The Municipal Secretariat for Citizenship was set up in 1994, to provide service to the lower-income population and provide the more vulnerable portions of society with access to rights. A public security nucleus was set up within the secretariat in 1997. Shortly after that, the secretariat was restructured and was renamed the Municipal Secretariat for Citizenship and Public Security.

The main roles of the secretariat are to coordinate projects and liaise with police forces, NGOs and civil society at large. It also manages the borrowing of funds from the federal government.

The CIC or Integrated Citizenship Center (*Centro Integrado de Cidadania*—CIC), housed in a building loaned by the Federal University of Espírito Santo, offers services to promote rights and access to justice for the least privileged. The CIC is coordinated by the secretariat and has been funded by the federal government through PIAPS.

In the case of Diadema, São Paulo, the municipality created a Public Security Secretariat from scratch to deal with the issue. Diadema was one of the most violent neighborhoods in greater São Paulo in the 1990s, and thus by extension, also in Brazil and Latin America. When the new municipal administration began its mandate in 2001, it set up a secretariat specially to deal with the issue. Its duties were to define guidelines for the work of the Municipal Guard and coordinate it with the state police forces in carrying out joint crime prevention programs.

The participation of society

Many municipal projects aim to foster the participation of the community and of society in the process of formulating and introducing projects.

Vitória decided to intervene actively in the area of violence while simultaneously setting up the Municipal Council to draft a strategic plan for the city. Violence was only one of several issues addressed. The Council brought together 350 components of several public authority agencies and representatives of civil society to take part in the plan. In the second stage the Municipal Security Council and the Regional Municipal Councils for Public Security were set up.

The Municipal Security Secretary, the presidents of the Regional Security Councils and one representative of the Municipal Chamber sit on the Municipal Security Council. In addition, representatives of the state authority such as the department head of the Vitória Judicial Police, the commander of the 1st Battalion of the Military Police and one member of the state Attorney's Office (*Ministério Público estadual*), one representative of the Commercial Association, one member of the state of Espírito Santo Federation of Industries, the president of the Vitória People's Council and one representative of the Bar Association, all have a seat on the Council.

Regional Municipal Councils for Public Security were established in accordance with the city's administrative regions: one for each of its seven regions. They include representatives of the Civil and Military Police forces, members of the communities and an agent from the local government. Their goal is to put forward proposals for interventions and to bring public authorities – particularly the police forces – closer to the beneficiary communities.

The municipality of Recife, the capital city of the state of Pernambuco, another city with one of Brazil's highest homicide rates, has also drawn up a strategy for social mobilization. Two bodies were created: the Municipal Council for Human Rights and the Committee for the Promotion of Human Rights and for the Prevention of Violence. The responsible politicians take the view that public security and human rights are goals to be sought simultaneously.

The Municipal Council for Human Rights is a body with eight members from the local government and eight from civil society. Its theoretical function is to hear accusations of human rights violations and involve public policies to defend human rights; however, it has not yet satisfactorily performed these roles.

The Committee for the Promotion of Human Rights and for the Prevention of Violence is a body made up of members from a range of municipal secretariats, without the participation of civil society. Its mission is not to carry out projects, which is the responsibility of the secretariats, but to effectively coordinate municipal efforts. Two important initiatives that sprang from the Committee were the setting up of a forum for debate, and the drawing of maps of violence showing risks in every zone of the city.

Generally speaking, social mobilization and participation can entail several beneficial effects:

- effects relating to the conception, management and follow up of programs in terms of their decentralization, democratization and so on;
- the preventive impact that the growth of social networks and enhanced community relations can have on fear and on violence, either indirectly by reducing fear and encouraging the use of public spaces, or directly by promoting the peaceful resolution of daily conflicts;
- a change in the social perception of violence, with assimilation of the new prevention paradigm.

Similarly, participation faces several challenges. Firstly, the most obvious risk is that this participation may be no more than mere rhetoric with no practical application, especially when it is a top-down prerequisite.

In the state of Rio de Janeiro, the state government ordered the setting up of Municipal Security Councils as a condition for funding municipal public security projects. Very few local governments set up such councils. The municipality of São Gonçalo, in Greater Rio de Janeiro, launched its council in 2004, but with a very limited impact. The candidate representing society itself did not have much support and several authorities would not take the institution seriously.

Secondly, mobilization is extremely difficult in certain communities. Unfortunately, those who stand to gain the most from participation and intervention are generally the most reluctant to take part. Thus in communities with high levels of violence, social networks tend to deteriorate and inhabitants do not trust each other.

Thirdly, mobilization of the population is sometimes very intense in moments of crisis or as a result of specific goals to be achieved, but falls off in the mid-term or when there are no longer any clear goals, such as obtaining a police station or receiving funds for a specific project.

Fourthly, the make-up of bodies representing society, and how representative their members are, continue to be issues that remain far from solution. One of the most obvious risks is that of reducing the participation of the population to segments with greater influence or better organization. For example, shopkeepers often take on the leadership of people's councils.

Fifthly, there are many cases of the use of participatory agencies by agents of the State as a means of obtaining resources from the community. This is the case of the funding of maintenance costs for state police forces by local traders, represented on the councils.

Finally, each process of open participation, above all those that work like assemblies, has its own dynamic and the final outcome is unpredictable: unexpected problems may arise.

One example took place in the Regional Municipal Council of Maruípe, in Vitória. The council meetings were traditionally open to participation. However, the participants began to feel intimidated when they were informed that a criminal wanted by the police had been present at the meeting where they had discussed strategies for capturing him. Whether this had actually happened or not, the feeling of insecurity that pervaded the meetings led to the banning of any person who was not an effective member of the Council. This restriction gave rise to heated debate. In the opinion of some, Councils are open agencies by definition and to restrict them meant denying their principles. The banning of people who were not effective members would mean becoming a representative but non-participatory body and run counter to its original purpose.

Vitória is sadly paradoxical. The city's Regional Municipal Councils, formerly an example of social participation, were dissolved when the public authorities realized that several council members became opposition party candidates in the municipal elections, precisely as a result of the high profile achieved through their being council members.

Existing types of preventive programs

The types of prevention projects fall into three groups: situational prevention projects, social prevention projects and policing prevention projects. A program will often encompass more than one type at the same time.

Situational prevention projects aim to reduce opportunities for crimes or acts of violence to happen in particular places by acting directly against them. The goal is to modify the social environment in order to make the occurrence of offences less likely. Behind this model lies the theory of opportunities, which highlights the importance not of changing the potential offender but of trying to reduce opportunities for that person to break the law. The traditional counter-argument is that if a potential offender does not find favorable conditions in one place, he or she will seek another place, but will in any case go on committing offenses. However, it is undeniable that the reduction of opportunities in several places will eventually reduce the total number of offenses, since not everyone can easily “transfer” to another place. Some crimes are also committed on a momentary impulse—street brawls, for example—so that they are linked to a given context and will not necessarily take place in a different context.

The simplest intervention along these lines is improving urban street lighting, increasing visibility, reducing the feeling of danger, and possibly reducing the risk of an assault or a mugging. The recuperation of degraded public spaces—overgrown waste ground, for example—in order not to create insecurity, is another strategy observed in several interventions.

Situational prevention through the installation of cameras at busy places or high-risk spots in a city is a classic example. The cameras are linked to a supervision center, normally operated by the police, and enable rapid response when a crime is committed. A significant number of municipalities in the state of São Paulo have

opted for the installation of cameras, along with an integrated surveillance center, generally operated by the *Guarda Municipal*, which calls in the police when necessary.

Social prevention programs are interventions that seek to change the condition of life of those people at high risk of developing aggressive or criminal behaviors, so as to reduce this risk. They are prevention programs by *antonomasia*: they are the most common type, receiving most funding, and those that have always been closest to the daily routines of the local governments. There are normally three levels of social prevention:

- primary prevention, aimed at the population at large, like universal attention programs;
- secondary prevention, targeting groups that risk suffering or committing violent acts;
- tertiary prevention, aiming to relieve the plight of victims of violence or help offenders reintegrate into society.

Local governments traditionally act more in the field of primary prevention, which is more wide-ranging. However, their ability to achieve results depends greatly on their capacity to channel their funds to the groups at highest risk.

Social prevention programs are often slow to yield results since they are based on changing living conditions, or changing relationships between people. However, when they do achieve the desired target outcome, their impact may be more intense and longer lasting than that of situational programs.

The philosophies of the different intervention programs emphasize different concepts, such as human rights, citizenship, improvement of the material conditions of life, and so on. This gives each program a different profile, even when the overall approach may be the same.

Here are some common examples of social prevention:

- educational projects to increase schooling among young people and avoid truancy, thus enhancing personal and professional options;
- professional training projects for young people with the same purpose;
- citizen training projects—with differing specific sub-issues—for young people living in at-risk areas, enabling them to exercise positive leadership in their communities and become catalysts in the struggle against violence;
- youth-oriented cultural and recreational projects. One example would be cultural activities organized in schools outside class-time. Recreational activities are sometimes held in places where there is, and at times when there is, a high risk of violence. Social and situational prevention actions are thus carried out simultaneously. The aim of these programs is to boost children's self-esteem and offer them constructive ways of using their time;
- health projects, especially for the youngest;
- legal and administrative support projects aimed at a population that is unused

- to dealing with the mechanisms of the formal State;
- social assistance or community work projects aiming at young people so as to discourage violence;
- public education campaigns on issues such as domestic violence or mediated conflict-solution;
- support centers for victims of violence (domestic violence and so on).

In many local governments, violence prevention programs are actually a terminological redefinition of older traditional social welfare projects. This redefinition may stimulate a reflection on, and an approach toward, how to make the activities of different projects mesh together in practice.

In Recife, for example, the *Bolsa-Escola* (school grant) program provides a grant to the mothers of poorer families to enable them to keep their children at school. It is the main program of the city administration, which invests much more in it than does the Federal equivalent. As part of a reflection upon violence prevention, the program now includes not only the income component as a criterion, but a benefit to wives of prison inmates with children of school age.

In Vitória, the *Agente Jovem de Desenvolvimento Social e Humano* (young social and human development agent) program trains young people in disease prevention, environmental conservation or citizenship. One of the program's selection criteria is to incorporate young people who have been condemned for petty crimes. It also works closely with the *Terra* environmental deterioration prevention program, since the same young people trained under the program are the people who will raise awareness among their communities as to the work carried out to preserve the mangrove swamps.

Policing prevention programs are initiatives in which the local authorities act through the police force to reduce the crime rate, either through street patrolling measures, or through community actions or some other means. These programs obviously depend on the liaison ability of the municipal police forces. One option is cooperation with state police forces, but there is great resistance to real municipal control in the political, administrative and cultural areas. Experiences in community policing – the best-known paradigm of police-linked prevention activities – are actually nearly always an initiative taken by the state public security authorities.

Another more common option is the participation of the Guarda Municipal, in the case of municipalities that have one. The profile and set-up of the Guarda Municipal are a core issue in the municipal public security debate in Brazil. The constitutional role laid down for the GM is to guard public buildings, parks and monuments. However the range of situations is very broad in practice. Many municipalities do not yet possess a Guarda Urbana and others have set one up recently. Vitória, for example, with its prevention initiatives dating back to the 1980s, had no “Guarda” until 2004. In other cases they were reformed and expanded. Some forces, especially in São Paulo, use firearms,⁷ which increases the risk for their officers and may reduce

their ability to carry out community work. If the “Guardas” become ordinary police forces, they lose their differentiation in terms of public security. The situation in Brazil ranges from “Guardas” that would desire to become military police forces, to “Guardas” that carry out the surveillance of public buildings, schools and parks, or to organizing the traffic.

A good example of police prevention activities is the so-called “*Lei Seca*” or Prohibition-style Law of Diadema. As explained above, Diadema had a high homicide rate in the 1990s, and was in fact an icon of violence in Brazil. A study of homicides showed that 60% of them took place in or around bars during the night. In 2002 the town ordered bars to close after eleven in the evening. Some places were given a special license to operate after this time provided they met certain prerequisites: a closed area, their own security service, and no recent recorded incidents of violence. This measure brought in bar owners as active players in violence prevention.

Night patrols by the Guarda Municipal and the Military Police, in a carefully planned intervention so as to obtain the support of the Attorney’s Office and the courts, enforce the law. Any bar given three warnings for non-compliance loses its license. The owner is free to choose an alternative commercial activity if he or she so wishes. Bars are closed down during the daytime so as to avoid unnecessary conflict with the clients at night.

Assessment of the projects

Federal programs as well as state and municipal programs need outcome assessments that will point the way ahead and raise public and political support for successful initiatives. However, the situation is bleak. The programs do not undergo impact evaluation to show whether they have attained the proposed results.

There are some assessment reports that usually refer only to implementation assessments—activities carried out, number of beneficiaries and so on—or that are audits of expenditures. The core issue of the impact is ignored in both cases. Furthermore, these reports often concentrate on measuring people’s participation and mobilization, which are intermediate variables. They do not reflect the changes that were the programs’ main goal: reductions in crime and in fear.

The traditional lack of data in this field hinders a thorough assessment. Many municipal plans actually include among their goals enhancements to production and access to public security information. Very few show satisfactory outcomes.

“Assessment reports” are usually drafted by the technical personnel who carry out the projects, which is why they tend to be self-congratulatory or take for granted that the sought-after effects will appear when the activities are put into practice. The assessment is rarely carried out by an independent, technically competent and program-neutral agency.

A high-quality assessment should be planned along with the intervention itself so that funds can be allocated, assessment activities scheduled, and above all a pre-

intervention study should be carried out, so that comparisons can be made in order to record changes that take place. Impact assessment is methodologically complex. The ideal way to carry it out requires an experimental group and a control group, qualified personnel, and accurate data. It cannot be done if you do not know the situation prior to the intervention whose impact you wish to measure. Ideally, every assessment of a project of a given scale should be carried out, at least partly, by independent institutions whose work is not directly linked to the outcome of the project.

Assessments in the field of public security and prevention are particularly difficult⁸ owing to a range of phenomena (migration of crime from one area to another, multiplicity of dimensions, mid- and long-term effects, and so on). However, they are extremely important if the continuity of programs is to be assured and resources are to be allocated efficiently. Most programs suffer from a lack of continuity and are carried out over short timescales, which makes assessment difficult. It is, however, true that without assessments that show clear effects, it will be difficult to obtain long-term funding for these projects.

NOTES

1. In this particular it follows the U.S. trend toward militarizing the fight against drugs.
2. What happened in this event was that the police surrounded a thief who was on an urban bus, holding several passengers hostage. After hours of tension, broadcast live on television, the police called off the negotiations and tried to kill the criminal. One hostage was shot accidentally by a police marksman. The thief was captured and choked to death inside a police car.
3. G. Mingardi, *Tiras, Gansos e Trutas. Segurança Pública e Polícia Civil em São Paulo (1983-1990)*, Porto Alegre, Corag., 2000.
4. This was a massacre in which military police officers randomly killed 29 people, apparently to destabilize the commander of their battalion who was bringing in measures to clean up and control police actions. CESEC/ FASE / JUSTIÇA GLOBAL/ Laboratório de Análise da Violência / UERJ/ SOS QUEIMADOS/ VIVA RIO, *Impunidade na Baixada Fluminense*. No Prelo.
5. There is a bill proposing the “deconstitutionalization” of the police force model, in other words to remove the mention within the Constitution, so each state can choose the model it deems most suitable.
6. J.T. Sento-Sé (org.), *Prevenção da Violência: O papel das cidades*, Rio de Janeiro, Civilização Brasileira, 2005.
7. This issue, which is not laid down in the legislation, was legitimated *a posteriori* by the *Estatuto do Desarmamento* of 2003, for municipalities above a certain size.
8. WORLD BANK Department of Finance, Private Sector and Infrastructure, Latin American Region, *Prevenção Comunitária do Crime e da Violência em Áreas Urbanas da América Latina: Um Guia de Recursos para Municípios*, 2003.

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ABSTRACT

In forbidding the use of force except in self defence against armed attack or when authorised by the Security Council, the UN Charter appears as the culminating development of a system of international order based on the doctrine of state sovereignty. The cumulative result of international law-related acts, omissions and declarations of the Bush Administration since its inception can be construed as a fundamental challenge to the sovereign state system. The Administration's stated security strategy is one possible response to undoubtedly grave challenges to national and human security. In fact, only institutionalised partnership between the U.S. and the next tier of consequential states can hope to address those challenges successfully in part because only it would have the requisite legitimacy. That partnership or concert could be organised within the UN framework albeit intensifying its hierarchical elements.

Original in English.

KEYWORDS

Bush Administration – Use of Force – Self Defence – State Sovereignty – National and Human Security – Legitimacy



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TOWARD AN EFFECTIVE INTERNATIONAL LEGAL ORDER: FROM CO-EXISTENCE TO CONCERT?

Tom Farer

The current state of international legal order

From its birth in the minds of European elites roughly four centuries ago until the latter part of the Twentieth Century, international law was seen to facilitate, as it expressed the terms of, coexistence among politically organised communities recognising no superior authority.¹ It arose gradually out of the defeat of Hapsburg imperial ambitions and of the associated Papal claims to govern the spiritual and moral lives of all the peoples in Christendom. In a process analogous to the alluvial development of order among the indigenous inhabitants of remote villages without formal political institutions, the leaders of European communities—enjoying *de facto* independence from one another yet living in close connection and sharing similar cultures, histories and values, so they did not see each other as different species—inevitably developed shared understandings about the nature of their relationship and the proper way of dealing with cases where sovereign rights overlapped or where the locus or indicia of sovereignty were uncertain.

In general, rulers were to live like property owners, free to do pretty much what they willed with their respective estates. The United Nations Charter carried the logic of equal rights and duties further by prohibiting the exercise of force to deprive states of territory and the autonomous decision-making and law enforcement activities which are coterminous with the idea of a sovereign state.²

Throughout the Cold War, the Charter prohibition dominated discourse

See the notes to this text as from page 167.

about the obligations of states. Yet during the approximately four and one-half decades that elapsed between the founding of the United Nations and the manifest end of that war, the United States, using either regular forces or proxies, invaded Guatemala, Cuba, the Dominican Republic, Grenada and Panama, while the Soviet Union did the same to Hungary, Czechoslovakia and Afghanistan. In addition, both ignored the ostensible sovereign rights of other states by employing a range of illicit means less flamboyant than invasion to manipulate their internal politics.³ When it came to disregarding Charter constraints on intervention generally and the use of force in particular, obviously the superpowers were not alone. France, for instance, made and unmade governments in West Africa at its discretion.

Some of these *prima facie* delinquencies were condemned by most academic international lawyers and also by huge majorities in the General Assembly of the United Nations, and a regional treaty organisation,⁴ seemingly determined to maintain, with marginal if any exceptions, the position that the only legitimate uses of force under the Charter are for self-defense against and actual or imminent armed attack or are authorised by the Security Council.⁵ Insofar as old-fashioned plundering aggression is concerned, the decisive response to Iraq's invasion of Kuwait in 1991 evidenced the continuing strength of collective support for the integrity of borders in the wake of the Cold War. But while in its authorisation of Desert Storm, the United Nations appeared to reaffirm the long-recognised prerogatives of sovereignty, it has to some degree attenuated them by authorising intervention in countries primarily to protect their populations from murder and misery whether resulting from the collapse of public authority (Somalia and Haiti 2) or its abuse combined with awful civil conflict (Sierra Leone and Liberia) or its abuse after putschists seize public authority (Haiti 1) or a murderous civil conflict aggravated by foreign intervention (Bosnia). Last year's unauthorised invasion of Iraq, coming not long after NATO's humanitarian intervention in Serbia over the issue of Kosovo and seen in light of the multiple delinquencies of the superpowers during the Cold War and of France's multiple interventions in the supposedly independent states of West Africa have led some commentators to conclude that international law has lost at least temporarily its capacity to serve as a central guidance mechanism for international relations.⁶ That remains to be seen. Arguably it is simply failing to a much greater than traditional extent to guide American foreign policy.

An authoritative legal system certainly is more than an archipelago of functional regimes. However effectively a blend of rules and principles, sometimes embedded in formal bureaucratic institutions, may as an observable matter stabilise behaviour and expectations concerning a wide array of subject areas as diverse as the uses of the seas and the protection of the chicken-breasted

sloth,⁷ they will not constitute a legal order unless they are seen as instances of a general system of authority that applies reasonably effectively to all states and addresses the existential concerns of human communities which include but is not limited to the question of who may use force under what circumstances. The system must also have broadly accepted rule for identifying which other rules are legal in character in the sense of commanding a respect superior to all other societal norms, what H.L.A. Hart⁸ called ‘the rule of recognition’.

Consent by state authorities, whether manifest in a formal text or in consistent practice, has been the international system’s rule of recognition. I see no evidence of dramatic change in this respect, but rather a gradual or gradually more open move toward what might be called law-making and interpreting by a ‘sufficient consensus’. Nowhere is this more evident than in the area of human rights. Twenty-five years ago, when their human rights behaviour was challenged, a significant number of countries—including such powerful ones as the People’s Republic of China—would still noisily invoke an alleged sovereign immunity to external appreciation of internal practices. Today such a defence is rarely if ever made.⁹ Governments stopped invoking the sovereignty defence when it ceased to resonate with their peers. In effect, they conceded that the norm of sovereignty had thinned out despite their objections

I do not want to overstate this point. The ramparts of old-fashioned sovereignty are still strongly manned. Only within the past year, a cross-section of U.N. members balked at endorsing an idea, championed by Canada and other proponents of humanitarian intervention, that sovereignty was conditional on a state meeting its obligations to protect the security of its peoples.¹⁰ The tension between the previously dominant value of state security and the growing demand to emphasise human security (with state security as a contingent means to that end)¹¹ remains high and divides not only affluent democratic states from many at best semi-democratic, less-developed ones, but also elites within many states, including the democratic ones. In the failure of the United States to secure even a bare majority of Security Council votes for its proposed essay in regime change in Iraq, a country with a monstrous regime, one could read the continued cling of governing elites to the deflating prerogatives of state sovereignty.

The Retreat of American internationalism

If, as the neo-conservative writer Robert Kagan¹² affirms, Europeans (the Germans above all) now personify belief in the law-guided resolution of interstate disputes by peaceful means, while Americans recognise force as the inevitable arbiter, then we are witnesses to something close to a reversal of historical roles. At the 1898 Hague Conference convened at the instance of the

Russian Czar to promote world peace, the chief U.S. representative spoke of war as “an anachronism, like duelling or slavery, something that international society has simply outgrown”, and proposed agreement on compulsory arbitration in the event that interstate disputes could not be resolved by diplomacy.¹³ Although the U.S. recognised an exception for those ‘differences’ that were “of a character compelling or justifying war”, the German delegation rejected its proposal, arguing that “treaties to limit arms and provide for ‘neutral’ arbitration of disputes negated [Germany’s] most important strategic advantage: the ability to mobilise and strike more quickly and effectively than any other nation”.¹⁴ In any event, the Germans argued, war, both in its ends and its means, is a prerogative of sovereignty not subject to judgment by third parties, a view not radically at odds with the raging hostility of American conservatives to the prospect of American war making being audited by the new International Criminal Court.¹⁵ Indeed, insofar as ends are concerned, it echoes in the views of certain quite respectable contemporary scholars.¹⁶

Of course, the difference between law-drenched American rhetoric and the German *raison d'état* softened when elites of the two states looked beyond relations between what the American lawyer-statesman Joseph Choate referred to as the “great nations of the world”¹⁷ to relations with what the American historian John Fiske¹⁸ called “the barbarous races”.¹⁹ In a similar vein, the influential turn-of-the-20th century German intellectual, Heinrich von Treitschke, called international law mere “phrases, if its standards are also applied to barbaric peoples”. “To punish a Negro tribe”, he wrote, “villages must be burned, and without setting examples of that kind, nothing can be achieved. If the German Reich in such cases applied international law, it would not be humanity or justice but shameful weakness”.²⁰

I do not want to overstate the parallel between German insistence on the prerogatives of sovereignty (and the consequent legitimacy of force as an instrument of statecraft) and the claims of the Rightists who now govern the United States. To begin with, von Treitschke rejected the idea of legal limits on the means as well as the ends of war. In stark contrast, as it has prosecuted the wars first against Afghanistan and then Iraq, the Bush administration has for the most part celebrated its strict adherence to the laws of war, going so far as to proclaim a new historical era in which technology makes it possible to target evil rulers rather than the societies they subjugate. Moreover, the administration has in part attempted to ground its recourse to force on interpretations of widely recognised legal and ethical rules rather than claims about the unreviewable prerogatives of sovereignty.²¹

Invoking the Charter-recognised right of self defence against an armed attack in the case of a *de facto* government (Afghanistan’s Taliban) that provides safe haven to a well organised terrorist organisation that had struck repeatedly

at American targets, killed more Americans than died at Pearl Harbor (when the Japanese attack precipitated U.S. entry into World War II), and threatens continuing assaults, is not a dubious stretch of the applicable norm. After all, the NATO states, including the smaller European countries that are normally among the strongest supporters of the Charter and the rule of law in international affairs, recognised the 9/11 terrorist attacks on New York and Washington as acts of war,²² as did the Security Council itself when it adopted a resolution recognising the applicability of the right of self defense under the circumstances created by the attack.²³

Iraq was a stretch, but, Bush administration defenders have argued, no greater than the one made by NATO when it bombed Serbia into submission over Kosovo, an action deemed technically illegal but nevertheless ‘legitimate’ by the Independent International Commission on Kosovo composed of the sort of cosmopolitan progressives committed to the minimisation of force in international affairs and the reinforcement of international institutions and law.²⁴ In the Kosovo case, recourse to force was considered and finally approved by a multilateral organisation of democracies (NATO) responding to the threatened commission of a crime against humanity (mass ethnic cleansing), about to be committed by a regime recently complicit in other such crimes and also of the crime of aggression (against Bosnia). In Iraq, the U.S.—backed by one Permanent Member of the Security Council and a mixed bag of thirty or so other states—acted to enforce Security Council resolutions under Chapter VII following repeated findings by the Security Council²⁵ of material breach of the 1991 cease fire agreement by the government of Saddam Hussein, a recidivist aggressor (Kuwait 1991, following Iran 1982). Moreover, in the preceding decade the Council had either acquiesced in or endorsed more limited military actions against Iraq by the U.S. and the United Kingdom for violations of the conditions of the 1991 cease fire and also for the defence of the Kurdish and Shiite populations from a renewal of gross human rights violations, bordering in the former case on genocide.²⁶

But Iraq looks like a merely modest stretch only when considered in isolation from the acts and claims that have marked American foreign policy since the advent of the Bush Administration in January 2001. When seen, however, against the backdrop of the National Security Strategy issued by the White House in 2002²⁷ and other statements from the Bush Administration,²⁸ Iraq looks a good deal more like a revolutionary challenge to the Charter system—and not just to its unprecedented restraint on recourse to force—for the Charter and the United Nations itself are only parts of a larger design implicit in the initial surge of international institution building following World War II.

What drove the architects of the United Nations, the international financial

institutions and the General Agreement on Tariffs and Trade (GATT) was a belief that the balance-of-power system marked by the commitment of national elites to the ceaseless competitive accumulation and exploitation of power is too dangerous to be endured and incompatible with the growing demand for welfare rather than warfare states.²⁹ An international free-trading system, facilitated by stable currencies (the IMF agreement) and the most-favoured-nation rule (the GATT), would make natural resources available to all countries, thereby removing one of the classical incentives to aggression and fostering interdependence. These political and economic institutions were the first elements of a management system for the global society and economy that would hopefully replace the global war system which from 1914-45 achieved slaughter on a planetary scale. Outside the Communist Bloc, the envisioned trading system and its associated financial order gathered pace and then was propelled forward by seismic changes in information, communications and transportation technologies, so that sixty years after World War II, we actually have the inter-connected world dimly imagined by the architects of 1945. We have what is called loosely 'globalisation', but it has occurred largely through private actors and without a proportional development of public management institutions, above all in the arena of political/military affairs, where the Cold War largely paralysed the Security Council and limited co-operation to avoiding catastrophic conflict between the superpowers.

The collapse of Soviet power in 1991 coincided roughly with a resurgence of economic and psychological buoyancy in the United States to produce an international environment with some similarities to the one prevailing in 1945, but with differences the potential effects of which were not immediately clear. Similarity consisted in the widely sensed dawning at least in Western polities of a new epoch filled with vast potential for co-operation among leading states to ameliorate the human condition.³⁰

The first difference was the absolutely unrivalled nature of American military power. The Soviet equilibrator was gone with no state or coalition of states on the horizon to replace it. For the first time in human history, one country could deliver militarily decisive conventional force to any corner of the globe within weeks if not days of a decision to do so. Both celebrants and critics of American pre-eminence began referring to the now ubiquitous 'Unipolar World'.³¹ A second difference was the reality of an interdependence and integration probably beyond the imaginings of the architects of the post World War II institutions. This was not just a matter of transnational trade and investment flows, but of transnationally integrated production and service networks and of the vulnerable communication and energy systems that made such integration viable.

A third difference between the conditions prevailing in 1945 and 1991

was the cumulative effect of market integration and the revolution in transportation and communications on traditional culture and political awareness in the global periphery, together with an extraordinary acceleration in population growth. Demographic bloating has filled the countryside with redundant people; the communications and transportation revolution has given them the incentive and the means to try their luck in cities, far from traditional sources of moral authority and the anchoring rhythms of rural family life, where they have formed pools of socially combustible materials particularly in the misgoverned societies of Africa and West Asia—pools which, given the openness of borders and the ease of movement, are washing over the frontier between the West and the rest. From these pools, leaders driven not by poverty but rather by the challenge of consumerist, libertarian culture to their sense of identity and authority and impelled by a sense of humiliation for the political/military weakness of their societies in the face of Western cultural and military power, can draw recruits for guerrilla war against the United States, its allies and its collaborators.

Given these salient features of the post-Cold War world, in 1991 one might reasonably have looked to American leaders for a burst of institutional and normative creativity similar to the one they had exhibited after World War II. On the one hand, the United States enjoyed far greater relative military power and economic and cultural reach than it had sixty years earlier and, on the other hand, it faced a set of interrelated threats to its long-term national security and the welfare of its people that could be analogised to the threat that Soviet power and Marxist ideology had posed. But these threats lacked something at that point, namely a name, a face and an address that could fit them into the manichaeian template of American popular culture.

In the years following the Soviet Union's dissolution, Washington did emit a few rhetorical hints of new ambitions for the international order usually in terms of a commitment to the planetary spread of free markets and liberal democracy.³² And a handful of deeds, like the interventions, however reluctant, in Somalia, Haiti and the Balkans could be construed as a germinating American commitment to institutionalised multilateral oversight of conditions in national societies in order to assure some minimum level of security for their inhabitants.

But other signs pointed in a very different direction for American foreign policy. A paper produced by Pentagon planners during the senior Bush's presidency and leaked to the press³³ advocated the indefinite preservation of American strategic dominance, albeit, interesting enough, by avoiding exploitation of that dominance in ways other states would find threatening. The unilateralist tone of the Pentagon paper had a bi-partisan echo in an address made in the early years of the Clinton administration by its then United Nations Ambassador Madeleine Albright. In it she declared that the Clinton

administration would use international organisations only to the extent they served to facilitate achievement of U.S. interests, and would not hesitate to pursue U.S. goals unilaterally.³⁴ Since the future Secretary of State invoked as exemplary instances of unilateral action the Reagan era invasion of the tiny Caribbean island of Grenada and Bush senior's invasion of Panama—military adventures widely seen as illegal under international law—Albright appeared to be announcing U.S. independence of the global order's core norms, as well as from its core institution: the United Nations.

Yet the Clinton administration's actual policies included attempts to secure Congressional appropriation of funds needed to pay U.S. budgetary arrears at the United Nations, support for international environmental treaties, and—at the very end of its mandate—signing the Statute of the International Criminal Court, the symbol-rich target of right-wing spleen. So despite sounding occasionally like his right-wing critics, Clinton's policies were not out of line with the general movement—or at least the abstract preference—of American foreign policy during the 20th century in favour of the progressive expansion of international law to the end of regulating statecraft and even the internal behaviour of states to the extent it shocks the conscience of the U.S. electorate. Nevertheless, to anyone anticipating a leap forward rather than a slight increment in the reach of international institutions and law, Clinton's policies had to be disappointing.

Among other reasons for his caution was the disappearance in the foreign policy arena of a certain discipline imposed by the high stakes of Soviet-American competition in the Cold War. With those stakes off the table, the arena of foreign policy became completely accessible to antagonists in the cultural wars that had been burning brightly in America since the Vietnam era. In that arena, the sort of unashamed definers of national interest in brutally competitive terms who echoed the contempt of the turn-of-the-century German elite for the arbitrament of law in international relations could coalition with right-wing religious groups sympathetic to manichaeic imagery and, opportunistically, with libertarians hostile to public regulation and management whether national or international (but also dubious about overseas adventures) and ethnic diasporas anxious to employ American power to defeat adversaries of their overseas kin, rather than to manage international conflict in accordance with general behavioural norms.³⁵ As I have suggested, one of the bonds among these groups was hostility to the constraints on national discretion that international institutions, usually encapsulated as the United Nations, and international law were seen to impose. And for reasons too complex to summarise here³⁶ and, for that matter, not entirely clear,³⁷ during the two decades before the Clinton presidency, they had increasingly influenced the tone and imagery of political discourse.

The disputed presidential election of 2000 brought these disparate antagonists of the international-law-and-institution-building project to the centre of world power. Out went Clinton's mild incrementalism. In came a ferocious assault on the International Criminal Court, followed quickly by rejection of the proposed enforcement protocol to the Biological Weapons Convention, abortion of efforts to increase the transparency of the global financial system in order to reduce its complicity in official corruption, tax evasion and money laundering,³⁸ and repudiation (without tender of alternatives) of proposed restrictions on activities contributing to global warming (i.e. the Kyoto Protocol), to name the best known moves.

These and other acts and omissions, however inimical to the vision animating the founders of the UN Charter system, did not yet challenge the system itself. That challenge awaited the precipitating event of the 9/11 terrorist attack and the ensuing declaration of a right and a readiness to wage preventive (misleadingly labelled 'pre-emptive') war against any state whose actions or attitudes are deemed by the government of the United States to constitute a threat, whether or not imminent, to the nation's security. Even with respect to states—as distinguished from shadowy terrorist organisations with no fixed address or sunk capital—the Administration proposed to eliminate rather than deter—to wage wars of choice against states that *could* become threats.³⁹ Such an expansion of the right of self defence is simply incompatible with the Charter system.

As a kind of corollary of its preventive war doctrine, the Bush administration announced its intention of restarting nuclear weapons development⁴⁰ in order to create very low yield warheads that could notionally be used against buried command posts and laboratories.⁴¹ In this way it assaulted another pillar of the system of order that evolved under the umbrella of the Charter, namely the implicit doctrine that, except possibly to avert nation-threatening strategic defeat, nuclear weapons would be used only to deter a nuclear attack or as a way of mitigating the consequences of one and of retaliating. Simultaneously it violated at least the spirit of the nuclear non-proliferation treaty in which non-nuclear states relinquished the right to acquire such weapons in return for a promise of the nuclear powers to reduce their nuclear weapon stockpiles and work toward nuclear disarmament.⁴² Hence the subtext of its declaration was an intention to rely on the threatened application of American power rather than a multilateral regime to limit the proliferation of nuclear weapons.

Unilateral enforcement of a selective non-proliferation regime challenged not just the Charter but the entire four-century old system of state sovereignty with its corollary of equal legal rights. For what is more central to the idea of sovereignty than discretion to determine how best to defend the sovereign state's

political independence and territorial integrity? It is one thing for states to relinquish by treaty the right to choose weapon systems most likely to deter attack. What is left of sovereignty if a single state, acting unilaterally, can deny to others the one weapon which might deter it from imposing its will on any and every issue?

The prospect for international legal order in light of Iraq

The escalating costs of the Iraq occupation and the refusal of certain important states to contemplate helping bear them without the Security Council's assuming a prominent role in overseeing the political transition in that country has to be a learning experience, however unwelcome. One lesson is that most of the world, the developed as well as developing, clings to the essential elements of the system of order provided by the Charter's substantive and procedural rules. Above all, there remains powerful support for the presumptive invalidity of any armed intervention by one state in another without Security Council authorisation or, at least in Africa, without authorisation by a regional organisation.

The Bush Administration has given no indication that it is unsympathetic to this broad consensus in favour of restraints on unilateral recourse to force, so long as the rules do not apply to it. That is hardly surprising. From the parochial perspective of a Unipower, the happiest normative world is one in which it alone or it and whatever other country it anoints, are uniquely licensed to use force for purposes other than self defence against an actual or imminent attack. Most other countries, however, seem indisposed to license exceptions for the countries that deem themselves exceptional. So we are, for the moment, at an impasse.

Normative dissonance in the core security realm coexists, of course, with the diurnal invocation of allegedly authoritative rules and principles in the various parts of the archipelago of transnational regimes. Governments process asylum and extradition requests, enforce fishing regulations in zones defined by the Law of the Sea Treaty, try in some measure to protect endangered species, comply in varying degrees with the rules of the World Trade Organisation, and so on. The dynamics of transnational social life generate expectations, and the power of reciprocity enforces a fair measure of respect for norms just as convenience and efficiency and inertia foster a degree of support for the institutions in which many of them are embedded, elaborated and executed. But in the absence of any collective experience of being part of an integrated system of order reflecting and protecting the deepest values of its subjects, respect for expectations, I propose and fear, rests only on

immediate calculations of utility, and that is precarious ground on which to stand in hard times or when faced with issues that cut across the grain of important domestic interest groups.

A generalised reduction in the authority (and hence pull toward compliance) of international law and multilateral institutions is only one of the possible costs stemming from the present reluctance of the United States to accept normative restraints on its own choices concerning the ends and means of statecraft. More immediately important is its potential impact on the norms and processes for limiting the use of force and on the efforts to strengthen restraints on the further development and deployment of weapons of mass destruction. But the gravest probable side effects stemming from the Bush administration's hostility to the international-law-and-institution-building project are what the economists call 'opportunity costs'.

The states with the collective capacity to act are not addressing effectively either the misery scattered in wide swathes around the globe or the not wholly unrelated sources of both nihilistic and instrumental violence that are ravaging human and eroding the foundations of national security. The diffusion and stunning enhancement of technological knowledge and its products, along with the population explosion, urbanisation, increased environmental pressures, wrenching challenges to traditional belief systems and identities and unprecedented levels of political, economic, social and cultural inter-penetration will continue to generate or intensify pathologies, including searing inequalities in life chances that will not heal themselves. With varying degrees of co-operation and success, national elites confront certain symptoms—like transnational terror networks or genocidal conflicts or starvation that catches the eye in some wretched place by vastly exceeding the quotidian tragedy of death from malnutrition—but at most poke desultorily at their roots.

Going to the roots requires levels of resources, human and material, that no one state or even the NATO states together can deploy.⁴³ Only a concert that includes the most important non-Western states could gather the requisite aura of legitimacy and irresistible power. In a sense, the concert would be a multilateral hegemonic project, but the hegemon in this case would be constituted by elites governing, in most but not all cases democratically, a majority of the world's peoples though only a small number of its national states.

At the time of its adoption, the U.N. Charter purported but actually failed to embody great-power commitment to global governance at least in the key area of peace and security, because the two superpowers were already girding for a traditional great power grapple and lesser states were clinging to their empires. While the Cold War's end seemed to offer a new opportunity for replacing the traditional competitive state system with an historically

unprecedented co-operative one, neither the Unipower nor important regional actors like China, Russia and France were psychologically disposed to transform—as distinguished from very incrementally adjusting—a structure marked by limited co-operation often negotiated bi-laterally one issue at a time. NATO's inability to secure Security Council sanction for intervention in Kosovo underscored the limits. And shortly thereafter, when the current American administration replaced Clinton's, the United States began withdrawing even from the incipient order-building project that had lumbered glacially forward during the Cold War and accelerated very modestly in its immediate aftermath when the 'like-minded' medium and small states, led by Canada and Norway,⁴⁴ tried to improve human security through an International Criminal Court, the Conventions on Child Soldiering and Landmines, and other initiatives rejected by American conservatives.

The terrorist attack of 9/11 left no ground for complacency about the conditions of the global status quo. But instead of animating a renewed search for a co-operative order, it initially empowered U.S. advocates of a violent, imperial project to reconstruct a recalcitrant world—the American Prometheus unbound.⁴⁵ Now, however, following the shambolic execution of their first step to that end, amidst a rising tide of popular hostility even among the polities of traditional allies (never mind those of hitherto moderate Islamic societies like Indonesia and Malaysia), the advocates of an imposed new order have lost the initiative.⁴⁶

That loss could be temporary, however, awaiting only a new act of catastrophic terrorism. For the warriors of the right, unlike many of their scattered opponents, recognise the volatile and dangerous conditions in which we live and offer a transformational vision. An anarchical system of sovereign states is compatible with American and, indeed, human security, they argue, only when all its constituents are capitalist democracies.⁴⁷ Hence the American superpower, with the aid of the willing, must shatter the Westphalian frame and impose an inegalitarian order, constraining the sovereignty of states deemed dangerous or feckless, while fostering over time—by whatever means prove efficient in given cases—the reshaping of authoritarian nations in the image of democratic capitalism.

Iconic invocations of the United Nations as an alternative means of order cannot compete with this proactive project. As presently constituted, the institution, despite its brilliant Secretary-General, does not measure up either to the immediate or to the deeper threats to order sketched above. Invoking it amounts to nothing more than an affirmation of sluggish incrementalism in the face of catastrophic risks. Calls for institutional reform, particularly of the Security Council, also have little political traction particularly within the unipower, at least in part because the envisioned reforms *by themselves* (adding members and possibly limiting the veto) appear to be and are largely formal responses to a

substantive challenge. Conservatives make a persuasive case for the proposition that, in the world as it has become, a system of order guided and inspired primarily by the negative virtue of mutual tolerance is a ship with many captains—a few even homicidal—pulling on the wheel as the iceberg nears.

The multilateral alternative to the unilateralist project must match the latter's visionary response to the present and prospective danger. In order to match, it too would have to move beyond Westphalian anarchy, but the departure would be far less abrupt and the break more narrow. From the beginning, after all, there were hierarchical elements in the Charter system coinciding with its purification of the Westphalian paradigm. How else can one describe the Charter's allocation of enforcement powers to a Security Council of only fifteen members, five of them permanent and endowed with veto power and, as originally conceived, power to direct UN military operations through the medium of officers drawn from their respective armed forces?⁴⁸ Moreover, since the Charter did not provide for World Court review of Security Council decisions, arguably it accorded to the Security Council unlimited authority to determine not only the nature and duration of enforcement measures, but also the existence of the jurisdictional conditions—'a threat to the peace'—requisite for applying them.

Over the past decade or so, the Council has authorised the use of coercion, economic sanctions and force in pursuance of ends going well beyond the prevention, limitation or termination of inter-state conflicts and the full-scale civil wars spilling dangerously across borders that were the focus of concern at the time of the Charter's adoption. In doing so, it built on a precedent from the 1970s when it had found the white racist *de facto* government of Southern Rhodesia (now Zimbabwe) to be a threat to the peace even though at the time it was facing little internal resistance and so did not need to pursue its dissidents across neighbouring frontiers.⁴⁹ The nub of the matter, then, is that a system of global governance characterised by close co-operation among today's leading states within the framework of the Security Council—for instance to force the termination of a suspected WMD development program or to resolve an incipient ethnic conflict or remove a government committing gross violations of human rights or to assume stewardship over a state foundering in the hands of kleptocrats—would not be entirely alien to the Charter paradigm, although it would be a great leap beyond the status quo. Only such a leap, however, is likely to reach the accumulating challenges of our era. With the exception of Rhodesia (a residual case of decolonisation), and the first intervention in Haiti (where in effect the U.N was endorsing a regional organisation's judgment about who constituted a country's legitimate government,⁵⁰ the Council has concerned itself with the internal conditions of states only in instances of humanitarian crisis—famine, genocide, mass slaughter—and even then, only erratically. But

it has never authorised intervention to deal with the *chronic* violators of human rights; regimes that survive through such regular applications of torture, arbitrary detention and exemplary assassination that they come to seem normal, much less regimes like the Angolan that torture and maim their citizens indirectly by stealing the national patrimony rather than producing public goods or, like the Libyan one, appropriate much of the patrimony to support a dictator's fantasies.

As far as one can tell, no proposal for threatening the delinquents in any such case with ejection and the transitional placement of their battered polities under United Nations trusteeships, possibly coupled with positive incentives to the miscreants for pre-emptive reform, has ever been contemplated, much less put on the agenda. And for that there have been at least three reasons. One was the previous lack of American interest in the reconstruction of awful but not utterly failed states. Another was the certain opposition within the Council both from one or more of the Permanent Members and of representatives from the developing world, filled as parts of it are with regimes of the sort just described. A third was the absence of a mandate or a mechanism for developing comprehensive plans for the correction of those state structures that guarantee the perpetuation of mass poverty, joblessness, functional illiteracy, chronic illness and accumulating alienation from the new global order. At least with respect to the Middle East, the first of those reasons no longer prevails, possibly pending the outcome and ultimate cost to the United States of intervention in Iraq. The second and third, the latter being largely determined by the former, remain bars to action.

A multilateral project liable to compete politically with the unilateral one that dominates the present Presidential Administration in the United States must include a strategy for inducing their removal. The only conceivable means to that end would be an historic compromise between the American Unipower and the next stratum of consequential states. The former would rejoin the great architectural project—begun with American support after World War II—to construct a normative and institutional system sufficient for the tasks of global governance. Rejoining requires that the United States surrender its claim of entitlement to exceptional status and its disinclination to reconcile its preferred means and goals with those of other states. The latter would have to embrace the idea that the primary purpose of governance must be positive action by all means necessary to protect the common good, whether in the face of immediate or of merely developing threats to peace and security, and the relevant security would be declared that of human beings, not merely of 'states' which has been a euphemism for any elite in control of a determinate national territory. Such a compact between the hegemon and the next tier of consequential states would carry the seed of a real legal order encompassing and vitalising the current archipelago of regimes. The historical conditions in which the elites of potential

concert members find themselves give them a breadth of common interests without historical parallel and yet they continue to rely primarily on the antiquated instrument of bilateral diplomacy to co-ordinate co-operation, where they are inclined to co-operate, and to avoid or mitigate conflict.

The move to collaboration can be accomplished within the framework of the United Nations and without reform of the Security Council. If there can be a Group of Eight self-tasked primarily with co-ordinating action in the economic realm, there can be a Group of Ten, Twelve or Fifteen, for that matter, accepting wider responsibilities, meeting regularly at the Ministerial and even more frequently at the higher bureaucratic levels to co-ordinate policy. It could be supported either by an independent secretariat or one custom-built within the U.N., in either event drawing on national and international institutions for intelligence to assist it in identifying and prioritising issues and developing operational plans for co-ordinated action using all the instruments of statecraft. Once approved by the relevant governments, where the execution of plans required armed intervention, they would be brought formally to the Security Council for authorisation. Since in the first instance, the concert would certainly include all of the Permanent Members plus India, Japan, Germany, Brazil and possibly such emerging market states as South Africa, Turkey, Indonesia and Mexico, one could reasonably anticipate approval even from an unreformed Council.

The concert would be open to additional members sharing its commitments (and able to contribute substantially) to extending the benefits of a globally integrated economy, mitigating the painful incidents of growth and planetary integration, limiting the spread of weapons of mass destruction, battling transnational terrorist groups and commercial mafias, and deterring illicit force and crimes against humanity. Based on those constitutive principles, a group of such diversity, size and power should be able to endow decisions of the Security Council reflecting the group's previously negotiated consensus with greater legitimacy than those decisions enjoy today, in part because the concert's backing would induce the expectation of effective enforcement.

Legitimacy, of course, is a matter of degree. The world confronts a clash not of civilisations but of cultures: the humanist on the one hand, and the chauvinist/chiliast, on the other—a clash that is internal to each historic civilisation. The concert and its purposes are expressions and instruments of the humanist project. They are concerned with spreading to all peoples the good things of this world and they call for co-operation and tolerance across national, religious and ethnic lines. Thus they are implicitly hostile to the world views of nationalist fanatics and religious extremists all over the world, not least in the United States.

Conclusion

Movement toward such a concert of leading states may have to await disasters more awful than 9/11, or it may be driven by the steady accumulation of costs to order and welfare evidencing ever more vividly the insufficiency of the present patchwork of contested norms and uncoordinated, generally weak institutions. Or it may not occur at all. Whatever its insufficiencies, the present order of things, like any established allocation of power and authority and wealth, has about it an aura of inevitability and is encrusted with accumulations of interest furiously resistant to change. The easiest response to traumas large and small is supposing that doing more of the same but with greater energy and larger resources will pre-empt new ones.

Like the man with a hammer seeing all problems as nails, the U.S. with its hypertrophied military power⁵¹ is inclined to see problems as amenable to military solutions, a tendency aggravated by the remarkably effective ideological assault within the country on the idea of public authority as an instrument for addressing inequalities of wealth and power and also by the appeal to significant electoral groups of manichaeic and apocalyptic templates for identifying threats and prescribing responses.⁵²

Washington nevertheless remains the more plausible source of any initiative to fashion an effective concert. Such an initiative could begin with a deceptively modest call for regular consultation among the states in question assisted by a planning secretariat consisting of seconded experts and a directorate of senior officials, one from each state with direct access to their respective heads of government. In theory, of course, a group of Washington's potential partners could shape such a proposal, thereby strengthening the hand of American multilateralists. But given their heterogeneity, their habit of dealing with the United States bi-laterally, and their individual political and social preoccupations (as well as the sensitivity of most non-European national elites to measures and precedents tending to shrink their own sovereign prerogatives), as a group they are unlikely instigators of new architectural proposals. And proposals emanating only from the Europeans may lack the heft needed to engage American interest.

"Old ideas", John Dewey wrote almost a century ago, "give way slowly; for they are more than abstract logical forms and categories. They are habits, predispositions, deeply ingrained attitudes of aversion and preference".⁵³ The realist assumption that co-operation among powerful states can never be more than a matter of temporary expedience, a mere tactic in the immutable struggle for power, is an old idea lodged in the consciousness of most governing elites. Yet in the face of the present grave threats to the security and affluence of the powerful, some once confirmed realists are beginning to move toward the constructivist view that identities and interests are plastic. Once the

personification of the realist optic in public affairs, former Secretary of State Henry Kissinger⁵⁴ advocates U.S. engagement with China, rejecting the call for restraint on economic intercourse in order to slow China's growth.⁵⁵ A legal order based on a concert of leading states is possible, if the constructivist intuition gains similar converts.

NOTES

1. Despite its overall utility, the word 'coexistence' may be a bit misleading in that particularly the larger participants in the construction of international law did not concede to the smaller ones a right to persist and the large ones did not for several centuries eschew forceful appropriation of a part of each other's territory and people. Coexistence did not, for instance, prevent Poland from being thrice partitioned by its more powerful neighbors—Russia, Prussia and Austria—between 1764 and 1795. Still, while one state might occasionally seize the territory and peoples of another, until it did, it had no recognised right to be concerned with the ways in which its neighbour organised its society and economy, legitimised its rule, or coerced its population. Those were matters to be determined at the discretion of the various kings and oligarchs. One could therefore say, as others have, that initially the system's only common—or shall we say constitutional—value was tolerance of diversity.
2. T. Farer, "Law and War", in C.E. Black and R.A. Falk (Eds.), *The Future of the International Legal Order*, Princeton: Princeton University Press, 1969.
3. S.C. Schlesinger & S. Kinzer, *Bitter Fruit: The Story of the American Coup in Guatemala*, Cambridge, MA: Harvard University Press, 1999; M. Kinzer, *All the Shah's Men: An American Coup and the Roots of Middle East Terror*, Hoboken, NJ: John Wiley & Sons, 2003.
4. T. Farer, "Panama: Beyond the Charter frame", *American Journal of International Law*, vol. 84, 1990, pp. 503-515; and "A paradigm of legitimate intervention", in L.F. Damrosch (Ed.), *Enforcing Restraint: Collective Intervention in Internal Conflicts*, New York: Council on Foreign Relations, 1993.
5. For a more detailed analysis of the practice of states in construing Charter restraints on the use of force, see T. Farer "Panama: Beyond the Charter frame", *American Journal of International Law*, vol. 84, 1990, pp. 503-515; T. Farer, "A paradigm of legitimate intervention", in L.F. Damrosch (Ed.), *Enforcing Restraint: Collective Intervention in Internal Conflicts*, New York: Council on Foreign Relations, 1993; T. Farer, "Humanitarian Intervention Before and After 9/11: Legality and Legitimacy", in J.L. Holzgrefe and R.O. Keohane (Eds.), *Humanitarian Intervention: Ethical, Legal and Political Dilemmas*, Cambridge, Cambridge University Press, 2002; T. Farer, "Beyond the Charter frame: Unilateralism or condominium?" *American Journal of International Law*, vol. 96, 2002, pp. 359-364; T. Farer, "The prospect for international law and order in the wake of Iraq", *American Journal of International Law*, vol. 97, 2003, pp. 621-628. See also C. Joyner, "Reflections on the

lawfulness of invasion", *American Journal of International Law*, vol. 87, 1984, pp. 131-144.

6. Glennon - in M. J. Glennon, "The new interventionism", *Foreign Affairs*, vol. 78, May/June, 1999, pp. 2-7; *Limits of Law, Prerogatives of Power: Interventionism after Kosovo*, New York, Palgrave, 2001- sees the exhaustion of the Charter system of collective security. Though disagreeing with Glennon's analysis and conclusions at almost every point, Thomas Franck (T. M. Franck, "Break it, don't fake it", *Foreign Affairs*, vol. 78, July/August, 1999, pp. 116-118) seems to end with the conclusion that international law is temporarily overborne by the violent reassertion of *raison d'état* and sees no early prospect for its revival.

7. In Steven Krasner's crisp formulation (S. Krasner, "Structural causes and regime consequences: regimes as intervening variables", in S. Krasner (Ed.), *International Regimes*, Ithaca: Cornell University Press, 1983, pp. 1-21.), regimes are "implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations".

8. H.L.A. Hart, *The Concept of Law*, Oxford: Clarendon Press, 1961.

9. I was able to witness this type of state behavior first-hand by virtue of my membership on (and for two terms, presidency of) the Inter-American Commission on Human Rights of the OAS (1976-83).

10. A report—"The responsibility to protect" (available online at <<http://www.dfait-maeci.gc.ca/iciss-ciise/pdf/Commission-Report.pdf>>, access on September 11, 2006.)—was commissioned by the International Commission on Intervention and State Sovereignty established by Canadian Foreign Minister Lloyd Axworthy after Kofi Annan gave a controversial speech to the U.N. General Assembly on sovereignty and intervention in 1999. Despite the claim by the Secretary General that the U.N. Security Council had "favorably received" the Report, "the concrete results of the meeting appear mixed. There is very little appetite in the Council to commit to principles that would force its hand": S. N. MacFarlane, J. Welsh & C. Thielking, "The responsibility to protect: Assessing the report of the international commission on intervention and state sovereignty", *International Journal*, vol. 57, 2003, pp. 489-502.

11. As the Human Security Program of the Canadian Department of Foreign Affairs and International Trade defines it, "*Human Security is a people-centered approach to foreign policy which recognizes that lasting stability cannot be achieved until people are protected from violent threats to their rights, safety or lives*". See <http://www.humansecurity.gc.ca/psh_brief-en.as>, access on September 11, 2006.

12. R. Kagan, *Of Paradise and Power: America and Europe in the New World Order*, New York: Knopf, 2003.

13. P. H. Maguire, *Law and War: An American Story*, New York: Columbia University Press, 2000, p. 48.

14. *Ibid.*, p. 48.

15. The Clinton administration opposed inclusion of crimes against peace (i.e. the illegal recourse to force) among the offences subject to the Court's jurisdiction (see Human Rights Watch, "Human Rights Watch condemns United States' threat to sabotage International Criminal Court", Press Release, 1998, July 9, available at <<http://www.hrw.org/press98/july/icc-us09.htm>>, access on September 11, 2006.) Conservatives (e.g. J. Bolton, "The global prosecutors", *Foreign Affairs*, vol.

78, January/February, 1999, pp. 157-164.), opposed the Court as such insofar as it would sit in judgment on any Americans even if charged with genocide or other crimes against humanity.

16. J. Yoo, "International law and the war in Iraq", *American Journal of International Law*, vol. 97, 2003, pp. 11-23; cf. R. Wedgwood, "The fall of Saddam Hussein: Security Council mandates and preemptive self-defense", *American Journal of International Law*, vol. 74, 2003, pp. 24-34; P. Zelikow, "The transformation of national security: Five redefinitions", *National Interest*, vol. 71, 2003, pp. 17-28.

17. P. H. Maguire, *Law and War: An American Story*, New York: Columbia University Press, 2000, p. 69.

18. Coiner of the term 'manifest destiny'.

19. P. H. Maguire, *Law and War: An American Story*, New York: Columbia University Press, 2000, p. 50.

20. *Ibid.*, p. 50.

21. W.H. Taft IV & T.F. Buchwald, "Preemption, Iraq, and international law", *American Journal of International Law*, vol. 97, 2003, pp. 5-10.

22. Statement of the North Atlantic Council, 12 September 2001, Press Release (2001) 124; available at <<http://www.nato.int/docu/pr/2001/p01-124e.htm>>, access on September 11, 2006.

23. In Resolution 1368 (12 September 2001), and especially Resolution 1373 (28 September 2001).

24. The Commission was also endorsed by UN Secretary General Kofi Annan. Full text of the report can be found at <<http://www.reliefweb.int/library/documents/thekosovoreport.htm>>, access on September 11, 2006.

25. An overview of the relevant Security Council Resolutions—and of the overall "case" the US was making—can be found in the text of the draft resolution offered up by the US, Spain and the UK on March 7, 2003, available at <<http://www.casi.org.uk/info/undocs/scres/2003/20030307draft.pdf>>, access on September 11, 2006.

26. W.H. Taft IV & T.F. Buchwald, "Preemption, Iraq, and international law", *American Journal of International Law*, vol. 97, 2003, pp. 5-10.

27. Available online at <<http://www.whitehouse.gov/nsc/nss.html>>, access on September 11, 2006.

28. For example, Bush's commencement speech delivered at West Point Academy in June 2002, available at <<http://www.whitehouse.gov/news/releases/2002/06/20020601-3.html>>, access on September 11, 2006.

29. According to George and Sabelli (S. George & F. Sabelli, *Faith and Credit: The World Bank's Secular Empire*, Boulder, CO: Westview Press, 1994.), "again and again, the *Proceedings* of Bretton Woods stress the ruling obsession of these leaders of a war-torn world: Never to revert to the 'competitive currency depreciations, imposition of exchange restrictions, import quotas and other devices that had all but stifled trade' and plunged the planet headlong into its most devastating conflict ever". On John Maynard Keynes' influence on the creation of especially the IBRD, see R. Skidelsky, *John Maynard Keynes: Fighting for Freedom, 1937-1946*, New York: Penguin, 2002.

30. See, for instance, then President George H. W. Bush's 1991 reference to a new world order in his

State of the Union Address to the U.S. Congress, available at <http://www.presidency.ucsb.edu/site/docs/doc_sou.php?admin=41&doc=3>, access on September 11, 2006.

31. e.g. C. Krauthammer, "The unipolar moment", *Foreign Affairs*, vol. 70, January/February, 1990, pp. 23-33.

32. A. Lake, "Confronting backlash states", *Foreign Affairs*, vol. 73, March/April, 1994, pp. 45-55.

33. P.E. Tyler, "U.S. strategy plan calls for insuring no rivals develop", *New York Times*, March 8, 1992, p. A1.

34. T.W. Lippman, "Clinton struggles to define world vision", *Chicago Sun Times*, September 30, 1993, p. 30.

35. T. Farer "The interplay of domestic policy, human rights & U.S. foreign policy", in T.G. Weiss, M.E. Crahan, and J. Boering (Eds.), *Terrorism and the UN: Before and After September 11*, London: Routledge, 2004 (forthcoming).

36. Ibid.

37. In a recent review of books on the Bush administration, the liberal economist, Paul Krugman (P. Krugman, "Strictly Business", *New York Review of Books*, November 20, 2003 pp. 4-5.) writes of the right-wing's success in setting the tone and parameters of public discourse and, after trying to explain its success, ends by admitting to a certain puzzlement.

38. P. O'Neill, "Confronting OECD's notions on taxation", US Department of State Website <<http://usinfo.state.gov/topical/econ/group8/summit01/www01051001.html>>, access on September 11, 2006, originally published in *The Washington Times*, May 10, 2001.

39. See Section V of the White House National Security Strategy, available at <<http://www.whitehouse.gov/nsc/nss5.html>>, access on September 11, 2006.

40. The US House of Representatives refused to fund the initiative. See C. Hulse, "House trims Bush plan for research on weapons", *New York Times*, July 19, 2003, p. A9.

41. Idem, "House retreats from Bush's nuclear plan", *New York Times*, July 15, 2003, p. A18.

42. S. Weinberg, "What price glory", *New York Review of Books*, November 6, 2003, available at <<http://www.nybooks.com/articles/16733>>, access on September 11, 2006.

43. To convey a sense of the gap between needs and proposed responses to them, I note that the United States proposes to spend up to \$150 million for schools in Indonesia that would offer the children of poor Muslims an alternative to those run by Islamic radicals that prepare students more for jihad than successful participation in the global economy. One hundred and fifty million dollars is slightly less than the annual budget of the public schools of my home town (Littleton, Colorado), population 40,000. Indonesia's population is 207 million. Pakistan, where the malign effect of radical *madrasas* is better known, has a population of 153 million.

44. These have formed "The Human Security Network", which grew out of a bilateral agreement—the Lysøen Declaration and Partnership Agenda—between Norway and Canada. Other states include Austria, Greece, Ireland, Jordan, Mali, the Netherlands, Slovenia, Switzerland, Thailand and (as an observer) South Africa.

45. A leading exponent of this view is Charles Krauthammer (C. Krauthammer, "The real new world order: the American empire and the Islamic challenge", *The Weekly Standard*, November 12, 2001, p. 25; "A new policy", *Townhall.com*, June 8, 2003, online at <<http://www.townhall.com/columnists/charleskrauthammer/ck20010608.shtml>>). For a more nuanced view, see S. Mallaby, "The reluctant imperialist: Terrorism, failed states, and the case for American empire", *Foreign Affairs*, vol. 81, March/April 2002, pp. 2-7. For a skeptical view, see J. Kurth, "Confronting the unipolar moment: The American empire and Islamic terrorism", *Current History*, December, 2002, pp. 403-408.
46. Pew Research Center for the People and the Press, *What the World Thinks in 2002*, Washington DC, 2002, available online at <<http://people-press.org/reports/pdf/165.pdf>>, access on September 11, 2006.
47. Even some thinkers hitherto associated with the political center or even the center-left in their overall ideological disposition— M. Ignatieff, "The burden", *New York Times Magazine*, January 5, 2003, pp. 22-27, 50-53 is one example, *New York Times* columnist Thomas Friedman another—are attracted by the perceived opportunity to realize the so-called "democratic peace" (see M. Doyle, "Kant, liberal legacies, and foreign affairs", *Philosophy and Public Affairs*, vol. 12, Summer, 1983, pp. 205-235) through the medium of an American Imperium. In his post-9/11 columns (a collection of which was recently published; see T. Friedman, *Longitudes and Attitudes*, New York: Anchor, 2003), Friedman, although critical of many details of implementation, argues that the goals of the Bush administration are boldly idealistic and just and in the American and human interest.
48. Charter of the United Nations (59 Stat. 1031, T.S. 993, 3 Bevans 1153), Chapter VII, Article 47.
49. M.S. McDougal & W.M. Reisman, "Rhodesia and the United Nations: The lawfulness of international concern", *American Journal of International Law*, vol. 62, 1968, pp. 1-19.
50. D. Malone, *Decision-making in the UN Security Council: The Case of Haiti, 1990-1997*, New York: Oxford University Press, 1998.
51. P. Kennedy, "The perils of empire; this looks like America's moment. History should give us pause", *Washington Post*, April 20, 2003, p. B1.
52. J. Didion, "Mr. Bush & the divine", *New York Review of Books*, November 6, 2003, online at <<http://www.nybooks.com/articles/16749>>, access on September 11, 2006.
53. R. Thomas Tripp, *International Thesaurus of Quotations*, New York: Penguin, 1970.
54. H. Kissinger, "Single-issue diplomacy won't work", *Washington Post*, April 27, 1999, p. A-17.
55. J. Mearsheimer, *The Tragedy of Great Power Politics*, New York: W.W. Norton, 2001.

BOOK REVIEW

Science in the Service of Human Rights, Richard Pierre Claude,
(University of Pennsylvania Press, 2002).

What tools do we currently have to assure that scientists can develop, produce, present and diffuse their knowledge and at the same time remain free from ideological pressure? What instruments do we have to control the development, production, diffusion and use of scientific advances that are known to cause an enormous amount of harm? How can we structure such controls in ways that do not interfere with scientific freedom? How can we redistribute universally beneficial scientific and technological advances? These are the main questions explored by Richard Pierre Claude, in his book *Science in the Service of Human Rights*.

The author presents a completely thorough description of the historical development, norms, contemporary issues and relevant factors of the relationship between science and human rights. His description provides an exceptional source of information for professors, students and human rights activists, as well as world scientists. Yet at the same time, it shies away from addressing thorny political questions such as: why has scientific innovation been centered on creating incentives for private investment instead of focusing on incentives to benefit the public? What negative consequences result from placing such high value on individual production and scientific freedom, as represented currently by the entire structure of intellectual property rights, yet at the expense of the rights of the citizens of the world to scientific advancements? What would the world be like if the normative structure of human rights, as related to science, were more a socialist structure than a liberal one?

The main objective of the book is to make available to people at the grassroots level both access to—and control of—scientific advancements, and to make these

instruments manageable and understandable. Additionally, the author wants to link the awareness of scientists to the Universal Declaration of Human Rights in order to illustrate the guarantees that Declaration crystallizes for scientific freedoms; as well as to show an establishment of the human right of all people to enjoy the benefits of science. In other words, Richard Pierre is interested in the interplay between science and human rights in a way in which human rights can control the misuse of science, and in ways in which science can benefit from the practice and enjoyment of human rights.

This objective is accomplished by using three different approaches to illustrate the natural and beneficial relationship between human rights and science: first, through a narration of success stories of past and present interactions; then by a description of norms and practices that have been developed as a consequence of those success stories, and finally by illustrating areas where work is still to be done.

In this sense, Pierre has presented a detailed narrative—past and present—of the exchanges and interactions between scientists and human rights activists, specifically those that have been able to negotiate and determine the norms that frame the field. This approach allows the author to demonstrate a natural alliance between activists and scientists. In Chapters 2 and 3 the author describes the relationship between these two communities in the drafting of the Universal Declaration of Human Rights, as well as in the International Covenant on Economic, Social, and Cultural Rights. Additionally, in Chapters 7, 8 and 9, the author describes the contemporary ways in which technological and scientific advancements are employed by citizens in promoting human rights, and the diverse forms in which scientists can use human rights to protect their scientific freedoms.

The second approach describes the set of norms and practices that have been put into place as a result of these interactions. While these examples permeate the whole book; they are specifically presented in a detailed analysis of two articles: Article 27 of the Universal Declaration of Human Rights and Article 15 of the International Covenant on Economic, Social and Cultural Rights. Additionally, Chapter 10 describes an establishment of codes of conduct for multinational corporations. These codes of conduct portray the desirable practices that have been developed as a result of relationships between scientists and activists.

Finally, the third approach shows that although there are success stories that could make us optimistic for humanity, there is still much work to be done. Here the author illustrates some issues where a lot of work could be done: medicine and health, for example, as well as computing and internet technology.

Nevertheless, the book plays down the many ways in which the relationship between these two communities could be perceived as antagonistic; the marginal results provided by the norms and practices in the human rights arena and the overwhelming tasks that remain if we are to take the field of science and human rights seriously. It seems the author places too much faith in the power of international laws, without thoroughly acknowledging the diverse range of difficulties that this field of law faces,

in both the local and the transnational sense. For example, the following unanswered questions are raised by Pierre's narrative: what do we—the members of the global community—either win or lose when technological and scientific advancements (as well as their control) are articulated in the language of human rights? How have the differences of economic power and scientific advantages which lie between the center and the periphery of the global community influenced the structure of the norms of human rights in relation to science? How would the appearance of the pharmaceutical industry be changed if the entire field were centered on collective rights and scientific responsibility, instead of being focused around scientific freedoms and the protection of individuals?

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