

Transitional Justice: Between Criminal Justice, Atonement and Democracy

SIM special 37

Anja Mihr (Ed.)

Utrecht, 2012



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BETWEEN CRIMINAL JUSTICE, ATONEMENT AND DEMOCRACY**

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PREFACE

The demand for publications, preferably in peer reviewed periodicals or series, is predominant in today's academic world. Of course (double blind) peer reviewed procedures provide good (albeit all but perfect) conditions for high quality. But there are also disadvantages: some topics demand a rapid reaction, because they are related to very actual and changing circumstances. Also, it can be advantageous to publish contributions which provide 'food for thoughts', to encourage debate, instead of reflecting over a longer period. This does not mean of course that this kind of publications would not meet the criteria for a peer review, but only that there are good reasons not to take this long way to publication.

SIM, the Netherlands Institute of Human Rights aims to promote academic thinking on human rights issues, to stimulate and deepen the debate with the SIM-Special series. In this volume on transitional justice the editors have brought together contributions in the field of transitional justice, all from authors that are somehow involved with SIM. We think that this is a very good initiative to make visible what our colleagues are doing in this field. Transitional justice processes are closely tied to human rights issues, and raise so many questions that, by the very nature of the process itself, need an urgent response.

I am sure that this SIM Special Volume will contribute to a better understanding thereof and trigger well informed public debate. I thank the editor and authors for their efforts and we look forward to comments and reactions.

I wish you an inspiring reading!

Jenny E. Goldschmidt

Director of SIM (Studie- en Informatiecentrum Mensenrechten), Netherlands Institute of Human Rights. Professor in Human Rights Law.

INTRODUCTION

The Netherlands Institute of Human Rights (SIM) at Utrecht University has worked in the field of transitional justice around the world for years. A number of studies, theses and expertise have been published in the different areas of criminal and well as political and historical justice over the past decade (see also www.uu.nl/sim). This 37th edition of the SIM-Special on transitional justice is a collection of studies in this area and an effort to share expertise and views on how to approach the impact of transitional justice measures on societal behavior, on justice or collective memory and narrative. The best way to approach the different instruments, mechanisms and measures of transitional justice is to investigate them with a multi-disciplinary approach. Legal, political and historical scholars have contributed to this compilation and shared their expertise and results. They highlight the fact that transitional justice is overall a process during fragile transition period from violence or conflict torn societies to peace and stability. In order to be a fruitful process a mix of different transitional justice mechanisms and measures ought to be applied, depending on the situation and genesis of the conflict. And often reconciliation and stable societies will only be achieved after decades of efforts to apply these methods.

Anja Mihr gives a general overview over some of the measures, mechanisms, legal and political instruments and tools that today count as methods to foster transitional justice to both strengthening democratic institution as well as the reconciliation process in any specific society or country. Frederiek de Vlaming shares her inside views on the work and methods of the ICTY for the Former Yugoslavia as one of the first international tribunals issued after the Nürnberg War Tribunals in post-WWII Germany. She sheds particular light on the role of the first chief prosecutor of the ICTY, Richard Goldstone, and his difficult role to define the role, the possibilities and limits to bring war criminals to justice. But she comes to the conclusion that many yet not well defined prosecutorial policies at the ICTY lacked significant transparency and thus also

impact. Gjentian Zyberi follows up on the previous chapter about the ICTY and analyses further flaws of the ICTY. In his opinion the ICTY would be completed by a Truth and Reconciliation Commission in the different post-war countries on the Balkans. The ICTY, and its limited and merely legal measures and output are too far away from peoples needs to reconcile and thus should be complemented. Yet, it is a valuable tool to bring facts and truth to light. Legal measures are one side of the transitional justice process. Needless to say that legal measures and criminal justice alone will not let to reconciliation and peace in a society. However sensitive and difficult this process is, is highlighted by Chiseche Mibenge. She points out in her piece on gender justice in African countries, which she has extensively investigated, that the common legal measures alone often overlook the victims groups of war that most severely suffer from injustice such as women and girls. Sexual violence is often used as a tool for war fare, and as such has to be explicitly considered in justice processes ones the fights are over. No longer can it be accepted as collateral damages of war. Interestingly enough, the debate about whether and to what extent sexual violence and discrimination against women should be included as in legal measures also triggered general debates about human rights and victim protection and in many African countries as of today.

Reparations and atonement are often seen as a result of a political and societal transitional justice and reconciliation process. These measures add to those of legal procedures but can be triggered and endorsed by court decisions, reports of truth commissions or general recommendation by political leaders. Diana Contreras-Garduno gives the example of the Inter-American Court of Human Rights in Costa Rica and how the court has over the years leveraged the idea of justice and reconciliation through ways and means of reparations. However, this prerequisites the fact that victims are clearly identified which yet again requires specific procedural regulations which remain a challenge for the court. Nevertheless, the Inter-American court is a pioneer in attaining to define reparations to

victims of human rights abuses as a means and way to repentance and acknowledgement of severe injustice and violation.

Michael Buckley and Nicholas Tomb illustrate with an example how difficult it is during the sensitive period of transition from war to peace if disarmament policies and political efforts don't meet the needs of people and victims in the war torn society. To reconcile divided societies demands more than just clear definitions of who is a perpetrator or a victim. It demands a change of attitude and behavior towards each other that with peace-building methods alone cannot be achieved. How deep rooted resentments, mistrust, fears and traumas of atrocities continue among people in post-conflict societies for ages and even transform from one generation to another is described by Nicole Immler's chapter on Compensation Practice and collective memory in post-WWII Austria among Holocaust survivors. Even second and third generation survivors remain with the dilemma whether to accept and deal with material compensations for the losses of their parents or grandparents during the war, or whether to accept them as a way of reckoning and restitution. Collective memory on victim and perpetrators side shape societal behavior and political agenda for generations after a conflict has ended.

These different views on the area studies of transitional justice show how diverse the methods are that society, governments and international organizations use to deal with past wrongdoings and violence. The examples illustrate that not one measure alone, neither compensation nor only criminal justice will heal wounds, reconcile societies or build up stable democratic societies. It is a mix of methods, measures and mechanisms that will make a difference over a period of time in order to avoid repetition of violence or perpetuation of vengeance among divided and mistrusting societies after violent or suppressive regimes have ended.

Special thanks go to the Focus and Massa Programme "Human Rights in context" of Utrecht University that kindly sponsors this publication.

The editor and copy editor of this SIM-Special No. 37 welcome any comments and responses to this compilation. We hope that it is fruit for thoughts and further multi-disciplinary investigations in the area studies of transitional justice.

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**TRANSITIONAL JUSTICE
AND DEMOCRACY**

TRANSITIONAL JUSTICE AND THE QUALITY OF DEMOCRACY – FROM DEMOCRATIC INSTITUTION BUILDING TO RECONCILIATION

ANJA MIHR

1. INTRODUCTION

Without transitional justice measures, a society in democratic transition or democratic institutions will face institutional failures. Democratic institutions, executive, legislative and judicial powers will be less resilient to political and even economic crisis if they can not base their effectiveness on public and civic trust by the majority of citizens. Civic trust in return is achieved through the frequency and ways citizens make use of and engage with democratic institutions. If they do not engage and mistrust these institutions, for example, by boycotting elections, or if they have to bribe judges in order to get justice, the level of civic trust will be low. So is then the effective performance of democratic institutions.

Transitional justice measures can be an inter-linkage between civic behavior and democratic performance or culture. These measures are generally applied over a period of time, years and even decades, throughout the democratization process and after democratic consolidation have taken place. When democratic institutions respond to citizen's needs and claims, they shape societal and democratic attitude or identity and can lead to behavior that again mirrors democratic culture and thus the performance of effective democratic institutions. Hence, I argue that transitional justice measures can strengthen democratic institution building and thus increase the quality of democracy.

One way of how to measure the quality of democratic institutions and democracy depends on how executive powers respond to citizens and victims claims such as how newly elected parliament responds to citizens needs and passing of effective laws

or regulations. They ought to reflect the way on how the society comes to terms with its often cruel past. Furthermore, it depends on how legislative powers and parliament independently constrain executive powers and set frameworks for independence judiciary and the rule of law. Citizen or victim participation has to be guaranteed at all times, free from fear, want and repercussions whilst dealing with the past. Qualitative high democratic performance depends on how equity laws such as international human rights norms and standards are applied by the judiciary and transformed into guidelines and laws by legislative and executive powers. The aim is that citizens (re-) gain civic trust in (democratic) state institutions, make use of them, strengthen them and abstain from arbitrary vengeance and undemocratic means to seek justice.

In the following chapter I will outline the interrelation between transitional justice mechanisms, democratic institution (building) and the reconciliation process in transition or post-conflict societies.

2. TRANSITIONAL JUSTICE

There is a close correlation between transitional justice mechanisms and the performance of democratic institutions and the reconciliation process. Overall, transitional justice mechanisms and democratic institutions are tools in order to reach peace while reconciliation is a method used for creating stability and fair sustainable development in society. However, the mechanism are diverse and multiple and mostly applied at different stages during a transition process. Transitional justice measures in the context of criminal, retributive or historical justice can contribute in strengthening democratic institutions and establish and enhance civic trust in societies. According to a general definition by the International Center for Transitional Justice (ICTJ), a transitional justice process includes ways, means, institutions or instruments to respond to systematic or widespread violations of human rights. These mechanisms seek recognition for victims by bringing perpetrators to justice in order to promote possibilities for peace,

stability and democracy. The process provides therefore the grounds for criminal, social or historical justice that adapt to societies transforming themselves after a period of human rights abuse such as during war, armed conflicts, periods of dictatorship, and autocratic suppression. International law, or international human rights and humanitarian law instruments such as treaties (covenants, conventions), declarations, agreements or protocols, are the legal basis for this process.¹ If looked at most of the different mechanisms and instruments used during a long term process of transitional justice in different countries and situation, we can categorize them in following four categories:

Acknowledgement of past wrongdoings can be conducted at different levels of intensity; either through history or truth commissions, apologies through civic and political actors, establishing memorials and introducing memorial days, initiating and responding to public debates, issuing films and documentaries, publishing literature or novels about the past, introducing past wrongdoings and historical facts in schoolbooks, conducting scientific research and allowing archives, media involvement or naming victims and alleged perpetrators. These acts can include claims by authors, media or the civil society for certain actions.

Restoration can be summarized as acts that involve restitutions, reparations, rehabilitation or compensation for victims of expropriations, eviction, imprisonment or illegal killings. Next to material and financial compensations or restorations, it includes establishing working relationships among former enemies or combatants in public institutions via quota or passing amnesties to political prisoners of the former regime, restoring and maintaining memorials, or through the public exhumation of mass graves. Compensations for example, are one part of a very specific TJ

¹ International Center for Transitional justice, ICTJ <http://ictj.org/> (accessed in March 2012).

measure and are only targeted at victims and survivors. It has to be connected to a larger profile of TJ and the meaning of it, such as acknowledgement and quantifying the personal loss of lives or years of living under suppression or other losses. Otherwise, it will lose its meaning for future generations. Rule 150 of the Hague convention on reparations from 1948, for example, has become customary international law and is applicable to all countries and societies. It implies that the responsible state is under an obligation to make full reparation for the injury caused by the internationally wrongful act.²

Criminal Justice can be defined as using international human and humanitarian law on cases to confront past injustice and perpetrators, to reform national legislation and criminal justice, and the vetting or lustration of civil servants. It helps to establish tribunals and a new national court system, as well as a judiciary that can deal with cases of the past. It also aims to combat impunity, to establish and reform a security system and to condemn or probate perpetrators of the former regime.

Silence can include amnesty laws or silence pacts according to agreements among old and new political elites and governments. They can be issued through informal agreements, or national legislations, but do not automatically equal impunity. Amnesties imply that perpetrators surrender and at the same time those to which amnesty is applied are seen to have committed crimes of some sort without (yet) being punished. But often, these laws become customary law and thus can turn into habits, political traditions or even impunity. Therefore, amnesty laws should be conditional and should be agreed upon or changed within referendum when the time is ready, always with the aim to avoid impunity.

Examples are:

² Art. 38, Second Protocol of the Hague Convention for the Protection of Cultural Property; Art 51, First Geneva Convention from 1948.

Acknowledgement	Restoration	Criminal Justice	Silence
Commissions of Inquiry History commissions Truth commissions Apologies Memorials Public Debates Film Literature Schoolbooks Scientific research and open archives policies Media involvement Symbolic naming of victims and perpetrators	Reparations Restitution Compensation for past injustice Working relationships among former opponents or combatants Restoration of destroyed historical sites Exhumation of mass graves	Application of international human and humanitarian law on past injustice National legislation and criminal justice reforms Tribunals & Ad-hoc tribunals National courts Combat impunity Security system reform Condemnation or probation Vetting of public servants	Amnesty laws Negotiated silence pacts

Prior to assessing which measures during which stage of transition is the most effective, strengthening democratic institutions can help carefully analyze which of these measure can either enhance the forthcoming of the democratic process or hamper it. Yet one must keep in mind that the elites of the previous non-democratic or violent regime are still holding many (or most) of public offices and will not be supportive of the idea to deal with their wrongdoings of the past. Without doubt the most crucial stage of transition from a suppressive or violent regime or conflict is the first year or even the first months of transition, for example, after a peace contract has signed as in Sierra Leone in 1999, a ceasefire agreed on, for example in 2011 in Libya or the new political regime made a commitment to introduce democratic reforms and justice as it happened since 2011 in Myanmar.

These (short) windows of opportunity for constitutional reforms, democratic institution building and basic set ups for transition ought to be accompanied by transitional justice

mechanisms. But depending on the kind of conflict, its severity, level of violence, the parties involved and how and whether old and new political elites in government oppose or cooperate, some of these mechanisms might apply in one country at an early stage of transition and in another one later during the reform process. It is a sequencing, timing and balance of mix of mechanisms that is of relevance for a fruitful impact of transitional justice mechanisms on the democratization process. Whereas in one country, trials or international tribunals might be an early option, as in the case of former Yugoslavia in 1993 or in the case of Rwanda after genocide in 1994, in another country it might be recommended to start with a Truth and Reconciliation Commission, as in South Africa after the end of the Apartheid regime in 1994. Or maybe it is suggested that with the process continues with informal ways when the government is not ready yet for any serious TJ measures such as to acknowledge the severe human rights abuses that happened in the past in the case of Turkey and the Armenian genocide in 1915. As we have seen during the democratization process of post-Franco Spain after 1975, a negotiated silence pact that excluded any prosecution of perpetrators and instead issued broad and blanked amnesty laws seemed to be the most adequate form for the interim-governments during the democratization process. Observers of transitional justice processes such as Hazan and most recently Olson, Payne and Reiter, agree that sequencing and balancing of mechanisms matters significantly if transitional justice measures ought to have any impact at all. According to Hazan, a formal set of human rights and democratic norms and standards (formal democracy) have to be in place before even thinking about introducing any transitional justice mechanisms at all. Furthermore, there has to be a popular and general catharsis and societal feeling of being ready for national reconciliation prior to issuing trials, commissions of inquiry or that alike. Mechanisms such as judicial proceedings, commissions of inquiry, reparations, public apologies or the achievement of a shared

vision of history, are tools to reach any impact on a change of societal behavior.³ To apply measures varies greatly whether a country and society is still in the stage of an armed conflict – as was the case of the establishment of the International Criminal Tribunal on Former Yugoslavia (ICTY), or whether a country is in early transition process that is to say approximately up to 5 years after the conflict has ended. Medium term transition between five to twenty years during which usually democracies consolidate or fail to do so, is the next stage in which mechanisms might be applied. Interestingly enough most measures apply later rather than sooner and in general after 20 to 25 years with the first generation after the conflict ended or the regime change took place. This generation has the advantage to be free from any responsibility for past wrongdoings and at the same time is free from want and revenge of others because they have not been directly involved in the previous conflict. At the same time they are curious enough wanting to know what happened in the past, what the “stories” of their parents or grandparents is, the foundations of the society they live in and last but not least their identity.

The overall goal of these measures is to delegitimize the previous suppressive or violent regime and to legitimize instead the new democratic regime. And as such, the toolbox and measures of transitional justice attain to increase civic trust in democratic institutions. Therefore, policies of forgiveness and/or punishment provide a means of restoring the dignity of victims, of contributing to national reconciliation through efforts to seek truth and justice, whether symbolic or criminal, of preventing new crimes, participating in the restoration and maintenance of peace, and establishing or strengthening the rule of law by introducing institutional and political reforms. To underline the idea that only if there is sequencing and a balance and mix of different measures combined there will be any long term effect on democratic institution (building) was already highlighted by Heyner in 2002, when she

³ HAZAN, P., ‘Measuring the Impact of Punishment and Forgiveness: A Framework for Evaluating Transitional justice,’ (2006).

summarized that either trials or truth commissions or vetting and lustration mechanisms will not have any impact on reconciliation and less so on democratization.⁴ There needs to be a parallel reparations program for those injured whilst at the same time attention given to structural inequalities and basic material needs of victimized communities is given. The existence of natural linkages in society that bring formerly opposing parties together should be taken into consideration over a passage of time. That is to say, measures that apply during the first five years of transition might not be relevant 20 years later. They need to be used in a combination with other measures, such as school book reforms, memorials or reconciliation projects on the local level. But the reality of many post-communist, post-conflict and post-war countries have shown over the past 20 years, that reconciliation and transitional justice policies are often add odds with politics of democratization. During the very delicate and fragile period of early transition political decision makers have to balance between past and present and they have to publicly acknowledge that “something went wrong” without placing former “wrongdoers” outside society that is meant to reconcile. Otherwise, it is reasonably feared that the marginalization of potential perpetrators will lead to arbitrary acts of revenge and vengeance in the near future by all sides, and thus destabilize the country ones again. Therefore, democratic constitution building during this period has to include and respond to the needs of society during transition period and it often requires amnesty laws to apply – albeit the risk of establishing a culture of impunity that later weakens again democracy and the rule of law is high. The early constitutional set up has to reflect the interests of all societal groups adequate. Political and legal norms, for example penal codes and the way judges are appointed have to be based on agreements with all relevant groups in society, if they cooperate.⁵

⁴ HEYNER, P., ‘Unspeakable Truths, Facing the challenges of Truth Commissions,’ (New York; London: Routledge, 2002).

⁵ SCHAAB, A., ‘Political Reconciliation, (New York, 2005).

Consequently democratization processes and transitional justice can go hand in hand, but transitional justice measure have to be carefully applied and might even consider to issue amnesty laws if the political or military elites occupy too many positions still in the newly reformed administration or government. However, amnesty laws, by no means should be the first choice but can be a measure of last resort if the countries runs the risk of facing violence or another civil war during transition period, as was the case in post-Franco Spain in 1975/1976 or in post-dictatorial Argentina in 1986/87, which nevertheless were revised in 2003. Also, the opposite of amnesty laws, that is to say the prosecution of perpetrators is often paired with little protection of victims and can lead to acts of revenge by its constituency and followers, such as coup d'états through military leaders or terror acts.

3. DEMOCRATISATION AND DEMOCRACY

The debate about the relationship between democratization, democracy and transitional justice has been influenced by Huntington's work on the third wave of democratization in Southern Europe, Latin America and Eastern Europe in the 1970s and the 1980s.⁶ Since the end of the Cold War in 1991, a large number of democracies have led to expanded research methodologies and increased attention to the impact of transitional justice on democratization, democratic consolidation, and the quality of democracy. During the 2000s, debates arose about how to differentiate between the levels of democracy after the democratization was completed. The term "quality of democracy" was introduced to measure the level of democratic strength in democratic regimes. The quality can be assessed by considering the level of responsiveness of institutional powers (legislative, executive and judiciary) to citizen's needs and claims, and in the case of

⁶ HUNTINGTON, S., 'The Third Wave. Democratization in the Late Twentieth Century,' (Oklahoma, University of Oklahoma Press, 1991).

transitional justice, the needs and claims of victims but also alleged perpetrators. Furthermore it can be measured by the level of citizen participation in politics, their civic trust, and level of engagement in political institutions. Civic trust is seen as a level of acceptance of democratic authorities and compliance with civic duties. Almond and Verba⁷ have coined the term civic cooperation and trust⁸ already in the 1960s to measure the democratic quality of the political system.⁹ Civic trust, engagement and participation can include, for example, the way and intensity in which victim groups express their needs for acknowledgement and justice and victimizers claim their need for fair trials.

Transitional justice measures are among the different factors needed to reach a higher quality democracy. For example, these measures can have an impact on the quality of democracy, if the newly established judiciary incriminates alleged perpetrators of past injustice and decisions against perpetrators are issued who under the old regime would have stayed unpunished. Civic trust in democratic institutions and thus the quality of democracy can also be impacted through new and old political elites publicly reckoning with the past, the launching of memorials, award reconciliation programs, etc. Thus, higher or lower quality of democracy in connection with transitional justice measures can be measured by looking at the correlation between these measures and the performance of democratic institutions and their political elites: parliament, government, judiciary, political parties, civil society organizations, etc.

Assessing democratic performance and thus quality has a long tradition. Huntington,¹⁰ Diamond,¹¹ and Linz and Stepan¹² have

⁷ ALMOND, G. and VERBA, S., eds., 'The Civic Culture, Political Attitudes and Democracy in Five Nations,' (Thousand Oaks: Sage Publications, 2004).

⁸ *Ibid.*, p. 227, p. 360.

⁹ *Ibid.*, p. 349.

¹⁰ HUNTINGTON, *op. cit.*

¹¹ DIAMOND, L., 'Developing Democracy, Toward Consolidation,' John Hopkins University Press, Baltimore, 1999.

proposed various core criteria for democratic consolidation which today can be found when looking at quality indicators for democracy. Diamond's consolidation indicators reflect citizens' trust in the political regime. Democratic regimes are legitimized by high levels of civic trust and thus engagement with their institutions. Without citizen's participation there is no legitimacy and a democratic system might have functional failures. For Diamond, to successfully democratize and to consolidate democratic institutions 1) the elites, the government and the state bureaucracy must be transparent, accountable and responsive; 2) interest groups must be allowed to participate in the decision-making process, and 3) citizens must actively and voluntarily participate in politics. At least 70 percent of the population must support democracy and democratic reforms for a society to be democratic.¹³ In this context, the notion that democracy must become the 'only game in town' underscores the fact that a significant number and majority of citizens and groups must support and participate in democratic institution building for democratization to be effective.¹⁴ To marginalize groups or to exclude victims, survivors or technocratic elites from the previous regime from the decision-making process might cause societal tensions and perpetuates conflict. Instead, new governments that aim to leverage their democratic institutions over time would be well advised to carefully launch legal and political reforms, criminal prosecution, inquiry commissions, recognize memorial days, launch re-education programs, allow property restitutions and issue public security sector reforms of the military and police. Nevertheless, during democratization politics are often at odds with transitional justice measures because they are meant to accuse old and new elites alike, open old wounds or shed light on democratic deficits in transition

¹² LINZ, J., and STEPAN, A., eds. *Problems of Democratic Transition and Consolidation. Southern Europe, South America, and Post-Communist Europe*, John Hopkins University Press, Baltimore, 1996.

¹³ DIAMOND, *op. cit.*

¹⁴ LINZ and STEPAN, *op. cit.*

periods. This runs the risk of slowing down or hampering democratization and increase institutional deficits like weak rule of law, bias judiciary, executive and legislative powers who do not launch political reforms and instead issue blanked amnesties that create a culture of impunity, etc.

If applied in the early stages of democratization, some transitional justice measures might help to consolidate countries torn by an armed conflict or a totalitarian or authoritarian regime ended by force or collapse, but these measures are not necessarily a prerequisite to democratization. The point here is rather, how strong and resilient the democratic institutions and the political elites become during the process of transition and beyond, and to whether or not transitional justice can contribute to this development. If institutional strength and resilience can be leveraged through transitional justice measures, it will improve the quality of democratic institutions.

There is often a small window of opportunity for these measures to be applied during democratization in the first year of transition and in the following up to five or ten years. However, some transitional justice methods can be applied after consolidation has taken place and when there is no longer fear of vengeance, as was the case in post-Franco Spain.¹⁵ In an ideal scenario, transitional justice should facilitate a reckoning with the past by launching reconciliation programs, memorials, creating new courts, hiring constitutional reform experts, and/or training judges and new politicians in international human rights norms and standards that have to be transferred and adapted to domestic jurisdiction. This would foster democratization and respond to citizen's claims. New legal experts, lawyers and judges both national and foreign, can advise on constitutional reform, reconfigure civil law, train judges, lawyers and state security agents, build up an independent judiciary, and contribute to ad-hoc tribunals like the International Criminal

¹⁵ AGUILAR FERNÁNDEZ, P., 'Memory and Amnesty, the Role of the Spanish Civil War in the Transition to Democracy,' Berghahn Books, 2002.

Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR). Domestic actors', civil society, and, in particular, victim groups contribution to transitional justice and democratization is pivotal. But democratic regimes have to provide legal and political frameworks, by granting basic human rights and social justice for these actors to freely participate. Thus democratic institutions and citizen's participation are closely interlinked in this process. Citizens participate in reconciliation projects, claim and lobby for justice measures, support political and legal reforms, and ask for compensations to be applied or amnesties to be abolished. When representatives of democratic institutions, such as politicians, judges and delegates respond to citizens and electorates demands they see them as means to reach their goal for reparations, compensations, trials or general forms of acknowledgement. At the same time, they legitimize and strengthen these institutions. More engagement and civic trust in these institutions leverages functional quality.

4. TRANSITIONAL JUSTICE AND DEMOCRATIC INSTITUTIONS

Studies of transitional justice in emergent democracies that explored the connection between democratization and transitional justice argue that at least some formal democratic institutions have to be in place in order to implement state-led transitional justice measures. Measures such as trials, examinations, or compensations will not work without having effective democratic, decision-making mechanisms and a judiciary in place. It is even less so if there are not at least a minimum of fundamental human rights incorporated in domestic legislation that guarantees free and equal participation rights for victim groups, citizens or victimizers and other stakeholders in the transitional justice process. If there is no judiciary that applies them and no parliament that debates issues of the past, the correlation between transitional justice and democratic institutions can not be measured.

Olson, Payne and Reiter quantitatively assessed the relationship between democratization and transitional justice.¹⁶ They concluded that countries that implemented transitional justice measures during democratization enhanced freedom and human rights that in turn strengthened the functioning of democratic institutions. However, when and to what extent these transitional justice measures are adequate enough, or applied at the right time, depends on each country's political, social and historical profile, given the diversity of cases, definitions of terms and concepts, methodologies, and assessment criteria. For example, some authors are interested to see whether transitional justice leads to retributive or restorative justice. Others seek more precise, qualitative, transitional justice indicators; like the extent to which the level of post-conflict national catharsis promoted through citizens joint efforts to change the regime generates willingness to implement transitional justice.¹⁷ Others examine the role of different non-state actors with regard to the relationship between democratization and transitional justice such as victims, non-governmental organizations, or the international community and how they impact political decisions of the newly established government.¹⁸

It is often assumed that transitional justice measures help prevent 'victor's justice' and arbitrary vengeance. It demonstrates that human rights abuses cannot be ignored in the free society where people ask questions, file claims, and seek retribution and justice without violent repercussions. It seems to be an obvious development in liberal societies and democracies that people deal with the past sooner or later. If governments respond adequately and do not

¹⁶ OLSON T., PAYNE, L., AND REITER, A., 'Transitional justice in Balance; Comparing Processes, Weighing Efficacy,' United States Institute for Peace, Washington DC, 2010.

¹⁷ HAZAN, P., 'Measuring the Impact of Punishment and Forgiveness: a Framework for Evaluating Transitional justice,' *International Review of the Red Cross*, Vol. 88, No.36, 2006, pp. 19-47.

¹⁸ BACKER, D., 'Civil Society and Transitional justice: Possibilities, Patterns and Prospects,' *Journal of Human Rights*, Vol. 3, No. 3, 2003, pp. 297-313.

suppress or discourage citizen participation through means of fear, they have the potential to increase civic trust and equally democratic institutions. Governmental response needs to take into account the needs of citizens and victims and measure them against those of perpetrators, for example, the desire for acknowledgement, compensation and truth as well as the right to fair trials of perpetrators.¹⁹ In an ideal scenario, democratic institutions and their elites have to balance the interests and needs of all citizens regardless whether they are perpetrators or victims. Civic trust in this context is the individual assessment of ones own interest and capabilities of others whether to interact with democratic institutions. In this context, Diamond argues that during democratization, citizens engage with democratic institutions and do so more often and in larger numbers, if the institutions respond to their needs. This cycle increases civic trust and consequently legitimizes the new political system. If the majority of citizens experiences that the new regime is willing to reckon with past injustice, pay tribute to victims, prosecute and punish perpetrators, trust increases because people learn that this new regime is capable to attain justice for all, regardless what, when and who committed the crime even if it is delayed. Because of this, democratic institutions are strengthened by receiving citizens' legitimacy through trust. The stronger these institutions are, the higher the quality of democracy and the sooner democratization is completed and democracy consolidated.

However, in some post-conflict and post-authoritarian countries, absences of official acknowledgement and a resistance to dialogue between state authorities and victims prevails. Specifically, international justice measures such as international or hybrid tribunals are perceived as "winners' justice" or legal vengeance. Often these justice measures fail in prosecuting opponents of the old regime who had also committed human rights abuses under that regime.

¹⁹ MCADAMS, J., (ed.), *Transitional justice and the Rule of Law in New Democracies*, University of Notre Dame Press, Notre Dame, 2003.

The US Institute for Peace in Washington D.C. and the University of Uppsala have investigated the role of justice in post-conflict periods and whether or not trials or truth commissions are more preferable to amnesty in order to strengthen democratic institutions. They concluded that trials, truth commission and amnesty can be relevant for democratization, if they lead to peaceful society and avoid arbitrary vengeance. Although this might only be for a determined time, the fact that amnesty laws do not automatically lead to a culture of impunity and a failure of the rule of law must be acknowledged, too. The International Criminal Court (ICC) also reviewed the idea that in some contexts amnesties can contribute to peace and stability during post-dictatorial transition, under certain circumstances and thus acknowledging that democratic institutions building can occur without necessarily bringing perpetrators to justice immediately after the conflict ended.²⁰ The case of the Extraordinary Chambers in the Court of Cambodia in 2003 almost 25 years after the atrocious Khmer Rouge regime ended in the country; or the example of the Hybrid Tribunals (the Special Panels of the Dili District Court) for East-Timor between 2000 and 2006 and one year after severe atrocities happened in the country in 1999, are some of the examples to further investigate whether they have more or less impact on democratic development due to the late or early time of their establishment under UN auspices.

But as mentioned earlier, whether or not certain measures to best apply during democratization also depends on the nature of the conflict, past injustice or previous regime, the level of crime, and the legitimacy and strength of the new political elite in regards to the old elites. These measures have to be adapted to the political and societal circumstances in post-authoritarian or conflict societies. For example, it matters if perpetrators and victims live side by side in the same villages, districts or even houses and have to re-establish working relationships after the end of conflict (like in many post-

²⁰ SCHABAS, W., *An Introduction to the International Criminal Court*, Cambridge University Press, Cambridge, 2011.

communist Eastern Europe, in post-war Kosovo, or in post-genocide Rwanda or Guatemala), or whether if they live largely in separate countries (like in post-World War II Europe between Germany and its neighboring countries).

With new democracies appearing in Eastern Europe, Latin America, the Arab world, Africa, and Asia, it is important to distinguish and compare their functioning, strengths, weakness, stability, fragility, and to understand if transitional justice can contribute to their strength and quality. Researchers have linked the functioning, strength, and quality of democracy with the degree to which human rights are granted through the rule of law and the implementation of justice. In this context transitional justice measures such as criminal justice on the basis of international human rights law, can contribute to the rule of law and leverage equity in society.²¹

Government commitment to pro-democratic transitions in countries like Africa and Latin America during the 1980s and 1990s was crucial for the social and political stability of those conflict-torn countries. Teitel highlighted the “punishment and democracy” thesis, which claimed that the justification for the punishment of human rights abusers contributes to the future creation and maintenance of democracy by providing victims with a form of legal redress; deterring future crimes by offering truth and evidence about the past; restoring faith in the judiciary and allowing for judicial resolution of past wounds and enabling reconciliation of warring groups.²² In his evaluation on the South African TRC, Gibson argued that bringing past events to light can reduce inter-group conflicts, stabilize societies, and enhance democratic efforts but the “blame” and thus

²¹ O’ DONNELL, G., VARGAS CULLELL, J., and IAZZETTA, O., *The Quality of Democracy; Theory and Applications*, University of Notre Dame Press, Notre Dame, 2004.

²² TEITEL, R., ‘How Are the New Democracies of the Southern Cone Dealing with the Legacy of Past Human Rights Abuses?’ in *Transitional justice. How Emerging Democracies Reckon with Former Regimes*, KRITZ, N. (ed.), 2nd edition. Washington, DC: US Institute of Peace, Vol. 1, 2004, pp. 146-153.

the prosecution or accusations and truth telling has to be applied on all sides of societies even on those who are the “winners” of the transitions or those who claim to be victims, if that does not seem to be evident.²³ By clarifying past wrongdoings of all societal groups and former conflicting parties governments can avoid conflicts among groups, but also generate new conflicts.

Civic trust, citizen’s interest and engagement with democratic institutions are often mentioned as being crucial to strengthening and legitimizing democracy.²⁴ This means that the greater the citizens’ participation in voluntary associations, the higher the effectiveness of governmental institutions. Thus, if a society aims for justice of the past regime, its institutions must respond to citizens’, victims’ and victimizers’ claims, albeit often competing. The claim to attain truth and fair trial, the need for adequate compensation and recognition, but also the need to integrate all citizens equally in society regardless whether they are victims or victimizers, are difficult tasks. Nevertheless, democratic institutions try to come closer to the fulfillment of these rights than autocratic ones. A government needs to address inequalities in public politics and to establish a protective and legitimate relationship between citizens and state.²⁵ Executive, legislative and judiciary powers can diminish inequalities generated by birth, gender, race, traditions, or the discriminating laws of the previous regime. Democratically elected governments ideally aim at increase their institutions’ capacities and effectiveness in order to be legitimized and exercise power. They perform better if they respond to citizens needs and include them in decision making process, beyond elections.

²³ GIBSON, J.L., ‘The Contribution of Truth to Reconciliation, Lessons From South Africa,’ *Journal of Conflict Resolution*, Vol. 50, No. 3, 2006, pp. 409-432.

²⁴ PUTNAM, R., *Making Democracy Work. Civic Traditions in Modern Italy*, Princeton University Press, Princeton, 1993.

²⁵ TILLY, C., *Democracy*, Cambridge University Press, Cambridge, 2007.

5. DEFICITS AND NEGATIVE CONSEQUENCES OF UNCONSOLIDATED POCKETES OF DEMOCRACIES

If human rights norms, participation, citizens engagement, transparency, accountability, and the rule of law lead to the better functioning of democratic institutions, transitional justice should be considered as a means to provide tools to increase democratic and good governance performances like citizen engagement, political transparency, governmental accountability, and so forth. By silencing the past and issuing blanked amnesties, previous injustices can become enduring injustices, perpetuating the autocratic performance of leaders and reducing social capital and further decreasing the trust and confidence between institutions such as public agencies, security forces and among citizens.²⁶ Thus, the previous regime will not be delegitimized and its political culture and anti-democratic institutional behavior will most likely continue. If governmental institutions do not reckon with the past or silence it, mistrust, fear, intimidation, terror, and insecurity will prevail and democratic institutions' might function less efficiently. If major social segments agree on "forgiving and forgetting" and accept the silence of victims and the impunity of victimizers, new democratic institutions populated by leaders of the former regime might have functional failures or face violent resistance, radicalization and revitalization of old elites and political parties. The decisions of politicians and judges with close ties or loyalties with the previous regime will be influenced by those ties and legislators might not take the interests of small victims' groups into account because the old elitist parties are still major voices in parliament, security forces or in the judiciary, can silence or perpetuate injustice and thus weaken democratic institutions.

Nevertheless, democratization can go on, but democratic institutions might be of lower quality and thus less effective and not as progressive as they could be, as was the case in the transitions of

26 OLSON *et al*, *op. cit.*

the 1970s and the 1980s: the '*pacto de silencio*' embraced by post-Franco Spain, the '*punto final*' of the post-junta Argentina, or the Expiry Law in Uruguay.²⁷ In these countries, civic trust was rather low and a culture of impunity and amnesty laws led to democratic failure (Uruguay) or perpetuated citizens' fear and mistrust of state institutions (Spain). The level of corruption was higher, the judiciary was not working as independent as they could and social, political and legal reforms were not issued to the extent they could have been in order to decrease inequality in things like society, fight poverty, organized crimes, etc. Many decision-makers of the past dictatorial regimes continued to occupy important public positions in the emergent democracy and preserved their old antidemocratic and unequal privileges that caused major tensions in society and politics alike.

Due to the need for domestic reforms and pressure from international organizations, many of these countries that democratized did not return to dictatorship, but kept silent about past wrongdoings. Amnesties might be temporarily accepted for the sake of democratization, to avoid open conflict, but it must be decreased over time if a functioning democracy is to be installed. In countries that opted for amnesties or half-hearted justice, within one or two generations people no longer confronted with threats of vengeance or intimidation by old elites started to ask questions, demand justice for atrocities, and revoke the amnesty laws. Thus, in slower democratizing countries, transitional justice measures might be delayed due to the pressure and influence of old elites, victimizers or divergent interests of victims, but not necessarily refused. For example, victims might be acknowledged and compensated by special pensions, as it was the case in Spain, without perpetrators ever being convicted. Still, the country democratized and transitional justice claims arose stronger one generation after the democracy was consolidated.

27 See for example: AGUILAR FERNÁNDEZ, P., *op. cit.*

6. DEMOCRACY AND TRANSITIONAL JUSTICE

A democratic transition generally ends when the democracy is consolidated through free and fair elections, political alternations of leaders, the establishment of the rule of law, and by high citizens' participation in civil society groups, elections and public debates. For Linz and Stepan, a democratic transition is complete when a sufficient agreement has been reached about political procedures to produce an elected government and when this government de facto has the authority to generate new policies, and when the executive, legislative and judicial power generated by the new democracy does not have to share power with other bodies de jure.²⁸ As was noted earlier, if these conditions are not met, democracy is deficient or lacks of qualitative performance. Thus, transition ends and consolidation begins when an absolute majority of the citizens view democracy as "the only game in town," there is no threat to return to the former authoritarian regime, and significant groups regard key political institutions as the only legitimate framework for political contestation and adhere to democratic rules.²⁹ Consequently, democratization ends when old and new elites and other social groups agree on and consistently follow the new democratic rules. Inclusive new political elite is crucial for the success of democratic development because it can decrease political tensions among conflicting parties. To completely exclude technocratic and skilled elites from the previous regime could destabilize the system, because their ties to the old military or autocratic elites as they could be waiting for their chance to reinstall the previous power structures and privileges. But the challenge persists; how much can the new and fragile democracy bear with the old elites that ones represented a suppressive and anti-democratic regime?

There is a need to include and compromise with the old elites in the transition process and jointly agree with them on common

²⁸ *Ibid*, p. 3.

²⁹ O' DONNELL, G., VARGAS CULLELL, J., AND IAZZETTA, O., *op. cit.*

rules, use their institutional knowledge as long as they do not contradict democratic rules and values. However, this is not to be equalized with reinstalling high political decision makers of the old regime in the new government. It is rather to make best use of them and include them to the extent that they can not harm democratization. At the same time, they should by no means compose the majority of the new government, but should be presented in parliament and among the judiciary. It is an act of political balance that not many transition governments manage well, due to lack of resources, new technocratic elites, education and training, economic development and other means. If there are no blanked amnesties or any litigation against perpetrators issued, the new regime has to decide which of the old political elites they will exclude and which ones they will keep. Where these criteria are not met and the necessary steps are not taken, authoritarian rule is likely to return within a foreseeable time, as in post-Soviet Russia and modern Russian Federation.

That in mind, one has not only to assess whether transitional justice measures such as memorials or reparations can leverage qualitative performance of democratic institutions but to what extent they contribute to societal reconciliation. Reconciliation of divided societies is important for sustainable and long term peaceful and democratic development and thus a high quality of democracy.

7. RECONCILIATION

The term reconciliation has a political connotation, when it refers to the political processes that bring groups of victims and victimizers, divided societies or former enemy states together. It has a theological connotation, when it refers to an act of forgiveness that brings people together after conflict, war or separation. Reconciliation is thus seen as a process that can take several generations to complete and it includes acknowledgement of past injustice, truth seeking, mercy, forgiveness, and assurance for

personal safety and societal peace, which are seen as essential to the social interactions that lead to post-conflict reconciliation.³⁰

The longer the process goes on to reconcile victimizer, perpetrators, bystanders and victims of past injustice and atrocities, the more symbolic it becomes, for example when third and fourth generation victims receive rather symbolic compensation or public acknowledgement. It affects the whole society or turns into formal reconciliation as in the case of post WWII Germany, where foreign relations to countries like Israel or France include a specific state doctrine to reconciliation by the German government.

Reconciliation aims to slowly change societal awareness, the decisions and behavior of societies and the political elites. It aims to build trust in the new political institutions and foster stability and peace in the country, which, in turn, should prevent the society from returning to violence, vengeance, war or other severe human rights abuse in the future. Thus 'political reconciliation' deals more with building peace, friendship and trust in and among institutions and countries, more than the prevalent theological understanding of the term in terms of personal face-to-face reconciliation that has been practiced in South Africa or Rwanda in the 1990s.

Reconciliation is part of an essential transitional justice and democratization process. In reference to the impact that reconciliation measures can have, the United Nations General Assembly declared 2009 as the International Year of Reconciliation, understanding reconciliation as a process that subsumes various transitional justice measures like trials, truth commissions, apologies, lustration, file access and the like. This definition deviates slightly from others, who describe reconciliation as a precondition for transitional justice. Nevertheless, current debates indicate that reconciliation is seen as an overall goal and long term process of a number of different transitional justice methods in post-conflict societies. Consequently, reconciliation that addresses and redresses

³⁰ ABU-NIMER, M. (ed.), *Reconciliation, Justice and Coexistence, Theory and Practice*, Lexington Books, Lanham, 2001.

the wrongs of the past has been included on the political agenda of many emerging democracies and post-conflict societies. It is worth highlighting that reconciliation goes well beyond face-to-face programs that are launched after war, conflicts, or systematic persecution.

8. DEVELOPMENT OF RECONCILIATION

Controversies and debates about whether reconciliation is a precondition, a consequence or ongoing process parallel to transitional justice continue. The same is true for whether or not reconciliation of a divided society is a precondition for democratization and democratic societies. The examples above should nevertheless emphasize that reconciliation is an imperative to peace and democracy. There is a debate whether reconciliation is a transitional justice method or, as the United Nations Resolution 60/147 on 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 of 21 March 2006 contends, a long-term process that starts after the end of conflict, turmoil or great injustice and strives to reunite the country through a number of methods which relate to transitional justice.³¹

Over the last decades, the concept of reconciliation was used and understood differently in disciplines like history, psychology, theology, political science, peace and conflict studies or international law. Slowly, in the 1990s it became a multi-disciplinary academic concept. Today, authors opt for a compromise stating that transitional justice methods contribute to reconciliation because of their impact on societal change and transition. Most countries in transition from

³¹ United Nations Resolution 60/147 on 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 of 21 March 2006.

authoritarian rule to democracy introduce some measure that potentially could lead to individual, societal or inter-state reconciliation. Whether explicitly named reconciliation programs or not, most states apply one of the other transitional justice mechanisms with the goal of seeking justice, peace or truth and thus reconciliation. As Olson et al have shown, a minimum mix of methods is necessary to achieve an outcome that can be identified as a reconciled behavior among individuals and societies. But those measures are still no guarantee that reconciliation will be achieved.³² In political rhetoric the term has become a firm part of post-conflict political agendas and thus is believed to be a tool to establish stable societies that go beyond the traditional understanding of acts of forgiveness, re-construction and the re-unification of societies.

Current reconciliation processes like in East-Timor, Cambodia, Guatemala or Rwanda take place under surveillance of the international donor community and organizations; in particular the United Nations and the European Union as well as foundations, parliamentary commissions, churches, charity organizations or NGOs and civil society actors alike. Their different approaches and priorities contribute largely to the current definition and understanding of reconciliation. As a result reconciliation, truth and history commissions, although nationally driven, are often internationally financed and of very different kinds, depending on their donors priorities. Among those measures mostly financed are truth, history and/or reconciliation commissions, projects and workshops. They present reports, launch websites, initiate face-to-face workshops or public debates which can lead to both individual and societal reconciliation. By doing so, they often re-define, if not, re-invent the term reconciliation. Consequently, many international and local NGOs support the idea of reconciliation being a long-term process that includes various mechanisms and means in order to balance the demand for condemnation of perpetrators on the one side, and to peacefully overcome conflict torn societies with forms of

³² OLSON *et al*, *op. cit.*

memorials, public apologies, and reparations on the other. The act of forgiveness, which has often been claimed to be merely a term in Christianity and Judaism, is no longer in the center of the definition but rather seen as one element of many such as truth and justice seeking methods during the ongoing process.

9. CONTROVERSIES OF RECONCILIATION

Reconciliation is complex and challenging because of its perpetual character explained above. Lederach³³ and Kriesberg³⁴ argue that this is the case because of reconciliation's close linkage to transitional justice mechanisms that can heal or open societal wounds at the same time and thus potentially perpetuate divisions between victims and victimizers or bring former enemies or combatants together. Gibney et al³⁵, Minow³⁶ and Murphy³⁷ argue that reconciliation is a long terms process and to some extent attained through transitional justice measures. Others like Abu-Nimer claim that reconciliation is an end in itself.³⁸ Reconciliation is thus not a fixed concept nor does it determine a period of time with an end in terms of time or a final act. Although many reconciliation programs such as truth commissions, for example, do have specific goals and timelines for reporting. There is no point in time when countries, societies or individuals can say, "We are reconciled." Reconciliation goes beyond the immediate group of victims. The process is complex

³³ LEDRACH, J.P., *Building Peace. Sustainable Reconciliation in Divided Societies*, United States Institute of Peace Press, 2004.

³⁴ KRIESBERG, L., *Constructive Conflicts: From Escalation to Settlement*, Rowman and Littlefield, New York, 1998, pp. 329-31.

³⁵ GIBNEY, M., HOWARD-HASSMANN, R., COICAUD, J.M, AND STEINER, N. (eds.), *The Age of Apology, Facing up the Past*, University of Pennsylvania Press, Philadelphia, 2008.

³⁶ MINOW, M., *Between Vengeance and Forgiveness, Facing History after Genocide and Mass Violence*, Beacon Press, Boston, 1998.

³⁷ MURPHY, C., *A Moral Theory of Political Reconciliation*, Cambridge University Press, Cambridge, 2010.

³⁸ ABU-NIMER, *op. cit.*

because a number of different measures feed this process and there is neither a determined end of it, nor a clear indicator that defines it.³⁹ It can take generations in which old and new elites as well as former victims and perpetrators interact, debate, agree or disagree on definitions, terms or interpretations of the past. They are part of a societal debate on how to commemorate, compensate, apologize or forgive. It therefore often affects second, third and following generations, children and grand children of victims and perpetrators alike and thus whole society and countries. We have seen in reconciliation debates in post WWII Germany's, within former European colonial powers or post WWII Japans reconciliation efforts with its Asian neighborhood states. Acts of reconciliation have no determined end, but change in the ways measures, methods and procedures are used and applied, for example, during commemoration ceremonies, via direct or symbolic compensations or the way victim-victimizers dialogues and accouterments are preformed.

Reconciliation efforts combine different developments, activities and events that can lead to the anticipated peaceful change and healing of societal wounds. The process goes at a different pace after a conflict has ended or, for example, when democratic transition has passed the first stage of consolidation up to five to ten years after the conflict has ended. During the early transition period, transitional justice measures are essential for justice and accountability of young democracies and thus any democratization and consolidation process. Minow observed that after mass atrocities and human rights violations, historical memory, narratives, memorials, recognition, truth commissions, and forgiveness are linked together when re-establishing societal trust and peace which again are essential in order to reconcile.⁴⁰ Seemingly, by reviewing the Truth and Reconciliation Commission (TRC) in South Africa, Gibson connected reconciliation to democratic stability and concluded that,

³⁹ OLSON, T. *et al*, *op. cit.*

⁴⁰ MINOW, *op, cit.*

if reconciliation does not involve the society, democratic institutions will not be strengthened and consolidated.⁴¹ Reconciliation efforts therefore contribute to stable societies and as assumed play an important role in democracies.

A growing number of case studies have been published in the field of reconciliation. Many of them deal with a combination of measures of transitional justice that might lead to reconciliation. They also emphasize that the reconciliation process can fail if victims, perpetrators, bystanders, interest groups such as victims or victimizers, old and new elites and those who oppose the process as such are either excluded from the process or not proportionally represented. In addition to this, it can also fail if criminal justice is perceived as the justice of the winner, victims' justice, or the old elite and not of the society at large. Often victims believe that perpetrators who are put on trial often receive more fairness and justice than the victims. This can lead to emotional outbreaks and irritation among victims, thus perpetuating the divisions, mistrust and hostility in society which counteracts the movement towards reconciliation.

Therefore, the first years of post-conflict transition are a sensitive period in which governments, societal movements and civil society, victims' organizations and elites all have to make careful decisions and not fall into the trap of "the winner [or] the victim takes all." Because stereotypes, hatred, prejudice and racism tend to prevail for generations, acts of vengeance, discrimination, exclusion and revenge become even stronger instead of justice and forgiveness. Old ideologies and bigotry easily continue in the minds of people and are counterproductive to reconciliation. They can lead to new conflict or the continuation of divided societies. The same is true when victims are continuing to press with their demands for recognition or compensations and when victimizers are targeted by former victims in revengeful acts then the society remains divided because each group aims to delegitimize the others

⁴¹ GIBSON, J., *Overcoming Apartheid: Can Truth Reconcile a Divided Nation?*, HSPC Press, New York, 2004.

10. THE PROCESS OF RECONCILIATION

The process of reconciliation involves different stages, methods, mechanisms that all contribute to its outcome. These stages include attaining goals like truth, justice, mercy and peace.⁴² Personal security and thus freedom from harm and want are other important goals.⁴³ Transitional justice methods that lead to reconciliation need institutions that establish, promote or guarantee these goals. These institutions ought to be democratic in the sense that they allow participation by victim groups, bystanders and perpetrators alike as well as an independent judiciary that guarantees fair trials including testimony without fear, personal security and prevention from revenge. The societal willingness to acknowledge, to repair and to apply criminal justice is a precondition to start a transitional justice process but can be executed at different times and stages in a peace building processes. Even amnesty laws can foster reconciliation for a determined and limited period of time, but should never be the first option of transitional justice tool to be applied. However, if amnesty laws are granted blanked – as it is mostly the case – they can lead to a culture of impunity and for a large group of former victimizers to be above the law and thus the rule of law. This weakens democracy. Acknowledgements of past injustice contributes to the creation of truth, public apologies, rewriting history books, initiation of memorials, public debates, films and documentaries, literature, trials, research and open archives policies, and the naming of victims and perpetrators can increase awareness on past wrongdoings. On the basis of public awareness, face-to-face programs, political measures and societal initiatives, reconciliation can be processed. Reparations, for example, can be acts of symbolic or financial compensation for past injustice to victims and survivors.

⁴² LEDERACH, *op. cit.*

⁴³ KRIESBERG, *op. cit.*

These reparations work to re-establish relationships among former opponents or combatants. They can be the restoration of destroyed historical or religious sites or the exhumation of mass graves and public burials to ease open wounds and grievance. These can be acts and measures that contribute to political reconciliation by which the new government takes responsibility for the injustice perpetrated by the previous regime.

Another example is the restoration of public or religious spaces where atrocities have been committed and converting them into memorials. Subsidizing historical or religious sites goes beyond the humanitarian obligation of restoration by states according to the Geneva Conventions of 1949, but these measures are included in the above mentioned United Nations Resolution Basic Principles and Guidelines from 2006. These guidelines aim at building peace through reconciliation. The exhumation of mass graves in Spain, Argentine, Japan, Rwanda, Cambodia, and the Former Yugoslavian republics was more than a symbolic act paying tribute to death and the suffering of the victims. Under public surveillance it turned into an act of reconciliation where perpetrators acknowledged, political elites apologized, victims – in some cases – forgave without forgetting.

Criminal justice in this context is narrowly defined as the application of international human and humanitarian law on past injustice in civil and military, local and community-based, national, international, hybrid, and ad-hoc courts. In most countries it also includes traditional or customary legal procedures. Establishing truth and justice as components of reconciliation is one element of criminal justice. Prosecuting perpetrators or vetting public servants can contribute to fact and truth finding, to justice, and thus, reconciliation. At the same time, these measures are also controversial because they might heighten tensions in post-conflict societies. International tribunals such as the International Criminal Tribunal for Rwanda (ICTR) dealing with the crimes against humanity during the genocide in 1994 are sometimes used in conjunction with national, traditional or local courts like the Gacacas.

However, neither international tribunals nor merely traditional mechanism replaced entirely the national jurisdiction according to international human rights law to seek justice. It is assumed that the combination of applying international law, law reforms, and domestic jurisdiction leads to a condemnation or probation of perpetrators and criminals who are responsible.

Vetting of public servants and the exclusion of old elites from political positions is legally justified. Due to its public awareness raising and truth seeking efforts, these measures and mechanisms aim to contribute to the long term process of individual and societal reconciliation. Second, these mechanisms, such as fair trials, intend to bring facts and truth to light to demystify perpetrators. Victims seek overall acknowledgement to be assured that it was not them who committed the crimes under the previous regimes but the regime itself. This was a crucial step towards reconciliation among individuals, for example, between state police and political prisoners in former post-communist countries in Eastern Europe. After being exposed to the files, confronting former state police officers in the court room or knowing that they have been expelled from state office was, for some victims, more than an official acknowledgement of their innocence. It was also a moment of reconciliation.

Many of these measures attain the goal of reconciliation on the individual and societal level as well as among states. They do not happen at the same time or to the same extent, because to reconcile at the individual level does not mean that societies or states have done so, too.

11. RECONCILIATION AS A MEANS TO SOCIETY

Reconciliation tries to stabilize divided, post-conflict societies and develop “a democratic culture and thus create relationships between countries, communities, neighbors, constituencies and individuals which leads to civic trust in democratic structures and a

new political system”.⁴⁴ Therefore it aims to healing wounds, mistrust and hatred among individuals and societies. Transitional justice methods can contribute to heal and overcome mistrust by re-establishing civic trust in institutions and in society who uses and supports these institutions through elections, participation and for example, by going to court to solve problems instead of taking into ones own hands and commit acts of vengeance. The nature of the past crimes, the time that lapsed between the crimes and their redress often determines the extent and success of these methods to overcome mistrust and vengeance.

Beyond individual, societal and state reconciliation stands a theory of social and moral justice for victims and perpetrators alike. Truth and ‘historical justice’ can avoid vengeance and contribute to peace if victim and perpetrators alike get the impression that facts have been investigated and came to a conclusion.⁴⁵ Such facts can be the outcome of a truth commission, public debates, tribunals, or educational programs and can increase civic trust of people into public and democratic institutions.

During the 1990s, reconciliation processes were often initiated by political leaders, former dissidents or church leaders. Raúl Rettig (Chile), Desmond Tutu and Nelson Mandela (South Africa), and Lech Walesa (Poland) appealed to Christian values to argue for reconciliation for their countries and forgiveness of victimizers by their victims. As such, many believed that reconciliation was a Christian concept, for example when Lederach uses the term “mercy”⁴⁶, although other Abrahamic faiths like Islam and Judaism uphold it, too. The Commission for Reception, Truth and Reconciliation of East Timor, established in 2001, or the Algerian Presidential Decree and Charter for Peace and National Reconciliation of 2006, which called on the Islamists to reconcile

⁴⁴ BLOOMFIELD, D., BARNES, T., AND HUYSE, L. (eds.), *Reconciliation after Violent Conflict, IDEA Handbook*, Stockholm, 2005, p. 14.

⁴⁵ BARKAN, E., *The Guilt of Nations, Restitution and Negotiating Historical Injustice*, John Hopkins University Press, Baltimore, 2004.

⁴⁶ LEDERACH, *op. cit.*

with the army guards after the civil war, show that reconciliation was attempted in predominantly non-Christian countries alike. Reconciliation commissions have also been established, for example, in South Korea, the Solomon Islands, Sierra Leone, El Salvador, Argentina, Ghana, and the Fiji.

The complexity of the term reconciliation becomes more evident when we ask: Is reconciliation intrinsic to peace and re-establishing stable societies? If so, we should be able to find evidence of reconciliation being used in any stable or democratic society. To reunite, forgive, establish working relationships, memorialize, punish and establish mutual trust between former combatants, victims and victimizers as well as bystanders. Yet, there is little evidence to what extent truth, history, reconciliation or restitution commissions, historical narrative projects, memorials, lustration condemnation probations and even amnesties for perpetrators contribute to peace and stability in a society. Instead, in some cases these methods perpetuate division between victims and victimizers and between old and new elites. Yet, there are no clear indicators that would explain when reconciliation begins; whether or not it affects societies or is about to be completed. As Olson et al conclude, that although there are no clear indicators it is evident, that one transitional method alone will not lead to reconciliation.⁴⁷

Mendez highlights that without any reconciliation efforts, political regimes would be based on the weak foundation of privilege for old elites and perpetrators and the denial of rule of law.⁴⁸ Neglecting to confront the past can lead to new or enduring injustice, conflicts or turmoil because old stereotypes, discrimination or vengeance will trigger or perpetuate violent acts. Old and new elites, former victimizers and victims such as oppressed, persecuted, and exiled people, deported, survivors, bystanders and ethnic, religious or sexual minorities, must be included in the reconciliation process.

⁴⁷ OLSON *et al*, *op. cit.*

⁴⁸ MENDEZ, J.E., 'In Defense of Transitional justice,' in MCADAMS, J. A. *op. cit.*, pp. 1-26.

These groups have to agree on common standards of rules and conducting policies and come up with a version of the historical truth or common narrative that is acceptable to both in order to reconcile. Therefore, to agree on common political, juridical standards or historical facts can help to look jointly towards the future and re-establish social trust among formerly antagonistic groups. Needless to say, it is very difficult to achieve such a balance of protagonists to agree on common standards, narratives and rules for the future. Bearing in mind, that not all members of a society feel the need or want to reconcile and even oppose the process. Most reconciliation processes fail because they do not balance or achieve agreements among these groups, for example, when agreeing on a common historical narrative about the past. The difficulty in this process remains in the installation of methods and measures that neither perpetuate divisions among the groups nor affirm enduring injustice and mistrust of the past.

So far the impact of reconciliation process on societal peace is understudied. As shown above, the term is contested and many authors have aimed at defining reconciliation either as a precondition or as a consequence of transitional justice. It is nevertheless assumed that the process and its mechanisms as such can contribute to a more just and peaceful society, leading to a more legitimate new democracy.⁴⁹ Murphy argues that reconciliation is therefore a condition for successful democratization in transitional societies and is a critical component of peacemaking globally.⁵⁰

12. DURATION OF THE RECONCILIATION PROCESS

Reconciliation can take generations and is a long term process. Forgiveness, peace, truth and justice look good on paper, but the methods that lead to these goals have to be applied and enforced

⁴⁹ BRONWYN LEEBAW, A., 'The Irreconcilable Goals of Transitional justice,' *Human Rights Quarterly*, Vol. 30, No. 1, 2008, pp. 95-118.

⁵⁰ MURPHY, *op. cit.*, pp. 1-2.

through state or international institutions which can take decades and generations. The extent to which this happens depends on the political will of the country's influential elites such as military or economic actors. In many cases, like in Argentine or Chile, these elites are only ready to confront the past after one or two decades after the turn of the regime. The international donor community plays a vital role in this process although many initiatives are national driven by civil society groups.

Truth and reconciliation commissions are expensive in terms of investigations and witness protection. In war and conflict torn societies with heavy economic burdens, the international community is often the main reliable source of funding and support. In addition, recommendations given by TRCs for example, on security sector or legal reforms on compensations and reparations, have to be implemented and monitored. Many of these commission efforts fail or are only half way completed due to a lack of finances or political will, and a lack of international support or surveillance. Right after the end of a dictatorship or civil war financial means are often not available or not seen as a priority. On the other side it can take decades until an official acknowledgement or apology by the government or perpetrators is expressed. Personal and public apologies are important in this process as it was seen in Argentina in the case of the Mothers of Plaza de Mayo who demanded a public apology since the 1970s. A similar event in Canada where an apology by the United Church in Canada to the First Nation Peoples was given in the 1980s, took place decades if not centuries after the crimes happened. In Germany after 1949 or in Rwanda after 1994, acknowledgements, state genocide laws and official reconciliation commissions, memorial sites, compensations and justice were put in place shortly after the genocide or the mass murder took place. However, their outcome, in terms of reconciliation, took another generation or two.

13. RECONCILIATION AS A CONTRIBUTION TO DEMOCRATIC TRANSITION

Reconciliation measures hope to change the civic and political behavior of societies to focus more on justice, which can re-establish trust among victim and victimizers, divided societies and former enemies. Today, reconciliation is a firm part of post-conflict and post-war political agendas, irrespective of a political system. It is an ongoing process passing through different stages of individual, societal or state reconciliation over generations. Ideally, reconciliation processes would trigger citizens to participate in political decision-making processes and come to terms with past dictatorial regimes or aggressive states. The intensity or the absence of transitional justice mechanisms can impact the level and extent of reconciliation. Mutual trust, confidence building, justice and forgiveness can lead to peace. However, without institutions like TRCs or independent courts as well as democratic decision making bodies in place, the likeliness that reconciliation can be achieved is low.

Reconciliation processes also benefit from the societal or national catharsis that past injustice should not turn into enduring injustice. Once the need for reconciliation is expressed, all societal groups, perpetrators, victims, old and new political elites and bystanders alike ought to work jointly in achieving change in behavior and politics. The process can fail because some of these groups alike are not sufficiently included in this process according to their proportion of victimhood or responsibilities. Others oppose it. Another negative impact on the process of reconciliation, however, could be that when naming and condemning perpetrators or old elites too soon will allow their followers and constituency to oppose the new regime and thus will divide the society again, for example through military putsch or boycotts by economic and old political elites. We should bear in mind that transitional justice measures have the potential to perpetuate divisions of groups in societies, but at the same time have the potential to reconcile divided societies.

14. CONCLUSION

Constitutional or liberal democracy rests on the rule of law and citizens' trust in an independent judiciary as well as in executive and legislative institutions which can be strengthened by successful transitional justice processes. Sometimes democratization is predicated on the need to bury the past, but most often democratization and transitional justice go hand in hand in reckoning with past injustices and crimes in order to bring stability to societies torn by war, violence, or facing a history of repressive rule. During the process of democratization, new governments may try to avoid victor's justice and the opening of old wounds by instead temporarily co-opting former perpetrators into the new democracy. This strategy can result in serious threats, but also successfully strengthen democratic institutions and progress democratization.

Democratization ends and democratic institution building is completed when power sharing between the different legislative, judiciary and executive institutions is installed and a high level of civic cooperation, engagement and participation and thus trust of citizens is guaranteed without restrictive repercussions. Transitional justice measures and reconciliation among divided societies can promote citizen engagement and contribute to strengthening democratic institutions. It is able to do so if the political balance among societal groups, and thus victims and victimizers are attained, injustice acknowledged and dealt with, and a culture of impunity is avoided by all means. It focuses on bringing perpetrators to justice, reckoning with past injustices, and comparing old (authoritarian institutions) with new (democratic) institutions and unveiling the crimes of the former regime. At the same time, successful democratization also means successfully integrating technocratic elites of the old regime into the new democratic institutions, if no alternative is available.

Reconciliation is a process that can be defined as goal attained through transitional justice methods and measures. Today the term

refers mainly to truth, justice, forgiveness, societal security and peace. These means are either considered as a prerequisite, a parallel requirement, or a consequence of transitional justice mechanisms that again contribute to democratic institution building and democracy. But democracies will face structural failures and lower quality if acts of injustice and past crimes are not brought to light and perpetrators are not held responsible for their wrongdoings. What matters is not so much the severity of punishment, but the ability of the new democratic institutions to reckon with, take responsibility for and punish those responsible for human rights abuses. They can use transitional justice measures to delegitimize the old regime to strengthen the new democratic institutions. At the same time, democratic institutions ought to respond to victims needs in one way or the other and if necessary even explain the necessity of amnesties, if not blanked, and the need to wait before trials, memorials or other transitional justice tools are applied. Otherwise, citizens will understand that, even under the new democratic system, perpetrators are exempted from justice. If injustice continues and if the new regime fails to punish those of the old regime, democratic leaders and institutions will suffer a lack of civic trust of citizens. Civic trust and the citizens' loyalty to the state and nation are key to stable democracy and can be fostered by transitional justice.

But transitional justice is only one way to do so. Many other factors such as economic development and leadership traditions contribute to democratic institution building. Thus, the continuous strengthening of democratic institution building through transitional justice are complementary processes, but not exclusive ones. After democracy is consolidated and a new post-conflict generation takes over leadership roles that is to say 20-25 years after the regime change took place, Transitional justice measures might be applied more frequently and differently depending of course on the consensus within the society, the nature of the conflict, the severity of the crimes, and whether perpetrators and victims must live side by side in one country or in different countries.

CRIMINAL JUSTICE

**NO LUXURY TO SET AN AGENDA
THE YUGOSLAVIA TRIBUNAL'S PROSECUTORIAL
POLICY TOWARDS TRANSITIONAL JUSTICE**

FREDERIEK DE VLAMING

1. INTRODUCTION

The first ad hoc tribunal established by the UN Security Council in 1993, the International Criminal Tribunal for the former Yugoslavia (ICTY) was an experiment. For the Security Council it was the first time to employ a criminal court as an instrument of transitional justice. The Council hoped that the tribunal would halt violence and contribute to the restoration and maintenance of peace in the former Yugoslavia. This essay answers the question whether the tribunal itself, in particular the office of the prosecutor, was to incorporate these ambitious aims in its prosecutorial policy.^{*}

The ICTY dealt with mass violence and its prosecutors had to be selective when deciding on who would be prosecuted. The selection of defendants lies at the heart of prosecutorial discretion. It amounts to the prosecutor's power to choose between two courses of action: to prosecute or not to prosecute. Since the post-war prosecutions of German and Japanese war crimes, the selection of defendants before international tribunals has been a subject of controversy. Commentators have criticized prosecutors for a variety of weaknesses: their lack of independence, opaqueness, bias, or

^{*} This is part of an article published in: LUC REYDAMS, JAN WOUTERS, AND CEDRIC RYNGAERT (eds), 'International Prosecutors,' Oxford University Press, 2012. It is based on the dissertation research: FREDERIEK DE VLAMING, *De aanklager: Het Joegoslavië tribunaal en de selectie van verdachten (The Prosecutor. The Yugoslavia Tribunal and the Selection of Defendants)*. Amsterdam, Boom Juridische Uitgeverijen, 2010.

support of misguided political goals. Such criticism must be taken seriously. It has been rightly stated that the extent to which “the prosecutor exercises his discretionary powers judiciously determines to a large degree the success or failure of international criminal tribunals”.¹ The International Criminal Tribunal for the former Yugoslavia (ICTY) was considered partial by commentators in the former Yugoslavia. In the international arena it was felt that the prosecutor would frustrate the peace process when indicting high level politicians. Sources more close to the ICTY complained about the lack of a clear prosecutorial strategy. In this article I analyze whether the criticism has any ground in reality. After a review of the selection processes at the Nuremberg and Tokyo tribunals, I first examine the prosecutor’s independence in establishing their policy. Second, I ask whether the prosecutors developed and publicized an *a priori* policy for selecting defendants and what their guiding criteria were. Third, my analysis focuses on whether the prosecutors articulated a clear policy in the public arena. Fourth, I examine whether the prosecutors had an overarching aim guiding their prosecutorial strategy. Lastly, I look at the outcomes of the selection policies. In my final analysis, I will thus be able to establish the extent to which the ICTY’s prosecutorial policy was related to transitional justice as envisaged by the UN Security Council.

2 SELECTING DEFENDANTS IN NUREMBERG AND TOKYO

Formally, the prosecutorial policy of the post-World War II tribunals in Nuremberg and Tokyo was the sole responsibility of the prosecutors. In practice, the policy was shaped by Allied governments, the founders of the Nuremberg and Tokyo Tribunals, who had been parties in the war and victims of the very crimes the tribunals sought to prosecute. Such direct involvement had a

¹ CÔTÉ, L., ‘International Criminal Justice: Tightening up the Rules of the Game,’ *International Review of the Red Cross*, Vol. 88, No. 861, 2006, p. 134.

significant impact on the selection process of the German and Japanese defendants. From the start, the Nuremberg trial was tainted by the Allies' desire for revenge, the need to oust the German leadership, the wish to educate the German people, and the aspiration to develop international law as an answer to acts of international aggression.² These larger aims influenced the debate on who would stand trial. At the 1943 Tehran Conference, Stalin proposed the execution of between fifty and a hundred thousand Germans, while Churchill envisioned the execution (without trial) of between fifty and a hundred German war criminals.³ U.S. Secretary of the Treasury Morgenthau Jr. suggested in 1944 the deportation of millions of Germans as well as the execution of all Nazi party members.⁴ In the same year, General Eisenhower advised executing about 3,500 prominent Nazis. Stimson, the U.S. Secretary of War, developed plans for prosecuting all members of the *Gestapo* and the senior leaders of the *SS* (*Schutzstaffel*).⁵ The Allied plans did not materialize. In the end, prosecutorial decisions were taken in a proper legal context, but not without heavy governmental involvement.

In October 1943, the Allies, except the Soviet Union, established the *United Nations War Crimes Commission* (UNWCC). The commission was tasked with investigating war crimes, gathering evidence, and drawing up a list of German war criminals to be prosecuted and sentenced.⁶ The poorly funded commission relied almost entirely on the assistance of the member states, i.e. the Allied

² TEITEL, R., 'The Law and Politics of Contemporary Transitional justice,' *Cornell International Law Journal* 2005, Vol. 8, 2005, p. 841. Shklar, J. N., *Legalism. Law, Morals, and Political Trials*, 1986 ed., Harvard University Press, Cambridge 1986 [1964], p. 158, 170. Jonathan Bass, *Stay the Hand of Vengeance*, Princeton University Press, Princeton, NJ, 2000, p. 157, 204.

³ Bass, *op.cit.*, p. 147, 181, 185.

⁴ *Ibidem* at p. 152, 159.

⁵ *Ibidem* at p.154, 156.

⁶ KOCHAVI, A.J., *Prelude to Nuremberg. Allied war crimes policy and the question of punishment.*, University of North Carolina Press, Chapel Hill & London, 1998, p. 100. SCHARF, M., *Balkan Justice*, Carolina Academic Press, Durham, NC, 1997, p. 4.

governments.⁷ The commission's National Bureaus conducted the preparatory investigations before passing on relevant information to the commission, which then examined the files to establish *prima facie* evidence of a war crime. If this was found, the suspect was added to the list.⁸ The commission had a hard time carrying out its tasks. Many cases submitted to the commission turned out to be unsuitable for prosecution. Files were incomplete and some cases merely involved 'trivial' crimes. The commission members, frustrated with the lack of progress, drew up guidelines to get more prominent suspects on the list, for example, by identifying those who had ordered, rather than executed, war crimes.⁹ The Allied governments failed to adopt the guidelines, however. The British and Americans especially feared repercussions against their fellow countrymen who were still stationed in Germany's occupied zones. Politicians wanted to make sure the commission's work remained on a low profile.¹⁰

The commission navigated between these external pressures and their own ambitious goals. In December 1944, the commission published a list of 712 suspects that had been proposed by the commission's governmental representatives. Of these suspects, forty-nine were deemed major war criminals. Various reasons came to determine which suspects to put on the list. For one, war crimes victims had to be citizens of any allied country.¹¹ American policymakers sought to prioritize the prosecution of crimes relating to waging an aggressive war.¹² According to U.S. prosecutor, Telford Taylor, in their selection the British were primarily influenced by the consideration that the general public should know the suspects.¹³

⁷ SCHARF, *op.cit.*, p. 4.

⁸ KOCHAVI, *op.cit.*, p. 101.

⁹ *Ibidem* at p. 102, 107, 108.

¹⁰ *Ibidem* at p. 133.

¹¹ *Ibid.*, p. 102. Scharf, *Balkan Justice*, p. 4.

¹² TAYLOR, T., *The Anatomy of the Nuremberg Trials. A Personal Memoir*, Knopf, New York, 1992, p. 83.

¹³ *Ibidem* at p. 86.

Taylor thought the selection process demonstrated that it proceeded rather randomly.¹⁴ The team of prosecutors felt extremely uneasy about the way the list of suspects had been drawn up.¹⁵ According to some, the American chief prosecutor Robert Jackson, responsible for the list's compilation, was so ill-informed about the military and political power structure in the Third Reich that he was unable to determine who could be criminally charged. Taylor concluded that the selection of suspects, who would eventually stand trial in Nuremberg, had been achieved in a hasty, chaotic, and neglectful fashion.¹⁶

Political considerations also entered the debate around the Tokyo tribunal. According to Röling, the Dutch judge at the tribunal, the prosecutors in Tokyo depended even more on their governments than they had in Nuremberg. US General MacArthur, supreme commander of the Allied Forces, played a dominant role in the procedures. Bix writes that MacArthur had the power "to reduce, approve, or alter any punishments meted out."¹⁷ As in Nuremberg, the Allies' main objective was to punish the Japanese for what, in their view, was the most serious crime: waging an aggressive war as a crime against peace rather than punishing the Japanese for actual war crimes and crimes against civilians.¹⁸ The Americans, hoping the Japanese Emperor would play a central role in the political reconstruction process, instructed the committee that the supreme leader should not be prosecuted, despite his responsibility for waging an aggressive war. This decision, made by General MacArthur and supported by American President Truman, went against the chief prosecutor's wishes, who felt there were ample grounds to prosecute the Emperor.¹⁹ MacArthur even forbade the prosecutors to

¹⁴ *Ibidem* at p. 90.

¹⁵ *Ibidem* at p. 90-94, 96.

¹⁶ *Ibid.*, at p. 90.

¹⁷ Bix, H.P., *Hirohito and the Making of Modern Japan*, Perennial Harper Collins Publishers, 2000, p. 587.

¹⁸ *Ibidem*, p. 592.

¹⁹ *Ibidem* at p. 545.

interrogate or summon the Emperor as a witness during the proceedings.²⁰ It soon became clear that, as the Cold War was heating up, the Allies' search for a stable Japan and a speedy restoration of its political and economic institutions influenced the proceedings.²¹

As in Nuremberg, the prosecutors in Tokyo tried hard to keep a balance between legal and non-legal considerations. National teams of prosecutors selected the accused from a list of 250 persons.²² According to Pritchard, the selection was intended to be no more than a "representative cross-section of those whom the Allied powers collectively regarded as responsible for Japanese policy before and during the Pacific War."²³ Ultimately twenty-eight accused were indicted in Tokyo.²⁴ Many closely involved with the proceedings disagreed with the selection. According to some, the fact that the Emperor remained exempt meant that others like former Prime Minister Tojo and a few army officials were blamed for the role the Emperor had played during the war.²⁵ Much criticism was leveled at the decision not to prosecute a number of prominent politicians and businessmen who were initially featured on the list of suspects on the

²⁰ *Ibidem* at p. 596.

²¹ MINEAR, R., *Victor's Justice. The Tokyo War Crimes Trial* Princeton University Press 1971, in Japanese print; RÖLING, 'Introduction' DOWER, J.W., *Embracing defeat: Japan in the wake of World War II*, Norton, New York, NY, 1999, p. 326. Bix, *op.cit.*, pp. 583, 613. BURUMA, I., *Wages of Guilt*, Phoenix, London, 1994. BASSIOUNI, M.C., 'Justice and peace: the importance of choosing accountability over realpolitik,' *Case Western Reserve Journal for International Law*, Vol. 35, No. 191, 2003, p. 196.

²² DOWER, *op.cit.*, p. 464.

²³ PRITCHARD, J.R., 'Contribution,' in C. HOSOYA et al. (ed.) *The Tokyo War Crimes Trials*, Kodansha, New York, 1986, p. 95.

²⁴ BERGSMO, M., CISSÉ, C., and STAKER, C., 'The Prosecutors of the International Tribunals: the Cases of the Nuremberg and Tokyo Trials, the ICTY and ICTR, and the ICC Compared,' in ARBOUR, L., ESER, A., and AMBOS, K. (eds.), *The Prosecutor of a Permanent International Criminal Court*, Max-Plancke-Institut für ausländisches und internationales Strafrecht, Freiburg am Breisgau, 1999, p. 134. BIX, *op.cit.*, p. 593. Also: MAGA, *op.cit.*, p. 44.

²⁵ BIX, *op.cit.*, p. 584-86, 597, 600. Cf. MAGA, *op.cit.*, p. 50.

grounds that they were projected to play a potentially useful role in the country's reconstruction efforts. In a 1985 lecture during the first congress ever held in Japan on the legacy of the tribunal, Röling concluded: "Tokyo judgment has suffered in Japan precisely because many people were not convinced that some of the statesmen found guilty were actually among those responsible [for leading Japan into the Pacific war]."26

In sum, both in Nuremberg and Tokyo circumstances, politics influenced the selection of defendants. Though the suspects' responsibility did play a role, several factors undermined a consistent selection process. The lessons of the Nuremberg and Tokyo tribunals shaped the strategies of the prosecutors in the 1990s but the situation was very different. What had first been a prosecutorial project of the war's winners became the personal responsibility of an individual prosecutor. To what extent did the United Nations, while taking over the allies' role in international prosecution, succeed in avoiding the mistakes of the past?

3. SELECTION POLICY

There were several differences between the prosecutors' mission at the allied sponsored tribunals and the newly established ad hoc tribunals of the 1990s. The prosecutor acting both for the ICTY and the Rwanda tribunal no longer received instructions from governments. Instead, the international community, represented by the UN Security Council, henceforth commissioned the prosecutor's tasks. Moreover, the Security Councils' mission to establish the *ad hoc* tribunals also emerged out of its responsibility to maintain peace and security.²⁷ The tribunals of the 1990s were to put an end to the crimes and contribute to the restoration and maintenance of peace.

²⁶ RÖLING, *loc.cit.*, p. 18.

²⁷ See, for example, the resolution establishing the International Criminal Tribunal for the former Yugoslavia (ICTY), S/Res/827, 1993.

Security Council members had several additional goals in mind, such as justice for the victims, general deterrence, truth seeking, and contributing to the historical record.²⁸ These aims were later to be incorporated in the UN Secretary General's transitional justice agenda.²⁹ The Security Council's formulated aims raise questions regarding the extent to which the prosecutor took such additional ambitions into account when developing his or her prosecutorial policies. The ICTY's mandate was "to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 [...]."³⁰ The Statute defined 'serious violations' as genocide, crimes against humanity, and war crimes.³¹

Only once did the Security Council issue a guideline regarding the prosecutor's selection strategy. In 2003, the Council sought to narrow down the prosecutor's mandate after the ICTY president proposed a *completion strategy* to conclude the investigations by the end of 2004 and all trial activities by the end of 2008.³² Subsequently, the Security Council's resolutions requested both tribunals to focus their activities on the highest ranking political and military leaders.³³ Significantly, the formulation of the Security Council's instructions only dealt with the level of responsibility and the position of the suspects as a threshold for prosecution. No criteria were included to indicate a threshold about the gravity of the crimes.

²⁸ MICHAEL P. SCHARF & WILLIAM A. SCHABAS, *Slobodan Milosevic on Trial: a Companion*, Continuum, New York 2002, pp. 52-54.

²⁹ *The Rule of Law and Transitional justice in Conflict and Post-conflict Societies*. Report of the Secretary General. United Nations Security Council, S/2004/616, August 2004.

³⁰ Art.1 Statute of the ICTY, 25-05-1993 Resolution 827. Last amendment, 07-07-2009.

³¹ Arts. 3, 4, 5, ICTY Statute.

³² S/2002/678.

³³ *Idem*.

3.1 Richard Goldstone

The first prosecutor of the ICTY, the South African Richard Goldstone, navigated in tumultuous political waters. For one, the wars in Bosnia and Croatia were still ongoing when he began his work and regional authorities were hostile to the new tribunal. Moreover, both the EU and the U.N., involved in peace negotiations, failed to make cooperation with the tribunal their priority. Not surprisingly perhaps, Goldstone refrained from publicly revealing much about his prosecutorial strategies as he was unsure about the effectiveness of his decisions. Neither did he disclose any information about the underlying aims of his strategies – if he had any – nor did he express the extent to which he felt bound by the Security Council’s aims. He did not publish a policy document. Instead, we may reconstruct his strategy from passing remarks in indictments, a lecture, and interviews. An internal policy document, collated in his office in October 1995 and partially published in 2008, revealed a variety of prosecutorial aims. The document referred to advancing jurisprudence and promoting the Tribunal’s reputation and effectiveness in the regions where crimes had taken place.³⁴ Yet these succinctly formulated aims neither included further explanation, nor did they their way into the prosecutor’s public statements at the time. It is therefore hard to determine to what extent these aims influenced the prosecutor’s prosecutorial policy or his decisions regarding the selection of defendants. Yet we may deduce some guiding principles from his actions.

Political circumstances influenced Goldstone’s initial strategic decisions to a great extent. His first priority was to set the wheels of international prosecution in motion to secure the much needed support from the U.N. Because of the region’s insecurity, on-site investigations were next to impossible. Practical and financial

³⁴ BERGSMO, M., ‘The Theme of Selection and Prioritization Criteria and Why it is Relevant,’ in MORTEN BERGSMO (ed.) *Criteria for Prioritizing and Selecting Core International Crimes Cases*, Prio, Oslo, 2009, pp. 15-19, 70-71.

support was limited and the Office of the Prosecutor struggled with a shortage of resources. To make matters worse, the U.N. threatened to stop funding altogether if no indictments were issued by November 1994.

In order to get the ball rolling, Goldstone developed a strategy that heavily depended on external sources. He first decided to indict defendants who were already held in custody by other prosecuting authorities, or, in an exceptional case in Bosnia, detained by international forces.³⁵ Second, Goldstone investigated mid and lower-level perpetrators, including physical perpetrators because he expected that investigation into the crimes by military and political top leaders would be too complicated and time consuming.³⁶ He called his approach a 'pyramidal' strategy expecting it would finally lead him to the top echelons: "In the former Yugoslavia there was no smoking gun, we had to build cases with witnesses. Who could the witnesses tell us about? They could tell about the people in the camps, the camp commanders. They had no evidence to give us about the orders higher up. So we had to build up the cases from the bottom up."³⁷ Third, Goldstone decided to concentrate on events and crimes that other organizations, such as the U.N. Commission of experts, had already investigated.³⁸ This strategic choice bore the risk that, instead of taking responsibility for mapping and analyzing the violence in the former Yugoslavia on his own accord, he had to rely

³⁵ BASS, *op.cit.*, p. 250.

³⁶ GOLDSTONE, R., 'Exposing Human Rights Abuses - A Help or Hindrance to Reconciliation?', *Hastings Constitutional Law Quarterly* Vol. 22, 1995, p. 617. CEES BANNING and PETRA DE KONING, *Balkan aan de Noordzee. Over het Joegoslavië-tribunaal, over recht en onrecht*, 2005, p. 43. [Balcan at the North Sea. About the Yugoslav Tribunal (ICTY), about justice and injustice]

³⁷ GOLDSTONE, R. in the documentary 'Against All Odds'. Sense Agency, 2003 <<http://www.sense-agency.com/en/multimedia/index.php?trans=8&mulkat=2>. Last accessed June 15, 2011>.

³⁸ See also: MINNA SCHRAG, 'Lessons Learned from ICTY Experience,' *Journal of International Criminal Justice* 2 (2004) pp. 435-445; IAIN GUEST, 'On Trial – the United Nations, War Crimes and the former Yugoslavia,' Washington D.C., 1995, pp. 76-79.

on reports that were not intended to expose political and military leaders' culpability. Moreover, some reports at the time soon turned out to be wildly inaccurate. In the heat of the war, numbers of victims were grossly overstated. It is now estimated that the actual figure of people killed in Bosnia-Herzegovina amounts to 97 000 instead of the more than 200 000 calculated at the time.³⁹ Likewise, in 1992 the number of rape victims was believed to be over 50 000. Later the estimate had to be reduced to 20 000, leading current reports to refrain from giving any indication of the number of victims.⁴⁰ At the time, however, Goldstone had no alternative but to follow external sources. His strategy was successful. It soon led to the prosecution of a large number of defendants.

Despite the publicly professed lack of an overall strategy, Goldstone did present a few concisely yet ambiguously formulated principles of his prosecutorial policy for the selection of ICTY defendants.⁴¹ The ambiguity resulted, among others issues, from the need to navigate between the Security Council's 'institutional ideology of impartiality' in its role as peace negotiator on the one hand, and the NGO's and UN rapporteurs' more factual-based reports that pointed at Serbs and Bosnian Serbs as the main aggressors.⁴² Goldstone's prosecutorial policy and strategy were based on three, rather clumsily formulated, principles. The first referred to the (political) independence of the Prosecutor: "Decisions with regard to indictments will be taken solely on a professional basis and without regard to political considerations or

³⁹ Research and Documentation Centre Sarajevo, Human losses in Bosnia-Herzegovina 91-05, <www.idc.org.ba>, accessed on May 2, 2010.

⁴⁰ VON RAGENFELD-FELDMAN, N., 'The Victimization of Women: Rape and the Reporting of Rape in Bosnia-Herzegovina, 1992-1993,' *Dialogue* Vol. 21, 1997. Berkeley, at < <http://unconqueredbosnia.tripod.com/Balk8.html>>. Accessed on June 27, 2011.

⁴¹ These were published at a later date: RICHARD GOLDSTONE, 'The International Tribunal for the former Yugoslavia: a case study in Security Council action,' *Duke Journal of Comparative and International Law*, Vol. 6, No. 5, 1995, pp. 5-10.

⁴² A/54/35, 1999, para. 505.

consequences.”⁴³ He failed to explain what he meant by professional basis in more detail, but Scharf argues that Goldstone meant the decision to prosecute should be based on sufficient evidence.⁴⁴ In a later account, Goldstone further elaborated on what he meant by ‘political considerations’, explaining that a decision to prosecute should be made without taking into consideration the suspect’s political or ethnic affiliation.⁴⁵ The second principle set a priority in the selection of defendants: “Persons indicted will be those who appear to the Prosecutor to be most guilty and most culpable on the evidence available from time to time.”⁴⁶ The ‘most guilty’ criterion seems to depend on the available evidence, although it is not entirely clear what the prosecutor meant by “the evidence available from time to time.” Probably, Goldstone wanted to stress the fact that he could only prosecute if there was sufficient evidence and, given the circumstances in the region, this was clearly problematic. Goldstone submitted that the limited capacity of the tribunal to conduct trials forced the prosecutor to work selectively and only investigate the “most serious violations of international humanitarian law and those who may be ultimately responsible for them”.⁴⁷ Here, the prosecutor presented what appears to be a principled approach in terms of purely practical considerations. Goldstone became more specific in articulating the third principle where he considered the question of the suspect’s responsibility: “With regard to the seriousness of the crimes, the guiltiest are those who ordered them. At the same time, all efforts will be taken to ensure that those who executed such orders are also brought within the net of indictments.”⁴⁸ Goldstone

⁴³ GOLDSTONE, R., ‘The International Tribunal for the former Yugoslavia: a case study in Security Council action,’ *Duke Journal Comparative and International Law*, 1995-1996, p. 7.

⁴⁴ SCHARF, *Balkan Justice*, p. 86.

⁴⁵ ICTY Press Release, CC/PIO/048-E, 22-03-1996; ICTY Press release, CC/PIO/033-E, 14-02-1996.

⁴⁶ GOLDSTONE, *loc.cit.*, p. 7.

⁴⁷ A/50/365, 1995 - S/1995/728, p. 13, para. 31.

⁴⁸ GOLDSTONE, *loc.cit.*, p. 7.

immediately added an exception and kept open an opt-out, i.e. a focus on different levels of responsibility. Another policy decision was taken in response to early reports and criticism for failing to pay sufficient attention to rape in the ICTY's first trial against Duško Tadić. Goldstone decided that gender-related crimes should become a focus of his prosecutorial policy. The choice was "an important part of our mission to redefine and consolidate the place of these offences in humanitarian law."⁴⁹ Here again, Goldstone received guidance from external forces. Given the circumstances, the ambiguity of Goldstone's policy is understandable. He realized he could only fulfill the tribunal's mandate with the help of its member states and local authorities. He had neither. In the public arena, however, his opaque policy formulation acquired the characteristics of an oracle.

Unbeknownst to the public, in the autumn of 1995, the office of the ICTY prosecutor compiled a list of criteria to rationalize the selection process.⁵⁰ The criteria focused on the suspect personally as well as the gravity of the crime. First, the criteria list the social sectors targeted for prosecution: politicians, the armed services, and paramilitary groups as well as government officials at the local, provincial, and national level. Second, the criteria refer to the defendant's nationality, his or her role and participation in the decision- and policymaking process, and the extent to which they controlled their subordinates, both formally and factually. Also, the suspect's personal or direct involvement in notorious atrocities was

⁴⁹ ICTY Press release, CC/PIO/093-E, 27-06-1996, see also IAIN GUEST, 'On trial - the United Nations, war crimes and the former Yugoslavia,' Washington D.C.: Refugee Policy Group, 1995, pp. 84-89. KELLY DAWN ASKIN, 'War Crimes Against Women. Prosecution' in *International War Crimes Tribunals*, The Hague, London, Boston: Martinus Nijhoff Publishers, 1997, pp. 300-01, 372.

⁵⁰ This list is discussed in CLAUDIA ANGERMAIER, 'Case Selection and Priorization criteria in the Work of the International Criminal Tribunal for the former Yugoslavia,' in MORTEN BERGSMO (ed.) *Criteria for Prioritizing and Selecting Core International Crimes Cases*, Oslo: PRIO, 2009, pp. 29-39.

taken into account. Other criteria include more practical considerations such as the possibility to arrest the suspect and the availability of sufficient evidence. In defining the gravity of the crimes, the criteria point at the number of victims, the nature of the crime, the duration and geographical scope of the crime, and the nationality of the perpetrators and victims. Although the latter two criteria do not necessarily relate to the crime's gravity, Bergsmo feels that these criteria are relevant because of the "representativity" between criminal victimization and the scope of the prosecution: since prosecutorial activities must be representative of the criminal offences committed by the various parties in the conflicts.⁵¹ Finally, the criteria deal with the suspect's potential legal defense and other anticipated legal obstacles like the potential theories regarding the "liability and legal framework of each potential suspect." Tactical, strategic, and policy considerations including the relevance for other investigations into higher level suspects also are included.⁵² The prosecutorial office did not elaborate on these criteria in its documentation. Neither is it clear whether, or to what extent, the prosecutor applied them when selecting the suspects. A former prosecutor's assistant argued the list was no more than a 'catalogue' of relevant considerations rather than a selective, focused set of binding criteria. Neither did a ranking order exist.⁵³ In fact, Goldstone never even publicly referred to the criteria in passing, but clarified his selection of defendants only in the most general terms.

Goldstone's tenure had mixed results. Goldstone's creative strategy resulted in an impressive record given the circumstances of the moment. He indicted a large part of ICTY defendants over a relative short period of two years. As we will see in discussing the composition of Goldstone's caseload, Goldstone fulfilled his stated ambitions and set the wheels of prosecution in high gear. He was

⁵¹ BERGSMO, M., *et al.*, *The Backlog of Core International Crimes Case Files in Bosnia and Herzegovina*, *FICHL Publication Series*, PRIO, Oslo, 2009, p. 70.

⁵² *Ibidem* at p. 72.

⁵³ ANGERMAIER, *loc.cit.*, p. 33.

responsible for making the new tribunal a visible asset among other international institutions. His strategy may have been ambiguously formulated, but he neither raised expectations nor made promises he could not fulfill.

3.2 Louise Arbour

When taking over from Goldstone in 1996, the Canadian Louise Arbour believed circumstances still did not allow her the “luxury of setting the prosecutor’s agenda”.⁵⁴ Nevertheless, the situation in and outside the Yugoslavia tribunal had improved substantially. The wars in Bosnia and Croatia had ended. The tribunal was in full operation and had become an accepted partner in the international community. Members of the UN actively supported and provided the tribunal with assistance and resources. In the Office of the Prosecutor, experience and expertise had grown substantially. Lack of regional cooperation continued to be a major challenge, however. Publicly, Arbour was more open than Goldstone about how she came to formulate her policy. Yet, she did not publish any policy document either. As she explained, “[...] the day to day life of the Prosecutor often consists almost exclusively of crisis management.”⁵⁵ This became apparent at the outbreak of the Kosovo crisis when “[...] events overrode our investigative plan [...]”.⁵⁶ Arbour organized extensive office debates both in The Hague to articulate her policy aims. The debates concentrated on various options. Arbour expressed reluctance to justify international criminal law along instrumental parameters: “We do not undertake investigations to do historical surveys, to provide the public with general information, or to extend the bounds of international law, for its own sake.”⁵⁷ But she acknowledged the advantages of

⁵⁴ ARBOUR, L., ‘The Crucial Years,’ *Journal of International Criminal Justice*, Vol. 2, No. 2, 2004, p. 402.

⁵⁵ *Ibidem* at p. 402.

⁵⁶ *Ibidem* at p. 398.

⁵⁷ OTP Charging and indictment guidelines (undated).

prosecution: “The recording by international investigators of irrefutable evidence of crimes prevents history from being falsified and the past from being distorted.”⁵⁸ According to Arbour, the prosecution of military and political leaders would also grant the victims a judicial status and prevent them from taking revenge.⁵⁹ When the decision was made to start investigations in Kosovo for example, Arbour wondered if a potential prosecution could have a deterrent effect: “[...] could we play a part in deterring the worst? Should we not at least try to put deterrence theories to test?”⁶⁰ But the prosecutor felt: “We had a right to enter Kosovo [...]”⁶¹ And ultimately, Arbour was primarily concerned that: “Our investigations are directed exclusively to establishing personal responsibility for those individuals who are most culpable for the atrocities committed in former Yugoslavia.”⁶² Such considerations of the different aims of prosecutorial policy showed that circumstances had improved significantly over the years.

Arbour was in a position to develop a more articulate strategy thanks to the improved circumstances outside the office and the experience and expertise built up in the office. Incidents were now selected based on the prosecutor’s own investigation instead of other organizations’ reports. Suspects were no longer selected only because of their availability. Arbour had established a system of sealed indictments and international assistance in the arrests of suspects had improved. A striking difference with her predecessor was Arbour’s ‘offence-driven’ approach, which prioritized incidents based on the crimes’ gravity in order to target the highest possible defendants, such as “Srebrenica, where there was massive loss of human life, and the promise of climbing up the chain of command to visit the responsibility of the highest echelons was greatest.” Her strategy thus still resembled Goldstone’s pyramidal approach; the

⁵⁸ Interview with Arbour in the UNESCO Courier, December 1999.

⁵⁹ *Idem*.

⁶⁰ ARBOUR, *loc.cit.*, p. 398.

⁶¹ *Idem*.

⁶² OTP Charging and indictment guidelines, Introduction.

role of the commanders could be investigated through the cases against direct perpetrators and those who had been physically involved in the perpetration of crimes.⁶³ The pitfalls of such a strategy were discussed both within the office and publicly, as the debate on investigations into sexual crimes well illustrates: “Punishment would, in the case of sexual violence, be particularly difficult to visit on the commanders under the doctrine of command responsibility. It would require proving that the commanders either participated in the offenses, or knew that the offenses were being committed but failed to punish those responsible.”⁶⁴ Overall, under Arbour the contours of a balanced strategy became apparent. For one, the gravity of the crimes gained more prominence.

It was under Arbour that the so-called *OTP Charging and indictment guidelines* were drafted, setting out the methods to be applied for investigating and preparing an indictment. The internal document was not meant for publication, however. The *Guidelines* were largely based on the criteria set by Goldstone. The *Guidelines* included directions on how to conduct and prepare for investigations, formulated criteria for selecting ‘targets,’ and offered a framework for legal and procedural issues. The decision to pursue investigations was based on the suspect’s position and role and the crime’s gravity.⁶⁵ The criteria refer to the suspect’s formal position within the army, paramilitary units, police, political, and government structure, the level of personal involvement in the crimes and participation in policy making resulting in the crimes as well as the defendant’s nationality and ethnicity. Other criteria consider the suspect’s possible willingness to testify against their superiors, whether they had been prosecuted elsewhere, and whether they could be possibly arrested. The *Guideline’s* criteria implied a pyramidal strategy as they did not only target the highest officials but also mid-level

⁶³ ARBOUR, L., ‘Crimes against Women under International Law. Stefan A. Riesenfeld Award Lecture,’ *Berkeley Journal of International Law*, Vol. 21, No. 196, 2003, p. 196, 203.

⁶⁴ ARBOUR, *loc.cit.*, p. 203. Also: A/53/219 (1998) - S/1998/737, para. 130.

⁶⁵ OTP Charging and Indictment Guidelines, 3.0, 3.3.

authority and those “in leadership positions, who are accountable in their own right, and whose prosecution provides a foundation for investigation of their superiors.”⁶⁶ Even suspects without a particular position within the military, political or police structures could be indicted in case the defendant was “so notorious and has committed such heinous acts that it is appropriate to charge the person, irrespective of what authority he exercised or position held.”⁶⁷ Criteria concerning the gravity of crimes refer to the number of victims, the extent of destruction, the systematic nature, the duration and extent to which the crime was repeated, and the location and notoriety of the crime. Additional circumstances such as the relationship to other cases or the presence of witnesses and evidence also played a role. Finally, the policy document includes more general considerations such as the crime’s symbolic and political significance and the victims’ ethnic background. Single-incident targets were generally not indicted even if the suspect could provide potentially useful information in other cases.⁶⁸ The prosecutor believed such a route was potentially risky and damaging for the Tribunal’s reputation. Yet, she kept her options open to investigate and prosecute ‘low-level perpetrators,’ who were willing to appear as witnesses in cases against high-profile perpetrators. In such cases the prosecutor insisted on a guilty plea to sustain the credibility of the suspect as a witness. The procedure did not, however, imply that the witness would automatically be prosecuted by the Tribunal at a later stage.⁶⁹ In short, the guidelines reflect Arbour’s public statements on selection issues and her preference for legal grounds as the main consideration for prosecution.

Building on the work of her predecessor, Arbour was able to refine the selection strategy in the prosecutor’s office even though she had stated she did not have the luxury to set her own agenda.

⁶⁶ *Ibidem* at 3.2.

⁶⁷ OTP Charging and Indictment Guidelines, 3.2.

⁶⁸ *Ibidem* at 3.4.

⁶⁹ *Ibid.*, at 3.5.

That was probably too modest. As will be shown in section 4, she was able to climb up the chain of command in order to target those ultimately responsible for what she considered the most serious crimes. Like Goldstone, Arbour's aim did not refer to UN ambitions but was limited to establishing legal accountability as leading principle of her selection strategy.

3.3 Carla Del Ponte

When the Swiss Carla Del Ponte succeeded Arbour in 1999, the violent conflicts in Bosnia Herzegovina, Croatia, and Serbia had ceased. Only a limited conflict erupted in Macedonia in 2001 that came under her jurisdiction during her tenure. To a certain extent some governments in the region had turned into the prosecutor's allies, while others continued to obstruct cooperation with the tribunal by refusing to hand over documents or arrest indictees. In the prosecutor's office expertise and knowledge of crimes and culprits were of the highest level and quality. Del Ponte considered the circumstances at the time most favorable not only to reflect on the prosecutorial policy's aims and criteria, but also to implement the tribunal's broader mandate.⁷⁰ Nonetheless, like her predecessors, she chose not to publish a policy document.

Under Del Ponte, non-legal aims and criteria became a part of prosecutorial policy. Del Ponte was the first prosecutor who explicitly related her policy to the UN Security Council's aims, i.e. to contribute to the restoration and maintenance of peace and security, to establish the truth, prevent violence, and encourage reform and reconciliation in the region.⁷¹ For Del Ponte, the prosecution of those

⁷⁰ Statement of Del Ponte during a panel discussion at the occasion of her farewell, The Hague, 4 December 2007.

⁷¹ On the ICTY: A/55/273 (2000) - S/2000/777, p. 27, para. 172; see also ICTY Press Release, PR/P.I.S./532-E, 06-10-2000; ICTY Press Release, JL/P.I.S./542-E, 24-11-2000; ICTY Press Release, F.H/P.I.S./598e, 29-06-2001; ICTY Press Release, CT/MO/1010e, 06-10-2005; ICTY Press Release, 15-02-2007; ICTY Press Release, OK/MOW/PR1172e, 03-07-2007. On the

who bore the greatest responsibility was a direct way to achieve reconciliation. Only by eliminating the source of ‘evil’ could peace be restored in the multi-ethnic society of the former Yugoslavia: “[...] by imprisoning those hard-line extremists whose continuing political and military involvement serves to hinder the creation of a lasting peace, it consequently improves the conditions for the rebuilding of a multi-ethnic society in the region.”⁷² We find also such an instrumental approach in another element of her policy. Del Ponte emphasized that a lasting peace could only be reached if *all* parties to the conflict had been investigated: “My remaining investigations cover the region and concern all main parties to the conflict. By completing these investigations, ICTY will have proven that it worked impartially towards achieving justice, peace and reconciliation in the former Yugoslavia.”⁷³ The policy of evenhandedness was also introduced after the end of the conflict in Kosovo when Del Ponte announced that, to achieve a lasting peace, she also wanted to prosecute crimes that were committed *after* the war. She referred in particular to the crimes Kosovar Albanians had committed against the Serbian minority.⁷⁴ For this purpose the Tribunal’s Statutes had to be amended, she argued: “We must ensure that the Tribunal’s unique chance to bring justice to the populations of the former Yugoslavia does not pass into history as having been flawed and biased in favour of one ethnic group against another.”⁷⁵ Such statements certainly gave the impression that legal criteria were deemed less important.

In spite of improved circumstances and the availability of all information in her office, Del Ponte maintained the multi-level approach of her predecessors, targeting not only the most senior

ICTR: Press Conference by Ms. Del Ponte, 6 December 2001, Available at: <<http://www.unictr.org/tabid/155/Default.aspx?id=1102>>.

⁷² A/55/273 (2000) - S/2000/777, p. 27, para. 172; see also para. 195; and the following eighth annual report A/56/352 (2001) - S/2001/865, para. 189.

⁷³ ICTY Press Release, FH/P.I.S./791-E, 10-10-2003.

⁷⁴ ICTY Press Release, FH/P.I.S./578e, 21-03-2001.

⁷⁵ ICTY Press Release, JL/P.I.S./542-E, 24-11-2000.

officials but also mid-level defendants. She considered them a vital link to the highest levels and believed they played a crucial role in organizing and committing crimes on the ground: “Such individuals often play a great role in setting the example and encourage, by their acts, speech and behavior, the commission of other gruesome crimes.”⁷⁶ Del Ponte thought prosecution of these groups important because: “For the local people, the victims and the survivors, it was these people who brought their world to an end, not the remote governmental architects of the overall policy of genocide.”⁷⁷ She thought that if they were not brought to justice, “the ordinary population will not come to terms with the past, and the process of reconciliation and building a stable peace will suffer accordingly.”⁷⁸ After the issuance of the completion strategy, Del Ponte indicated she would concentrate on suspects at the highest institutional levels of the police, politics, and the military because she thought them responsible for allowing the atrocities to continue.⁷⁹ At the same time, Del Ponte stated she would continue to investigate other categories of perpetrators, including direct or physical perpetrators of very serious offences, even if they had not held important positions.⁸⁰ As we will see, Del Ponte refrained from prosecuting such defendants.

Del Ponte’s statements are a manifestation of the international prosecutor’s dilemma of having multiple constituencies. Seeking to provide justice to victims at all levels and aiming to fulfill UN aims at the same time has not contributed to the transparency of her policy. Moreover, integrating aims of peace and reconciliation into

⁷⁶ DEL PONTE, C., ‘Prosecuting the Individuals bearing the Highest level of Responsibility,’ *Journal of International Criminal Justice* 2, no. 2 (2004): 516-19.

⁷⁷ ICTY Press Release, GR/P.I.S./642-E, 27-11-2001 E.

⁷⁸ ICTY Press Release, GR/P.I.S./642-E, 27-11-2001; A/56/352, para. 229.

⁷⁹ ICTY Press Release, PR/P.I.S./488-E, 06-04-2000. See also: DEL PONTE, C., ‘Prosecuting the Individuals Bearing the Highest Level of Responsibility,’: 516-19, 516. (*loc.cit.*?).

⁸⁰ ICTY Press Release, GR/P.I.S./642-E, 27-11-2001.

her selection policy, Del Ponte took the risk of introducing political factors in her selection policy and thus marginalizing other selection criteria, such as gravity of the crimes and the level of responsibility of the perpetrator.

4. SELECTION PRACTICE

To what extent did the practice of the tribunal respond to the prosecutorial strategies? In what ways did prosecutorial practices match the lofty ideals the UN had articulated? Based on an analysis of the ICTY caseload, we get an insight into the difference between the stated prosecutorial policies and the actual practice. This analysis focuses on the indictments dealing with the two pillars of prosecutorial selection: criteria concerning the responsibility of the defendants and the gravity of the crimes.⁸¹ Between 1994 and 2004, ICTY prosecutors indicted 161 defendants⁸² In short; the ICTY's legacy is a mixed bag of low, mid-level and high-level functionaries. As such, the tribunal's case load does reflect the prosecutors' stated strategies, but not the UN's agenda.

When we focus on the issue of the responsibility of the defendants, the ICTY caseload reveals a clear increase in leadership cases over the years. Nevertheless, over eighty percent of all ICTY indictees occupied mid-level or lower level positions. Only twenty percent of the defendants were senior officials active at state or federal level. This is partly explained by the fact that Goldstone's share of the ICTY caseload was relatively high. He issued indictments against seventy suspects. The early indictments resulted from his strategy that what counted most of all was to set the wheels of prosecution in motion. Indeed, he based his first indictment merely on whether sufficient evidence against the suspect was available. As Goldstone admitted, the suspect was a "comparatively

⁸¹ The indictments against twenty defendants were withdrawn by Arbour and the indictments against four defendants were not published on the ICTY website.

⁸² Figures obtained from ICTY website.

low-level member of the Bosnian Serb Forces,” and “hardly an appropriate defendant for the first indictment issued by the first ever international war crimes tribunal.”⁸³ Goldstone’s first trial in The Hague, against another Bosnian Serb, resulted from his decision to request the transfer of perpetrators already prosecuted or investigated elsewhere. The defendant, detained by German judicial authorities, had not been indicted by the ICTY at the time of Goldstone’s 1994 request. Three other defendants were indicted in the same manner. In May 1995, Goldstone demanded the judicial authorities of Bosnia Herzegovina defer their cases and the suspects were indicted three months later.⁸⁴ Likewise, Goldstone requested the deferral of Bosnian investigations into the Bosnian Croats’ crimes in the Lasva Valley in Central Bosnia and went on to indict eight suspects.⁸⁵ Another substantial number of indictments grew out of Goldstone’s decision to take up cases other organizations had investigated and reported upon. The indictments dealt with crimes committed in the Bosnian district of Prijedor and the Bosnian cities of Foča and Brčko, regions the Commission of Experts and other organizations had examined extensively. The majority of Goldstone’s impressive number of seventy indictments during his tenure resulted from his pyramidal strategy. Most defendants were low profile – a reason why, when she took over, Arbour rightly decided to withdraw indictments against twenty of them. Still, of the remaining fifty cases, over eighty percent involved low-level perpetrators. Some defendants had carried out tasks in one of Bosnia Herzegovina’s many detention camps, others had been active at the village level, or held no formal position at all. The rest (20 percent) of the Goldstone cases dealt with mid-level suspects, who had operated in provincial state or military institutions. Only a small number of his cases dealt with high-level suspects in national positions such as the Bosnian

⁸³ GOLDSTONE, *op.cit.*, p. 105.

⁸⁴ A/50/365 (1995) – S/1995/728, para. 52-66. The defendants were Radovan Karadžić, Ratko Mladić and Mićo Stanišić.

⁸⁵ A/50/365 (1995).

Serb politician Radovan Karadžić and military leader Ratko Mladić. Goldstone did not indict anyone from the Serbian political or military leadership. This outcome is in line with his belief that it would take time to investigate their involvement in crimes on Bosnian and Croatian territory.

Arbour indicted thirty-one ICTY defendants who had been active at different levels. Many indictments were based on Goldstone's investigations. It explains why former functionaries at detention camps still formed more than a quarter of 'her' defendants. Mid-level defendants made up one third of Arbour's caseload. New investigations into the crimes in Kosovo did lead to the first indictments against top Serbian politicians and military, among them Serb president Slobodan Milošević. Interestingly, Arbour did not need to pursue a pyramidal strategy with respect to the Kosovo crimes. No lower or mid-level suspects were prosecuted in the context of these investigations. Del Ponte issued indictments against a total of fifty-three defendants.⁸⁶ She indicted more senior officials at the highest governmental and military levels than her predecessors. One third of her caseload dealt with defendants in national or federal positions. Nevertheless, almost half of the defendants Del Ponte indicted were mid-level provincial officials and the remaining defendants came from a lower rank, operating at the community or village level. Even though the overall outcome at the ICTY may be logical given the circumstances and the decisions taken therein, it is not clear why so many low-level perpetrators were needed to make the pyramidal strategy effective. Goldstone's defendants, for example, had operated in only a limited number of crime scenes. Arbour's and Del Ponte's lower-level cases may be explained in part by the fact that investigations were already going on when they took over, but they also resulted from their own policies. The broadly based pyramidal caseload is thus the clear result of a combined prosecutors' strategy.

⁸⁶ This leaves five indictments unaccounted for, the texts of which are not traceable on the ICTY's website.

Generally speaking, the higher the defendants' position, the more serious the crimes are with which they were charged. The gravity of the crimes in the indictments has been analyzed on the basis of the numbers of victims involved. Almost all victims were civilians. Half of all the crimes in the indictments concern a large number of victims: from hundreds to hundreds of thousands. Here again, there is a difference between the early indictments issued by Goldstone with more crimes with relatively low numbers of victims, and those issued at a later stage with more crimes charged with high numbers of victims. Del Ponte, however, also charged more crimes with few victims than her predecessor. This was a consequence of her policy to indict all parties that had taken part in the conflicts. While Goldstone indicted members of the three Bosnian groups, Croats, Serbs and Muslims and Arbour prosecuted Bosnian Serbs, Bosnian Croats, and Serbs, these defendants were not selected for their ethnicity. Del Ponte indicted suspects from eight national or ethnic groups in four different countries.⁸⁷ To be sure, the geographical spread of the region's conflicts in Kosovo and Macedonia during her tenure partly explains such an ethnic diversity, but her policy to target all sides of the conflicts also accounts for the greater variety. All but one indictment Del Ponte leveled against Bosnian Muslims, Macedonians, and Kosovar Albanians concerned crimes involving fewer victims in comparison to the indictments regarding other groups. Looking at the relative gravity of the crimes in the indictments, her strategy of evenhandedness implied that a number of defendants were selected based on membership of a particular national or ethnic group rather than the gravity of their crimes. As most of these defendants were senior officials, part of the Del Ponte caseload is an exception to the rule that the seniority of defendants is equal to the gravity of their crimes.

The overall composition of the ICTY caseload reflects the inability to indict the most senior responsible officials during the

⁸⁷ Bosnian Serbs, Bosnian Croats, Bosnian Muslims, Croats, Serb Croats, Serbs, Albanian Kosovars, Macedonians.

early years. Comparing the gravity of the crimes in the indictments, actual differences between the national and ethnic groups and their share in the crimes becomes visible. Bosnian Serbs and Serbs were indicted for the ICTY Statute's three crime categories (genocide, crimes against humanity, and war crimes). They were also charged for crimes involving the largest number of victims—running in the hundreds of thousands. The Bosnian Croats (sixteen percent of all defendants), Serbian Croats (four percent), and Croats (five percent), and Kosovar Albanians (over four percent) were accused of war crimes and crimes against humanity.⁸⁸ The Bosnian Muslims defendants (over six percent) and Macedonians (1.5 percent) stood trial for the single category of war crimes. The policy of evenhandedness that was employed during the last phase of issuing indictments shows that gravity was not always the guiding principle in selecting defendants.

5. CONCLUSION

International prosecutorial strategies shifted from a governmental responsibility during the post Second World War tribunals to an individual prosecutor's task at the current *ad hoc* tribunals. This one man's or woman's task, included elements of governance as the UN required the prosecutor to consider the local effects of their decision. The Yugoslavia tribunal's history shows that, for a large part, the prosecutors developed their selection policy independently. The prosecutors decided to what extent they integrated UN transitional justice goals into their policy. A difference can be observed between Goldstone and Arbour who hardly referred to such UN ambitions and Del Ponte who followed the UN agenda in this respect. Due to external circumstances and the vulnerable position of the tribunal at the time, the first prosecutor Richard

⁸⁸ Interestingly, the indictments against the Albanian Kosovo defendants concern crimes against members of their own ethnic group and not, as envisaged by Del Ponte, crimes against the Serbs.

Goldstone was not in a position to set specific aims in order to realize the Security Council's agenda on transitional justice. However, he did take into account the ongoing peace process, balancing as much as possible target groups in order not to disrupt peace negotiations. Arbour stated that she did not have luxury to set an agenda, in other words, to engage the tribunal as an instrument for transitional justice purposes. Her selection policy was very much based on legal criteria such as gravity of the crimes. Only Del Ponte explicitly referred to the UN transitional justice agenda both in her policies and her prosecutorial practice.

Only once did the UN Security Council give additional instructions about the prosecutor's mandate, in the context of the completion strategy. There is no evidence the instructions influenced the substance of the prosecutors' policy. The relative independence of the prosecutors did not mean that the prosecutors were always able to put their policies into practice. Circumstances in and outside the prosecutor's offices, in particular the assistance from powerful nations, shaped the prosecutor's ability to put strategy into practice.

Overall, prosecutorial policies at the ICTY lacked transparency. Grounds for selecting defendants were often opaque. Understandably, during the early years, the prosecutor shied away from publishing information on how he selected particular targets because he was unsure whether he could get enough assistance and resources. Over the years, especially after the completion strategy was issued, the prosecutor became more open about considerations and choices, although no official policy document was ever published. Complete openness may not always be feasible in the highly politicized context of international tribunals. To avoid perceived bias or politicization of the selection process, however, prosecutors should be as clear as possible about the grounds for prosecution.

In most cases, grounds for selection focused on the level of the suspects' responsibility and the gravity of the crimes. Generally, the two criteria are related: the more senior the defendant, the more serious the alleged crimes. In principle, the prosecutors in their

formulated policies followed the UN's focus on senior officials and top-level leaders even though strategies differed to achieve this aim. The prosecutors formulated an exception to the rule, either for strategic or principled reasons. The prosecutors opted for the possibility to prosecute 'notorious' perpetrators, including those who had not held any formal position. There may be legitimate grounds for such decisions, but they should be avoided because they often resulted from secondary considerations.

Most leaders were indicted for very serious crimes involving large numbers of victims. Some senior defendants however, were not indicted for the most serious crimes. This outcome resulted from a policy which focused on factors other than the responsibility of the suspect or the gravity of the crime. The policy of evenhandedness to prosecute all parties for its potential—yet never established—effect on reconciliation serves as the most telling example. The policy of evenhandedness, notably Del Ponte's eagerness in this respect, implied that in some cases indictments were issued on the basis of membership of certain groups rather than on the gravity of crimes committed. The question is whether this is in line with the UN transitional justice agenda as it has not proven to assist in peace or reconciliation efforts. In 1999, former UN Secretary General Kofi Annan correctly proposed to abolish the "institutional ideology of impartiality".⁸⁹ The lawyers in the international prosecutor offices should follow suit. If not, they will go beyond their mandate and become diplomats, threatening the legitimacy of present and future courts. In the end, this might endanger processes of transitional justice.

⁸⁹ A/54/35 (1999), para. 505.

INVESTIGATING OUTCOMES OF A LIMITED GENDER ANALYSIS OF ENSLAVEMENT IN POST- CONFLICT JUSTICE PROCESSES

CHISECHE MIBENGE

1. INTRODUCTION

In the aftermath of armed conflict, countries such as Sierra Leone, the Democratic Republic of Congo, Rwanda and Uganda experience a myriad of interventions led by international organisations seeking to contribute to peacebuilding and development. Some of these interventions, led for example by specialised United Nations agencies, have prioritised security and taken the form of demilitarisation processes. Other interventions, led for example by the International Committee of the Red Cross and the International Rescue Committee, are more humanitarian and focus on the pressing needs of internally displaced persons and refugees.

Increasingly, these and other interventions are regarded as part of a global rule of law and democratisation project. The growing endorsement by the international community of this legal and political project signifies a victory of sorts for the international human rights law framework crafted by the reigning powers in the wake of World War 2 and the Holocaust. Weak or failed judiciaries contribute to impunity for egregious human rights violations, and since the 1990s the call for justice has emerged as a pillar of the rule of law and democratisation project in post-conflict societies.¹ In Africa alone, Rwanda's *gacaca* courts, the International Criminal Court (ICC), which is now pursuing prosecutions in the Democratic

¹ Security Council Resolution 1315 (2000) on Sierra Leone recognises that, in the particular circumstances of Sierra Leone, a credible system of justice and accountability for the very serious crimes committed there would end impunity and would contribute to the process of national reconciliation and to the restoration and maintenance of peace.

Republic of Congo, Sudan, Central African Republic and Uganda, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone and the Sierra Leone Truth Commission are just a small sample of justice processes establishing accountability for war crimes and crimes against humanity. These mechanisms of accountability are both legal and political processes, and increasingly they prioritise enforcement of sanctions against perpetrators of violence against women and children.

These mechanisms of accountability each respond to unique manifestations of political, economic and military oppression: torture, killings, beatings, murder, rape, and displacement were common in each of these conflicts. And yet these abuses took on culturally significant nuances – an amputation by rebels in Sierra Leone and an amputation by the Rwandan Armed Forces communicated different messages to the victim and his/her community. This article is not intended to produce an anthropological analysis of violence and the messages it communicates throughout communities in conflict.² Rather, it is a preliminary enquiry into the means by which scholars and practitioners engaged in transitional justice processes construct violence against women as gender-based discrimination.

The study of the case law is marginal in this article.³ Rather than presenting a traditional case law review of international tribunals prosecuting war crimes and crimes against humanity, it gives an overview of historic and contemporary forms of enslavement and the ways in which legal practitioners and scholars within and outside of legal studies have defined enslavement of men and women broadly, using gender relations as opposed to sexual relations as a category of analysis. Then follows a review of a narrow analysis of gender by the Special Court for Sierra Leone and the ICC.

² See NORDSTROM (1997), RICHARDS (1996), TAYLOR (1999) and NI AOLAIN (2000) for exemplary analyses of violence, its symbolism and meaning in specific conflicts and contexts.

³ For the leading gendered case law review of the Sierra Leone Special Court judgments and decisions, see OOSTERVELD (2009).

Specifically, it critiques the legal construction of a gender crime called ‘sexual slavery’ seen in the statutes of the ICC and the Special Court and argues that the emergence of sexual slavery as a distinct international crime represents a failed gender analysis by the drafters of the statutes. Instead of investigating the social and political constructions of masculinity(ies) and femininity(ties) in order to create categories of gender-based violence, they have simply tagged sex onto specific crimes against humanity.

This approach is inspired by Hillary Charlesworth’s description of the feminist method as exposing and questioning the limited basis of the claims of international law to objectivity and impartiality while insisting on the importance of gender relations as a category of analysis. The article endorses her warning that this method will not produce neat ‘legal’ answers, but will challenge the very categories of ‘law’ and ‘non-law’.⁴ It argues that the legal categorisation of ‘sexual enslavement’ as a crime separate from ‘enslavement’ signifies a false legal reality.

2 OUTCOMES OF A BROAD ANALYSIS OF GENDER AND ENSLAVEMENT

Slavery and slavery-like practices have underpinned the major global forms of political oppression, including imperialism, colonisation and apartheid. The most far-reaching treaty against slavery, the Convention to Suppress the Slave Trade and Slavery (Slavery Convention) came into force in 1927. Its preamble repeated the declaration made in the General Act of the Brussels Conference of 1889-1890 to put an end to trafficking in African slaves and to secure the complete suppression of slavery in all its forms. Slavery was defined as the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.⁵

⁴ CHARLESWORTH, (1999) pp. 379-394.

⁵ Slavery Convention, art. 1.

Contrary to the increasingly popular representation by legal practitioners and scholars of 'sexual slavery' with its emphasis on multiple or mass rapes of women, Pamela Bridgewater provides an exemplary gender analysis of men's and women's experience of enslavement in the United States. She describes a wide range of gender-based forms of violence, ranging from denying women legal protection from rape and denying new mothers the opportunity to recover from labour and to nurse and otherwise care for their children.⁶ She makes the important point that rape was not only a condition inherent in the female slave's experience, but that unfettered sexual access to women was central to the right of ownership which slave owners exercised over slaves.⁷ The sexual access also extended to control and ownership of the reproductive potential and product of women, and the slave owner thus owned children born from the rapes of his female slaves.⁸

Bridgewater's research shows how the sexual vulnerability and reproductive potential of women shaped the female experience of slavery. It also reveals the extent of sexual and reproductive ownership of male slaves: the denial of their fundamental right to be fathers and husbands and reducing them a reproductive role analogous to that of bulls in the practice of animal husbandry, with women not of their own choosing.⁹ Castration was regarded as a legitimate punishment and form of oppression of male slaves.¹⁰ Such exercises of ownership over male slaves were gender-specific harms

⁶ BRIDGEWATER (2005), pp. 115-117.

⁷ *Ibid.* pp. 117-118. See also CORCORAN-NANTES describing sexual violence as inherent to slavery in Brazilian society where female slaves were also expected to engage in sexual labour. From an early age pubescent females were given to young males in the household and were subject to all manner of abuse...It was also customary to offer slave women to male house guests... marriage and family life were generally denied to the slave population. CORCORAN-NANTES (1998), pp. 160-161.

⁸ BRIDGEWATER (2005), pp. 118-121.

⁹ *Ibid.* pp.125-126.

¹⁰ SMITH (2006), p. 579.

degrading the masculinity of male slaves and denying their humanity and citizenship.

Brenda Smith's enlightening work on women in U.S. prisons has expanded the approach to gendering enslavement, particularly in her description of the sexual exploitation of incarcerated women as a modern corollary to slavery. Her approach to understanding the hegemonic relations that make abuse in state-run institutions possible requires that both women's and men's experiences of violence are seen as gendered. Smith finds that sexual violence is a reality for both women and men in prison and that sexual violence against male slaves and male prisoners takes different shapes to violence against women slaves or women prisoners. She writes that:

I t would be tempting to say that sexual abuse in institutional settings primarily affects women, and therefore – like slavery – an identifiable group is targeted for discriminatory treatment. That, however, is not true. Both male and female prisoners frequently face sexual abuse by both staff and other inmates as a means of domination.¹¹

A 2009 report of the Irish government's Commission to Inquire into Child Abuse corroborates Smith's conclusions on gender and abuse.¹² The report made shocking disclosures of brutality against children in industrial and reform schools run by Roman Catholic orders. A striking feature of the report is the ready comparative gender analysis made possible by the fact that since the 19th century the bulk of state institutions in Ireland were gender-segregated. Patterns emerge as one reads of how girls and boys experienced abuse and neglect in similar but also gender-specific ways. A striking conclusion of the report is that there was no persistent problem of sexual abuse in girls' schools. Abuse of girls was opportunistic and

¹¹ SMITH (2006), p. 279.

¹² Most of the allegations the commission investigated emerged from the system of 60 residential 'Reformatory and Industrial Schools' that Catholic Church orders had run since 1858. They were funded and supervised by the Irish Department of Education. The report is available at www.childabusecommission.ie/.

predatory by male employees or occurring in outside placements. In contrast, sexual abuse in boys' schools was described as 'systemic', 'endemic', 'chronic' and occurring at 'disturbing levels'. Much of the abuse was attributed to members of the Catholic orders, but the report also describes sexual abuse by peers. In one instance, vulnerable boys had to submit to sex in exchange for protection from older boys.

The objective of this cursory but important reference to sexual violence against boys and adolescents in state institutions is not to ask, 'Did Irish boys or Irish girls suffer the most?' It is counter-productive to challenge the legal necessity for a separate crime of sexual slavery by claiming that 'boys, too, were raped, and more frequently than girls' because it could be used to normalise girls' experience and even sexual violence. Rather, the aim is to raise the questions that a thorough gender analysis of incarceration, captivity, conscription and enslavement would require.

The current approach that this article critiques reduces a gender analysis of enslavement to the rape of women and excludes any analysis of the ways in which masculinities as well as femininities are attacked by slavery. The prominent focus on 'women sex slaves' and 'raped women' also presents a risk of eroticising intercourse between women and their abusers rather than exploring and challenging hegemonic gender relations that make such violence inherent and even necessary to sustain military power.

Jeffrey J. Pokorak writes that 'slavery is commonly understood as the control of all aspects of a slave's social interactions'.¹³ It is not an exaggeration to say that enslavement is not really enslavement without the possibility or reality of violence, including sexual violence against the enslaved man or woman. Bearing this in mind, it becomes clear that describing male slaves as 'mere' slaves also precludes the development of a narrative describing the ways male slaves experienced gender-specific forms of enslavement, including but certainly not limited to sexual and reproductive exploitation.

¹³ POKORAK (2006), p. 110.

The historic examples of transatlantic and colonial slavery illustrate that ownership of slaves inherently includes sexual and reproductive ownership. The sexual and reproductive exploitation of a slave is comparable to the exploitation of his/her labour as he/she harvests the slave owner's field or repairs his home. It is the right of ownership that allows a slave to toil under the most egregious conditions and to submit to sexual exploitation. Everything that is entailed in this right of ownership and its gender manifestations should be examined in order that women's and men's gendered experiences can be fully revealed, distinguished, condemned and remedied. Simply 'adding sex' to the experience of women slaves stifles the required gender analysis such that it never matures beyond an analysis of women's biological differences from men that make them vulnerable to forced pregnancy and other sexual acts of violence.

If enslavement is approached not from a 'sex'/lust perspective but from the hegemonic power perspective, it would leave room for a study of boys' and men's experiences of captivity. Furthermore, it would lead to a deeper understanding of the social and political underpinnings of sexual violence as it disproportionately affects women, but also as it affects men and target communities. When poorly considered and analysed, the mere classification of practices as 'sexual' holds the danger of eclipsing other relations of power and symbolic acts, punishments and practices that men and women experience collectively and also in specific ways shaped by gender.

Armed conflict often depends on slavery and slavery-like practices. Examples of enslavement from World War 2 are that of Chinese men by Japanese corporations, that of up to 200,000 women by the Japanese Imperial Army and that of European peoples in labour camps by the Nazi government. Examples from contemporary conflicts are the enslavement of Tutsi women during the 1994 genocide and of women detainees in the former Yugoslavia. Enslavement was recognised as a crime against humanity by the Nuremberg and Tokyo charters, although the tribunals provided no elaboration of the elements of this crime. The 1995 study by the

Special Rapporteur on violence against women revived the question of a legal definition of ‘military sexual slavery’ in the context of the Second World War. Using a broad gender analysis of women’s experience of Japan’s wartime enslavement of women, the rapporteur emphasised that she did not intend to invent new crimes committed against women in armed conflict. She used the term ‘sexual’ to describe a form of slavery, but not to denote a separate offence. The Special Rapporteur used the term ‘sexual’ in order to highlight the historic and contemporary reality that slavery amounts to the treatment of a person as a chattel, which often includes sexual access and forced sexual activity. She concluded that in all respects sexual slavery is slavery and its prohibition is a *jus cogens* norm, a fundamental principle universally binding on all states as a norm from which no derogation is permitted, like crimes such as torture and genocide.¹⁴

Shortly after this study, the International Criminal Tribunal for the Former Yugoslavia (ICTY) prosecuted Dragoljub Kunarac, Radomir Kovač and Zoran Vuković for crimes against humanity (Kunarac et al.). The Trial Chamber judgment provided a thorough legal analysis of the elements of the crimes committed and employed a broad gender analysis of the enslavement of women in the case of two defendants Kunarac and Kovač.¹⁵ The charges arose from the mistreatment of women and children and allegations of forced labour in 1992 after the town of Foca was placed under the control of Serb forces. The Muslim and Croat inhabitants of the occupied town were rounded up and detained. The gender-specific nature of the enslavement of women in the former Yugoslavia was evident:

The women were kept in various detention centres where they had to live in intolerably unhygienic conditions [and] where they were mistreated in many ways, including, for many of them, being

¹⁴ Special Rapporteur on Violence against Women (1996), paras. 11, 17, 30.

¹⁵ Vuković was not charged for the crime of enslavement. He was convicted of torture and rape and sentenced by the Trial Chamber to 12 years imprisonment. This sentence was distinctly less severe than that of Kunarac and Kovac, who were sentenced by the Trial Chamber to 28 years and 20 years respectively.

raped repeatedly. Serb soldiers or policemen would come to these detention centres, select one or more women, take them out and rape them. Many women and girls, including 16 of the prosecution witnesses, were raped in that way. Some of these women were taken out of these detention centres to privately owned apartments and houses where they had to cook, clean and serve the residents, who were Serb soldiers. They were also subject to sexual assault.¹⁶

Kunarac and Kovač were found guilty of rape and enslavement as crimes against humanity. The Appeals Chamber confirmed that contemporary forms of slavery (as opposed to the traditional concept of slavery defined in the 1926 Slavery Convention and referred to as ‘chattel slavery’) form part of enslavement as a crime against humanity under customary international law.¹⁷ The decision in the Kunarac case has been criticised for not fully conveying the fact that enslavement was particularly of a sexual nature and therefore sexual slavery. It has been argued that the tribunal missed an opportunity to recognise the sexual nature of the enslavement and instead treated the sexual violence as merely one of a large number of factors that indicated that enslavement had occurred.¹⁸

In popular parlance, the verb ‘to sex up’ is used to denote an effort to make something more interesting often by eroticising it. It is a term popularly applied to teen idols who do or are pressured to do increasingly provocative costumes in an effort to increase public visibility and boost record sales, designer labels or other products.¹⁹

¹⁶ *The Prosecutor v. Kunarac et al.*, 2001, paras. 573-574.

¹⁷ *Ibid.* para. 117.

¹⁸ ASKIN (2003), p. 2561.

¹⁹ See the following headlines: ‘Sexed up Miley Cyrus video sparks outrage,’ Perth News, 11 October 2010, available at <http://www.perthnow.com.au/entertainment/sexed-up-miley-cyrus-video-sparks-outrage/story-e6frg30c-1225937184146>, accessed on 26 November 2010; ‘New Feminist Coalition Slams Sexed-Up Images of Girls,’ Alternet, 22 October 2010 available at http://www.alternet.org/media/148585/new_feminist_coalition_slams_sexed-up_images_of_girls accessed on 22 November 2010; ‘Terry Richardson’s sexed-up Glee photos for GQ magazine,’ Examiner, 22 October 2010, available

This article argues that the outcome of sexualising crimes against humanity committed against women is a 'sexed up' version of men's experience of violence. It precludes a gender analysis of crimes such as torture, slavery and imprisonment. This point can be emphasised when we consider that violence against men is often characterised by sexual assault and yet, a different discourse abounds around it: The high incidence of sexual violence against male detainees by fellow inmates and wardens, for example, does not make their experience sex imprisonment. The verbal or physical assault of the genitals of male detainees' by interrogators does not raise a discussion on the crime of sexual torture. Whilst sexual assault can characterise violence against male detainees, sex is not allowed to dominate the wider discussion between prisoners rights advocates and policymakers about abuse of power, vulnerability, race, class, subaltern sexualities, consensual and/or transactional sex, sexuality and hegemonic masculinities that combine to make such abuse flagrant.

The approach taken by the prosecutor and the trial chamber in the Kunarac case avoided 'sexualising the women's experience, but still made the point clearly that sex and the control of sexuality were core elements of their enslavement. However, it was not necessary for the statute, prosecutor or trial chamber in this case to categorise the experience of women as sexual slavery, as the 'sexual' range of crimes women slaves experienced are consistent with 'the exercise of power' necessary to create an absolute slave-master relationship. The Kunarac decision provides a landmark recognition of the ways in which gender can significantly impact gross violations of human rights. Men and women alike were enslaved in the context of the war; however, the trial chamber did not allow this to obscure the gender-specific manifestations of this international crime. It did not describe slavery in a 'neutral way'. Rather it produced a gender analysis that revealed the different shapes that war crimes and crimes

at <http://www.examiner.com/women-s-fashion-in-national/terry-richardson-s-sexed-up-gee-photos-for-gq-magazine>, accessed on 26 November 2010.

against humanity take when used by men against men and by men against women. In this case, the women, unlike men prisoners, were detained in apartments or other suburban addresses and ordered to carry out domestic chores such as cleaning and cooking and were made sexually available to their captors.

The Kunarac case sets out clearly the elements and root causes of gender-based violence occurring in the act of an enslavement that was shaped by hegemonic gender relations between men and women. It should be noted that being forced to perform servile acts, domestic chores and being confined to a bedroom might not and almost certainly did not reflect the lived gender reality or relationship between Serbian or Muslim men and women in the former Yugoslavia prior to the armed conflict. However, the fact that these forms of abuse were reserved for female detainees is the first step to their becoming gendered acts of violence. The second is that the space where the violations were committed affirmed an archaic (real or imagined) patriarchy that confined women to gendered spaces deemed private (the bedroom and the kitchen).²⁰ In this case the attacks were a part of the wider persecution of Muslims; however, they clearly attacked Muslim women as a gender group in a gender-specific form.

²⁰ There is very often a disconnection between real and imagined gender realities. For example, a community may agree that men are the breadwinners and have primary responsibility for financially maintaining the home. However, men and women may be expressing an idealised image of men's gender role while denying the reality that women in their community have historically and traditionally created and maintained the bulk of household wealth through their commercial transactions in the informal sector. Brandon Hamber of INCORE raised this point at the Emory University conference on gender violence and gender justice in May 2009 in his presentation, 'Masculinity and Transition: Crisis or Confusion?' Likewise, Christopher Taylor, in his analysis of gender hegemonies in the context of the Rwanda genocide, notes that Hutu extremists sought to reassert a male dominance that had 'probably never existed' in Rwanda's history. Taylor (1999), p. 155.

3. OUTCOMES OF A NARROW INTERPRETATION OF GENDER AND ENSLAVEMENT

This final section contrasts the broad approach taken by the ICTY trial chamber and the work of academics such as Bridgewater and Smith with the limited gender analysis made by judicial or quasi-judicial organs investigating and/or prosecuting enslavement in armed conflict. Illustrative cases are taken from the Women's International War Crimes Tribunal for the Trial of Japanese Military Sexual Slavery, Statute of the Special Court for Sierra Leone and the International Criminal Court (Rome Statute).

Contemporary international and hybrid tribunals have mandates that originate from a statute, Security Council resolutions, parliamentary act, constitutional provision or other binding order. Gender considerations and analysis are part and parcel of each tribunal's mandate as a result of recent developments in international human rights norms. The Fourth World Conference on Women (the Beijing Conference) was held in September 1995 to review and appraise the advancement of women since 1985 in terms of the Nairobi Forward-looking Strategies for the Advancement of Women to review and appraise the achievements of the UN Decade for Women: Equality, Development and Peace (1976-1985).

The international community adopted the Beijing Declaration and Platform for Action, which identified women and armed conflict as one of the 12 critical areas of concern that member states, the international community and civil society should address. The impact of war on women is described broadly by the Beijing Declaration in terms of displacement, loss of the home and property, the loss or involuntary disappearances of close relatives, poverty and family separation and disintegration. The declaration called on states to integrate a gender perspective into the resolution of armed conflicts and to aim for a gender balance when appointing candidates for judicial and other positions in all relevant international bodies,

particularly those related to the peaceful settlement of disputes.²¹ States were also called upon to ensure appropriate gender training for prosecutors and judges and other officials in handling cases involving violence against women and to integrate a gender perspective into their work.²² The declaration includes the crime of sexual slavery, noting that: ‘Other acts of violence against women include violation of the human rights of women in situations of armed conflict, in particular murder, systematic rape, sexual slavery and forced pregnancy.’²³

Security Council Resolution 1325, passed unanimously on 31 October 2000, was the first resolution passed by the Security Council that specifically addressed the impact of war on women and the need to increase women’s contributions to peace and conflict resolution processes. The Women’s International War Crimes Tribunal for the Trial of Japanese Military Sexual Slavery (the Women’s Tribunal) was, like Resolution 1325, established five years after the Beijing Conference. Its subject matter, sexual slavery, meant that introducing a gender perspective was of paramount importance. Sitting in Tokyo from 8 to 12 December 2000, it was a people’s tribunal organised by international human rights advocates and Asian grassroots movements, and notably, its judgments lacked any legal force.²⁴ It found that sexual slavery was held to have been a crime against humanity in 1945 in the context of World War 2, and stated:

Sexual slavery is not a new crime but rather a particularly outrageous, invasive and devastating form of enslavement defined as

²¹ Beijing Declaration, para. 144 (c).

²² *Ibid.*, para. 144 (d).

²³ *Ibid.*, para. 115.

²⁴ See PICCIGALLO for one of the few detailed studies of the entire Allied Eastern war crimes operations. The study reveals that Dutch military courts tried 448 cases involving more Japanese accused (1,038) than any other nation save the United States. A civilian hotel proprietor in Batavia, Washio Awochi, was charged with the war crime of the enforced prostitution of 12 Dutch women and girls. He was found guilty and sentenced to 10 years’ imprisonment. Piccigallo (1979), pp. 179-180.

the ‘exercise of any or all the powers of ownership over a person’. The conscription of the ‘comfort women’ as part of the ‘material’ of war represents the institutionalisation of sexual slavery on an unprecedented scale, rooted in profoundly misogynistic and racist attitudes all too common in the world today,²⁵

The indictment asserted that multiple rapes were the sole and defining harm suffered by detained women and girls, and that the primary reason for their abduction was to provide labour in the form of sex to the Japanese military. It focused on multiple rapes, forced gynecological examinations, treatment for sexually transmitted infections, forced abortion, forced use of contraception, miscarriages, and infertility. The major historical works about ‘comfort women’ confirm this narrative of the abuses.²⁶ There are no criminal charges relating specifically to other gross violations of human rights suffered by enslaved women, such as beatings or torture; forced domestic labour in the form of laundry services or acting as seamstresses for the military; entertainment tasks such as singing and serving liquor at recreation centres; forced labour such as digging foxholes, farming; or carrying out military activities such as acting as sentries contrary to basic principles of the laws of war relating to the protection of civilians. These crimes are subsumed under the single crime of sexual slavery. This approach was contrary to that taken by the ICTY in the Kunarac case, in which rape and enslavement were

²⁵ The Women’s International War Crimes Tribunal 2000 for the Trial of Japanese Military Sexual Slavery in the matter of the Prosecutor and the Peoples of the Asia Pacific Region v. Emperor Hirohito et al and the Government of Japan, Summary of findings, 12 December 2000, par. 24.

²⁶ See TANAKA (2002). An exception and valuable contribution to broadening the range of abuses and indignities women suffered is presented by Karen Parker and Jennifer F. Chew. They detail other forms of torture and abuse women experienced, including beatings, mutilations, murder and being forced to watch the torture of fellow women slaves. They also describe the poor living conditions, such as inadequate nourishment, forced moves and long distances to travel in wartime conditions. Many women died from lack of appropriate medical care for malaria, malnutrition and broken bones and internal bleeding resulting from beatings. PARKER & CHEW (1994), p. 509.

prosecuted as separate crimes, even though enslaved women were raped on many occasions. Rape as a separate crime and rape as an element of sexual control of an enslaved woman were both successfully prosecuted.

Sel Hwang is another important voice in the Women's Tribunal historiography of the comfort women, even as he remains focused on sexual violence. He criticises the superficial scholarly analysis of the Korean women that depicts them solely as victims of wartime rapes, and he shows how gender was assaulted and constructed by the acts of rape and enslavement. He speaks of the gendered and sexual erasure of Korean women in particular, and its contribution to a Japanese nationalist agenda.²⁷ One form of erasure was through the masculinisation of Korean women's bodies by the Japanese military. Hwang uses testimonies to show that Korean women were referred to during rapes as 'bastards', 'men' and 'guys' and they were subjected to medical interventions that made them barren so that the rape of Korean female bodies was constructed as a sexually non-reproductive act.²⁸

Most importantly, Hwang finds that these women actually inhabited gendered territory beyond the culturally specific definitions of 'women': the different gender constructions of Korean women, other Asian women in territories conquered or occupied by Japan, and Dutch and Japanese women created a hierarchy of sex slaves and aggravated or mitigated levels of abuse.²⁹ Hwang states the obvious: that women did not experience sexual violence in the same way, as expatriates (Dutch or Australian), Japanese citizens, colonised Koreans, or women in occupied territory (Indonesian). These and

²⁷ SPADE & HWANG (2004), p. 244.

²⁸ *Ibid.*, pp. 244 and 251.

²⁹ The Women's Tribunal found that the comfort woman system victimised Taiwanese, Indonesian, East Timorese, Filipina, Korean, Chinese and Japanese. It also describes sexual enslavement as misogynistic and racist, but its analysis falls short of distinguishing between the different racial categories and hierarchies existing between and amongst Asian peoples and between Asian, Eurasian and Caucasian women.

other groups of women all experienced sexual violence, but only a gender analysis that took into account race, class, age, and other factors would reveal distinctions in the experience of sexual abuse and exploitation between women. Hwang provides important analyses and distinctions, locating the rape of Korean women in the context of a colonial history with Japan that developed a mythology of male and female Koreans' superhuman strength and suitability for forced labour.³⁰

The sophisticated analysis of gender and slavery provided by scholars such as Hwang, Bridgewater and Smith is not replicated in most contemporary legal definitions of enslavement in armed conflict. It is a worrying development for the advancement of gender analysis of international crimes that the Rome Statute of the ICC provides separate listings for enslavement and sexual slavery as distinct international crimes. It reaffirms the well-established definition of 'enslavement' as the 'exercise of any or all of the powers attaching to the right of ownership over a person [...] including the exercise of such power in the course of trafficking in persons, in particular women and children'.³¹

This definition is clearly admissible in the context of the decision on the enslavement of women in the Kunarac case. The trial chamber stated that under its definition of enslavement, indications of enslavement often include, though not necessarily, sex and control of sexuality.³² 'Any or all of the powers attaching to ownership' would include the acts of sexual abuse and exploitation, and 'forced labour and servile status' covers the gendered exploitation of women for domestic work. However, the drafters of the Rome Statute felt that 'all of the powers attaching to ownership' did not adequately encompass sexual violence perpetrated against women slaves. It therefore introduced the crime of sexual slavery in article 8 (2) (e) (vi). In 2000 the Preparatory Commission to the ICC provided the

³⁰ SPADE & HWANG (2004), p. 250.

³¹ Rome Statute (1998), art. 7 (2) (c).

³² *The Prosecutor of the Tribunal v. Kunerac et al.* 2001, paras. 540 and 543.

specific elements of crimes of sexual enslavement³³ that distinguish it from the definition of enslavement: ‘The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.’

The construction by the Rome Statute of sexual violence as a crime separate from slavery was widely welcomed by international legal scholars as an overdue recognition of the sexual aspect inherent in slavery.³⁴ It was regarded as a contemporary and more correct way to describe certain harms that might otherwise have been narrowly referred to as ‘enforced prostitution’.³⁵ Valerie Oosterveld reports that the Women’s Caucus supported the separate listing, arguing that women may be forced into maternity or temporary marriage complete with domestic duties, both of which might have sexual and non-sexual aspects. In this case a prosecutor could charge the perpetrator with both enslavement and sexual slavery.³⁶

The specific inclusion of sexual slavery in the Rome Statute influenced the adoption of this crime within the statute and jurisdiction of the Special Court for Sierra Leone.³⁷ The Special Court was established jointly by the government of Sierra Leone and the UN pursuant to Security Council Resolution 1315 to prosecute those who bear the greatest responsibility for violations of international humanitarian law committed in Sierra Leone since 30 November 1996.³⁸ While the Special Court can be criticised for its limited gender analysis – whereby male slaves are ‘just’ slaves and their female counterparts are ‘just’ raped – it is nonetheless the ad hoc tribunal that best encodes (in its statute) the gender considerations of the Beijing Declaration (1995), and Security

³³ *Report of the Preparatory Commission for the International Criminal Court, Finalised Draft Text of the Elements of Crimes, Preparatory Commission for the International Criminal Court, addendum part II, UN Doc. PCNICC/2000/1/Add.2 (2000).*

³⁴ DE BROUWER (2005), p. 137.

³⁵ OOSTERVELD (2004), p. 608.

³⁶ OOSTERVELD (2004), p. 624.

³⁷ *Ibid.*, p. 626.

³⁸ Special Court (2002), art. 1.

Council Resolution 1325 on women, peace and security. The statute requires gender competence as a professional requirement for specialist investigators of gender-based violence and for the entire staff of the Office of the Prosecutor. Gender competence would include experience in trauma, including trauma related to crimes of sexual violence and violence against children.³⁹

The indictments included charges of sexual slavery and forced marriage, a development that arguably had the effect of reducing women's experience of violence to the 'coital' and/or 'conjugal' experience.⁴⁰ The 'conjugal' experience of enslavement is raised in response to the (mis)categorisation by the prosecutor of the crime called 'forced marriage' to describe the experience of girls and women abducted by rebel forces. This article does not elaborate on this crime chiefly because it was not listed as a crime under the statute of the Special Court for Sierra Leone, but was prosecuted under the banner of outrages on personal dignity, a war crime (art. 3 (e)). However, it treats the application of the term 'forced marriage' to the Sierra Leone conflict as analogous with 'sexual slavery'. Both constructions provide overly simplistic constructions, or false legal realities, of the volatile intersection of gender with violent conflict.

That the categorisation of 'forced marriage' and 'sexual slavery' is narrow and falls short of a gender analysis is reinforced by the growing body of ethnographic studies on post-war reintegration into society of children, youth, men and women associated with armed forces in Sierra Leone and neighbouring Liberia. These studies have produced complex elaborations of how gender shaped former combatants' access to demilitarisation projects, how it inhibited or facilitated reintegration into community life and how it influenced the experience of abduction, child recruitment, forced labour and soldiering. Most importantly, ethnographic studies find that many men and women inhabited multiple roles during the war. Thus a commander may have entered

³⁹ *Ibid.* art.s 15 (3) & (4), and 16 (4).

⁴⁰ OGUNDIPE-LESLIE (1994), p. 251.

the rebel forces as a child conscript; she may also have been raped for several months until she found protectors or gained status; and she may herself abuse younger girls who threaten her transactional relationship with a more senior commander. Ethnographers describe women's experiences of sexual victimisation in ways that complicate but enrich the gender analysis of enslavement in their analysis of issues such as hierarchy and conflict between abducted women and girls; parallels between child labour in peacetime and forced labour in support of a military faction; and rewards for cooperation for women and girls who are assimilated into the fighting forces.

4. CONCLUSION

This study has taken the form of a preliminary enquiry into the means by which scholars from various disciplines and practitioners in the transitional justice process categorise certain crimes as a form of gender-based violence. It brings into an illustrative gendered narrative of ownership and enslavement of men and women throughout different epochs and locales acts of oppression such as: the denial of female slaves the right to nurse a newborn child; the separation of enslaved children from their mothers and fathers; the wilful destruction of the African and African-American family; the traffic and enslavement of women by the Japanese military; sexual victimisation of Irish boys in reform schools; the abuse of prison inmates by wardens; and the abduction of children into the armed forces for soldiering.

This conclusion should stand as a warning that the landmark legal development in the statutes of the ICC and the Sierra Leone Special Court that fragmented enslavement into a separate 'gendered' crime of sexual enslavement is a part of a wider movement to limit the scope of gender mainstreaming in transitional justice processes, as well as in peacebuilding and development. Reducing women's experience of harm to sex permits the institutions mandated to bring justice to post-conflict societies to maintain and reinforce a patriarchal construction of women as rape victims or

potential rape victims. In this way, women in such societies are cast in a perpetual state of sexual vulnerability and passivity.⁴¹ This portrayal allows the institutional protection of women to become another form of oppression by silencing, essentialising and undervaluing women's full experiences. And in the lengthy processes of post-war reconstruction, development and democratisation, programmatic efforts promoting gender equality will restrict the perceptions and tailor the responses of practitioners to the monolithic 'rape victim identity' of their women clients. This construction simply adds the rape of women to the ambit of war crimes and crimes against humanity, but excludes women's other pressing needs for equal opportunity and non-discrimination in their quest for livelihood, rehabilitation and reintegration into a post-conflict economy and civil society.

⁴¹ SCULLY, (2009).

THE TRANSITIONAL JUSTICE PROCESS IN THE FORMER YUGOSLAVIA: LONG TRANSITION, YET NOT ENOUGH JUSTICE

GENTIAN ZYBERI

1. INTRODUCTION

This short paper aims to provide a general assessment of the transitional justice processes in the countries emerging from the violent break-up of the former Yugoslavia by focusing on the issues of reparations for victims of the armed conflicts. These states are Croatia, Bosnia and Herzegovina, the Former Yugoslav Republic of Macedonia (FYROM), Serbia, and Kosovo. The issue of reparations for victims can be seen as one measure of the breadth and depth of the transitional justice process within these countries. Evidently, dealing with a violent past comes at a cost—political, economic, and social—and requires gradually changing public attitudes through education and increasing public awareness, which in turn requires political will and courageous and good political leadership.

The paper will focus on two main transitional justice initiatives. First, it will address the role of the International Criminal Tribunal for the former Yugoslavia (ICTY) in supporting transitional justice processes in these states, with particular reference to the issues of reparations for victims and reconciliation. The Tribunal's activity and apparent achievements are contrasted with perceptions of, and general public attitudes towards, its work.¹ Second, the paper

¹ The tribunal's achievements are claimed to include holding leaders accountable, bringing justice to victims, giving victims a voice, establishing the facts, developing international law, and strengthening the rule of law. More information is available at: www.icty.org/sid/324. See also ZYBERI, G., 'The role of international courts in post-conflict societies,' in: BOEREFIJN *et al.* (eds.), *Human Rights and Conflict: Essays in Honour of Bas de Gaay Fortman*, Intersentia, 2012, pp. 367-385.

will address a proposal coming from the civil society for creating a regional truth and reconciliation commission in the Balkans. While these two issues will form the primary focus on this paper, it should also be noted that many issues connected to the evaluation of transitional justice processes and societal transformation in the states emerging from the former Yugoslavia are likely to raise further questions, which cannot be adequately addressed in a paper of this scope.

2. ICTY REPARATIONS FOR VICTIMS AND DOMESTIC TRIALS FOR WAR CRIMES

The mandate of the ICTY is to bring to justice the persons most responsible for serious violations of international humanitarian law in the former Yugoslavia since 1991 and thus to contribute to the restoration and maintenance of peace in the region.² Its subject-matter jurisdiction covers grave breaches of the 1949 Geneva Conventions, violations of the laws or customs of war, genocide and crimes against humanity.³ Since its establishment in 1993, the ICTY has indicted 161 persons for a range of serious crimes committed in different parts of the former Yugoslavia.⁴ The persons indicted and tried before the ICTY have mainly been high-ranking military and civilian leaders from all sides of the conflict.

The activity of the Tribunal has contributed considerably to the promotion and strengthening of the rule of law at both the international level and domestically in the states emerging from the former Yugoslavia.⁵ The support of the ICTY for the rule of law at

² Security Council Res. 827 of 25 May 1993. More information on the mandate and jurisdiction of the ICTY is available at: www.icty.org/sid/320. A timeline of the activity of the ICTY is available at: www.icty.org/action/timeline/254.

³ See respectively articles 2, 3, 4 and 5 of the ICTY Statute.

⁴ More information on the activity of the ICTY is available at: www.icty.org/sections/TheCases/KeyFigures.

⁵ See inter alia the Report of the Secretary-General, The rule of law and transitional justice in conflict and post-conflict societies, UN Doc. S/2004/616,

the domestic level consists of, among other things, training for legal professionals, exchange of best practices and experience, and numerous public outreach activities. To further support strengthening the rule of law at the domestic level, the ICTY has assisted with the transfer of legal expertise to legal professionals from the former Yugoslav republics, training them both, in handling war crimes cases and enforcing international legal standards in their local systems.⁶ As part of its Completion Strategy,⁷ the ICTY has transferred eight cases involving thirteen persons, as well as numerous investigative files, to domestic authorities and courts.⁸ These transfers, mainly to courts in

23 August 2004, at 1 (Rule of Law and Transitional justice Report), 13-17, paras. 38-49; Report of the Secretary-General, 'Strengthening and coordinating United Nations rule of law activities,' UN Doc. A/63/318 (20 August 2010), 7-9, paras. 24-30 (Strengthening and Coordinating UN Rule of Law Activities Report). For more information regarding the UN activities and approach to rule of law issues visit the UN Rule of Law website, available at: www.unrol.org. See also VOORHOEVE, J., *From War to the Rule of Law: Peacebuilding After Violent Conflicts*, Amsterdam University Press, 2007.

⁶ More information on ICTY's contribution to strengthening the rule of law is available at: www.icty.org/sid/324#strengthening. See also the 2010 ICTY Report, UN Doc. A/65/205-S/2010/413 (30 July 2010), at p. 19, paras. 83-84.

⁷ More information on the Completion Strategy and the relevant ICTY reports is available at: www.icty.org/tabs/14/2. On the basis of Security Council Resolution 1966(2010) the International Residual Mechanism for Criminal Tribunals ('the Mechanism') with two branches, shall commence functioning on 1 July 2012 (branch for the ICTR) and 1 July 2013 (branch for the ICTY). From 1 July 2013, the Mechanism will respond to requests for assistance from national authorities (not restricted to the former Yugoslavia) in relation to national investigations, prosecutions and trials of persons responsible for serious violations of international humanitarian law in the former Yugoslavia. This function comprises the provision of assistance to national courts conducting related proceedings, which includes transferring dossiers, responding to requests for evidence, variation or rescission of protective measures for witnesses and responding to requests to question detained persons. For more information on the ICTY residual mechanism see <http://www.icty.org/sid/10874>.

⁸ The persons whose cases have been transferred to a national jurisdiction are Rahim Ademi, Dušan Fuštar, Momčilo Gruban, Gojko Janković, Vladimir

Bosnia and Herzegovina, illustrate the central role of domestic courts in widening the circle of justice and promoting accountability. The process of transitional justice in the former Yugoslavia can be seen to be quite different in terms of its reach from the case of Rwanda, where the *gacaca* courts have tried about one million persons for the crimes committed in the country during 1994.⁹

The majority of cases transferred have been brought to the Bosnian War Crimes Chamber (known until 2003 as the Human Rights Chamber), which is responsible for dealing with perpetrators of serious crimes.¹⁰ While the ICTY is especially committed to assisting the Bosnian War Crimes Chamber, it has also provided substantial assistance to the War Crimes Chamber of the Belgrade District Court as well as to the courts within the Croatian judiciary dealing with war crimes cases.¹¹ The Mixed Panels in the Courts of Kosovo (2000/64) have also played a significant role in prosecuting war crimes committed there. EULEX, the EU rule of law mission in Kosovo, the largest of its kind, is now carrying out this task.¹²

Kovačević, Duško Knežević, Paško Ljubičić, Željko Mejakić, Mirko Norac, Mitar Rašević, Radovan Stanković, Savo Todović, Milorad Trbić.

⁹ For a detailed discussion of the *gacaca* trials and the process of transitional justice in Rwanda see CLARK, PH., *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda: Justice without Lawyers*, Cambridge University Press, 2010.

¹⁰ See *inter alia* ZYBERI, G., 'Bosnian Special Court,' in A. CASSESE *et al.* (eds.), *Oxford Companion to International Criminal Justice*, Oxford University Press, 2009, pp. 258-259.

¹¹ More information on the support provided by the ICTY to strengthening the rule of law in the former Yugoslavia is available at: www.icty.org/sid/324#strengthening.

¹² See *inter alia* CADY, J-C AND BOOTH, N., 'Internationalized Courts in Kosovo: An UNMIK Perspective' in: ROMANO, C.P.R., NOLLKAEMPER, A., and KLEFFNER, J.K., (eds), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia*, Oxford University Press, 2004, at pp. 59-78; ZYBERI, G., 'Kosovo Special Courts,' in: CASSESE *et al.* (eds.), *Oxford Companion to International Criminal Justice*, Oxford University Press, February 2009, pp. 403-404.

3. REPARATIONS FOR VICTIMS OF ARMED CONFLICT

The protracted conflicts which took place in the territories of Bosnia and Herzegovina, Croatia, and Kosovo caused harm to numerous victims and extensive material damage. So did the brief armed clashes during 2001 in FYROM, albeit on a smaller scale.¹³ After many years of work it has been possible to gather some data regarding the loss of human life caused by these armed conflicts. The final estimate for the number of war victims in Bosnia and Herzegovina is 104,732. This estimate was produced in January 2010 after twelve years of data collection.¹⁴ According to evidence collected by the Office of the Prosecutor (OTP/ICTY) between 24 March and 22 June 1999, an estimated 10,356 ethnic Albanians were killed in Kosovo by Serbian forces.¹⁵ With regard to victims and missing persons throughout Croatia, the disparity of the numbers among the different sources did not allow for overall data to be presented in ICTY trials.¹⁶ While this information presented in ICTY proceedings through expert reports provides a partial picture of the

¹³ The cases linked to this conflict tried before the ICTY are those of Ljube Bošković (acquitted) and Johan Tarčulovski (sentenced to 12 years imprisonment).

¹⁴ More information on these issues is available on the section on War Demographics at: www.icty.org/sid/10562. See also ZWIERZCHOWSKI, J., and TABEAU, E., *The 1992-95 War in Bosnia and Herzegovina: Census-Based Multiple System Estimation of Casualties' Undercount*, 1 February 2010, Conference Paper for the International Research Workshop on 'The Global Costs of Conflict' The Households in Conflict Network (HiCN) and The German Institute for Economic Research (DIW Berlin) 1-2 February 2010, Berlin, available at: www.icty.org/x/file/About/OTP/War_Demographics/en/bih_casualty_undercount_conf_paper_100201.pdf.

¹⁵ See *inter alia* TABEAU, E., (ed.), *Conflict in Numbers: Casualties of the 1990s Wars in the Former Yugoslavia (1991–1999)*, Major reports by demographic experts of the Prosecution in the trials before the International Criminal Tribunal for the former Yugoslavia Testimonies no. 33, Helsinki Committee for Human Rights in Serbia, Belgrade, 2009, available at: www.helsinki.org.rs/doc/testimonies33.pdf.

¹⁶ More information is available at: www.icty.org/sid/10593.

armed conflicts' toll in terms of human lives lost, it cannot properly reflect the psychological suffering experienced by the individuals who went through those traumatic events.

In late 2000, the judges of the ICTY, through their President, suggested to the UN Security Council that the appropriate UN organs consider creating a special mechanism for reparations in the form of a claims commission.¹⁷ However, thus far this suggestion seems to have fallen on deaf ears. To date, the ICTY has not ordered any reparations for victims.¹⁸ In June 2010, the President of the ICTY, Judge Robinson, called upon the Security Council to take action and establish, as the International Criminal Court (ICC) has, without further delay, a trust fund for victims of crimes falling within the tribunal's jurisdiction, to complement the tribunal's criminal trials by providing victims with the resources necessary to rebuild their lives.¹⁹ President Robinson submitted a similar request on 11 November 2011 during his address to the UN General Assembly on the occasion of presenting the ICTY 2011 report.²⁰ It remains to be seen whether the UN or the countries concerned with the issue of reparations for victims will establish a claims commission, a trust fund or another mechanism in the coming years.

There have been a number of attempts by the countries emerging from the former Yugoslavia to support victims of crimes committed during the armed conflicts. However, as the examples

¹⁷ See the letter addressed to the UN Secretary-General by the President of the ICTY, UN Doc. S/2000/1063 (dated 12 October 2000), in Appendix 'Victims' compensation and participation,' at p. 18, para. 48. President Jorda stated that the judges, prosecutors, defence counsel and legal officers at the Tribunal agreed that the need, or even the right, of the victims to obtain compensation is fundamental for restoration of the peace and reconciliation in the Balkans.

¹⁸ Rule 105 of the ICTY Rules of Procedure and Evidence provides for the restitution of property and Rule 106 provides for compensation to victims. These rules are yet to be used.

¹⁹ See the ICTY Completion Strategy Reports of 18 May and 16 November 2011, respectively UN Doc. S/2011/316, paras. 88-90 and UN Doc. S/2011/716, paras. 57-59, available at: www.icty.org/tabs/14/1.

²⁰ More information is available at: www.icty.org/sid/10850.

used below illustrate, they have encountered a number of legal and practical problems both at the international and at the domestic level. There were no reparations, even in the form of symbolic compensation, awarded for the victims of the Srebrenica genocide in legal proceedings before the International Court of Justice (ICJ).²¹ The proceedings instituted before the Dutch domestic courts by the relatives of the victims of Srebrenica have had mixed results.²² On several occasions international monitoring mechanisms as the UN Committee against Torture (CAT), the UN Human Rights Committee (CCPR) and the Human Rights Commissioner of the Council of Europe have voiced serious criticism against Serbia for lack of adequate mechanisms to provide reparations to victims of human rights violations committed by the Serbian army and police in the 1990s.²³ Several lawsuits for reparations brought forth by the

²¹ Application of the Genocide Convention (Bosnia and Herzegovina v. Serbia and Montenegro), ICJ Reports 2007, pp. 232-236, paras. 459-469.

²² The case *Mothers of Srebrenica v. The Netherlands & the UN* was not successful. More information on this case is available at: www.haguejusticeportal.net/eCache/DEF/7/766.html. In its decision of 5 July 2011 in the Nuhanović v. The Netherlands case, The Hague Court of Appeals found that the Netherlands had to compensate the relatives of the victims, although there is not yet a final ruling on reparations. For more information see *inter alia*: www.sharesproject.nl/dual-attribution-liability-of-the-netherlands-for-removal-of-individuals-from-the-compound-of-dutchbat and for the whole text of the original judgment see: http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BR0132&u_ljn=BR0132 (in Dutch).

²³ See *inter alia* the Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe Following his visit to Serbia on 12-15 June 2011, CommDH(2011)29, 22 September 2011, paras. 24-27, available at: www.coe.int/t/commissioner/WCD/visitreports_en.asp#; Concluding remarks of the Human Rights Committee on the Implementation of the International Covenant on Civil and Political Rights in 2004 and 2011, respectively CCPR/CO/81/SEMO, 12 August 2004, paras. 7-15 and CCPR/C/SRB/CO/2, 20 May 2011, paras. 10 and 12, available at: www2.ohchr.org/english/bodies/hrc/sessions.htm; Concluding remarks of the UN Committee for the Prevention of Torture on the Implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Humanitarian Law Center of Belgrade, a well-known human rights NGO, on behalf of Kosovar Albanian victims or Bosnian victims have been unsuccessful. In a January 2012 report, the Humanitarian Law Centre concluded that the families of the killed Albanian civilians in Podujevo (Kosovo), as well as other victims of crimes committed by Serbian forces, have no legal instrument or remedy available in Serbia to allow them to exercise their right to fair financial compensation.²⁴ According to the Humanitarian Law Centre, practice has shown that the courts interpret unilaterally the provisions on statutory limitation of damage claims, in order to deny to Bosniak [sic] and Albanian victims of the Serbian armed forces the right to material reparations.²⁵

The trust fund for the victims proposed by the President of the ICTY could be a useful mechanism to establish appropriate reparations' programs, or at the very least to address the needs of the persons most gravely affected. However, even if there was adequate political will to establish a reparations mechanism, the key questions would remain, who would provide the necessary funds and what kind of procedures would such a mechanism employ.

4. PUBLIC PERCEPTION OF THE TRIBUNAL AND RECONCILIATION IN THE FORMER YUGOSLAVIA

Unsurprisingly, whether the public perceives the Tribunal as biased or even-handed affects its legitimacy and, in turn, its potential contribution to reconciliation in the conflict-torn societies of the

CAT/C/SRB/CO/1, 19 January 2009, p. 8, para. 18, available at: www2.ohchr.org/english/bodies/cat/cats41.htm.

²⁴ See Humanitarian Law Center, *Material Reparations for Human Rights Violations Committed in the Past: Court Practice in the Republic of Serbia*, Belgrade, January 2012, p. 46. See also the general conclusions on the legal framework and practice in Serbia in pp. 59-60. Report available at: www.hlc-rdc.org/wp-content/uploads/2011/12/Material_Reparations.pdf.

²⁵ *Ibid.*, p. 59.

former Yugoslavia.²⁶ However, ordinary Serbs, Croats, Bosnians, and Kosovars perceive the work of the ICTY as distant and abstract, even if their overall impression may be positive.²⁷ The Tribunal's impact, besides trying a limited number of individuals, probably would have been fairly minimal were it not for the strong support it has received over the years from the European Union and other international organizations. EU support has had a positive influence with regard to state cooperation, since cooperation with the ICTY has been one of the conditions for the integration of the former Yugoslav republics into the EU. Moreover, the EU has also offered generous support for the outreach activities of the Tribunal.

The perceived public legitimacy of the tribunal in the states emerging from the former Yugoslavia seems to have little to do with fair trial standards and outreach activities and more to do with the nationalist fervour for defending one's own account of the narrative of the conflict.²⁸ That said, the combined effects of the work of the tribunal—including the guilty pleas by the accused,²⁹ the decision of the International Court of Justice in the *Genocide* case,³⁰ the EU's influence, and efforts on the part of moderate elements of domestic

²⁶ ARZT, D.E., Views on the Ground: The Local Perception of International Criminal Tribunals in the Former Yugoslavia and Sierra Leone, *The ANNALS of the American Academy of Political and Social Science* (2006), pp. 226-239.

²⁷ See ROHT-ARRIAZA, N., 'The Role of International Actors in National Accountability Processes' in: DE BRITO, A.B., GONZALÉZ-ENRÍQUEZ, C. and AGUILAR, P., (eds.), *The Politics of Memory: Transitional justice in Democratizing Societies*, Oxford University Press, 2001, p. 58.

²⁸ See inter alia KAMMINGA, A., Seeds of the Future: 'Presence' of the Past in Relation to Ethnic Violence, 1 *KRISIS* (journal for contemporary philosophy) 2010, pp. 42-62.

²⁹ There have been twenty guilty pleas at the ICTY. In order for a plea of guilty to be accepted, the Trial Chamber has to be satisfied that it is voluntary, informed and unequivocal and that facts point to the accused's responsibility for the charged crime. More information on guilty pleas at the ICTY is available at: www.icty.org/sid/26.

³⁰ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, ICJ Reports 2007, p. 43.

politics and civil society to assess critically the role of Serbia in the Balkan conflicts in the 1990s—seem to have influenced, at least to some extent, existing popular narratives. This change was expressed, although half-heartedly, in a resolution adopted by the Serbian parliament in March 2010 implicitly acknowledging a certain degree of responsibility for the genocide committed in Srebrenica.³¹

Besides providing a narrative of the events surrounding the conflict and the crimes committed, the removal from the political scene of a number of high level accused who are put on trial at the ICTY has helped to create some of the necessary basic preconditions for a democratic transition. The prosecution of high-ranking political and military leaders by the tribunal has helped to trigger discussions within the affected societies about their response to the conflict and has also facilitated the emergence of new and more moderate leaders. However, the differing narratives taught at schools and the ethnic segregation which continues even though the conflicts have ended (Bosnia is one such an example, despite the long period of international administration), continue to obstruct the process of reconciliation.

5. REGIONAL TRUTH AND RECONCILIATION COMMISSION AS A WAY FORWARD?

The idea of establishing a regional truth and reconciliation commission (TRC) for the former Yugoslavia has been around for some time. The activity of such a mechanism could complement the

³¹ The relevant provision reads: “The parliament of Serbia strongly condemns the crime committed against the Bosnian Muslim population of Srebrenica in July 1995, as determined by the International Court of Justice ruling.” For more information see the English summary available at: www.parlament.rs/Third_Sitting_of_the_First_Regular_Session_of_the_.7296.537.html. For a brief discussion of this resolution see *inter alia* J. OBRADOVIC-WOCHNIK, ‘Serbia’s Srebrenica Declaration: A Small Step, but in the Right Direction,’ available at: www.iss.europa.eu/uploads/media/Serbias_Srebrenica_Declaration.pdf.

work of the ICTY.³² The idea of a TRC seems to be taking root and has the support of a considerable part of civil society, as well as the political authorities of some of the affected countries.³³ The Coalition for a Regional Truth and Reconciliation Commission for instance, a network of NGOs, associations, and individuals, is promoting the creation of a Regional Truth and Reconciliation Commission (RECOM or Commission). RECOM would be tasked with establishing the facts about all victims of war crimes and other serious human rights violations committed on the territory of the former Yugoslavia in the period from 1991 to 2001. While such a task would be an enormous challenge for any institution, a potential TRC would be able to build on the work done by the ICTY. While the ICTY is constrained by its strict legal procedures, the RECOM could provide a more complete narrative of the events which accompanied the violent breakup of the former Yugoslavia. Arguably, a narrative provided by the regional civil society would be more acceptable to the different ethnicities, furthering the reconciliation efforts and helping to provide closure to the victims.

In January 2011, the Parliamentary Assembly of the Council of Europe adopted a resolution backing this initiative.³⁴ According to the Parliamentary Assembly, a regional truth and reconciliation commission would be created with a view to reaching a mutual understanding of past events and to honouring and acknowledging all

³² See PEJIC, J., *The Yugoslav Truth and Reconciliation Commission: A Shaky Start*, 25 *Fordham International Law Journal* 2001, pp. 1-22.

³³ See for more details the document available at: www.zarekom.org/documents/Signatures-Collection-Campaign-Report-July-7-2011.en.html.

³⁴ Parliamentary Assembly of the Council of Europe, Resolution 1786 (2011), *Reconciliation and political dialogue between the countries of the former Yugoslavia*, 26 January 2011. In paragraph 4 the states that the Assembly particularly welcomes the initiative recently taken by a coalition of non-governmental organisations from the region to create a Regional Commission for Establishing the Facts about the War Crimes in the former Yugoslavia (RECOM) to document all crimes committed during the wars in order to honour and acknowledge all the victims.

the victims.³⁵ So far, the RECOM initiative has the support of the Montenegrin Parliament, the presidents of Serbia and Croatia, the European Commission, the Subcommittee for Human Rights of the European Parliament, the Foreign Affairs Committee of the Council of Europe's Parliamentary Assembly, the Serbian Parliamentary Committee for European Integration, and many individuals.³⁶ The proposed statute provides that the functions of RECOM would include recommending measures to help prevent the recurrence of human rights abuses and to ensure reparations to the victims.³⁷ In its final report, RECOM could recommend appropriate forms of material and symbolic reparations.³⁸ It remains to be seen, however, whether or not a RECOM statute can be agreed on, which countries agree to be involved, and what its impact will be on promoting peace and reconciliation in the region.

While being a promising initiative, RECOM's objectives and functions are no less ambitious and politically sensitive, despite the lapse in time.³⁹ Apart from issues relating to the financing of such a mechanism, which could potentially be resolved with the help of the EU,⁴⁰ the most formidable obstacles to RECOM's success might be the time factor and the lack of cooperation on the part of relevant state authorities. Time could prove to be an obstacle in two ways: first, the memory of many witnesses has generally faded and some of

³⁵ In paragraph 7.7, this resolution calls on the countries of the former Yugoslavia to support the establishment of a regional truth and reconciliation commission, with the participation of all countries involved in the conflicts, with a view to reaching a mutual understanding of past events and to honouring and acknowledging all the victims.

³⁶ More information on the consultations that have taken place is available at: www.zarekom.org/The-Coalition-for-RECOM.en.html.

³⁷ Art. 14(f) of the proposed RECOM Statute. The full text of this Statute is available at: [www.zarekom.org/uploads/documents/2011/04/i_836/f_28/f_1865_en .pdf](http://www.zarekom.org/uploads/documents/2011/04/i_836/f_28/f_1865_en.pdf).

³⁸ See Art. 45(2)(b) of the proposed RECOM Statute.

³⁹ See respectively Arts. 13 and 14 of the RECOM Statute.

⁴⁰ Art. 42(1) of the RECOM Statute reads: 'The commission shall be financed by funds provided by the Parties to the Agreement and through donations.'

them are no longer amongst us; second, under the current Statute RECOM would operate for a period of three years, which is a very limited timeframe for accomplishing its wide-ranging objectives.⁴¹ Moreover, going through the large number of relevant documents and materials, which can easily amount to millions of pages, is itself a herculean task, requiring a considerable amount of time.⁴² In addition, the functions of the Commission would have to be carried out by a limited number of no more than twenty commissioners.⁴³

The tasks of the Commission would include, among others, taking statements from victims, witnesses, representatives of institutions, and perpetrators;⁴⁴ collecting relevant documents;⁴⁵ field inquiries and visits to the scenes of crimes;⁴⁶ public hearings of victims and other persons;⁴⁷ and carrying out thematic sessions.⁴⁸ For RECOM to be able to accomplish its objectives, the current Statute needs to allocate more time to the Commission to complete its work. Another important issue which needs to be addressed properly in this Statute is a framework for settling disputes between RECOM and the parties in the case of non-cooperation.

6. CONCLUDING REMARKS

Dealing with past wrongs and coming to terms with their effects takes time in any society. In order for a transitional justice process to succeed in bringing a society together to build a peaceful and prosperous future, it needs to be accompanied by measures

⁴¹ According to Art. 6(1) of the RECOM Statute the timeframe of operation of the Commission shall be three years.

⁴² See Art. 18 of the RECOM Statute on collecting documentation.

⁴³ See Art. 23 of the proposed RECOM Statute on the composition of the Commission.

⁴⁴ See Art. 17 of the proposed RECOM Statute.

⁴⁵ See Art. 18 of the proposed RECOM Statute.

⁴⁶ See Art. 19 of the proposed RECOM Statute.

⁴⁷ See Art. 20 of the proposed RECOM Statute.

⁴⁸ See Art. 21 of the proposed RECOM Statute.

aimed at achieving economic and social justice,⁴⁹ both within and across borders. The normalization of relations between the countries that have emerged from the former Yugoslavia, especially between Serbia and Kosovo, is very important for sustainable peace and reconciliation in the Balkans.

Although arguably the public perception of the Tribunal is largely out of its hands, outreach efforts notwithstanding, the ICTY should continue to make sure that information on its activity is available and is properly explained to the people in the region. Although the Tribunal has indicted and tried persons across all of the afflicted ethnicities, the judgments rendered against some of the leading military or civilian figures have attracted the ire of the public either at home or abroad. Regrettably, the divergent narratives, kept alive among the individual parties, continue to support the notion of the Tribunal as being biased. That is true especially for Serbs, and to a lesser degree also for the other ethnicities.

Obviously, the criminal legal proceedings before the ICTY cannot expose the whole truth about the human tragedy which took place during the armed conflicts from 1991 to 2001 in the former Yugoslavia. However, these proceedings have triggered a chain reaction, the effect of which will continue to be felt long after the Tribunal closes its doors around 2015. The initiative of civil society in the countries emerging from the break-up of the former Yugoslavia to establish a regional truth and reconciliation commission provides an opportunity for reaching a mutual understanding of past events and giving more attention to victims and missing persons. With regard to reconciliation, RECOM may prove to be a more effective vehicle than the ICTY. Moreover, its activity might encourage domestic legal systems in the region to increase the reach of justice beyond the 161 persons indicted by the ICTY. If properly conceived and in turn supported by domestic

⁴⁹ See *inter alia* MCAULIFFE, P., Transitional justice and the Rule of Law: The Perfect Couple or Awkward Bedfellows, 2 *Hague Journal on the Rule of Law* 2010, pp. 127-154.

society and the relevant government authorities, RECOM might play an important role in continuing the efforts for peace and justice in the States emerging from the former Yugoslavia.

REPARATIONS AND ATONEMENT

ARE ALL VICTIMS ENTITLED TO REPARATIONS? THE CASE OF THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS

DIANA CONTRERAS-GARDUÑO

1. INTRODUCTION

Transitional justice processes date back to the Athenian transitions from oligarchy to democracy. However, the actual term is relatively new.¹ In modern history, transitional justice commenced after the Second World War. Hitherto, the prosecutions of the Nazi regime and the reparations programmes carried out by Germany after the war had a clear influence on transitional justice. The German steps represent a large scale effort which ‘was utterly unprecedented and remains unequalled’.²

Like Germany, Latin America has been at the forefront of debates about democratic transitions. Latin-America lived under the rule of authoritarian regimes for decades. During the twentieth century, Latin-American has been the home of bloody conflicts in which all persons who opposed the regime were considered enemies of the state. Enemies were subjects of persecution, extrajudicial executions, arbitrary detentions, tortures or forced disappearances by either state agents or people acting with the acquiescence of the states. Thanks to victims movements immense efforts were made to end the era of impunity and to open the door for the respect and implementation of human rights.³ Those efforts, coupled with

¹ TEITEL, R.G., ‘Transitional justice Genealogy,’ *Harvard Human Rights Journal* Vol. 16 (2003), pp. 69.

² ELSTER, J., ‘Closing the books: Transitional justice in Historical Perspective,’ Cambridge University Press (2004).

³ ALDANA-PINDELL, R., *et al.*, ‘In Vindication of Justiciable Victims’ Rights to Truth and Justice for State Sponsored Crimes,’ 35 *VAND. J. TRANSNAT’L L.* 1399, 1429 (2002).

economic and political crises, international pressure for the observance of universal human rights, *inter alia*, caused the fall of those regimes.

Enormous efforts at promoting justice and truth were undertaken to deal with the problems of the past. Numerous truth and reconciliation commissions were created, as well as administrative reparations programmes. Other measures were institutional reforms, prosecutions and commemorations throughout the region. Undoubtedly, victims' rights movements played an important role in the implementation of justice mechanisms.⁴

A special role was played by the Inter-American System of Human Rights (IASHR) – existing of Inter-American Court of Human Rights' (IACtHR) and the Inter-American Commission of Human Rights. It helped to enforce national projects of accountability and reparations through judicial decisions as well as non-judicial activities. The rulings deeply influenced the prosecution of past atrocities and recalled the imperative obligations that states have towards its victims. The jurisprudence of the Court provides with many standards to conduct national trials related to past abuses. For instance, it gives a definition of enforced disappearance;⁵ establishes the significance of the duties to prosecute and punish crimes of mass scale;⁶ establishes the right to truth that every victim has; establishes the obligation of states to remove all obstacles fostering impunity such as amnesty laws or the application of statute of limitations.

Furthermore, the Court's jurisprudence marked a new era of reparations for victims; its groundbreaking and holistic approach has served as a model for diverse reparations programmes around the

⁴ ALDANA-PINDELL, R., *et al.*, 'In Vindication of Justiciable Victims' Rightsto Truth and Justice for State Sponsored Crimes,' 35 *VAND. J. TRANSNAT'L L.* 1399, 1429 (2002).

⁵ I/A Court H.R., *Case of Velásquez-Rodríguez v. Honduras*, Merits. Judgment of July 29, 1988. Series C No. 4, paras. 149-150.

⁶ I/A Court H.R., *Case of La Cantuta v. Peru*, Merits, Reparations and Costs, Judgment of November 29, 2006. Series C No. 162, para.110.

world: globally and regionally. The IASHR undoubtedly joined the clamour of thousands of victims who were and are demanding “all the truth and as much justice as possible”,⁷ by encouraging the investigation of facts of violations and making enforceable the rights of the victims recognized by international law. In this light, a brief recollection of the rights of the victims seems to be appropriated.

Writing about victim’s rights in international law means taking for granted a constant and progressive transformation in the understanding of the concept of the victim, the role of victims in international proceedings, and their entitlements such as the right to reparation. This constant transformation is encouraged by the widespread concern for the protection of human beings through international instruments. It must be recalled that in the last century international law shifted from protecting states’ rights to the protection of individual rights, implying that relatively, fundamental rights are placed in a higher position than the rights of states. Because of this development, *the realization of justice* has become the primary goal of international law. Victims were given a centre position in the field.⁸

The IASHR has played a major role in the advancement of a better understanding of victim’s rights in international law; its developments as a victim-oriented system have been praised worldwide. In the realm of reparations, the system has proven to be the most progressive and comprehensive regional regime.⁹ In comparison to other international human rights bodies, the IACtHR has developed a broad range of reparations including the decree to prosecute and punish perpetrators, the identification of victim’s bodies to assure that bodies could be properly buried, the improvement of the life conditions of collective victims, the release

⁷ ORENTLICHER, D.F., ‘Settling Accounts’ Revisited: Reconciling Global Norms with Local Agency’ in *International Journal of Transitional Justice* (2007).

⁸ CACADO TRINDADE, A.A., ‘International Law for Humankind: Towards a New Jus Gentium,’ Leiden: Martinus Nijhoff, 2010.

⁹ FEYTER, KOEN DE, ‘Out of the Ashes: Reparation for Victims of Gross Human Rights Violations,’ Antwerpen: Intersentia, 2005, p. 357.

from prison of unlawful detainees, the reforms of national laws, and the awarding of a scholarship to fulfil the *project of life* of a victim. The innovative substantive remedies often serve as a remedial model for other international judicial and non-judicial bodies.

Because of the innovative reparations, scholars have studied the IACtHR's reparation approach skilfully. Yet, in their analyses, these academics have focused primarily on analyzing the kinds of reparations (collective and individual) or the forms of reparations (restitution, compensation, rehabilitation, satisfaction or guarantees of non-repetition) the Court has awarded.¹⁰ Little attention has been paid to the question how the system identifies the victims or the beneficiaries of the reparations. Significantly, jurisprudence of the Court shows that rules related to the identification of victims often limit the number of victims and beneficiaries in a given case. This limitation could result in a re-victimization; in other words, in an evident injustice.

In transitional justice it is suggested that victims place a centre-role and that their needs need to be addressed.¹¹ Victims and survivors play the role of reconstructing their properties, communities, and primarily, their lives. Reparations programmes can assist victims to shoulder their loss and reconstruct their lives. This makes them a vital element in transitional justice.

Furthermore, the important transitional justice scholar Jon Elster has stated that victims usually share two desires: i) to make the perpetrator suffer what they did, and ii) for the "harm to be undone".

¹⁰ PASQUALUCCI, J.M., 'Victim Reparations in the Inter-American Human Rights System: a critical assessment of current practice and procedure.' *Mich. J. Int'l L.*, 1996 – HeinOnline.; A.J.CARRILLO, 'The Relevance of Inter-American Human Rights Law and Practice to Repairing the Past in the Handbook of Reparations,' 2006., L. LAPLANTE, "Bringing Effective Remedies Home: The Inter-American Human Rights System, Reparations and the Duty to Prevention," *Netherlands Quarterly of Human Rights*, Vol. 22, No. 3, pp. 347-388, 2004.

¹¹ ALDANA, R., "Victim-Centered Reflection on Truth Commissions and Prosecutions as a Response to Mass Atrocities", *Journal of Human Rights*, 2006.

Reparations are an effective way to address the latest desire.¹² . However, for those reparations to take place one must identify victims. The identification of victims is of great importance in order to decide who is entitled to reparations. Here the importance of clear rules of defining and identifying victims.

The state of academic research calls for addressing the procedural rules for defining or identifying victims and beneficiaries. This discussion paper analyzes the question of reparations by addressing i) the concept of victims in the IASHR, and ii) victims as individualized/identified persons. By means of this analysis we hope to get closer to answering the bigger question: *are all victims entitled to reparations?*

2. THE CONCEPT OF THE VICTIM IN THE IACTHR

In his writings, former IACTHR Judge Cançado-Trindade has repeatedly stated that the imperative of international law is the *realization of justice*, or, the delivery of justice to victims. Victims are the ones seeking justice. Against this backdrop, the concept of victim is at the basis of international law. The definition of a victim in this field, and, more concrete in international human rights law, differs from the definition of persons entitled to reparations.

Under international law, there are only few documents that define the concept of victim. The first UN instrument defining victims is The 1985 Declaration on Basic Principles of Justice for Victims of Crimes and Abuse of Power. The definition is enshrined in article 1 and 2:

Article 1. "Victims" means 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

¹² DE GREIFF, P., 'The Handbook of Reparations,' Oxford University Press, USA (2006).

operative within Member States, including those laws proscribing criminal abuse of power.

Article 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 dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.¹³

The definition of victims given in the Victims Declaration was mirrored in the 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.¹⁴ However, in this document the concept of victim was expanded by including not only persons who, individually or collectively, have suffered harm, but also and “[w]here appropriate, and in accordance with domestic law, [...] 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.”¹⁵

The Universal Declaration of Human Rights and the binding international human rights instruments fail in providing a definition of victims.¹⁶ However, these documents do provide for “remedies”, “redress”, “compensation” or “reparation” for the ones who had

¹³ See: <http://www.coe.int/t/dghl/standardsetting/victims/Declaration%20of%20Basic%20Principles%20of%20Justice%20for%20Victims%20of%20Crime%20and%20Abuse%20of%20Power.pdf> [last accessed January 15th, 2012].

¹⁴ <http://daccessdds.un.org/doc/UNDOC/GEN/N05/496/42/PDF/N0549642.pdf?OpenElement>.

¹⁵ Principle 8 of the UN Basic Principles.

¹⁶ The International Convention for the Protection of all Persons from Enforced Disappearance also provides for a definition of victim in its article 24 (1) which reads as follows: For the purposes of this Convention, "victim" means the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance.

suffered harm.¹⁷ In order to be granted a remedy one must be a victim or recipient of such a remedy. The question therefore remains: how can a state grant remedies when it is not clearly defined who is a victim and who is not?

An official definition of the victim is also lacking in the Inter-American System. The founding document of the Inter-American Court of Human Rights, the American Convention on Human Rights, does not set forth a concept. Rather, Article 63 states that upon the determination of state's responsibility for the violations of a right or freedom protected by the Convention, the Court shall rule that the 'injured party' be ensured the enjoyment of his right or freedom that was violated and, if appropriate, be paid a fair compensation. The 'injured party' comprises persons whose rights violation arose from the facts lead to a State's international responsibility, as well as persons whose violated rights arose from the State's violations committed against the former. We could conclude that the term includes persons who *directly* and *indirectly* suffered from a specific violation protected by the Convention.

Only since 1991, the Rules of Procedure of IACtHR (RP) contains a direct reference to the concepts of 'alleged victim' and 'victim'. The Rules indicate that an alleged victim becomes a victim after the determination of violations enshrined in the American Convention.

It is important to note that the American Convention is not the only regional human rights instrument silent in regards to the definition of victim. The European Convention on Human Rights (ECHR) also does not define the concept of victim. Article 34 simply

¹⁷ DECLARATION OF HUMAN RIGHTS (UDHR) (Art. 8); International Covenant on Civil and Political Rights (ICCPR) (Art. 3, 9.5); International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (Art. 13, 14); International Convention on the Elimination of All Forms of Racial Discrimination (CERD) (Art. 6); UN Convention on the Rights of the Child (CRC) (Art. 9); European Convention on Human Rights (ECHR) (Art. 5, 50); American Convention on Human Rights (Art.10, 25, 63(1)).

states that the Court may receive applications from those claiming to be the victim of violations by one of the High Contracting Parties, and Article 41 provides that once the Court finds a State responsible for a violation of the Convention, shall, if necessary, afford just satisfaction to the ‘injured party’.

Similar to its European counterpart, the IACtHR has distinguished between, and recognized, direct and indirect victims. In the jurisprudence of the IACtHR, the concept of indirect and direct victims is found in the opinions of some of the Judges.¹⁸ However, it is important to point out that this Court does not utilize the wording of direct or indirect victims in its jurisprudence.

- Direct and Indirect Victims

It must be noted that in its initial jurisprudence the Court focused more on the foundation of international responsibility which includes the obligation of repair, rather than in defining victims. Nevertheless, since this initial jurisprudence the Court has acknowledged that “next of kin” were affected by the violations against the victims, and suffered damage as a result. Since this damage was directly related to the illicit acts for which a state was responsible, those “next of kin” were entitled to reparations.¹⁹ This reasoning clearly shows that regardless the official implementation of the concepts of direct and indirect victims, this distinction was already made in practice by differentiating between “victims” and “next of kin”.

¹⁸ I/A Court H.R., *Case of Bámaca-Velásquez v. Guatemala*. Merits. Judgment of November 25, 2000. Series C No. 70: Opinion Judge Cançado-Trindade and Opinion Judge García-Ramírez.

¹⁹ I/A Court H.R., *Case of Velásquez-Rodríguez v. Honduras*. Merits. Judgment of July 29, 1988. Series C No. 4, par. 192; *Case of Godínez-Cruz v. Honduras*. Merits. Judgment of January 20, 1989. Series C No. 5, par. 203, *Case of Aloeboetoe et al. v. Suriname*. Merits. Judgment of December 4, 1991. Series C No. 11, par. 17.

In later jurisprudence, the Court has upheld that victim's next of kin are also victims and therefore are owed reparations.²⁰ Victims, therefore, are defined by the Court as persons who *directly* and *indirectly* suffer from a specific violation protected by the American Convention. This reaffirms our conclusion that the concept of victims includes persons who *directly* and *indirectly* suffered from a specific violation protected by the Convention.

The definition of victims by the IACtHR's seems in line with ECtHR's definition of this term. This Court has upheld that the word 'victim' denotes "the person directly affected by the act or omission which is in issue".²¹ Yet, when there is sufficient proof of a direct link between the direct victim and a next of kin, the latter can legitimately claim to be a victim.²² The ECtHR has also adopted the approach that when dealing with victims who have suffered directly and indirectly from a given violations, all are to be considered *direct victims*.

These direct victims comprise of persons whose rights violation arose from the facts lead to a state's international responsibility and persons who suffered from anguish, distress or any other disturbance which could amount a violation of their rights. For instance, in enforced disappearances cases, the next of kin are believed to suffer a prolonged anguish, distress and often denial of justice. Therefore, those persons could legitimately claim to be victims of ill-treatment or access to justice.²³ In extraordinary cases,

²⁰ I/A Court H.R., *Case of La Cantuta v. Peru*. Merits, Reparations and Costs. Judgment of November 29, 2006. Series C No. 162.

²¹ E/Court H.R., *Cases of Wilde, Ooms and Versyp ("Vagrancy") v. Belgium*, Judgment of June 18, 1971, paras 23-24; E/Court H.R., *Case Amuur v France*, Judgment June 25, 1996, par. 36.

²² E/Court H.R., *Case Yaşa v. Turkey*, Judgment of September 2, 1998. Reports of Judgments and Decisions 1998.

²³ E/Court H.R., *Case of Kurt v. Turkey*, Judgment of May 25, 1998, Reports of Judgments and Decisions 1998.

the European Court has also recognized those applicants who can be *potentially affected* by an act or omission in issue as victims.²⁴

It is interesting to note that contrary to Human Rights Courts' avoidance of the terms direct and indirect victims, in international criminal law a distinction between direct and indirect victims is provided by the Rules of Procedure and Evidence ("RPE"). Under the RPE, rule 85 (a) establishes that a direct victim is one who has suffered harm as a result of the commission of a crime within the jurisdiction of the Court. Jurisprudence of the International Criminal Court has pointed out that indirect victims are those who have suffered harm as a result of the harm suffered by direct victims.²⁵ It has been suggested that this normative construction was, to a great extent, inspired by the IASHR even though the latter do not utilize this wording.²⁶

It is praised that despite the lack of a definition for victim in the confines of the American Convention, the IASHR has thrived in providing the foundation for the effective protection of victims by including not only direct but also indirect victims as terms. It has therefore contributed to the development of a better protection of victims in the field of international law

- Injured Party

Under the IACtHR's jurisprudence, establishing the injured party necessarily implies the identification of the victims of a certain violation of the Convention. Jurisprudence shows that the terms

²⁴ E/Court H.R., *Case of Klass and Others v. Germany*, Judgment of 6 September 1978, paras. 37 and 56., *Case of Open Door and Dublin Well Woman v. Ireland*, paras. 41, 43 and 98.

²⁵ ICC-01/04-01/06-1813 (Trial Chamber I), 8 April 2009, par. 44.

²⁶ OLÁSULO H. AND GALAIN P., "La influencia en la Corte Penal Internacional de la jurisprudencia de la Corte Interamericana de Derechos Humanos en material de acceso, participación y reparaciones de víctimas", KONRAD, 2010, pp. 379-427. See: http://www.kas.de/wf/doc/kas_23685-1522-4-30.pdf?110823001043 [last accessed January 15th, 2012].

victims and injured party has been used interchangeably but this issue has been never been addressed by the Court.²⁷

In its early case law, the European Court has held that the term “injured party” is synonymous with the term “victim”.²⁸ Yet, the Court changed its approach with respect to later cases and embraced a broader concept of injured victims. This concept comprised not only victims of violations of the ECtHR, but also persons that may be affected as they suffered harm connected to the suffering of the direct victim, even though those persons were not declared victims of violations of any right by the Court.²⁹

The idea of an injured party being synonymous to a victim and the reference to both “victims” and “next of kin”, seems to prove that the IACtHR in its initial jurisprudence had a limited interpretation of the term victim. This is not entirely true, because since its first judgment of *Velásquez Rodríguez* the Inter-American Court, stated that the “next of kin” suffered harm resulted of the direct victim’s rights violations and consequently, they were entitled to reparations.³⁰ Thus, the Court deemed that “victims” and “next of kin” were entitled to receive reparations which in turn are also synonyms with “injured party”.

At first glance, elaborating in the differences of these terms might create confusion, but a deeper analysis shows clearly that the concept of victim and injured party evolved to ensure a better protection of all victims. In this line, Cançado-Trindade has stated that ‘the concept of “victim” itself has evolved and expanded, and so

²⁷ I/A Court H.R., *Case of Velásquez-Rodríguez v. Honduras*. Interpretation of the Judgment of Reparations and Costs. Judgment of August 17, 1990. Series C No. 9, para.27.

²⁸ E/Court of HR, *Case of De Wilde, Ooms and Versyp (“Vagrancy Cases”) v. Belgium*, Judgment of March 10, 1972.

²⁹ E/Court of HR., *Case of Aktas v Turkey*, Judgment of October 23, 2003, para. 364.

³⁰ I/A Court H.R., *Case of Velásquez-Rodríguez v. Honduras*. Reparations and Costs. Judgment of July 21, 1989. Series C No. 7.

have the parameters of protection owed to the justiciable ones and the circle of protected people'.³¹

3 VICTIMS AS INDIVIDUALIZED, IDENTIFIED PERSONS

As discussed in the antepenultimate paragraph, the IACtHR uses different terms when defining the recipients of reparations. Those concepts are 'victims', 'injured party', 'next of kin' and also 'beneficiaries'. According to article 63, to be *titulaire* of reparations, a person must be deemed an 'injured party'. And to be an 'injured party' a person must be considered a 'victim'.

Although the American Convention does not elaborate on the concept of victim, the Court has constructed a definition of it in its jurisprudence which seems in line with the first definition of victim in international law given by the Victims Declaration.³² The definition is restricted to physical persons as the Court has upheld in several judgments that "every individual has human rights, [and any] violation of those rights be examined on an equally individual basis."³³ Interestingly, it also establishes that the alleged victims

³¹ I/A Court H.R., *Case of La Cantuta v. Peru*. Merits, Reparations and Costs. Judgment of November 29, 2006. Series C No. 162. Opinion Judge Cançado-Trindade, para. 60.

³² DECLARATION ON BASIC PRINCIPLES OF JUSTICE FOR VICTIMS OF CRIMES AND ABUSE OF POWER (the "Victims Declaration") on 29 November 1985. Article 1: "Victims" means 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. Article 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.

³³ I/A Court H.R., *Case of the "Juvenile Reeducation Institute" v. Paraguay*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 2, 2004. Series C No. 112, para. 106.

“must be properly identified and named in the application that the Inter-American Commission files with this Court”.³⁴ It is necessary to highlight that the Court has also recognized the existence of victim groups.³⁵ When dealing with indigenous groups, the Court has taken account of the importance to include cultural perspectives. For example, the impact of violations made to a person or various persons belonging to a group will not only have an individual impact, but also a collective one. For cultural reasons, the harm done by human rights violators affects the group as a whole.

However, this is not *jurisprudence constante* because the same Court has accepted the Commission to include more persons as victims, who were not mentioned in the application, in a later stage. The Court has considered that these inclusions were fair due to the fact that upon the Commission’s request, the respondent state is given time for submitting observations, in other words, to object the Commission’s request. However, when former does not object it, the inclusion might be granted. The Court, therefore, considered appropriate and in accordance to the state’s right to defense, to include more victims to the original application.³⁶ Furthermore, the Court has not only allowed the Commission to include victims in a later stage, whenever the respondent states do not object this petition, but also when dealing with a large number of victims, mainly, in cases concerning massacres or indigenous people.

- Procedural Rules

³⁴ I/A Court H.R., *Case of the "Juvenile Reeducation Institute" v. Paraguay*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 2, 2004. Series C No. 112, para. 109.

³⁵ I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay*, Merits, Reparations and Costs, Judgment of June 17, 2005. Series C No. 125, para. 176.

³⁶ I/A Court H.R., *Case of the Moiwana Community v. Suriname*. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 15, 2005. Series C No. 124, paras. 72-74.

During contentious process, international tribunals must identify the alleged victims themselves or through diverse bodies or commissions pursuant of a normative instrument. Former IACtHR Judge, García- Ramírez has stated that this is “a matter of fundamental importance in international human rights law, both because of its substantive implications - to identify the passive subject of the injury, holder of the affected rights and others generated by the respective conduct - and because of its procedural consequences - to define the competency and the corresponding capacity to act at different moments of the proceeding.”³⁷ The first substantive implication constitutes the basis to define the injured party and thereby the recipient of reparations.³⁸

Before discussing the rules of procedure related to the identification of victims in contentious cases before the Court, it is important to mention that provisional measures can be provided to those who can be identified and not necessarily individualized.³⁹ An in-depth analysis of provisional measures far exceeds the scope of this paper and it is enough to point out that the rules governing the identification of victims in litigious cases are not applicable to provisional measures cases.

Turning to the issue of identifying victims, it is important to stress that nothing in the binding documents governing the IASHR makes any reference to which organ does have the duty to identify the victims of an alleged violation. However, the IACtHR has found that some of its instruments do actually offer enough guidelines to

³⁷ I/A Court H.R., *Case of Bámaca-Velásquez v. Guatemala*. Merits. Judgment of November 25, 2000. Series C No. 70: Opinion Judge García-Ramírez, para.2

³⁸ I/A Court H.R., *Case of La Cantuta v. Peru*. Merits, Reparations and Costs. Judgment of November 29, 2006. Series C No. 162, para.201.

³⁹ I/A Court H.R., Order of the Inter-American Court of Human Rights of November 24, 2000 Provisional Measures in the matter of the Peace Community of San José de Apartadó regarding Colombia, Order of the Inter-American Court of Human Rights of July 5, 2004 Provisional Measures regarding Colombia Matter of Pueblo Indígena de Kankuamo.

define the body that bears this responsibility. Despite the latter, it remains quite unclear the procedural moment of such identification.

As said, the normative instruments of the IASHR do not make any specific reference to when the procedural moment to identify victims is and who bears this responsibility.

However, the Court has come to the conclusion that pursuant article 50 of the American Convention and art 33 (1) of the Court's Rules of Procedure, alleged victims must be indicated in the application and in the Commission's Report. According to this interpretation it is for the Commission, and not the Court, to identify the victims in any case before the Court:

“The Court considers that, in accordance with Article 33(1) of the Rules of Procedure of the Court, it corresponds to the Commission, and not to the Court, to identify precisely the alleged victims in a case before the Court.”⁴⁰

“According to Article 50 of the Convention, the alleged victims must be indicated in the application and in the Commission's report.”⁴¹

Failure to fulfil this rule, the Court can refuse to include additional persons as victims in a later stage and those persons therefore, would not be granted the status of victims. However, this position was not endorsed in the Court earlier jurisprudence.⁴²

⁴⁰ I/A Court H.R., *Case of the Ituango Massacres v. Colombia*. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 1, 2006 Series C No. 148, para. 98., *Case of the Plan de Sánchez Massacre v. Guatemala*. Merits. Judgment of April 29, 2004. Series C No. 105, para.48; *Case of Montero Aranguren et. al. (Detention Center of Catia) v. Venezuela*. Merits, Reparations and Costs. Judgment of July 5, 2006. Series C No. 150, para. 33

⁴¹ I/A Court H.R., *Case of the Ituango Massacres v. Colombia*. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 1, 2006 Series C No. 148, para. 91.

⁴² /A Court H.R., *Case of Bámaca-Velásquez v. Guatemala*. Reparations and Costs. Judgment of February 22, 2002. Series C No. 91, para. 36; *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of August 31, 2001. Series C No. 79 where the court granted reparation to the “community” without further individualization of its members; *Case of Barrios Altos v. Peru*, Judgment of November 30, 2001. Series C No. 87, para. 31; *Case*

It is important to note that this interpretation qualifies as “creative” because it is difficult to find in the both article 50 of the American Convention and article 33.1 of the RP any reference neither to the organ responsible nor to the procedural moment of the identification of victims. Nor the Court has ever put forward the foundations of its reasoning.

Article 50 1. If a settlement is not reached, the Commission shall, within the time limit established by its Statute, draw up a report setting forth the facts and stating its conclusions. If the report, in whole or in part, does not represent the unanimous agreement of the members of the Commission, any member may attach to it a separate opinion. The written and oral statements made by the parties in accordance with paragraph 1.e of Article 48 shall also be attached to the report. 2. The report shall be transmitted to the states concerned, which shall not be at liberty to publish it. 3. In transmitting the report, the Commission may make such proposals and recommendations as it sees fit.

Article 33.1. 1. The case shall be presented to the Court through the submission of the report to which article 50 of the Convention refers, which must establish all the facts that allegedly give rise to a violation and identify the alleged victims. In order for the case to be examined, the Court shall receive the following information: a. the names of the Delegates; b. the names, address, telephone number, electronic address, and facsimile number of the representatives of the alleged victims, if applicable; c. the reasons leading the Commission to submit the case before the Court and its observations on the answer of the respondent State to the recommendations of the report to which Article 50 of the Convention refers; d. a copy of the entire case file before the Commission, including all communications following the issue of the report to which Article 50 of the Convention refers; e. the evidence received, including the audio and the transcription, with an indication of the alleged facts and arguments on which they bear. The Commission shall indicate whether the evidence was rendered in an adversarial proceeding; f. when the Inter-American public order of human rights is affected in a significant manner, the possible appointment of expert

of the Caracazo v. Venezuela, Judgment of August 29, 2002. Series C No. 95, para.73.

witnesses, the object of their statements, and their *curricula vitae*; g. the claims, including those relating to reparations.⁴³

Notwithstanding the interpretation of the Court, in cases of multiple victims, such as cases involving indigenous communities or massacres, the Court has granted both the inclusion of victims in later stage and collective reparations to persons who could not be identified in the proceeding but were *identifiable*.

‘In the instant case, some of the next of kin displaced [...] have been identified in the proceeding before this Court. In this regard, the Court decided in this Judgment that non-identification of all the next of kin of the victims is due to the very circumstances of the massacre and to the deep fear they have suffered [...].’⁴⁴

The Court, on the one hand, has ruled that the alleged victims must be indicated in the application and in the Commission’s report, but on the other hand, has been flexible in the application of its own interpretation.

However, owing to the particularities of each case this has not always been so, and the Court has therefore considered as alleged victims persons who were not alleged as such in the application, provided that the right to defense of the parties has been respected and that the alleged victims have some connection with the facts described in the application and the evidence provided to the Court.⁴⁵

These two exceptions to the rule find their grounds with on the complexity of specific cases. In cases related to indigenous people,

⁴³ This article was amended in the New Rules of the Court of 2009 and the entirely text is currently found in article 35.

⁴⁴ I/A Court H.R., *Case of the Mapiripán Massacre v. Colombia*. Merits, Reparations and Costs. Judgment of September 15, 2005. Series C No. 134, par. 183.

⁴⁵ I/A Court H.R., *Case of the Ituango Massacres v. Colombia*. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 1, 2006 Series C No. 148, para. 91.

the Court deals with violations suffered by specific groups whose entire members sometimes cannot be individually identified because these communities usually “have obstacles to register their births, deaths, and changes in their civil status, as well as to obtain any other identification document.”⁴⁶ In cases of massacres, the Court has decided that “non-identification of all the next of kin of the victims is due to the very circumstances of the massacre and to the deep fear they have suffered”.⁴⁷ It is also important to note that in cases with a large number of victims, the Court has also ordered, for instance, that such victims must be identified after the judgment is delivered by documentation presented to competent authorities within a fixed period of time.⁴⁸

These two exceptions to the rule seem fair. However, the problem arises in cases that are not related to indigenous people or massacres. If the Commission does not identify all victims in its application and its report, the Court can simply refuse the addition of more victims to the original application.

It is appropriate mentioning that under the IASH, only the Commission and States parties to the American Convention may refer cases to the Court. After receipt of an individual application, the Commission examines and assesses it and seeks for a friendly settlement. If no agreement between the parties is reached, the

⁴⁶ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, para. 73.

⁴⁷ I/A Court H.R., *Case of the Mapiripán Massacre v. Colombia*. Merits, Reparations and Costs. Judgment of September 15, 2005. Series C No. 134, para. 183.

⁴⁸ I/A Court H.R., *Case of the Mapiripán Massacre v. Colombia*. Merits, Reparations and Costs. Judgment of September 15, 2005. Series C No. 134, para. 257, *Case of the Ituango Massacres v. Colombia*. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 1, 2006 Series C No. 148, para. 358; *Case of the Plan de Sánchez Massacre v. Guatemala*. Reparations and Costs. Judgment of November 19, 2004. Series C No. 116, *Case of the Plan de Sánchez Massacre v. Guatemala*. Reparations and Costs. Judgment of November 19, 2004. Series C No. 116, para. 67.

Commission may refer the case to the Court. During the first years of existence of this system, the Commission represented victims in the Court's proceedings. This is not longer the case as the procedural rules have changed, and the victims were given a limited position before the Court. Although, victims or their representatives have no *locus standi* before the Court, they are afforded the right to "present their pleadings, motions and evidence autonomously."⁴⁹ In those briefs the representative can assert the existence of more victims that of the mentioned in the application.

The Court, however, has been inconclusive as to whether the inclusion of victims by the representatives retrieves the Commission's omission and therefore determines that these victims are to be included in the original application. In some cases, the Court has accepted the request of including victims not mentioned in the report and application of the Commission, by the representatives:

'the Court takes into account that such persons were mentioned by the representatives in their brief of requests and arguments, before the State filed its answer to the application and admission, that is to say, they were included in such admission. Consequently, this Court shall consider them as next of kin of the alleged victims'.⁵⁰

Yet, in other cases, the Court has observed that if the Commission did not mention all the victims in its application and report, the representatives could not correct this omission:

'Commission did not declare [the victim's brothers and sisters] as victims of any violation whatsoever in its Report on Merits and that in the application it identified Mrs. Reverón Trujillo as the only beneficiary of the

⁴⁹ Art 23 of the Court's rules.

⁵⁰ I/A Court H.R., *Case of Montero-Aranguren et al.* (Detention Center of Catia) v. *Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 5, 2006. Series C No. 150, para. 36.

reparations. Therefore, the Tribunal, pursuant with its jurisprudence, will not consider the next of kin of the victim as an injured party.⁵¹

Hitherto, we have found that the IACtHR has ruled that the procedural moment to identify victims is in the application and report sent to the Court by the Commission and therefore, the latter bears such responsibility. However, there are exceptions to the rule: (i) *indigenous people cases*; (ii) *massacres cases*; (iii) *when the respondent State does not object a Commission's request of including victims, and (iv) "sometimes" when the representative of the victims, in the brief of request and arguments, assert the existence of more victims that of the mentioned in the application to the Court.*

The unclear standard as to when the representatives of victims could include more victims to the original application seems to be in contradiction to the main purpose of the IASHR, the respect of human rights protected by the Convention and to the *pro homine* principle.⁵²

Furthermore, the Court has the discretion to review whether a victim mentioned in the application is entitled to reparations or not. If there is no evidence to prove that a person was a victims of some violation of a right enshrined in the American Convention, the Court can rule that such person is not be nominated "injured party" and thereby is not entitled to reparations.⁵³ This calls for the question why the Court has not the discretion to review whether all victims are mentioned in the application and Commission's report. Perhaps, the answer can be found in the workload that this step would be for

⁵¹ I/A Court H.R., *Case of Reverón-Trujillo v. Venezuela*. Preliminary Objection, Merits, Reparations, and Costs. Judgment of June 30, 2009. Series C No. 197, para. 158.

⁵² Article 29 of the American Convention.

⁵³ I/A Court H.R., *Case of Tristán-Donoso v. Panama*. Preliminary Objection, Merits, Reparations and Costs. Judgment of January 27, 2009. Series C No. 193, para.180.

the Court and its imminent financial cost. Notwithstanding this, the Court is supposed to ensure the protection of the rights enshrined in the Convention equally to everyone and not only to some ones. While it is understandable that some procedural rules need to be implemented in order to provide certainty as to how proceedings are carried out in the system, the Court should also take account of the interests of the victims. The Court certainly can correct the omissions made by the Commission, this could present an extra financial cost to the Court, but this could prevent the re-victimization of some of the people who have paid the consequences of conflict.

Significantly, the Court leaves a door open for including victims in a later stage. The Court accepts, ‘pursuant to Article 43 of the Rules of Procedure, the evidence submitted by the parties with regard to supervening events occurring after the application had been filed’.⁵⁴ The addition of more victims to the original application, thus, could be done through the proof of supervening facts. Nevertheless, there has not been any practice on it.⁵⁵

4. CONCLUSION

Pursuant article 63 of the American Convention, the Court shall grant reparations to the injured party, which implies the identification of the victims during the contentious process. If a victim is not duly identified, they cannot be nominated injured party and consequently nor can they be guaranteed the enjoyment of his right or freedom violated and awarded reparations.

In the absence of a specific rule regarding the procedural time to identify victims, the Court has ruled that, pursuant the Convention and its Rules of Procedure, the alleged victims must be indicated in

⁵⁴ I/A Court H.R., *Case of the “Five Pensioners” v. Peru*. Merits, Reparations and Costs. Judgment of February 28, 2003. Series C No. 98, para. 84.

⁵⁵ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, para 69. See the case in Spanish as the translation contradicts the original wording.

the application and in the Commission's report. Notwithstanding this, the Court has been flexible in cases of multiple victims due to their complexity, and "*sometimes*" when the omission of victims in the application is corrected by the victim's representatives.

Unfortunately, the jurisprudence of the IACtHR does not provide a coherent approach in this matter. It rather shows that an omission from the Commission, which does not have the role of representing victims, can cause an avoidable evident injustice. This seems to be in completely contradiction of the most commendable goal of the IACtHR and the principle *pro homine*.

On the one hand, international law establishes that "all victims of human rights are entitled to receive reparations," but the case of the IACtHR clearly shows that this is not entirely true. It is hope that further jurisprudence of the IACtHR acknowledge the need of the Court of having discretion when reviewing both whether victims mentioned in the application are to be injured party and whether all victims of a given case are included in the application. This could have a great positive impact to all judicial and non-judicial mechanisms that have mirror the reparation approach of the IASHR.

My suggestion is that the Court creates a specific body to deal with the identification of all victims in order to provide justice equally. Should the Court refuse to do so, it could at least acknowledge victims who are identified after the report of the Commission is submitted to the Court by the legal representatives without making a distinction to the nature of the case. For many victims in the region, justice at the national level is still much of an illusion due to juridical obstacles at the domestic level. In this light, the Court has always been there to uphold the highest standards of victims' protection in the region. It is now just a matter of doing this equally.

**A JUST PEACEMAKING PROCESS:
THE UN'S INTEGRATION OF TRANSITIONAL JUSTICE
WITH DDR**

MICHAEL BUCKLEY & NICHOLAS TOMB

**1. INTRODUCTION:
COORDINATING PEACEBUILDING EFFORTS**

Disarmament, Demobilization and Reintegration (DDR) practitioners have long known that successful DDR programmes depend on reaching atypical combatants like women and children. They are also well aware that successful peacebuilding operations require coordination among various peacebuilding programmes, such as DDR, Security Sector Reform (SSR), and Transitional justice (TJ). But only recently has the United Nations developed an expansive approach to DDR that coordinates its efforts with cross cutting issues such as gender, youth, children, disabled persons, SSR and TJ.¹ The guidelines and policies of this expansive approach are collected in the Integrated Disarmament, Demobilization and Reintegration Standards (IDDRS), which includes a new module identifying linkages between DDR and Transitional justice. Facilitating communication and coordination between these two programmes is essential for a just peacebuilding process. For in the absence of further coordination, peacekeeping practitioners could unwittingly perpetrate the very injustices they seek to eradicate.

To illustrate the moral pitfalls of uncoordinated efforts, take the experience of one female combatant, 'Ellen'. 'Ellen' was 15 years old when war descended upon her country. One day, opposition forces swarmed into her village. 'They went from door to door to

¹ UN Disarmament, Demobilization and Reintegration Resource Center, Integrated Disarmament, Demobilization and Reintegration Standards Framework (IDDRS), available at <http://www.unddr.org/iddrs/>, 1.10, p. 3.

search for civilians. We could hear them in the street. When they came to our house they kicked the door. We were hiding ourselves under the beds. They killed my parents and they raped me'.² Her family slaughtered and her home razed, Ellen was subsequently kidnapped, beaten, and repeatedly raped. Eventually, a mid-level officer offered to take her as his 'war wife'. Confronted with the option of going with him or continuing as she was, she went with him. 'So from now on I was part of the group and as the wife of a fighting man I was ensured that the other men of this group did not rape me anymore [...] But instead I had to do only sexual favors for my boyfriend. I never liked my boyfriend but everything was better than to live every day in fear to be [*sic*] raped by this group'.³ Ellen stayed with the rebel leader over the next several years. She cooked for him and his fellow soldiers, tended their wounds after battle, gave birth to a child, then a second.

One day, Ellen received word that the war had ended. A peace treaty had been signed and a United Nations peacekeeping force was coming to assist with the transition to peace. A Disarmament, Demobilization, and Reintegration (DDR) programme was set up to collect weapons and provide job training for former combatants. Ellen visited the camp where services were offered and contemplated registering. But she faced several challenges. She had no weapon and therefore no proof she was a member of the armed faction. She had young children to care for, and she worried about the social stigma attached to being a 'war wife'. Ultimately, she decided against registering with the camp, stating: 'I don't want to go to the DD [camp] and talk with a counselor what happened to me [*sic*], I don't

² SPRECHT, IRMA, International Labor Organization, 'Red Shoes: Experiences of girl-combatants in Liberia,' available at http://www.ilo.org/employment/Whatwedo/Publications/WCMS_116435/lang--en/index.htm, p. 33. This seminal work documents the personal testimonies, experiences, and decision-making processes of female combatants during Liberia's fourteen years of war and its difficult post-conflict period, providing insight into the challenges women face during times of conflict and political transition.

³ *Ibidem* at pp. 53, 54.

think that is what is good for me. I just want to forget'.⁴ As she left the camp, she saw the young men that served with her 'husband', the young men who destroyed her life. They were signing up with the program, getting stipend payments, new clothes, and job training. They had big smiles on their faces and laughed loudly. Tears blurred Ellen's vision as she walked back to her home. The smiles haunted her thoughts; the laughter rang in her ears. From deep within herself she heard a voice ask, 'where is the justice'?

'Ellen's' case is just one example of how peacebuilding operations can unintentionally exclude people from the scope of justice. To ensure justice for 'Ellen' and her children and avoid accidental exclusions, the various elements of the peacebuilding process must be coordinated. The United Nations is working toward this end by developing the *IDDRS*. This paper summarises the *IDDRS* module on transitional justice and discusses various ways coordinated efforts between TJ and DDR can facilitate a just peacebuilding process.

2. IDDRS MODULE 6.20: TRANSITIONAL JUSTICE AND DDR

The IDDRS module on transitional justice is intended to inform policymakers and program planners of potential linkages between DDR and TJ measures. It describes common TJ mechanisms and the legal framework within which coordination efforts between DDR and TJ should develop.⁵ As a result, it predominately focuses on international humanitarian and human rights law, and standard TJ efforts such as prosecutions, reparations, truth commissions, and institutional reform. However, it also articulates the motivation for including a module on TJ within IDDRS. Specifically, it notes that post-conflict states are increasingly addressing the victims' needs by adopting TJ measures within the

⁴ *Ibidem* at p. 89.

⁵ *Ibidem* at 6.20 p. 1.

post-conflict stage of peacebuilding. The inclusion of these efforts markedly increases the likelihood that DDR and TJ will be pursued simultaneously. Failure to anticipate areas of potential contact and conflict could lead to unbalanced outcomes that compromise peacebuilding operations.⁶ To avoid this, the IDDRS includes a module on TJ.

Although DDR programmes target ex-combatants and TJ measures primarily target perpetrators and their victims, there are clear areas of overlap. Perhaps the most conspicuous is the reintegration process. A key aim of DDR is to help ex-combatants transition into a well functioning civilian life. To achieve this goal, ex-combatants receive benefit packages that include training, counseling, access to micro loans, and cash payments. The reason for offering such packages is that without assistance, there is a chance ex-combatants will become frustrated with the peace process and retake arms. However, the problem with this approach is that the victims of the conflict often develop resentment toward ex-combatants, since the victims' losses are often ignored. Ignoring the victims' loss is not only unjust, but also threatens the peace process by creating hostilities among community members.⁷ TJ measures help balance these disparities by correcting for the victims' losses through reparations. It thereby nurtures the community's willingness to accept the benefit packages delivered through DDR programmes. Similarly, prosecutions and truth commissions address the victims' need for accountability and recognition. These efforts both facilitate a just peacebuilding process and strengthen the 'legitimacy of the (DDR) programme from the perspective of the victims of violence and their communities' by creating a transparent process conducive to trust building.⁸

It is with respect to trust building that DDR and TJ can develop their deepest and most productive operational links. For example, ex-

⁶ *Ibidem* at 6.20 p. 4.

⁷ *Ibidem* at 6.20 pp.11-12.

⁸ *Ibidem* at 6.20 p. 2.

combatants often avoid truth commissions despite their providing an excellent opportunity to ‘break down rigid representations of victims and perpetrators by allowing ex-combatants to tell their own stories of victimization’.⁹ This was the case in East Timor, where the participation of less serious offenders helped expose the roots of violent conflict and contributed to a successful reconciliation process. Public information and outreach programmes between DDR and TJ efforts can facilitate greater participation among former combatants, which could help build trust and improve the likelihood of a just peace.

In addition to reparations and truth commissions, prosecutions provide an additional area of overlap. Criminal prosecutions create a distinction between human rights violators and ex-combatants, a distinction that might not exist in the minds of either combatants or victims. Failure to make the distinction could disrupt the peace process in two distinct ways. First, it could upset the reintegration process by creating false impressions in the minds of victims who might otherwise view all ex-combatants as equally guilty. Second, it could stall the process by decreasing the likelihood ex-combatants will enter the DDR process out of fear they may be prosecuted for violating international law.¹⁰

This last point illustrates a potential area of conflict, too. DDR programmes require the cooperation of ex-combatants and their leaders. If these participants suspect DDR managers of colluding with international lawyers and prosecutors, they might withhold their participation. The module recognises this potential pitfall and emphasises the need for clear communication. It is important for all parties in the peacebuilding process to know, for example, that amnesty or pardons might be consistent with international law provided that the crimes did not involve war crimes or other gross human rights violations. Communicating such points could alleviate potential friction.

⁹ *Ibidem* at 6.20 p. 9.

¹⁰ *Ibidem* at 6.20 p. 8.

Other challenges of coordination are operational. ‘Disarmament and demobilization components of DDR are frequently initiated during a cease-fire, or immediately after a peace agreement is signed. However, transitional justice initiatives often require the forming of a new government and some kind of legislative approval, which could delay implementation by months or, not uncommonly, years’.¹¹ The temporal gap between the two programmes creates obvious coordination challenges, and risks opening past wounds, which could destroy social cohesion in a fragile society struggling to overcome recent atrocities. Likewise, the lack of steady funding could hurt coordination efforts. The D&D phases of DDR are funded with UN assessed contributions, which can be accessed quickly. The reintegration phase is supported by voluntary contributions, or donor funds, which can take a year or longer to collect.¹² Funding for TJ efforts is an ongoing problem; ‘as of 2009, the compensation fund for genocide survivors called for in the 1996 Genocide Law has not been established’.¹³ Scarce resources not only create challenges for coordinating DDR with TJ efforts, but also create competition for limited funding.

3. PHILOSOPHICAL SIMILARITIES AND DIFFERENCES

The shared aims of establishing a just, stable, and sustainable peace are the primary linkages between DDR and TJ efforts. These common goals suggest common means by which they are achieved. For example, UN peacebuilding and peacekeeping efforts demonstrate that a just and stable peace can only be achieved when people feel confident that disputes can be settled through a peaceful

¹¹ *Ibidem* at 6.20 p. 3.

¹² LARSON, H., The Center for Stabilization and Reconstruction Studies, ‘An Expansive Approach to Disarmament, Demobilization, and Reintegration,’ Workshop Proceedings, Monterey, 2010, p. 9, available at http://www.csr-nps.org/logistica/public/docs/expansive_ddr_feb2010_FINAL.pdf.

¹³ IDDRS, *op.cit.*, 6.20, p. 12.

and fair judicial process.¹⁴ Establishing the rule of law and incorporating local traditions of justice whenever they are consistent with international law are critical components for building such confidence. As a result, DDR and TJ practitioners can create operational links around programmes that help establish the rule of law and promote local traditions of justice.

However, these broader aims operate under a philosophical difference for how best to interpret the means by which a just and stable peace is achieved. Typically, DDR practitioners develop their programmes with an eye toward alleviating the most egregious injustices.¹⁵ By contrast, many in the field of transitional justice operate under an ideal conception of restorative, retributive, or reparative justice.¹⁶ Ideal conceptions of justice provide comprehensive perspectives for assessing competing moral claims. Yet from the perspective of DDR programme managers, the circumstances of transitioning societies are not easily subsumed under a single comprehensive view. For example, the line between perpetrator and victim is often opaque, resulting in an equally opaque assessment of each party's due punishment or recompense. Is the child soldier who commits atrocities a victim, a perpetrator, or both? The answer often depends on whom you ask, and how the child impacted the respondent's life.

¹⁴ UN Security Council, 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), p. 3.

¹⁵ LARSON, H., *loc. cit.* p. 2.

¹⁶ For examples of each position, see: KISS, E., 'Moral Ambition Within and Beyond Political Constraints: Reflections on Restorative Justice,' in: ROTBERG, R. I. and THOMPSON, D. (eds.), *Truth v. Justice*, Princeton University Press, Princeton, 2000, pp. 68-98; ORENTLICHER, D., 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime,' *Yale Law Journal*, Vol. 100, 1991, pp. 2537-2615; UN General Assembly, 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, UN Doc. A/RES/60/147 (2006).

Given the inherent challenges faced by transitioning societies, the application of different philosophical approaches could yield rival positions. DDR managers may oppose sharing information on the grounds it unnecessarily compromises the potential success of the D&D phases, and thus endangers a fragile peace. By contrast, TJ practitioners might assess the same issue in light of a more comprehensive ideal of justice that interprets retributive and restorative efforts as essential elements of justice.

The potential conflict results from two competing interpretations of ‘justice’. One interpretation evaluates issues of justice in relative terms by defending a particular action on the grounds that it makes society less unjust.¹⁷ The other evaluates issues of justice in comprehensive terms by defending a particular action as consistent with an ideal conception of a just society.¹⁸ To be less unjust is not the same as to be fully just, and applying each view to a particular case could yield rival judgments—each incompatible with the other yet seemingly correct from within its own philosophical framework.

4. ASSESSMENT: THE DDR PRACTITIONER’S PERSPECTIVE

In addition to competing views on justice, no two conflicts are the same. Wars start, are fought, and end in a wide variety of ways, making the individual context of each conflict critical to an analysis of peacebuilding. Thus, it is very difficult to determine the extent to

¹⁷ This position is taken by AMARTYA SEN in his book, ‘The Idea of Justice,’ Harvard University Press, Cambridge, 2009. Sen reminds us that “[w]hen Condorcet and Smith argued that the abolition of slavery would make the world far less unjust, they were asserting the possibility of ranking the world with and without slavery, in favour of the latter... not also making the further claim that all the alternatives that can be generated by variations of institutions and policies can be fully ranked against each other” at p. 398.

¹⁸ The paradigmatic example of ideal theory is JOHN RAWLS, ‘A Theory of Justice,’ revised ed., Harvard University Press, Cambridge, 2000.

which DDR practitioners can learn from and apply the TJ module. Instead, to be of much value, the analysis must take either a very broad view of post-conflict work, or focus-in on specific conflicts by taking into account the values and traditions of the given society, the extent of the violence and abuses committed, the original cause of the conflict, how a political settlement was eventually negotiated, where major combat operations occurred, the steps taken toward reconciliation, and other factors that play into how a society will heal at the end of the trauma of war.

Nevertheless, one common reality that applies to all peacebuilding efforts is that they are expensive.¹⁹ Furthermore, most post-conflict states lack the economic resources to fund reintegration and TJ efforts. For example, Liberia's fiscal year 2011 budget for all government expenditures was \$460 million.²⁰ By comparison, the Colombian Congress recently approved a law attempting to compensate millions of citizens who suffered losses during Colombia's nearly fifty years of armed conflict.²¹ The law offers financial compensation to victims or their surviving relatives, addresses illegal land seizures, and provides symbolic reparations for victims of torture, kidnapping and sexual abuse. The estimated cost is between \$550 million and \$800 million per year over the next ten years, matching or doubling Liberia's entire 2011 fiscal budget.

While to our knowledge there exists no systematic assessment of DDR and other peace practitioners' reception of the integration of TJ measures, our conversations at conferences and through other professional channels suggest some concern. As far as we can tell,

¹⁹ One estimate puts the total dollar amount spent on transitional justice efforts since 1990 at over \$1 billion. See WEINSTEIN, H. M., 'Editorial Note: The Myth of Closure, the Illusion of Reconciliation: Final Thoughts on Five Years as Co-Editor-in-Chief,' *International Journal of Transitional Justice* Vol. 5, 2011, p. 1.

²⁰ 'Liberian government submits US\$459.9m budget to legislature,' *Afrique Avenir*, 2011, available at <http://www.afriqueavenir.org/en/2011/05/11/liberian-government-submits-us459-9-m-budget-to-legislature/>.

²¹ 'Feeling Their Pain,' *The Economist*, 4 June 2011, p. 46.

these concerns reflect worries anyone might feel when change within one's profession creates uncertainty over funding, or includes new rules and bureaucratic structures that may alter one's previously normal modes of operation. The TJ module can only go so far in answering these concerns. Personal experience moving forward will either ease or confirm them.

5. CONCLUSION

Concern over the way integration affects one's field cuts both ways. Some of those for whom international law, and the justice it fosters, is a major concern are worried that 'integrating' TJ with other post-conflict efforts threatens the integrity of TJ. Specifically, they worry that the integration exposes a narrative by which TJ becomes a political 'cloak that covers a range of particularized bargains on the past'.²² None of these bargains necessarily have justice as their aim. Instead, they are political maneuvers informed by special interests, but they are presented as if in the interest of justice.

Co-opting ideals of justice for unjust purposes is a legitimate concern in both well-ordered and transitioning societies. But in the context of political transition, one can argue that the concern speaks most plainly to the challenges of applying 'justice' under the very difficult circumstances of political change. For example, any response to the needs of 'Ellen' and her children can be construed as a failure of justice, since her losses can never be fully repaid by society. How the relevant actors within the peacebuilding process navigate the morally treacherous landscape of transitioning societies so as to create a just peace remains an unanswered question. But at the very least it will require coordination and communication among

²² BELL, C., 'Transitional justice, Interdisciplinarity and the State of the "Field" or "Non-Field",' *The International Journal of Transitional justice*, Vol. 3, 2009, p. 15.

practitioners. The IDDRS takes a first step in that direction and, as a result, moves closer toward a more just peacemaking process.

**COMPENSATION PRACTICES
AND THE DYNAMICS OF MEMORY:
A TRANS-GENERATIONAL APPROACH**

NICOLE IMMLER

1. INTRODUCTION

The first post WWII West German Chancellor, Konrad Adenauer, called the German *Wiedergutmachung* a ‘material symbol’ of a will to repair suffering. Since then, it is seen in the international context of post-1989 as a role model for defining moral policies and often also material claims in international justice; negotiating justice for victims of historical injustice, not only in states in transition (such as South Africa, Rwanda, Chile), but also in long-established democracies in Europe when addressing their Holocaust, communist or colonial past.¹ Today, the idea of recognition requiring a monetary complement is manifest in the Rome Statute (1998), which gives victims of gross human rights violations the right to request reparation at the International Criminal Court in The Hague, embracing the so-called Van Boven/Bassiouni Principles, which were negotiated in the early 1990s to harmonize victims’ rights, and set a new internal standard for reparations when adopted by the UN in 2005.²

¹ This global spread of reparations politics is explained by some as the triumph of liberal Enlightenment and a result of a new international morality within a global economy (ELAZAR BARKAN), while others see it a substitute for a progressive politics that is linked to the collapse of socialism the decline of the nation-state (JEFFREY OLICK, JOHN TORPEY), and the celebration of human rights as ‘last Utopia’ (SAMUEL MOYN).

² See regarding this development: MALCONTENT, P.A.M., Financial compensation as a political process. In: RYNGAERT C. (ed.), *The Effectiveness of International Criminal Tribunals*. Intersentia, Antwerp, 2009, pp. 237-256;

While we know that the German *Wiedergutmachung* produced strong emotions throughout generations,³ monetary compensation as an instrument of transitional justice or memory politics is still mainly discussed with reference to the victims themselves and only rarely with reference to their families. An example for this is a recent decision of the Civil Court of Den Haag which obligated the Dutch Government to acknowledge their responsibility for a particular crime of the Dutch military in their former colony Indonesia, in the village Rawagede in 1947, to apologize and to pay compensations, but to limit the responsibility to victims of the first generation only, as they consider the other surviving relatives of a next generation as less directly affected.⁴ Although the harm done there is according to the victim-representatives still visible, they see no duty towards descendants. Is this legitimate?

My article will indirectly contribute to this current debate, by arguing that collective memory and particularly family memory play an important role in compensation procedures towards historical injustice, as descendants also evaluate those procedures and have their own expectations. By reflecting upon my own empirical

WEMMERS, J.A., Special Issue: Victim Reparation and the International Criminal Court. *The International Review of Victimology*, 2009, vol. 16, nr. 2; KELLER, L.M., Seeking Justice at the International Criminal Court: Victims' Reparations. *Thomas Jefferson Law Review*, 2007, 29, pp. 189-218.

³ As overview: FREI, N., BRUNNER, J., AND GOSCHLER, C. (eds), *Die Praxis der Wiedergutmachung. Geschichte, Erfahrung und Wirkung in Deutschland und Israel*. Wallenstein, Göttingen, 2009. For problematic aspects: KESTENBERG, M., 'Diskriminierende Aspekte der deutschen Entschädigungspraxis: Eine Fortsetzung der Verfolgung,' in: BERGMANN, M. *et al* (eds.), *Kinder der Opfer. Kinder der Täter, Psychoanalyse und Holocaust*. Fischer, Frankfurt/M., 1995, pp. 74-99.

⁴ Civil Court Den Haag, 14 September 2011, *LJN*: BS8793. Available at: http://www.rechten.vu.nl/nl/Images/Vonnis%20Rawagedeh%20EN_tcm22-243851.pdf. WOUTER VERAART, Uitzondering of precedent? De historische dubbelzinnigheid van de Rawagede-uitspraak. [Exception or precedent? The historical ambiguity of the Rawagede-statement], In: *Ars Aequi*, April 2012, pp. 251-259.

research – interviews with victims of National Socialism, their children and grandchildren, who experienced compensation procedures in Austria in the recent years⁵ – my article will explore the afterlife of compensation across the generations in Austria, a country, which has a long-term experience with the Second World War reparations, and where in the 1990s different new Funds for the victims of National Socialism have been initiated by the Federal Government: restituting property (such as pieces of art, books or real estate) and paying financial compensation for losses. Whereas the *National Fund of the Republic of Austria for Victims of National Socialism (NF)*, established 1995) compensated Austrian survivors with a gesture payment, the *General Settlement Fund (GSF)*, established 2001) calculated the losses of assets individually, also acknowledging heirs. Working as an historian at the *GSF* I have seen how much emotion this topic stirs up with applicants and particularly with their children, whom inspired me to do a trans-generational research about the impacts of those compensation practices, based upon the hypotheses that family memory might be an important power in such processes dealing with recognition and reconciliation efforts.

Although the history and political impact of these measures have already been broadly discussed and documented,⁶ we know

⁵ This study covers about 90 qualitative semi-structured interviews with applicants from Austria, the Netherlands, England and Argentina (2007–2009), including members of different NS-victim-groups (Jews, Sinti and Romanies, partisans a.o.) and different generations. The interviews were audio-recorded and subsequently analyzed using textual and discourse analysis. All anonymous quotes without further reference (to protect their privacy) are from those interviews.

⁶ Since the 1980's much literature regarding restitution has been published in national and comparative perspectives: on Germany, see works by e.g. Christian Pross, Helga und Hermann Fischer-Hübner, Constantin Goschler, Jürgen Lillteicher, Günther Hockerts, Ludolf Herbst, Tobias Winstel and Dan Diner; on Austria by e.g. Albert Sternfeld, Brigitte Bailer-Galanda, Helga Embacher, Anton Pelinka, Eva Blimlinger and the Historical Commission. See generally on reparations: BARKAN, E., *The Guilt of Nations. Restitution and*

little about how compensation works across generations, their significance decades after the Second World War, and the consequences of this repeated confrontation with the past for those people involved and their families. This article presents impressions from a three-generation interview-study, exploring the consequences for the generation of survivors, the family and the relationship between the generations. In this article I explore the interplay between the legal compensation practice, memory politics and family memory across the last decades, reflecting particularly upon the image of restitution in public and in private and its interactions.⁷ I will argue that, firstly, public discourse and the role of the media – the way it reports or neglects the issue – is key to the matter of restitution affairs⁸, and that, secondly, restitution itself affects a specific form of recollection, mediating between the family memory and the collective memory. Understanding this dynamic will help to explain the relatedness between transitional justice measures and memory processes. Guiding the debate from that of ‘justice’ towards ‘memory’ will allow insights into specific mechanisms on the individual/family level triggered by such policies.

Negotiating Historical Injustices. John Hopkins University Press, Baltimore, MD, 2000; DE GREIFF, P. (ed.), *Repairing the Past: Compensation for Victims of Human Rights Violations*, in: *The Handbook of Reparations*. Oxford University Press, Oxford, 2006; TORPEY, J., *Making Whole What Has Been Smashed. On Reparations Politics*. Harvard University Press, Cambridge, MA, 2006

⁷ For a more evaluating perspective, comparing lump sum with individuated payments, see: IMMLER, N.L., “‘Too little, too late’? Compensation and Family Memory: negotiating Austria’s Holocaust Past,” in: IMMLER N.L., RIGNEY A., AND SHORT, D., (eds.), *Reconciliation & Memory: Critical Perspectives*, *Memory Studies* 2012, vol. 5, nr. 3 (2012).

⁸ In this text I will use the term restitution when referring to both measures of compensation (for losses) and restitution (of goods), and use the term compensation when referring only to the monetary aspects. The English term ‘restitution’ has a comprehensive character (see: www.worldjewishcongress.org), similar to the German term ‘Wiedergutmachung,’ but is more neutral. ‘Wiedergutmachung’ was commonly used for all such procedures after the Second World War.

2. RESTITUTION IN AUSTRIA: A HISTORICAL OVERVIEW

With the end of the Cold War, when long-suppressed memories erupted and access to documents became possible, historical commissions were established in whole Europe to assess the state of compensations to the victims of the Second World War. These commissions uncovered the huge scale of the property transfer implemented by the Nazis in conjunction with businesses, banks and insurance companies. They delivered facts, figures and percentages, thus forming the basis for new political action. Although there had been restitution measures after the war in all Western European countries, the regulations differed from country to country, were incomplete and limited by deadlines. The definition of who was a “victim of National Socialism” also changed depending on the social and political context. In the atmosphere of the Cold War, it was difficult for communists, for example, to receive acknowledgement for their suffering in the Nazi camps. Especially in the former Soviet countries of Eastern Europe where the measures were limited. It was not until the 1990’s that laborers and concentration camp prisoners from Eastern Europe received some compensation on a larger scale.⁹ Other groups also had to wait a long time to be recognized as victims: Roma and Sintis, Jehovah’s Witnesses and (just since 2005 in Austria) victims of ‘euthanasia’ and sterilization, homosexuals and deserters from the German *Wehrmacht*.

Various events drew new attention to this matter: the discussion about the looted gold and the discovery of former Jewish bank accounts in Switzerland (as in Austria), the pressure of class action suits (*Sammelklagen*) in the US against German and Austrian firms, and the public attention to cases of art theft, such as the affair linked to the Schiele paintings: when two of the paintings by Egon

⁹ In 2000 the Reconciliation Fund was established in Austria, providing lump sum payments to former forced labourers from Eastern Europe.

Schiele (Portrait of Wally and Dead City III) from the Viennese Leopold Collection were confiscated in 1998 at the Museum of Modern Arts in New York due to unclear ownership.¹⁰ This international pressure produced the impression that there was still a need to do something for the victims of National Socialism and their descendents. Another reason for that was in Austria a changed view of the past since the late 1980's. Initiated by the turmoil around the case of Kurt Waldheim, who became president of Austria in 1986 despite his controversial NS-past; by the fiftieth anniversaries – commemorating the annexation and the night of the pogroms (in 1988), and the end of the war (in 1995); or by Chancellor Vranitzky's public apology issued in the Austrian parliament (1991) and his promise to take "historical responsibility". This paved the way politically for the establishment of the *National Fund of the Republic of Austria for Victims of National Socialism*, well-timed in 1995, on the fiftieth anniversary of the founding of the Second Republic, to which, to date, more than 31,000 survivors of Austrian origin and/or living in Austria in 1938 have applied. It is this recognition of guilt, which many applicants see as the main value of the Fund: "They said actually, 'Yes we are guilty'. [...] They could not keep saying anymore: 'We were invaded.'" (Peter S.)

Austrians no longer saw themselves collectively as the first victim of Hitler, which they had until then, based on his aggression against Austria and the annexation ('*Anschluss*') to Hitler Germany in 1938. This self-perception, the so-called victim theory ('*Opfer-These*'), was linked to a hesitant attitude towards compensation: confronting themselves directly with the 'real victims' would have demolished their constructed belief of being themselves victims.¹¹ Instead of taking 'responsibility for the victims' as was done in Germany, in Austria compensation was long regarded as voluntary

¹⁰ This led to a Commission for Provenance Research and a federal law on the restitution of art from Austrian Federal Museums and Collections (*Federal Law Gazette* 1998/141).

¹¹ WALZER, T. AND TEMPL S., *Unser Wien. 'Arisierung' auf österreichisch*. Aufbau, Berlin, 2001, p. 24.

rather than a matter of moral obligation (only restitution was seen as a legal obligation).¹² Only after the Germans declared in 1952 that they would not pay for the Austrian victims did Austria enter into the compensation negotiations. This was also demanded by the occupying powers, mainly the US. In the end, Austria passed seven laws for restitution (1946-49) and a law, amended twelve times, providing for the welfare of victims (*Opferfürsorgegesetz*). But still the US demanded further obligations: the Austrian state treaty, the declaration of independence in the year 1955, had implemented Article 26, obliging the Austrians to administer property without heirs via Collection Agencies (*Sammelstellen*), selling heirless properties to pay lump sums to the survivors; it also established a fund (*Hilfsfonds*) to support those who were no longer living in Austria. These measures were supplemented by other laws regarding personal belongings (*Kriegs- und Verfolgungssachschädengesetz* 1957), life insurance policies or unrightfully collected discriminatory taxes (*Abgeltungsfonds* 1961). This is just a short summary of what had happened in the post-war decades.

3. THE AMBIVALENT HISTORY/NATURE OF COMPENSATION

Reports about current claims before the 2001 established *General Settlement Fund* show this history. They show how

¹² THONKE, C., *Hitlers Langer Schatten. Der mühevolle Weg zur Entschädigung der NS-Opfer*. Böhlau, Wien, 2004, p. 67. This comparison should not conceal the fact that there was also huge resistance in the German government and society against the 'Wiedergutmachung,' as well as practical difficulties, for example the fragmentation of the measures caused by the existence of four occupying powers and different rules in each section. But whereas the restitution in Germany was completed in the mid-1950's, in Austria thousands of cases were not yet dealt with, and often delegated to the courts. In addition, only a 25% reduction in ability to work due to the persecution was needed in order to receive a pension, while in Austria 50% or 70% was required. For more details see: DAVID FORSTER, 'Wiedergutmachung' in Österreich und der BRD im Vergleich. Studienverlag, Innsbruck, 2001, p. 222f.

applicants, often for decades, had already fought for restitution or compensation. Many people had already tried to get their property back during the post-war years, but they often failed, because of restrictive laws or their unsystematic and restrictive application. As the final report of the Historical Commission¹³ – which was established in 1998 for documenting and evaluating the huge scale of property transfer implemented by the Nazis (together with banks and insurance companies) and thereby providing facts to take further action – stated: the restitution laws were not well-functioning because they often had short deadlines, were not systematic and were bewildering due to the many different contact points and several extensions at short notice, and the procedures took disproportionately long. These delays meant that people often had to stay in camps until the 1950's before receiving some help. Because the authorities applied a limited interpretation of inheritance law, many properties were not returned. Often in restitution procedures people were asked to pay to get their property back. In many cases, especially when living abroad, they accepted certain payments (settlements) as compensation for the property. For all these reasons it can be said that the restitution helped to return some of the property and there was some help regarding the welfare of victims, but that many people felt they were treated unjustly, as they had to ask for what was rightfully theirs and prove their case. There were also many survivors who never applied for compensation, because they did not want to negotiate anything with the Germans or Austrians, often feeling shame or anger at the thought of taking money from the perpetrators.

¹³ The results are presented in 49 volumes, summarized in a final report: JABLONER, C. *et al* (eds.), *Schlussbericht der Historikerkommission der Republik Österreich. Vermögensentzug während der NS-Zeit sowie Rückstellungen und Entschädigungen seit 1945 in Österreich* (vol. 1, *Series of the Austrian Historical Commission*). Oldenbourg, Wien, 2003, 452f.

While the extent of gaps and deficiencies in those earlier procedures are worth discussing,¹⁴ some issues were clearly totally neglected. In Vienna alone approximately 59,000 flats were confiscated, including their furnishings and all private belongings. However, only recently were people able to claim financial compensation. One case is Rosa Weinberger,¹⁵ which I will use here to explain the different procedures. She, who fled with her husband from Vienna in 1939 via Italy and France to Shanghai, and lived thereafter in Australia, applied in 1995 at the *National Fund* for the symbolic lump sum payment of around EUR 5,000 which was supplemented by an additional lump sum of EUR 8,630 for the loss of household goods, tenancy rights and personal valuables. Thus, after more than 60 years, she received a symbolic compensation for the flat she lived in, which was confiscated during the Nazi era. Few years later she filled in another application form. When the *General Settlement Fund* was established in 2001, in which the material losses of Holocaust victims were specifically calculated on an individual basis, also accessible for heirs, she claimed the restitution of her fathers' property, a claim she has more or less unsuccessfully following since the 1950s. The GSFs was an ambitious attempt to individualize victim stories, the result of long negotiations between the Austrian and US governments, including victim representatives and class action lawyers, signing the Washington Agreement on 17 January 2001, addressing both the issue of deficiencies in social welfare benefits withheld from Austrian Jews living abroad and of

¹⁴ Historians as Berthold Unfried have indicated that contrarily to public opinion there had been many more post-war reparations than they had expected, when starting with their research in the Historical Commission. Cf. UNFRIED, B., 'Restitution und Entschädigung von entzogenem Vermögen im internationalen Vergleich. Entschädigungsdebatte als Problem der Geschichtswissenschaft,' *Zeitgeschichte*, 2003, nr. 5, pp. 243-267, 260.

¹⁵ Cf.: LESSING, H.M., MEISSNER, R.S., AND BJALEK, N., "'Wir können nur anklopfen, wo die Tür offen ist' – Der lange Weg zu Anerkennung und Entschädigung,' in: PAWLOWSKY, V. AND WENDELIN, H., (eds.), *Ausgeschlossen und entrechtet*. Mandelbaum, Wien, 2006, pp. 241-274, 247f.

stolen assets¹⁶ based upon a detailed questionnaire (with different categories, such as education, bank accounts, mortgages, stocks, bonds, businesses, insurance policies, immovable property and movable property). Particularly there was the possibility of restitution of real estates, but only in cases of public ownership (of the Federal Republic, the city of Vienna, or the federal states), and where no restitution measures had been taken after the war. This is the reason why Rosa Weinberger got back parts of a property that her father had owned, because those parts, on 17 January 2001, were owned by the Republic of Austria. The other parts were under private ownership at that time, therefore restitution was no option and according to *GSG*-law monetary in such cases compensation needs to be provided. But how to evaluate a property which was in 1938 a building area, but meanwhile was turned into a nature protection area? Moreover, only about 15 percent of its value that it was before could be compensated, as in the Washington Agreement a fixed sum of \$210 million was negotiated, but as we know today the claims in a whole are amounting to approximately \$1.5 billion, consequently each applicant receives only aliquot shares of his/her claim.¹⁷ Owing to the length of archive procedures and the legal and administrative complexities – for example of acknowledging heirs as applicants – it

¹⁶ It enabled applicants to receive such social benefits as victim assistance or the possibility of re-buying pension months to be able to receive the minimum state pension from Austria (and many applicants used the compensation money in this way). For decades, such benefits had been linked to having Austrian citizenship, but since 2005 this has no longer been a pre-condition. See: EMBACHER, H., AND ECKER, M., A Nation of Victims. How Austria dealt with the victims of the authoritarian Ständestaat and National Socialism. In: WITHUIS, J. AND MOOIJ, A. (eds.), *The Politics of War Trauma: The Aftermath of World War II in Eleven European Countries*. Aksant, Amsterdam, 2010, pp. 15–47, 32. For a history of the negotiations, see: EIZENSTAT, S.E., *Imperfect Justice: Looted Assets, Slave Labor, and the Unfinished Business of World War II*. New York, Public Affairs, 2003.

¹⁷ To be precise: This amounts to 10.56 percent in the claims-based process, 20.74 percent for insurance policies and 17.16 percent in the equity-based process. See for details and the annual reports: <http://www.en.nationalfonds.org/>.

took almost a decade to deal with around 20,700 applications. After some advance payments in 2006, the last of the closing payments were being made in 2010.

This procedure is not only difficult to understand, but even harder to accept. Peter Phillips, chairman of the Austrian Restitution Group in Britain, writes in an article in the *Jewish Chronicle*, titled “My Holocaust compensation is an insult”. He states, “To be given only fifteen percent of what is owned, after so many years, is the final insult.” (26 October 2006) What does it mean to see all your losses listed in detail and calculated with a certain amount and to then receive just a percentage of the former value? Here even a very complex procedure seems not always to serve the greatest possible justice. This example shows the ambivalent and unjust nature of restitution. It is a rare accident that some of the claimed properties are now publicly owned and therefore can be given back. However, it must be noted that there had in fact already been many cases of restitution procedures after the war, so that about 70 percent of the confiscated property in Vienna was restituted. Roughly 20 percent was part of settlements, and about ten percent was not claimed and without heirs.¹⁸ Many of these and other procedures were either forgotten or not acknowledged as such. To explain this loss of memory or this rewriting of memory, I will refer to some examples which could offer some explanation.

It is known from the application forms for compensation from the *General Settlement Fund* that knowledge of family history and what happened after 1945 is often limited because documents were lost and the war generation was unwilling to speak or was clouded by nostalgic childhood memories. A child’s imagination often misinterprets what is meant when parents say the family was ‘well-off’. For example, instead of receiving compensation for an apartment house or a summer villa, one is confronted with the information that the family had ‘just’ a rented flat or a rented place to spend the summer. ‘False’ memories like these are often also shaped

¹⁸ JABLONER, *op.cit.*, p. 318f.

by present circumstances. People living in the US today can hardly imagine that most people in Vienna in the 1930's lived in rented flats. And the family itself is an important social framework for memory, which means, according to Maurice Halbwachs, that only certain things can be remembered.¹⁹ As Halbwachs says, family memory is always symbolic and variable, concentrating only on certain aspects, events and people, and consequently reveals less about historical details than about the present and its view of the past. This is particularly obvious when children, for example, do not really try to find out about their parents' past, but rely on long-imagined pictures and try to have them confirmed. From this perspective, compensation procedures are sometimes disappointing, because they do not correspond to certain expectations, and they also challenge the family memory.²⁰ This family memory seems particularly restrictive regarding the post-war procedures of restitution. Why?

In this respect, Gerald Aalders, an expert on Dutch restitution, made an interesting observation regarding memory and restitution. At a conference in Israel at the end of the 1990's, he described the system of restitution in the Netherlands in the 1950's, admitting that the system had had its shortcomings (long legal procedures without compensation measures or emotional support), but emphasizing that the restitution had not failed and was "by no means a disgrace".²¹ Many people in the audience were upset, because they perceived it differently: For the public, there was no doubt that the restitution procedure was a disgrace. Additionally, they could not accept his

¹⁹ HALBWACHS, M., *Das Gedächtnis und seine sozialen Bedingungen*. Luchterhand, Berlin, 1966 (Org. 1925).

²⁰ For a case study on the interplay of the proces of a restitution claim and family memory, see: IMMLER, N.L., "The History, the Papers, let me see it!" *Compensation Payments: The Second Generation between Archive Truth and Family Speculations*, in: LEVIN, I., LENZ, C., AND SEEBERG, M.L., (eds), *Holocaust as Active Memory: Public and Private Perspectives*. Ashgate, Aldershot, forthcoming.

²¹ AALDERS, G., 'A disgrace? Postwar restitution of looted Jewish property in the Netherlands,' in: BRASZ C. AND KAPLAN Y. (eds.), *Dutch Jews as Perceived by Themselves and by Others*. Brill, Leiden, 2001, pp. 393-404, 402f.

approach of using statistics and numbers to prove the restitution of about 90 percent of the material value. Consequently they tried to make him change his mind, ignoring the issue that his results were matters of fact and not a question of morality.²² Aalders tries to explain this widespread negative view of restitution today with its negative image in the post-war media: in the 1950's, mainly sad stories and complaints about the issue of restitution were "newsworthy" and represented in the newspapers, which may well have influenced private memory. But this example shows further that the whole debate seems based less upon facts than on morals. It almost seems that family memory insists that restitution in itself is always an unsatisfying and deficient procedure.

Following this hypothesis I will take a closer look at the role of the media in presenting the subject of restitution in the Austrian public and then explore the nature of family memory. Restitution affairs are directly linked to the broader discourse of National Socialism. From the two extremes – ignoring victims of National Socialism in the 1950's and the 'victimization' culture of the 1970's – it can be shown that the discourses current in society and in the media have a strong impact on people's self-perception.

4. 'BEING A VICTIM': PUBLIC DISCOURSE AND INDIVIDUAL STORIES

In the post-war decade, people in Europe as well as those in exile abroad were primarily focused on reconstruction and keeping their eyes and minds turned to the future. In this atmosphere, victims of National Socialism were not encouraged to tell their stories. This is clearly expressed in the application forms for restitution at that time, asking for a quantification of all losses, and providing categories for certain material aspects, but not any space for the

²² AALDERS, G., *Berooid. De beroofde joden en het Nederlandse restitutiebeleid sinds 1945. [Destitute. The deprived (bereft) jews and the Dutch restitution policy]*, Boom, Amsterdam, 2001, p 9f.

retelling of personal experiences. This “material reductionism” to individual material aspects was enforced by the use of abstract and impersonal language as well as by the separation of the procedures regarding damages to life and to property, excluding any non-material losses regarding lifestyle or education. Nonetheless, some people were adding lengthy reports of their whole story of persecution, inserting their life story into the files.²³ Whereas many survivors preferred not to talk about the past in order to start a new life, others wanted to tell their sad stories and wanted to confront the public. But the public did not want to listen. Some observers interpret this as an intentional denial of the past, others as behavior which was instrumental to stabilizing the society at that time.

Only in the 1970's, after a ‘psychological turn’, first in the field of medicine (the understanding that trauma could be a consequence of the Holocaust), and then in society, a sudden awareness of the psychological dimension of the Holocaust grew, and this created a new interest in personal life stories, whether published as autobiography or broadcast, for example in the *Holocaust* series on TV (USA 1969, D and A 1979). ‘Hollywood’ conventions enabled new identifications with Jewish victims. As a consequence, the experiences of victims became a strong image in the public’s mind as survivors started to talk about themselves in these stories. As a result, the language describing persecution changed. “It was no longer told to exemplify the wickedness of the Nazis, but more and more to display the lasting physical, but more importantly, psychological damage the persecution had caused among its victims [...] Jewish survivors had no option but to talk about their experience in the psychiatric vocabulary of mental suffering”. As described here by Ido de Haan, a strong connection between memory, image and identity is evident, and it is clear that

²³ BAJOHR, F., “‘Arisierung‘ und Restitution. Eine Einschätzung,” in: GOSCHLER, C. AND LILLTEICHER, L. (eds.), “‘Arisierung‘ und Restitution. Die Rückerstattung jüdischen Eigentums in Deutschland und Österreich nach 1945 und 1989.” Wallenstein, Göttingen, 2002, pp. 39-59, 56.

“neither memory, nor identity can be understood as strictly private affair”.²⁴ In this way, the media became a mediator between the collective and the individual memory in changing people’s self-expression and self-perception.

This change enabled, for example in the Netherlands, new forms of institutionalized help for victims of National Socialism, such as benefits in the social system or the establishment of institutions for mental health care, thus recognizing the social dimension of trauma. In Austria, the TV series *Holocaust* transformed the focus of public memory. Instead of concentrating on who was responsible for the ‘*Anschluss*’ and on the political problems before 1938, anti-Semitism, the murder of the Jews and the fate of the victims became part of a new emotional narration. Contemporary witnesses and psychologists were frequently interviewees in different media, and the question of guilt was no longer addressed to political parties, but to the we-community (‘*Wir-Gemeinschaft*’), the generations of the parents and grandparents.²⁵ The Austrian society felt a new sense of responsibility for the victims, linked to a new interest regarding family histories.

In the late 1980’s, with the omnipresence of the Holocaust in mass media – the so called “Schindler-effect” (Elan Steinberg) – Jewish identity became a “symbol of universal victimhood”, resulting even in a “competition of victims” with other unprivileged groups in society, a development experienced all over Europe. These discourses of victimization were one pre-condition amongst others allowing for a resumption of political negotiations regarding compensation in the 1990’s. At that time, a decade began which was

²⁴ DE HAAN, I., ‘The postwar community and the memory of the persecution in the Netherlands,’ in: BRASZ, C. AND KAPLAN, Y. (eds.), *Dutch Jews as Perceived by Themselves and by Others*. Brill, Leiden, 2001, pp. 405-435, 426, 431, 434.

²⁵ UHL, H. VON, ‘Endlösung’ zu ‘Holocaust’. Die TV-Ausstrahlung von ‘Holocaust’ und die Transformation des österreichischen Gedächtnisses’. Available at: www.zeitgeschichte-online.de/Portals/_Rainbow/documents/pdf/uhl.pdf.

marked by, to use Jeffrey Olick's term, the "politics of regret". He didn't see regret as a new emotion or phenomenon, but that its "ubiquity and elevation to a general principle" and to an "emblem of our times" was a new element. It framed anew the dealings with the past.²⁶ This atmosphere was feeding expectations and creating the need to react. In France, although they had a quite successful restitution process after the war, if measured in terms of the percentage of property restituted, they decided nevertheless on compensation payments in the 1990's. Members of governments regretting in public earlier mistakes in dealing with the past became a matter of course. In a similar way the restitution of Jewish property in the former East Germany became "business as usual", having lost most of its moral drama and becoming a matter of mere rational and legal action.²⁷

But as Dan Diner has emphasized, restitution is a *dialectic* process; it is the result of recovered memory, but it also affects a revival of memory.²⁸ He describes restitution as both a catalyst and a consequence of memory. This puts the focus on the trans-generational perspective and on the effects of restitution on the family memory as a kind of re-mediation of memory. With compensation payments one can see a similar effect; they are the consequences of a new public awareness and at the same time they stir up individual memories. I will show this in the following pages, reporting from my interviews done in Vienna in 2007/2008 with representatives from three generations, who recalled their experiences with restitution and its effects on their families at a time when some of them were receiving their first payments from the

²⁶ OLICK, J.K., *The Politics of Regret. On Collective Memory and Historical Responsibility*. Routledge, New York, 2007, p. 14.

²⁷ See: GOSCHLER AND LILLTEICHER, *op. cit.*, 25. GOSCHLER, C. AND THER, P. (eds.), *Raub und Restitution. 'Arisierung' und Rückerstattung des jüdischen Eigentums in Europa*. Fischer, Frankfurt/M., 2003, pp. 225-237 and the article on France by CLAIRE ANDRIEU, pp. 134-154.

²⁸ DINER, D., 'Restitution and Memory – The Holocaust in European Political Cultures,' *New German Critique*, 2003, 90, pp. 36-44, 39f.

GSF. As the interviews show, the way survivors feel about compensation varies from absolute rejection to a kind of reconciliation, and depends on their personal experiences and their life situation at the moment of the interview. Some of them still vehemently refuse it, some take the money because of the simple reason that they need it, and others because they are entitled to receive it; for others it means an acknowledgment of their suffering and they see it as a symbol of recognition.²⁹ I will generalize some individual experiences by concentrating on the trans-generational dimension of restitution.

5. INTERVIEWS: RESTITUTION, THE MEDIA AND THE DYNAMICS OF MEMORY

Interviewing people about what ‘compensation’ means to them – using the familiar German term ‘*Wiedergutmachung*’ – leads directly to a chain of explanations about its deficiency, connected with a rather hostile attitude. From an academic point of view, the

²⁹ There is growing body of scholarship on compensation (by and large favoring a top-down approach), to which I cannot refer here, only summarizing schematically some important notions:

Some argue that money helps those who need it, and they see it as a symbolic attempt to acknowledge past injustices and suffering, seeing its importance in the sense of entering into a relationship (EIZENSTAT, *op.cit.*; BARKAN, *op. cit.* pp. 317-329). Others emphasize that focusing on material compensation feeds the danger of a monetary valuation of memory, and that a claim for compensation is often more about wanting answers and recognition of moral injuries rather than compensation as a ‘primary purpose’ (LEYDESDORFF, S., How Shall We Remember Srebrenica? Will the Language of Law Structure Our Memory? In: GUTMAN, Y., BROWN, A.D., AND SODARO, A., (eds), *Memory and the Future. Transnational Politics, Ethics and Society*. Palgrave Macmillan, London, 2010, pp. 121–137).

However, there is some consensus that financial compensation gives foremost more weight to a mere apology (DE GREIFF, *op. cit.* 133f.). At the same time they highlight that compensation needs to be seen in relation to the other instruments of transitional justice or memory politics, thus, cannot be evaluated on its own – a thought this article is based upon.

“so-called *Wiedergutmachung*” (Constantin Goschler) is a metaphor for a complex and diversified topic. Yet for the people involved, the term is explicitly defined by its inadequacy and shortcomings, although when – as in recent debates – it is only referred to symbolically, it is associated with re-compensation, which is impossible, as this would require being able to calculate an exact figure. What academics have theorized as a shift from “guilt into debts” (Sigrid Weigel), involved people rather call “dirty money” and then often refuse it, as did the husband of my interviewee Susi N. This discussion about what term to use leads directly to the center of the emotional upheaval those involved experience.³⁰

The compensation procedure in Austria started in 1995 with public campaigns. Advertisements in newspapers and magazines titled ‘Who was a victim of National Socialism?’ invited claims. The application is in itself a confrontation with a medium and its specific rhetoric: it is a sheet of questions (like that of the *GSF*), asking for losses in different categories (education, bank accounts, insurance policies, property). For many people it meant talking about their experiences and recalling all these little details of their private belongings, how they had lost them and how they have been treated. Does this advance the narrative of a failed biography or of ‘being a victim’ instead of advancing a story of success, as generally presented by memoirs and autobiographies (‘made it in spite of everything’)? How is family memory influenced when confronted again with details of loss and persecution 60 years after the war? Has not each form of restitution some danger of reproducing the role of ‘being a victim’, as this attribution is not only thus officially acknowledged but possibly also manifested and perpetuated?

³⁰ WEIGEL, S., ‘Shylocks Wiederkehr. Die Verwandlung von Schuld in Schulden oder: Zum symbolischen Tausch der Wiedergutmachung,’ in: WEIGEL, S. AND ERDLE, B. (eds.), *Fünfzig Jahre danach. Zur Nachgeschichte des Nationalsozialismus*. VDF, Zürich 1996, pp. 165- 192; GOSCHLER, C., *Schuld und Schulden. Die Politik der Wiedergutmachung für NS-Verfolgte seit 1945*. Wallstein, Göttingen 2005

- The Need for Success Stories: Narrative Identity

As the application form for receiving compensation is focused on losses, one could expect that to talk about restitution means to talk about losses. However, most of the first-generation-interviewees (survivors) told me the whole story of persecution, focusing on little success stories, usually a story they are more or less used to talking about. Talking about restitution is something uncomfortable to many and would mean remodeling their narrative, at least for this occasion of the interview. That also seems to be the reason why some people refused to be more specific regarding their losses and their experiences with compensation procedures. One interviewee, Kurt Z., said: “I don’t want to talk about it, because I can’t live with that”, and kept on talking about himself as a boy (“echter Lausub”), a story he is used to telling. This shows an essential need for people to focus on the positive moments of life, also as a mechanism of self-protection. It becomes apparent how, via a narrative, a certain identity is created. Telling a story is primarily not a self-reflexive act, but is directed at an audience, such as the fictive imagination of the ‘other I’ (‘anderen Ich’). As Jerome S. Bruner stresses, “Stories are not only created to report experiences, but also and firstly to shape them.”³¹ Here, in the context of a narrated success story, the issue of restitution is associated with bad memories and with anger, as when Kurt Z. called the compensation payments “a pittance” (“Almosen”). He wants society to focus on the present and to improve the current relationships between different groups in society through knowledge and mediation, not past events and debts. In this respect he is involved in the trans-Jewish dialogue, which he sees as harmed rather than helped by compensation procedures, as it revitalizes old anti-Semitic stereotypes. Other interviewees also criticized the

³¹ BRUNER, J.S., ‘Vergangenheit und Gegenwart als narrative Konstruktionen,’ in STRAUB, J. (ed.), *Erzählung, Identität und historisches Bewusstsein. Die psychologische Konstruktion von Zeit und Geschichte.* Suhrkamp, Frankfurt/M., 1998, pp. 46-80, 52.

publicity given to restitution on television and in the newspapers, because they felt it instigate wrong ideas. Politicians, talking for years about compensation payments, give both the public and the victims wrong impressions about the amounts involved. This could also contribute to revitalizing certain stereotypes as well as certain segmentations within society, leading to the recipients' feeling once again that they are different from those around them. Accordingly some wish the procedure of compensation to be done in silence, not as a political act of generosity, accompanied by attention-catching speeches.

Indeed, media and restitution seem to be a difficult and ambivalent alliance. Until recently the media had never paid such attention to the issue or promoted restitution in such a concerted way. The growth in American media of the Holocaust since the 1980's contributed to this change. One could think that a strong presence of restitution procedures in public would help show more clearly the legacy of the Nazi era and the necessity of dealing with it still today. But in my interviews I could see a certain gap between the generations. Members of the first generation seem rather skeptical about this particular publicity (emphasized, for example, by their near absence from media reports about restitution), while the second generation seems to rather appreciate this attention, arguing as Robert L. does that only a public discourse has the power to communicate restitution as a social process and to acknowledge its legitimacy.

- Restitution in the Austrian Newspapers

When reading the newspapers in Austria, how is the topic of restitution represented? In general, looking at the reports of recent years, documentation and commentary seem to be well balanced, reporting successes as well as disappointed and critical voices, but

generally portraying it in a positive light.³² Only recently, owing to the start of the commemorative year 2008, did the compensation payments get negative front-page news in *Die Presse*, because at this point still only about half of the applicants have received some payments, after seven years of waiting for their claims to be processed. (18 January 2007) Voices calling for deadlines and for finality (*'Schlussstrich'*) are hardly present in the general public, mainly just in letters to the editors or in postings in Internet forums. Even the tabloid *Krone* prefers to ignore most of the debates. The topic seems to be taken for granted, based upon such a consensus, to the extent that politically there seems to be nothing to win and no political profile to gain. This does not mean that there aren't any negative feelings in society, which could be instrumentalised easily, as happens in the cases of restitution of artwork like in the Schiele case, evoking a debate about art and national identity. But in general the issue is handled seriously, without concessions to the boulevard press (cases of art restitution are an exception) rather reflecting certain moral values and attitudes by communicating a specific picture of history. Thus, many reports in the media contrast the need for new measures with the failures of the past. They describe the property confiscations by the Nazis and then the recent measures in Austria, mostly neglecting the restitution procedures after the war. There is a certain resistance to be seen in the media to acknowledging the whole history of restitution. Here it needs to be asked firstly: Were the former measures too insignificant to become part of the collective memory? And secondly: Does this abbreviated narrative in the media possibly back the common public view that nothing had happened after the war, and does this reduced perception, now reanimated and retold by the media, fix and support the view of a (needed) 'late justice'?

As the interviews show, the restitution procedures after the war are not very present in family memory. Few people know or recall

³² The information is based upon interviews with the media coordinators at the GSF, as well as on a survey of articles published in 2007 and 2008 in Austria.

details about their procedure; mostly they describe it as a disappointing experience, receiving little or nothing at all. But even those who succeeded in getting their property back often experienced it as a failed procedure, highlighting the years it took or using summary descriptions like “we got it back, but had to sell it”. For example, an elderly lady remembers very well that although the house of her parents was restituted to her, she was forced to pay back the purchase price which she had supposedly received. Obviously the lawyer presumed that it was legitimately purchased from her family in the late 1930’s. However, it was often the case that people had never received this money owing to enforced taxes and the reality of frozen accounts, which means that many people had to re-buy their own property (or at least pay part of the purchase cost, reflecting the inflation rate of about 500 percent between 1938-50), and many could not afford it, like my interviewee Sophie R.. She was only in her twenties and had neither the knowledge nor the money to be able to keep the house, so she signed a settlement. The son, Paul R., described more losses; besides the house, there was also a flat, a business, and all the furniture and private belongings. His story could be summarized with his first phrase: “My family received nothing”.

The lack of compensatory measures seems particularly to strengthen people’s feeling that nothing had happened after the war. My interviewee Sophie R. remembers well, and has kept the letters from the administration of being confronted with “outrageous reasons” (*“haarsträubend”*) why she supposedly had no right to compensation, even though she had lost her parents in the concentration camps. Her son kept the letter from the governor of Vienna from the year 1957, in which his father’s application for compensation for his parents’ time in a concentration camp was turned down, on the grounds that the conditions of *that* concentration camp did not correspond to those of a prison. Paul R. resumes bitterly, “They were *just* in a concentration camp, not in prison.” These kinds of stories, of which there are many, contribute to the perception that “nothing” had happened after the war. And if

something was done, it was “half-hearted, not favorable and not recognizing one’s mistake” (Robert I.).

It was less the war than the way people were treated *after* the war which was so hard to cope with. There were some restitution laws, and there were some announcements in the Austrian newspapers, but who of the scattered refugees read the Viennese newspaper? Who knew what was going on at home? The government made little effort to communicate these procedures, instead they installed deadlines. Survivors remember unsuccessful letters, unfair deals, and long procedures with often no result. These individual experiences were painful, but also the post-war atmosphere was hurtful; not having been invited to come back after the war, not getting substantial support for the reconstruction or help dealing with the restitution procedures, having to deal with institutions and officials not long ago responsible for the ‘Aryanisation’. Restitution was seen as a generous gesture on the part of the government, and not as a right of the victims, and was communicated in this manner by politicians and institutions. As Gustav Jellinek, negotiator for restitution on behalf of the Jewish community in Vienna (as board member of the Committee for Jewish Claims on Austria), writes, “The people in Vienna and the Austrian press were almost without exception against restitution and many regarded the estimation of the lost properties as exaggerated.”³³ There were also rumors in the media about influential Jewish pressure groups in America or ‘the Jewish capital’, anti-Semitic stereotypes people believed in and which shaped the discussion. Arguments like these also indicate that the whole issue of restitution was mainly discussed along political lines, by representatives of the government or political functionaries demanding ‘*Wiedergutmachung*’ for their political clientele.

The discussion after the war in general was limited and very impersonal. It was mostly restricted to political and Jewish victims,

³³ JELLINEK, G., ‘Die Geschichte der österreichischen Wiedergutmachung,’ in: FRAENKEL, J. (ed.), *The Jews of Austria. Essays on their Life, History and Destruction*. Vallentine, London, 1967, pp. 395-426, 399.

hardly mentioning any other groups. You could find mainly reports about the restitution laws in the media and the poor living conditions of the Jewish victims after the war, but only in some party newspapers were there brief accounts of the life stories of NS victims.³⁴ This social and media context seems at least as important as the question of to what extent lawyers tried their best to help the survivors to reclaim their property. In the face of this, people apparently often forgot what was possible in spite of this hesitant and often hostile attitude.

In this way it became manifested in family memory that the restitution had failed and was a very unsatisfying procedure, especially when compared to the neighboring country Germany, which had – albeit reluctantly – acknowledged its responsibility in various ways. This dialectical perception, in all generations, is mentioned in many interviews. It shows how collective memory patterns such as the ‘victim theory’ influence people’s perception of the restitution measures, because filling in an application form for compensation does not only mean searching for historical documents to provide exact dates of an individual or family past, but also remembering all the past struggles regarding compensation. In this respect, it means confronting private memory with the former official memory of Austria as the ‘first victim of Hitler’, in which position it did not feel obliged to make compensatory payments. Consequently restitution itself is not part of the collective memory. This may also have contributed to the fact that the procedures after the war were often not acknowledged as such.

³⁴ “Wohnungsamt legalisiert Arisierungen”, *Arbeiterzeitung*, 14 January 1946, qtd. JAROSCH, M., *Die Berichterstattung österreichischer Tageszeitungen zur Restitution von während der NS-Herrschaft entzogenem (jüdischen) Eigentum in den Zeiträumen 1945 bis 1948 und 1997 bis 2000*. Diplomarbeit University Vienna, 2002, 97.

- Generational Effects

What is quite striking is that to some extent the restitution seems to be even more important for the second than for the first generation. One interviewee, Robert I., told me, emphasizing that this was typical for his generation (and it was repeated by others as well), that he wanted his parents to ask for restitution because they are entitled to do so. He was always criticizing the way his parents hide their Jewish identity and their defensive behavior in general. For him restitution means giving them back some empowerment and self-confidence, because they have to be active, make a claim, confess to being Jewish. They have a certain life story and the right to ask for something. To that extent, it seems that the procedure of restitution could help to reformulate a conflict between the generations. To return a sense of agency to the older generation which they had lacked for many decades could improve communication with their children and bring the generations closer to each other. In this view, asking for restitution does not confirm the status of being a victim, but instead signals emancipation and empowerment.

This is confirmed by historical studies. They show the problems in families after the war, when, after fighting for decades, the claims for compensation were not acknowledged. Then people often felt degraded, especially in front of their children. Their suffering was not acknowledged and by that the family history was not officially legitimized. That often caused the children to doubt the credibility of their parents.³⁵

This fact could explain why the second generation is often so much more emotional, demanding and argumentative about the matter of restitution. Whereas their parents sometimes even tend to see the faults of restitution within themselves (like having been too young and stupid to manage these affairs better), or explain it with the unfortunate circumstances of the post-war situation, their children

³⁵ KESTENBERG, *op.cit.*, p. 79.

blame the state, using narratives such as “They got away with it”, “They did not apologize”, or “They delayed”. Like others, Robert I. sees the post-war measures as a plain “second Aryanization”. He thinks that his parents were treated with cynicism. While he is very critical about the recent restitution – the sum is too small, “just a joke”, given not from heart but again owing only to international pressure – he accepts it at least as a success for his parents, and as an occasion to remember what occurred.

Here the interviews show that the compensation payments seem also particularly important for some members of the second generation themselves: “At the end my mother filled in the forms to please me, because she saw how important it was for me.” Anna O. considers the reparations of recent years as very important for her and her children’s generation, “finally” giving some more attention to the special situations in post-Holocaust-families because in her family she still feels the impacts of persecution, like being brought up deprived of love and voiceless, and she welcomes the compensation procedures as a possibility to talk about these difficulties within her family more openly. However her mother (being proud of her family’s past and her own communist engagement) rejected the compensation as she has also rejected to see herself as victim or to acknowledge the consequences the past had for her family.

Memory itself is an interactive and intergenerational process as later generations always take part in inner-familial communication concerning the past.³⁶ This can be seen also in the way many members of the third generation reflect upon their family past: in precise language, thoughtful explanations, with a specific political or social consciousness and a great awareness of being part of a minority. An interviewee in her mid-twenties called this the “hyper sensibility of our generation” (Linda I.). She sees a trend in her generation of going back to religion and back to their roots,

³⁶ For research on social memory and the ‘Familiengedächtnis’ see the work of Gabriele Rosenthal, Harald Welzer and Dan Bar-On.

explaining that it is not just important to know *who* you are, but also *where* you are living (“Es ist immer gut zu wissen wo man lebt!“). In this respect the issue of restitution means for her an opportunity to confront the public with Jewish history and the existence of a Jewish community in Austria. In general she sees the compensation as important for her grandmother, because she has been waiting for an official acknowledgement. As for many old people, it gives her the chance to tell her story and to talk about it with official authorities. That is an opportunity that many survivors appreciate, especially when they had never told their stories within the family. But the granddaughter is also skeptical, because if one looks at the process in detail, very little is being done: the gesture is too small, giving evidence of the mindset of the politicians. Another interviewee in his mid-twenties shares her view, by saying, “One has to be honest with oneself [...]. Call it what it is: It is neither a *Wiedergutmachung* nor compensation, only simple payments.” And then he starts telling the story of a thief who had been sentenced under Jewish law not to lose his hand, but to pay back twice what he had stolen. This is a painful sentence. It was similar in Germany, which had paid so much that it hurt the state tremendously and this was accepted by the victims. And he finishes: “I do not see this will in Austria.” He, like many others, sees the compensation plans purely as the result of a contract which forces Austria to pay, as an obligation initiated by the American class-action suits and by international force, and not as something done out of free will. He hereby highlights that for him it is less about issues of justice than about power-politics.

When both young adults signal no need for this acknowledgement personally, they interestingly overlook the emotional engagements of their parents in the compensation issue. They rather prefer to stress its relevance for society as a whole. This highlights the political dimension of these measures, independent from individual disappointments. This desire to see restitution as a social process is common to all generations, because when considered in detail, compensation often has to fail: “Compensation always calls for a confrontation with the past”, says applicant Robert

L., “and this often makes a repetition of the victim-experience inevitable”. But he sees an important civilizing effect “when a society proves that it has a memory”, whether in giving back stolen property or in punishing perpetrators. Forming judgments about wrongdoings of the past he sees as an essential message for future generations: “It is an important experience for the younger generation that nothing is forgotten.”

Many issues were mentioned by my interviewees that would belong to such an extended understanding of restitution and the need to imagine restitution in alternative ways, such as an open-minded debate about today’s minorities and asylum policies. I would think that a comprehensive debate about restitution and all its side-issues in the media and in society would give the affected people and their heirs the feeling of a change in society and that is what most of them would like to see yet hardly do. Here the media has a huge responsibility in the way they communicate restitution affairs, in the way they possibly not just re-frame the term ‘restitution/compensation’, but also the term ‘victim’. There are minorities like Corinthian Slovenes, partisans or deserters from the German Wehrmacht who were recognized officially as victims of National Socialism quite recently. But without any public campaign, it had presumably little consequence for their family memory or for rehabilitation in public opinion, and as such nearly no effect on society as a whole. They and particularly their heirs could profit from an extended discussion.

6. CONCLUSION: AN ATTEMPT TO GUIDE THE DEBATE ON COMPENSATION TOWARDS MEMORY STUDIES

How can compensation payments contribute to processes of transitional justice? Compensations were long seen as a matter of generosity and not of rights. In this respect, the *General Settlement Fund* made a difference by creating the idea that the applicants were entitled to make a claim on an individual basis, allowing them to

fight for a better result, or even to sue the Austrian state. As Evi I. succinctly put it, “I have been active ever since”. However, legally speaking, the individual lump sum compensations were voluntary gestures, not obligatory ones. The difference is the detailed procedure and the change in public discourse, from symbolic gestures *towards* victims to legal demands *from* victims.³⁷ This created feelings of empowerment but was often followed by disappointments. As illustrated above, today’s family memory is often convinced that there is still done “too little”. While until the 1980s this view was supported by the victim-theory, it seems today supported by a discourse based less upon historical facts than on morals.

This seems to be supported by the restricted communication about compensation matters. The *thinking* about compensation today seems to be focused too much on the first generation and (family) memory is ignored force in the compensation process. But as memory-scholars say, there are no descendants in terms of memory.³⁸ As the Austrian case shows, compensation procedures are specifically important for members of the *second generation*, the ‘angry generation’, as I have called them,³⁹ who fight not only for the recognition of their parents, but also of their own difficulties with legacies of the war (whether real or imagined). While the topic of compensation has often vanished into historical details and legal procedures (Historical Commissions, laws), above examples show that losses and pain have a strong imaginary presence in the mind of the descendants, creating broader expectations towards compensation practices (and their debate). In this respect, compensation is often too narrowly discussed, usually as a medium for recognition of past

³⁷ UHL, H., ‘Recovering Austrian Memory: Stratifying Restitution Debates,’ in: DINER, D. AND WUNBERG, G. (eds.), *Restitution and Memory. Material Restoration in Europe*. Berghahn Books, Oxford, 2007, pp. 233-254, 244.

³⁸ REITER, M., *Die Generation danach. Der Nationalsozialismus im Familiengedächtnis*. Studien-Verlag, Innsbruck, 2006.

³⁹ For analysing the function of anger in compensation procedures and its particular role in family memory, see: IMMLER, *Memory Studies* (2012).

suffering and losses and hardly of present needs (in a broader political sense) or as a medium for trans-generational dialogue. Here this research proposes a shift in the debate.⁴⁰

⁴⁰ Acknowledgment: The publication of this article was financially facilitated by the Fondation pour la Mémoire de la Shoah (Paris). Here an earlier published set of data is reframed and re-read from a transitional justice perspective. Cf.: ASTRID, E. AND RIGNEY, A. (eds.), *Mediation, Remediation and the Dynamics of Cultural Memory*. De Gruyter, Berlin/New York, 2009.

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