

# Measuring the impact of punishment and forgiveness: a framework for evaluating transitional justice

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## Abstract

*Truth commissions, international criminal tribunals, reparations, public apologies and other mechanisms of transitional justice are the new mantras of the post-cold-war era. Their purpose is to foster reconciliation in societies that have experienced widespread human-rights violations and to promote reform and democracy, the ultimate aim being to defuse tension. But to what degree are these mechanisms, which are financially and politically supported by the international community and NGOs, truly effective? Very little, in fact, is known about their impact. By examining the underlying hypotheses and workings of transitional justice and proposing a series of indicators to evaluate its results, this article helps to fill the gap.*

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Transitional justice has become the new mantra of domestic and international politics since the end of the cold war. Within two decades, truth commissions have multiplied throughout the world, there has been unprecedented development in international criminal justice, and there have never before been so many

\* The author wishes to thank the United States Institute of Peace, the Swiss National Scientific Fund, ref 100.012-102025 (October 2003–September 2005), the Human Rights Program of Harvard Law School (January–July 2005) and the Faculties of Economic and Social Sciences (SES) and Law of the University of Geneva.

statements of public apologies and instances of reparations granted to the victims of human rights violations. Since 1989, the intensity of the process of remembrance of past atrocities has been unequalled.

Transitional justice bears the contradictory hallmarks of the 1990s – those of hope and of tragedy. On the brighter side, there has been the collapse of the communist dictatorships in the former Soviet empire, the end of the apartheid regime in South Africa, and the consolidation of democracies in Latin America. And on the darker side have been the genocide in Rwanda and the policies of ethnic cleansing in the Balkans, the Caucasus and Africa. In all of these regions, the efforts to cope with past and sometimes continuing crimes have resulted in a profusion of initiatives which stirred many passions. The virtually simultaneous creation of the South African Truth and Reconciliation Commission and the International Criminal Tribunal for the former Yugoslavia became emblematic of the heated debate in the mid-1990s between the advocates for a policy of forgiveness and those in favour of a policy of punishment, each claiming to better serve the goal of “reconciliation”.<sup>1</sup>

Today the international community places emphasis both on the non-judicial mechanisms geared to rebuilding society and on the stigmatizing dimension of criminal punishment. Within the field of transitional justice itself, restorative and criminal justice are both perceived as necessary, since they are complementary.<sup>2</sup> In the post-cold-war world, which is marked by the resurgence of a moral philosophy of international relations, this complementarity of criminal and restorative justice thus plays a fundamental role. It is both the safeguard for the pillars of civilization and the fragile hope for a better world.<sup>3</sup>

In the view of the states that are threatened with fragmentation, where values and the social fabric are crumbling, transitional justice presents itself as an alternative means of escaping escalating violence and vengeance. Attuned to the request of victims and societies, transitional justice seeks to contribute to their reparation. But it proposes to be more than that. It aims to mobilize the dynamic

1 See the writings of Desmond Tutu, and in particular, *No Future without Forgiveness*, Rider, London, 1999. Resolution 955 of the UN Security Council, which established the ICTR in 1994, explicitly assigns to the Tribunal the purpose of achieving “reconciliation” among Rwandans: “Convinced that in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law ... would contribute to the process of national reconciliation and to the restoration and maintenance of peace ...”.

2 See in particular the Report of the UN Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies, 3 August 2004, S/2004/616. The UN tested this combined approach in Sierra Leone by establishing a Special Court and a truth commission. Symptomatically, Desmond Tutu today advocates that the perpetrators of political crimes who have not asked the TRC for amnesty be prosecuted in South Africa. See “Tutu urges apartheid prosecutions”, <<http://news.bbc.co.uk/2/hi/africa/4534196.stm>> (last visited January 2006). The ICTY stated for its part that it was in favour of establishing truth commissions in the countries of former Yugoslavia.

3 See in particular Eleazar Barkan, *The Guilt of Nations: Restitution and Negotiating Historical Injustices*, W.W. Norton and Company, New York, 2000; Alex Boraine, *A Country Unmasked, Inside South Africa's Truth and Reconciliation Commission*, Oxford University Press, Oxford, 2000; Priscilla B. Hayner, *Unspeakable Truths, Confronting State Terror and Atrocity*, Routledge, New York and London, 2001; Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, Beacon Press, Boston, 1998.

forces in those societies in order to help them face a past mass violation of human rights so that they can then advance along the road towards a dawning democracy. In that sense, transitional justice appears as a New Jerusalem: it shows the way to institutional and political reforms which will gradually contribute to the establishment and consolidation of peace and the rule of law. There is an eschatological dimension to transitional justice here – the will of a society to extricate itself from the tragedy of history, to thwart the fatality of a world.

Transitional justice is a utopia in the positive sense of the term, a utopia which, according to its postulates, enables societies to mobilize and to act, mindful of the fact that they are facing formidable challenges, as is pointed out in the UN report on “The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies”:<sup>4</sup>

“Helping war-torn societies re-establish the rule of law and come to terms with large-scale past abuses, all within a context marked by devastated institutions, exhausted resources, diminished security and a traumatized and divided population, is a daunting, often overwhelming, task. It requires attention to myriad deficits, among which are a lack of political will for reform, a lack of institutional independence within the justice sector, a lack of domestic technical capacity, a lack of material and financial resources, a lack of public confidence in Government, a lack of official respect for human rights and, more generally, a lack of peace and security.”

This programme, which aims to improve security in hotbeds of tension, is a truly Herculean task. As can be seen, transitional justice involves fundamental societal choices. It participates in establishing the norms that form the basis for the operation of the international system. At the crossroads of moral standards, politics, law, history and psychology; transitional justice has narrowly circumscribed the bounds of national sovereignty by limiting the definition of diplomatic immunities and the permissible scope of amnesties. This has also influenced the dynamics of conflict resolution and made the work of mediators in their negotiations with the warring parties more problematic, for what assurance can they give political and military leaders or warlords who may tomorrow be charged with heinous crimes?

Transitional justice has become one of the salient features of the post-cold-war era. The international community has heavily invested financially, politically and symbolically, in policies and mechanisms of forgiveness and punishment. The United Nations has played an essential role in certain truth commissions such as those established in El Salvador and Haiti. The UN Security Council has also created two ad hoc UN tribunals, for the former Yugoslavia and for Rwanda, whose operating costs account for over 15 per cent of the UN’s current budget. Since their inception in 1993–4, those two tribunals alone have

4 Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, above note 2.

cost the United Nations over US\$1.6 billion; together they currently cost over \$250 million a year.<sup>5</sup>

Within fifteen years, transitional justice has become a branch of learning with its own systems, practices, institutions, specialists, scholars, publications and debates, and since 2000 has been included in the curricula of some universities. It is given wide media coverage, since it asserts the new values of societies and of the international community and is thus a subject of impassioned debate.

Whereas the literature on transitional justice is considerable, works that decipher its *modus operandi* and empirically evaluate its effects are in fact extremely rare. There are two major reasons for this: the methodological obstacles involved (see below), and the fact that the debates on transitional justice, and in particular on international criminal justice, are highly ideological. These are as polarized as they are ritualized and, in the final analysis, often prove frustrating. Traditionally, they range the advocates of transitional justice, who see this justice as a chaotic but necessary process to render politics more ethical by releasing the dynamic forces of society, against those who are radically opposed to it, criticizing either the entire process or at least several of its aspects. As one of many, General Gallois considers, for example, that international criminal justice is quite simply a selective political form of justice. A high-handed means of establishing “judicial apartheid” between an all-powerful West and weak countries:

The International Criminal Tribunal for the former Yugoslavia is a weapon of war just as a bombing or an economic blockade can be. Contemporary wars comprise a number of phases ... a phase of disinformation intended to demonize the enemy ..., a trial of the “vanquished” putting the finishing touches to the justification of the war. The right of intervention at the humanitarian and military level is now complemented by the right to intervene in the criminal-law field.<sup>6</sup>

Others, such as Indian anthropologist Nandini Sundar, see it as a sign of the hypocritical policy of the West, which supports international criminal institutions whenever they strike at its enemies but reserves the right to express timid regrets when it comes to its own crimes.<sup>7</sup>

In fact, many observers and practitioners of transitional justice rightly point out that its effects are hardly known. Scores of states set up transitional justice machinery with the support of the international community and many non-governmental organizations (NGOs). But what has been the return on this financial, symbolic and political investment? What have these judicial and non-judicial procedures yielded? To what extent have the promises of transitional justice actually been kept (reconciliation, stability, democratization ...)? How can

5 Above note 2, p. 14.

6 Pierre Marie Gallois, Jacques Vergès, *L'apartheid judiciaire: le Tribunal pénal international, arme de guerre*, L'Age d'Homme, 2002, p. 11.

7 Nandini Sundar, “Toward an anthropology of culpability”, *American Ethnologist*, Vol. 31, No. 2, pp. 145–63.

the international community better target its support in order to empower civilian societies and help them to overcome the divisions arising from internal conflicts?

The above-mentioned UN report already drew lessons.<sup>8</sup> As a modest contribution amongst others, the present article endeavours to help to fill this gap.<sup>9</sup> This article proposes to decipher the modus operandi of transitional justice and to assess some of its results. In order to do so, it is necessary to first define the transitional justice mechanisms, then analyse the underlying logic of it, and finally examine ten challenges which transitional justice proposes to take up.

## Transitional justice: a set of mechanisms

As mentioned above, the advocates of transitional justice argue that 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.

These are both individual and societal objectives, since they range from the psychological recovery of individual victims to “national reconciliation” through the forming of a new collective identity.

Transitional justice uses a number of practices to achieve these aims: judicial proceedings, truth commissions, lustration and screening laws, reparations, public apologies, development of a shared vision of history.<sup>10</sup> These practices are used selectively, simultaneously or even chronologically, depending on the situation. Some countries, for instance, have chosen not to prosecute, others have instituted parallel truth commissions and criminal proceedings, and yet others have begun with policies of forgiveness and subsequently implemented policies of punishment. As a counterpoint to this trend of extending transitional justice, Mozambique decided to grant a general amnesty at the end of an appalling civil war in 1992, and Algeria did virtually the same in the autumn of 2005.<sup>11</sup>

8 Above note 2.

9 To cite only some, Eric Stover and Harvey M. Weinstein (eds.), *My Neighbor, My Enemy, Justice and Community in the Aftermath of Mass Atrocity*, Cambridge, 2004, Cambridge University Press, Eric Brahm, “Getting to the bottom of truth: evaluating the contribution of truth commissions to post-conflict societies”, paper presented at the International Studies Association Annual Meeting, Honolulu, Hawaii, March 1–5, 2005; *Forgotten Voices: A Population-Based Survey on Attitudes about Peace and Justice in Northern Uganda*, ICTJ and the Human Rights Center, University of California, Berkeley, July 2005; *A Call for Justice: A National Consultation on Past Human Rights Violations in Afghanistan*, <<http://www.aihrc.org.af>> (last visited January 2006); Hayner, above note 3.

10 This is the avenue chosen by most of the former Communist regimes of the Soviet bloc; it will not be discussed in this article.

11 The Algerian authorities organized a referendum in which, under heavy pressure from the authorities, the majority of the population voted in favour of a very extensive amnesty law for the perpetrators of crimes committed during the civil war. The international observers contested the results of this referendum.

## The principal machinery of transitional justice

### *Judicial proceedings*

These constitute the various forms of punitive policy, first implemented by the creation of the International Military Tribunal in Nuremberg; international criminal tribunals, semi-international tribunals, the International Criminal Court and national courts. Their purpose is to suppress international crime (war crimes, crimes against humanity and crimes of genocide) and, also according to their mandate, serious human rights violations.

### *Truth commissions*

Truth commissions (sometimes called truth and reconciliation commissions) are oriented towards the victims. They form an extrajudicial process which, depending on the context, complements or replaces criminal proceedings.

### *Reparations*

Reparations are as old as war itself. But what we mean here by reparations is a relatively new phenomenon intended for the victims or for the legal successors of persons who were persecuted because of their origin or allegiance. The first reparations of this kind were those granted by the Federal Republic of Germany from 1952 onwards to the survivors of the Nazi extermination and concentration camps. They are voluntary payments by a state for moral and political purposes to individuals or groups.<sup>12</sup> In addition, there are now reparations that can be ordered by criminal courts.

### *Public apologies*

The expression of regret by a head of state or by high-ranking state officials is nothing new. But since the end of the cold war the increase in the number of such acts of remorse has been unprecedented. In the late 1990s all Western leaders voiced public apologies for past crimes, some of them committed several centuries ago. Tony Blair, for instance, apologized for British responsibility for the Irish famine in the nineteenth century, Jacques Chirac for France's responsibility in the deportation of Jews, Gerhard Schröder for Germany's Nazi past, and Bill Clinton for his country's attitude during the Rwandan genocide, for the slave trade and slavery, and for the support of dictatorial regimes in Latin America.

12 This definition is based to a large extent on that of Eric Posner and Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, Vol. 103, pp. 689–748, 2003, esp. p. 694.

### *Developing a shared vision of history*

Judicial proceedings, truth (and reconciliation) commissions, public apologies and the payment of reparations all play a part in how a nation construes its history by stating its identity and its new values. This process of historical awareness is combined with a more extensive process that is marked by the opening up of archives, the rewriting of history textbooks, the construction of memorials and memorial museums, and the institution of days of remembrance.

### **The postulates of transitional justice**

Very few theoretical works have focused on the postulates of transitional justice. On closer examination transitional justice is based on two fundamental and complementary axioms. The first is that the establishment of norms backed by a carrot and stick policy socializes “bad students” by inculcating respect for human rights. It is a normative method of education intended for the political elite and the military, in other words a top-down process. The second axiom, on the other hand, is a so-called bottom-up process. It stems from the idea that societies stained by the bloodshed of civil wars or peoples victimized by dictatorial regimes must be healed in order to exorcize their traumatic past. This process of “national catharsis” seeks to release the members of the society in question from their emotional stress by channelling those emotions towards the rebuilding of national identity.

### **Peace through the institution of norms**

The development of transitional justice is based on the idea that the establishment of new norms gradually socializes “ethnic cleansers” and warlords, for example, and eventually enables the international system to be stabilized. Two authors, Martha Finnemore and Kathryn Sikkink, have explained with great conviction that norms act as a corset on states, progressively limiting their room for manoeuvre.<sup>13</sup> They control the behaviour of the various players, redefine their identities and impart new values, which gradually pervade the national institutions.

According to Finnemore and Sikkink this normative change acts like a three-stage rocket: to begin with, the “norm entrepreneurs” – the NGOs – use their power of denunciation in order to outlaw and isolate human rights violators; this is the “law of noise”. To do so NGOs create alliances with states which have developed a niche market in international relations, where their role is that of guardians of moral values, arbitrators or mediators, such as Switzerland, Sweden, Norway and Canada. They are generally Protestant countries which are not major

13 Martha Finnemore and Kathryn Sikkink, “International norm dynamics and political change”, *International Organization*, Vol. 52, No. 4 (Autumn 1998), pp. 887–917. See also Jack Snyder and Lesli Vinjamuri, “Trials and errors, principle and pragmatism in strategies of international justice”, *International Security*, Vol. 28, No. 3 (Winter 2003/04), pp. 5–44.

powers and are unencumbered by the millstone of a colonial past, and thus have no exclusive reserve to protect as do, for example, France and the United Kingdom.

Subsequently, the NGOs work to achieve universal recognition of these norms with the support of international organizations and states. The latter see the political advantage of adopting a moral stance. And in the final stage, according to this approach, all states gradually adopt these norms.

Recalcitrant players are subjected to “strategic bargaining.” If they accept the rules of the international community they will be entitled to the gains offered by respectability (such as access to World Bank and International Monetary Fund loans, application for accession to the European Union), and if they refuse, they pay the price for their isolation. The co-operation of the countries of the former Yugoslavia with the Hague Tribunal is a perfect example of this approach: Serbia only handed over Slobodan Milošević to the International Criminal Tribunal for the former Yugoslavia (ICTY) because the West had made the granting of a loan of US\$10 billion conditional on the former Serbian president’s transfer to the ICTY prison. This cheque-book diplomacy was later compounded by the European Union countries’ decision to make co-operation with the ICTY a prerequisite for negotiations on Serbian and Croatian accession to the European Union. It is this pressure which explains the fact that practically all of the accused were arrested. Such strategic bargaining forces recalcitrant states to establish procedures within their own structures which satisfy the Western sponsors. And in the final stage, these external constraints end up by becoming internalized to such an extent that they form part of the integrative culture in those institutions. Once this socialization process has been completed, pressures arise from within, leading to the emergence of a state genuinely governed by the rule of law.

### Peace through popular catharsis

This normative approach is combined with a psychologistic approach based on the concept of a metamorphosis of national identity. Its objective is “national reconciliation,” a process whereby former enemies manage to coexist without violence. This calls for a new societal pact to be drawn up which breaks “the cycle of violence and vengeance” – one of the fundamental tenets of transitional justice. It is based on a redemptive conception of narration, namely that by recounting their suffering in the solemn context of a criminal tribunal or truth commission, victims are enabled to “regain” their dignity.

Through this voicing of truth a national catharsis takes place, allowing a common history to be written in lieu of mutually exclusive and antagonistic memories and identities. The national identity is transformed. The most emblematic example is that of South Africa: by setting up the Truth and Reconciliation Commission and changing the flag and national anthem, symbols were very effectively mobilized to promote this metamorphosis of national identity centred on the idea of the Rainbow Nation, the new South Africa.



## Evaluation of results

We have so far defined both the mechanisms and postulates of transitional justice, but to what extent are these mechanisms achieving their goals? First of all, the difficulties they face should be stressed. To start with methodological difficulties: how does one assess the political and symbolic value of an international criminal tribunal or truth commission in the eyes of public opinion? First, the specific effect of such institutions must be isolated from other factors in which they play a part, such as the political evolution of a country. This initial difficulty is compounded by the use of vague moral concepts such as truth, forgiveness or reconciliation. Let us take the example of reconciliation alone: is it to be defined as the absence of vengeance? As the peaceful coexistence of erstwhile enemy groups? Or as a social reality marked by the close interaction of the various groups? Besides, some authors are wary of this term, preferring to use the expression “social reconstruction”.<sup>14</sup> The third difficulty is the question of the yardstick to be used for measuring the prevention of new crimes, an effect on which transitional justice prides itself. Deterrence is by definition difficult to apprehend and requires hypothetical arguments based on “what if?”

In short, the difficulty of isolating variables, the use of ambiguous concepts, reasoning based on hypothetical constructions – all this makes for an arduous task. Despite all these difficulties, however, let us try to clarify the concepts in view of the importance of the societal issues at stake.

### The temporal dimensions of transitional justice

It should be noted first of all that transitional justice has its effect in different phases. The German example is particularly striking. Analyses show that until the 1960s most Germans saw the Allies’ tribunal in Nuremberg only as rendering the justice of victors. To their mind, the blanket-bombing of Dresden, Hamburg and Berlin by the US and UK air forces was the price already paid by German society for Nazi crimes. It was not until the 1970s that the Nuremberg Tribunal became an integral part of the German frame of reference and played a part in the younger generation’s questioning of their elders’ attitude during the war, a questioning reflected in the rapid rise of pacifism.

To examine the impact of post-cold-war transitional justice, it is necessary to define temporal variables. Unlike the Nuremberg Tribunal, international justice is sometimes exercised even before the end of hostilities; examples of this are the ICTY, established at the height of the conflict in the former Yugoslavia, and the International Criminal Court (ICC), to which the UN Security Council similarly referred the ongoing Darfur crisis (in Sudan).

It is all the more essential to take the temporal dimension into account, for the very reason that the mechanisms of transitional justice reflect the balance of

<sup>14</sup> See, for example, Eric Stover and Harvey M. Weinstein (eds.), above note 9, pp. 13–15. We ourselves have conformed to general usage and use the term “reconciliation”.

power but are also instrumental in changing it. An assessment over time reveals this dynamic reality. Defeated or weakened leaders often initially retain sometimes disruptive influences which may enable them to negotiate the form that the new internal order takes. However, their strength and ability to rally support tends to dwindle in the long run, mainly due to the effectiveness of transitional justice mechanisms. This is what happened in Chile, where the truth commission contributed to the erosion of General Pinochet's popularity, promoting a new balance of power and opening the way, years later, for judicial proceedings which had formerly been impossible.

Four phases can be distinguished in the work of transitional justice, depending on the context.

1. The armed conflict or the repression phase, in which those political and military leaders with their partial or total grip on power make the work of international courts (the most used transitional justice mechanisms capable of intervening in this period) particularly difficult, for the war effort and propaganda have mobilized the population.<sup>15</sup>
2. The immediate post-conflict period (the first five years), when the warlords can (but do not necessarily) use their ability to cause disruption and can mobilize the media and networks loyal to them.
3. The medium term (from five to twenty years), when the society undergoing social and political reconstruction works out new points of reference. In the new political environment the persons charged with offences and the networks which support them are weakened. Hence the series of arrests in the former Yugoslavia, since more than 80 per cent of the accused – except for the two most famous fugitives – were taken into custody during this period.
4. The long term, with the rise of a new generation much more receptive to the need to overcome old divisions.

The mechanisms of transitional justice must be evaluated in relation to these various phases.

## The ten indicators for evaluating transitional justice

We have selected ten indicators for assessing the effectiveness of transitional justice in attaining the objectives assigned to it by the international community, namely to help bring about national reconciliation, regional stability and international security.

These indicators all constitute markers of the effects of transitional justice. Some apply only to policies of punishment, others to policies of forgiveness and others to both. They also reflect the promises made to societies and in particular to the victims of major human rights violations. They are the terms of reference for transitional justice.

<sup>15</sup> Transitional justice mechanisms are also established in situations other than war and/or internal conflict, as was the case in South Africa.

### *Indicators for international (and semi-international) criminal justice*

1. The penal effectiveness of international and hybrid criminal tribunals
2. The impact of “show trials”
3. Deterrence

### *Indicators for truth commission*

4. Production of the “truth”
5. Presentation of the “truth”
6. Recommendations for institutional reforms and implementation

### *Common indicators*

7. The therapeutic impact
8. The effectiveness of public apologies
9. The effectiveness of reparations
10. The process of building a common narrative

### Indicators for international criminal justice

#### *The penal effectiveness of international justice*

According to the advocates of international criminal justice, establishment of the truth and the punishment of criminals are indispensable for reconciliation and for the restoration and maintenance of peace.<sup>16</sup>

In this section we shall consider only the question of the effectiveness of criminal justice. What are the conditions conducive to such effectiveness? A brief examination shows that the penal effectiveness of international tribunals depends on two kinds of parameters: external parameters related to co-operation by states, and internal parameters related to the functioning of these judicial institutions. Two limitations of international justice are set out below. One clearly shows that unless states co-operate with a tribunal, its capacity for action is very much reduced. The other underscores the ambiguity of the existing norms for the main perpetrators of mass crimes to be prosecuted during or immediately after a conflict.

*The external parameters.* The ability of international tribunals to dispense justice largely depends on those who hold political and military power. Briefly, the latter can be divided into two groups: powerful states, in particular the permanent members of the UN Security Council, and state or sub-state entities (army, militias, guerrilla forces, etc.), over which the authority of international justice is to be exerted.

16 See in particular UN Security Council Resolutions 808, 827 and 955, which established the two ad hoc UN Tribunals.

In the case of the two ad hoc UN tribunals, the major powers help in various ways to determine their penal capacity: it is they who have defined the mandate and selected the judges and prosecutor, who decide whether or not to provide political and financial support, who regulate their co-operation in accordance with their national interests, who have sophisticated monitoring systems at their disposal to retrace links up through the chains of command and help the prosecutor to establish evidence, who arrest the accused, often in the course of robust commando operations, and who exert (or refrain from exerting) pressure on the warring parties to induce them to co-operate with the prosecutor.

Each of these factors is essential if international justice is to be effective. Conversely, if the political will of the major powers is absent, the capacity for international justice is very limited, as is demonstrated by the example of the International Criminal Tribunal for Rwanda (ICTR).

In adopting Resolution 955, which established the International Criminal Tribunal for Rwanda, the Security Council set “national reconciliation” as the Tribunal’s objective. The resolution gives it the power to punish the main perpetrators of the genocide in which 800,000 Tutsis were massacred, as well as the perpetrators of war crimes and crimes against humanity committed in retaliation by the Rwandan Patriotic Army. Justice was seen as the indispensable precondition for reconciliation among Rwandans.

But what actually happened? The Rwandan government co-operated initially with the ICTR in order to prove the reality of the genocide to those who still had doubts and also in view of negationist arguments. Once that had been achieved and certain key members of the regime were at risk of being charged with the crimes they had allegedly committed, the government embarked on a policy of active obstruction. And that policy was successful. In the ten years that have elapsed since the ICTR was established it has not issued one single bill of indictment for the crimes committed in retaliation for the genocide. When ICTR Prosecutor Carla del Ponte publicly announced her intention to indict persons close to the regime, the Kigali government sought her removal and finally obtained it, even though the diplomatic conventions of her departure were respected.

The Rwandan government’s capacity to obstruct international justice worked all the better since the serious dysfunctional problems which tainted the first few years of the ICTR had affected its credibility. It is also a fact that for both political and geostrategic reasons Rwanda was never subjected to the same pressure to co-operate with international criminal justice as was exerted on Serbia.<sup>17</sup>

In such circumstances, how can the truth that is produced satisfy the objective of national reconciliation if only some of the international crimes

17 The Security Council did not extend the mandate of the tribunal, for instance, whenever 200,000 Hutu refugees were assassinated in 1996–7 in what was formerly eastern Zaire. This selectivity in prosecuting crimes is to be explained essentially by the West’s guilty conscience: it was difficult for Washington, Paris or London to accuse the Rwandan authorities of international crimes when, in 1994, it was the forces of the Tutsi-dominated Rwandan Patriotic Army which had put an end to the genocide committed under the indifferent eye of the West. What is more, the Rwandan government is a precious ally of the United States and the United Kingdom in that part of Africa.

committed are subjected to prosecution? Alison Desforges, one of the leading experts on the region of the Great Lakes and expert on the ICTR, wonders whether this international justice helped to unify the population or to divide it even further.<sup>18</sup> Scepticism is in order here, although the tribunal can be credited with making the genocide of the Tutsis an undisputed fact, which was not the case ten years ago. The US\$700 million which the ICTR has cost to date would doubtless have been better invested in rebuilding the judicial system and the rule of law in Rwanda, thus curbing the government's drift towards authoritarianism.

*The internal parameters.* These parameters concern the functioning of the actual judicial mechanism per se, thus respect for the due process of law, the security of lawyers and witnesses, the prosecutor's penal strategy, the determination of proof, the sentence and so on.

Let us take a closer look here at the one example of the penal strategy of prosecutors during or immediately after a conflict. This is the trickiest period for international justice to handle, since it introduces competition between two international relations systems – one focusing on seeking justice, the other giving precedence to seeking peace. The appropriateness of prosecuting heads of state or key figures who are suspected of international crimes but are the only persons in a position to sign peace agreements is debatable. What norm should be adopted? Ambiguity prevails – also in the ICC, where the Statute entitles the prosecutor to refrain from prosecuting war criminals in “the interests of the victims.”<sup>19</sup> International reality also shows contradictory decisions. In disagreement with Mary Robinson, the UN High Commissioner for Human Rights, Lakhdar Brahimi, the UN Administrator in Afghanistan, was against prosecuting ministers suspected of war crimes who were members of the government supported by the United Nations. Brahimi considered that the efforts to seek peace and stability would suffer.<sup>20</sup>

The Prosecutor of the Special Tribunal for Sierra Leone, on the other hand, publicized the indictment of the Liberian president on the very day he was en route to the peace negotiations; this torpedoed the negotiations but, in doing so, reconfigured the political order.<sup>21</sup> We have two different models here. Discussion of the tension between peace and justice would warrant reflection going far beyond the scope of the present article, but it is essential to devote such

18 Alison Desforges, *Leave None to Tell the Story: Genocide in Rwanda*, Human Rights Watch, 1999, p. 41.

19 Note the evolution of the international community. Prosecutor Richard Goldstone stated in accordance with the 1993 Statute of the ICTY that “unless it is endorsed by war criminals, peace without justice is worth no more than the paper and ink used”, for it would be illusory. Conversely, the mediators of the former Yugoslavia considered that seeking a just peace would result in the continuation of the war and in the death and suffering of entire populations. The ICC Statute allows the Prosecutor a wider margin of discretion than does that of the ICTY.

20 John F. Burns, “Political realities impeding full inquiry into Afghan atrocity”, *New York Times*, 29 August 2002.

21 We would point out that, although the peace negotiations ended before they ever got off the ground, the Liberian president lost legitimacy as a result of the indictment, which immediately made him a war criminal. It thus weakened his position and, under international pressure, he stepped down and sought asylum in Nigeria ... which then refused to hand him over to his judges.

attention to the effects of transitional justice. There are many factors to be taken into account, for the prosecutor does not act in a vacuum but in a specific setting determined by the internal balance of power in the conflict, the ability of the international community to exert pressure, the loss of political legitimacy through possible indictment and the timing to be observed in the sequences of negotiation and justice.

### *The impact of “show” trials*

Major trials are “didactic monuments,” to quote Mark Osiel.<sup>22</sup> They are intended to recount barbarity to society, to remind society of fundamental norms and to make known the new national and international order. In a way, the verdict is merely of secondary importance: given the horror of the crimes committed, no punishment can match the tragedy. These major trials are thus only of value if they are effective from the educational point of view. That is their sole merit. Criticizing international tribunals on the ground that they are an exhibition of justice is the wrong approach, because the purpose of that justice is precisely to show that it is taking place. Justice must not only be done, but must be seen to be done, as the saying goes. It is thus a question of examining the nature of the exhibition and assessing its effectiveness.

Here again, the indicators need to be refined. This “show” trial is performed on several stages at once. The various audiences must therefore be considered separately in order to assess its effectiveness. There are the societies most directly concerned, those for which this theatre of truth and punishment is primarily intended and which, in theory, are the target group, such as the populations of the former Yugoslavia, Rwanda, Sierra Leone, Sudan, Uganda, and so on. Then there is the international public. As the ICC Prosecutor put it, both are clients of international justice, but their expectations, reactions, and perceptions are radically different. Neither group is homogeneous. The whole difficulty for international justice is to take a line which is acceptable to all the parties concerned, and especially to the target group: the victims, the police forces, the army, the militias and so on.

There is a great deal to be learned from the case of the ICTY. Whatever its mandate might say, its role – at least while the atrocities were still being committed in the former Yugoslavia – was to appease the guilty conscience of Western opinion. The designers of the ICTY gave it a mission based on triangulation logic, which works according to the billiard ball principle: the player aims at a first ball in order to hit the one that he is really aiming at. In the case in point, the ICTY was mandated to address the populations of the former Yugoslavia, but its actual target group was the West, at least while the war was still raging. Another look at our temporal categories will show more clearly the effects of this discrepancy between the real and the supposed target group. In the period

22 Mark Osiel, *Mass Atrocity, Collective Memory and the Law*, Transactions Publishers, New Brunswick, 1999, p. 4.

of justice during and immediately after the hostilities – thus soon after the events – the Tribunal was a tremendous success in Western public opinion, at least until the war in Kosovo.<sup>23</sup> The ICTY triggered the fight against impunity and the increase in international litigation subsequently leading to the creation of numerous tribunals – the ICTR, the Special Court for Sierra Leone, the ICC – and the development of universal jurisdiction, which resulted in the criminal charges brought by Spanish and Belgian judges against former dictators Augusto Pinochet and Hissène Habré (Chad). The ICTY's success is essentially institutional and symbolic, since there were practically no trials of high-ranking state officials at that time. In the medium term, when the accused have to answer for their acts, the media and Western public opinion are wearied by the heavy technicality of the debates and the length of the trials (eighteen months on average). The Milošević trial, which Western governments hoped would demonize the former master of the Balkans and justify NATO's intervention, was totally ineffective from that point of view.

The scenario was very different on the Balkan stage. During and immediately after the conflict, the Tribunal was regarded by the Bosnians as an alibi for non-intervention or perceived as a Western instrument by a large majority of Serbs and Croats. Its legitimacy was widely cast in doubt. The international community and the ICTY bore their share of responsibility. The banning of nationals of the former Yugoslavia to senior ICTY posts, the fact that the UN General Assembly ruled out any Muslim or Orthodox judges in the initial composition of the Tribunal, its geographical location in The Hague hundreds of miles away, the absence of any ambitious communication policy in the area of the former Yugoslavia, and the hostility of nationalist Serb and Croatian media to the Tribunal all served to widen the gap between it and the populations of the former Yugoslavia for whom it was in principle intended. The NATO member states' eagerness to increase their co-operation with the ICTY at the height of the war in Kosovo confirmed the large majority of Serbs in their perception of it as the legal arm of the Atlantic alliance.

The Tribunal thus never succeeded in asserting itself either during or immediately after the various periods of war, or even in the medium term, except in Bosnia.<sup>24</sup> The arrest of Croatian General Gotovina in December 2005, charged with being responsible for the death of Serb civilians, and in particular of old people, provoked a huge demonstration by 40,000 people in Split praising the "hero" and "liberator" and mocking the ICTY. In Serbia itself, public opinion was massively hostile to the ICTY and probably created an environment ultimately

23 Western public opinion's perception of the ICTY was favourable to a large extent, even if the indictment of Slobodan Milošević in the midst of the Kosovo war gave rise to debate on how independent the Tribunal could be in view of its main sponsors and political support in the West. There are many reasons for that support.

24 In an opinion poll conducted in April 2002, only 20 per cent of the Serbians interviewed said they were convinced that co-operation with the ICTY was "morally right", and only 10 per cent considered that the ICTY was "the best way to serve justice", "Serbia: Reform Constituency Shrinks", results of the nationwide survey conducted by Greenberg Quilman Rosner Research, NDI, June 2002, p. 2.

leading to the assassination of the Prime Minister, Zoran Djindjić, in March 2003 and to an attempt to assassinate the ICTY Prosecutor, Carla del Ponte.

There was a further factor that exacerbated the hostility of many Serbs and Croats to the ICTY, which we shall call the pressure of the meta-norm. Why should the former Yugoslavs submit to international justice when the Americans were seeking to free themselves from it? This policy of double standards concurred with other factors to blacken the Tribunal's reputation in the Balkans. How could it be otherwise when the United States was threatening the republics of the former Yugoslavia, particularly Serbia and Croatia, with economic reprisals if they refused to co-operate with the ICTY, but also if they ratified the Statute of the ICC?

Thus far we have observed the various groups' perception of the Tribunal during the war and then in the short and medium term. The key issue is that of its long-term impact. How far will the work of the ICTY help to pave the way for a consensus in ten or twenty years' time on the crimes committed in that region in the 1990s? If the ICTY proves to have been able to deter the denial of mass crimes – and there are certain signs pointing in that direction, such as the fact that courts in Croatia, Serbia and Bosnia have tried their own war criminals, the Serbs' recognition of the Srebrenica massacres, and the apologies expressed by the authorities of the Republika Srpska – then the work of international justice will have borne fruit.

### *Deterrence*

One of the principal objectives of international justice is to deter new crimes. This is stated in particular in UN Security Council Resolutions 808 and 827 establishing the ICTY. This deterrent dimension is also central to NGO vindication of human rights in the fight against impunity. It is said on the Human Rights Watch website, for example, that “Justice for yesterday's crimes supplies the legal foundation needed to deter atrocities tomorrow”.<sup>25</sup>

At first sight an empirical analysis is rapidly made. Two years after the creation of the ICTY the Bosnian Serb forces committed the greatest massacre in Europe since the end of the Second World War in the UN-declared “safe zone” of Srebrenica. The UN Security Council founded the ICTR in 1994. In 1996–7 the forces of the Rwandan Patriotic Army took part in mass crimes in Kivu. Deterrence was an even greater failure at the regional level: various organizations estimate that over three million people (the vast majority of them civilians) died in the Democratic Republic of the Congo between 1998 and 2003 due either to the direct consequences of the war or to the indirect effects thereof. It is hard to imagine a more complete fiasco.

Is the deterrent capacity of the Tribunal necessarily nil? The real question is how the warring parties perceive the risk of prosecution. According to empirical observations, which should be corroborated through more comprehensive

25 See <<http://www.hrw.org/justice/about.php>> (last visited January 2006).



research, the belligerents are aware of the legal risk and act accordingly when prosecution is identified as a short-term personal threat. The UN peacekeeping forces present in the former Yugoslavia reported that the warring parties took account of the legal risk during the first few weeks after the creation of the ICTY in 1993. They later realized that the Tribunal was weak and, confident of impunity, committed the Srebrenica massacres. In Darfur, too, according to eyewitness reports, the militia scaled down their acts of violence when they felt that they might be in trouble because of them. These two examples tend to demonstrate that warring parties take the risk of prosecution into account as long as the tribunal is perceived as being determined and backed by the political and military support of the major powers. But they also show that the deterrent effect soon diminishes without prompt indictments and arrests.

Beside these parameters, which play a part in how the belligerents construe the legal risk, there is the influence of the “meta-norm”, that is, the scale of values of the international community at a given point in time. The “war on terrorism,” which is marked in particular by the US superpower’s questioning of certain areas of international humanitarian law, its challenging of the prohibition and definition of torture, and the fierce hostility of the Bush administration to the ICC, no doubt modifies the perception of the legal risk. Here, too, research would be necessary to confirm these hypotheses.

## Indicators for truth commissions

### *Production of the “truth”*

The advocates of transitional justice argue that expressing the truth leads to a process of national catharsis which channels energies towards national reconciliation. One of the key questions is the nature of the “truth” that will emerge.

The term “truth” has itself given rise to numerous debates. Let us adopt the approach of South African Truth and Reconciliation Commission Vice-Chairman Alex Boraine, who makes a distinction between three levels of truth – factual truth, personal truth, and social or dialogical truth – although they all aim to “document and analyse both actual human rights violations and the structures which have allowed or facilitated them.”<sup>26</sup> Factual truth provides a family with concrete information about the mortal remains of a deceased relative. Personal truth, in theory, allows a cathartic effect to take place for the person who voices that truth.<sup>27</sup> And finally, according to South African Judge Albie Sachs, “dialogical truth” is the truth which society adopts: “Dialogical truth is social truth, truth of experience that is established through interaction, discussion and debate”.<sup>28</sup> Here we are concerned with factual and dialogical truth (see indicator 7 for personal

26 Alex Boraine, *A Country Unmasked: Inside South Africa’s Truth and Reconciliation Commission*, Oxford and New York, Oxford University Press, 2000, p. 287.

27 *Ibid.*, p. 290.

28 *Ibid.*

truth). What are the conditions which allow these two levels of truth to emerge? It transpires that factual truth and dialogical truth are each determined by specific parameters.

The capacity to establish factual truth depends to a large extent on co-operation by the former organs of repression: the minister of the interior, the army, the police, the intelligence service, the militia and so on. But it also depends on a network of institutions, hospitals, morgues and cemeteries, whose registers often prove essential.

The state holds a trump card for ascertaining the factual truth. It can decide to vest the commission with subpoena powers enabling it to obtain documents and compel witnesses, including the perpetrators of crimes, to appear in court. This was the case in South Africa. Similarly, the South African decision to make hundreds of agents of repression appear in court helped to bring the *modus operandi* of that political criminality to light. In other words, the stronger the mandate of the commission, the greater its ability will be to establish factual truth, and hence personal and dialogical truth.

Dialogical truth aims to clarify the political responsibilities for the crimes committed. For the government it is a historical political exercise which has legitimating potential but also carries the risk of getting out of hand, since it is from the debate within society that a new consensus on the past will emerge and the present political balance will be transformed. This explains the fierceness of negotiations between old and new elites to set the stage on which dialogical truth will emerge. Factors such as defining the mandate of the commission and the victims,<sup>29</sup> determining whether or not the perpetrators shall appear in court, the possibility of prosecution for certain high-ranking officials, the commission's public presentation (indicator 5), the recommendations made in the report (indicator 6) and how they are followed up can therefore be crucial.

Each of these factors will play a part in deciding the commission's impact. The other essential aspect is the ability of a society to take note of and identify itself with the work of the commission. The weight of influence of the victims, the attitude of the political parties, churches, trade unions and former warring parties, the balance of power between the various entities and the specific nature of the transition process all condition the extent to which dialogical truth emerges. NGOs play a decisive role. In South Africa, where they are powerful, they helped to "carry" the Truth and Reconciliation Commission (TRC), even if they criticized it. In Sierra Leone, where they are weak but have strong links with the Western world, they induced the international community to create, and then back, a truth commission, but were not in any real position to enlist support in their own country, and this made itself apparent.<sup>30</sup>

29 The Chilean commission's mandate, for example, was to establish the truth about the deaths of thousands of people, but not to take account of the torture inflicted on thousands of former political prisoners. Some of the population considered themselves excluded from this truth-finding exercise, since it did not acknowledge that they were among the victims of the dictatorship.

30 Rosalind Shaw, *Rethinking Truth and Reconciliation Commissions: Lessons from Sierra Leone*, USIP Special Report No. 130, 2005.

Let us take two very different examples here, Chile and El Salvador, which highlight the ability of a society to identify itself with the work of a commission in order to change the internal balance – or not to identify with it, as the case may be.

The truth produced is partly conditioned by the balance of power between the former and the new government. In Chile, for instance, the commission's composition reflected a balance between former Pinochet supporters and democrats. The result confirmed a view of the past that endorsed "the theory of the two demons," placing the repression carried out by state agents and the acts of violence committed by left-wing extremist groups (but limited by their restricted capacity) practically on an equal footing, whereas the overwhelming majority of the crimes had been committed by the military junta. This consensual but historically questionable interpretation nonetheless discredited the Pinochet view under pressure from victims' associations, trade unions, NGOs and certain political parties. Thus, despite its limitations, the work of the commission did change the internal balance in Chilean society and promote the emergence of a dialogical truth in the medium term, which tallied with the historical truth. As a result judicial proceedings were resumed, whereas, owing to opposition from the junta's supporters, the commission's *raison d'être* had, on the contrary, been to act as a substitute for those proceedings.

Although the El Salvador commission (composed exclusively of foreign members) had more latitude in its work to establish and interpret the facts than the Chilean commission, the dialogical truth that ultimately emerged was greatly limited by the former warring parties. Their representatives, far from following the commission's recommendations to prosecute some fifty state officials and guerrilla leaders, agreed instead that the parliament would declare a general amnesty.

### *Presentation of the "truth"*

The only value of truth commissions, like trials in international courts, lies in their public impact. It is their very teaching of the policy of forgiveness that is designed to reconcile a divided society.

The key question here is the way in which the authorities and the commission should put over the message stigmatizing the past: how is this presentation of human cruelty to be staged? Should the approach be minimalist? Or, on the contrary, should public hearings be held which evoke the venerable nature of the judicial environment? And if so, should the criminals also appear in court? Should these public hearings be broadcast on television?

The choice is often dictated by the kind of message to be conveyed and by the balance of power between the human rights activists and those who embody the erstwhile repression. The greater the will to break with the past, the stronger the temptation will be to use some form of symbolic expression to convey that message. The cases of South Africa and Morocco illustrate these differences in message. In South Africa a dual objective was pursued, the aim being to demonstrate the criminal nature of the former regime (and of abuses by the African National Congress) while legitimizing the deal struck between

F. W. De Klerk and Nelson Mandela, that is, the truth in exchange for amnesty. In Morocco the commission's aim was to gain more space for democracy without undermining the continuity of the regime. In all cases, commission members are identity entrepreneurs, since they play a part in creating new rituals for the nation.

The form of presentation in fact reveals the underlying political project of which the commission is the messenger. By starting the public hearings in South Africa with prayers, a clear political message was sent out, namely that the truth-seeking exercise and, through it, the truth–amnesty transaction had the blessing of the highest religious authorities. The dramatic intensity of the confrontation between victims and tormentors reflected public expectations: ignominious censure of the criminals, but also the renunciation of justice for the sake of the higher interests of the new nation.

Commission Chairman Archbishop Desmond Tutu's handling of the religious and cultural symbols and his celebration of the "superiority" of African restorative justice over Western criminal justice were intended to legitimize the new political balance achieved. They also transformed amnesty into forgiveness.

In Morocco, the victims testified to the truth commission in 2005 before portraits of the present king, Mohammed VI, and of his late father and predecessor, King Hassan II, under whose rule they had been tortured by the security squads. In contrast to South Africa, the torturers, kidnappers and, in some cases, killers of the past did not appear before the commission. The message sent out by the royal palace was intended both to condemn the repression of those dark years and to continue the democratization process, while safeguarding the continuity of the monarchy and the organs of repression.

These two commissions were perfectly in keeping with the objectives assigned to them. They were not alibi commissions, even though they undeniably played a part in legitimizing the new government. Truth commissions must be evaluated in the light of their specific objectives.

### *Recommendations for institutional reforms and implementation*

One of the potential impacts of truth commissions lies in the recommendations published in their reports, for these recommendations draw lessons from past crimes and lay down the reforms that are essential to build a state genuinely governed by the rule of law.

Eric Brahm lists some twenty truth commissions and points out that three of them held public hearings and published reports, eight others issued public reports (without having held any public hearings), three others distributed their reports sparingly and five (Bolivia, Zimbabwe, Uganda 1986, the Philippines, Ecuador) did not issue any report at all.<sup>31</sup> In Argentina the accounts of the commission were a bestseller for months. The distribution of the report is a key factor: it helps to give the society in question the feeling that it has a hand in its

31 For a more detailed discussion see in particular Eric Brahm, above note 9, p. 35.

own destiny. The acts of violence of the past are described, the persons responsible are named, and the course to be followed in order to consolidate the rule of law is set. It is then up to society to exert pressure on the state machinery in order to ensure that the proposed reforms – with the typical purposes of improving the conduct of the police and army, truly prohibiting torture and guaranteeing fair trials – are adopted. Experience in Chile, where the recommendations made in the report were largely applied, has been one of the most favourable. Among other things, the report had advocated reparations for the victims, suggesting further that the work of the commission be taken as a basis for determining their entitlements, and it was carried out. The various recommendations served to strengthen the rule of law and to calm feelings that still ran high. In its report, the Moroccan commission announced that some 10,000 former political prisoners would be granted reparations and advocated far-reaching institutional and political reform with a view to guaranteeing justice, strengthening parliamentary control over state organs and limiting the powers of the executive.

Unfortunately, no analysis has as yet been carried out, to our knowledge, on the authorities' implementation of the recommendations set out in the reports of the truth commissions. Neil Kritz of the United States Institute of Peace in Washington, DC put forward the idea that governments should issue periodic reports on the follow-up to the recommendations and, where necessary, should explain why they consider them inappropriate.

It seems, however, that most of the recommendations have not been implemented; nor has there been any substantive discussion of them. The question is to what extent these recommendations nevertheless contribute to the democratic development of society, even if they have not been put into practice. In other words, does the commendable fact that these recommendations for institutional reforms have been put forward open a new arena for democratic debate within these societies, which will lead to future reforms?

## Indicators common to international justice and truth commissions

### *The therapeutic impact*

Transitional justice devotes special attention to the victims. The intention is that through their recovery and the amends made to them, society itself will also recover from the scars of the past and will reunite once the truth has been established and a symbolic or criminal punishment has been imposed. But do “recognition,” “justice,” and “truth” indeed have a therapeutic effect on the victims, as is claimed by many advocates of transitional justice?<sup>32</sup>

To start with, many psychologists see the non-prosecution of the tormentors as a continuation of the torture: “Impunity generates feelings of

32 For detailed research see Jamie O'Connell, “Gambling with the psyche: Does prosecuting human rights violators console their victims?”, *Harvard International Law Journal*, Vol. 46, No. 2, 2005, pp. 295–345.

defencelessness and abandonment, accompanied by symptoms such as nightmares, depression, insomnia, and somatizations.<sup>33</sup>

The fight against impunity, on the other hand, is a means of assuaging the need of certain victims for factual and personal truth. Knowing the circumstances in which a close relative died, where that person is buried and who was responsible for his or her suffering facilitates the grieving process. Personal truth is connected in particular with clarification of the past, but also with the need felt by many witnesses to express their suffering and thus to have it acknowledged by the state. These witnesses considered it indispensable to state their evidence in a public arena, whether judicial or extrajudicial. We shall discuss only these victim-witnesses here. Some of them told us that unless the perpetrators of the crimes were punished they considered it their duty to instil into their descendants the duty of avenging the dead.<sup>34</sup>

Irrespective of the motives which prompt victims to testify (a sense of moral obligation towards the dead, ideological conviction or a psychological need), they hope that their testimony will restore their dignity and will free them to some extent from their traumatic past. But this testimony is also a perilous undertaking and will affect the therapeutic potential of testifying, for the victim has to recall extremely stressful events. The psychological imperilment differs, depending on whether the victim is speaking in a court of law or in the context of a truth commission. A distinction must therefore be made between the two.

### *Risks within the context of judicial proceedings*

*The physical danger of testifying.* In Rwanda and the former Yugoslavia as well as in other judicial proceedings, the tribunals guaranteed that victim-witnesses would remain anonymous. Unfortunately, the identity of some of these witnesses was revealed, particularly in Rwanda, and as a result they received threats to their lives and those of their families, which in some cases forced them to flee. This endangerment affects the therapeutic dimension, since it destabilizes the witness and stirs up past suffering.

*The risk of retraumatization.* In the case of the two ad hoc UN tribunals, the victims only have witness status since the procedures are based on common law.<sup>35</sup> They are not there to recount their tragic experiences but to help to substantiate the prosecutor's indictment. They are then subjected to cross-examination procedures, which are sometimes conducted by particularly aggressive lawyers. In accordance with US practice, these lawyers seek to disorient the witnesses in order to weaken the prosecutor's case. Carla Del Ponte, then the ICTR

33 Diana Kordon *et al.*, "Argentina: Psychological and clinical consequences of political repression and impunity", *Q.J. Rehab of Torture and Prevention of Torture*, Vol. 8, 1998, pp. 43–4.

34 Pierre Hazan, *Justice in a Time of War. The Secret History of the International Tribunal for Former Yugoslavia*, Texas A&M, 2004, p. 160.

35 The International Criminal Court has drawn "lessons" from these dysfunctional problems of the ICTY and the ICTR and has virtually granted victim-witnesses civil party status.

Prosecutor, deplored the fact that the cross-examination should become “an instrument of torture” in the context of the Arusha Tribunal.<sup>36</sup> This is an exaggeration, but one which nevertheless underlines the perverse nature of the cross-examination when conducted by lawyers out to destabilize very vulnerable witnesses, such as women who have been subjected to multiple rapes. Drawing lessons from these precedents, the ICC has formulated procedures which are intended to prevent the retraumatization of victims. A further point to be considered is the verdict: often victims are disappointed with the sentence, which they consider too lenient, and are adversely affected by it. But justice is not a therapeutic process, even though it does sometimes have favourable effects.

*North–South disparities.* International justice is the product of rich countries. It grants the accused elementary rights according to the criteria of affluent societies, rights which victims in poor countries do not necessarily enjoy. Rwanda is the most extreme case, with the shocking discrepancy between surviving victims of the Rwandan genocide and its perpetrators, who contaminated them with the AIDS virus but who, due to the Rwandan state’s lack of funds, are the only persons to enjoy the privilege of treatment. This appalling difference in treatment between tormentors and victims can affect the therapeutic dimension of testifying.

We have stressed here that the therapeutic dimension of testifying can never be taken for granted and that the conditions in which testimony is given must be borne in mind.

### *Risks within the context of truth commissions*

The dynamics of truth commissions differ from those of judicial proceedings. The fact that the culprits are not punished gives rise to a variety of reactions in the victims, which, depending on their individual response, range from a profound feeling of injustice to the granting of pardon and the return to some measure of serenity. Generally speaking, the risk taken in truth commissions seems to be lower in psychological terms for victims than in judicial proceedings. They are not confronted with their tormentors (except in the case of South Africa). Nor are they a “ping-pong ball” between the prosecution and the defence. They even personify the subject of law – the leading role on this stage. At first sight, all these factors confirm the idea that this restorative justice is beneficial for the victims, particularly for those who testify.

Yet the Trauma Centre for Victims of Violence and Torture in Cape Town, South Africa, estimates that 50 per cent to 60 per cent of the hundreds of people with whom it has worked experienced serious psychological problems after testifying or said that they regretted having taken part in the TRC’s hearings.<sup>37</sup> A number of them were “retraumatized” to such a point that Trudy de Ridder,

36 In the TV documentary *Rwanda: la justice prise en otage*, ARTE/TSR/Article Z, produced by Gonzalo Arijon and Pierre Hazan, 2003.

37 Hayner, above note 3, p. 144.

one of the psychologists who worked with the victims who testified before the TRC, wonders whether the political benefit gained by society justifies the suffering caused to the victims by the truth commission hearings.<sup>38</sup> Moreover, as Rosalind Shaw points out, a TRC might disrupt traditional justice mechanisms, as happened in Sierra Leone.<sup>39</sup>

Our purpose is not to assert here that witnesses are systematically ill-treated but to underline the fact that testifying is not necessarily therapeutic for the victims. Some victims do actually derive satisfaction from publicly stating their share of the truth. They sometimes obtain precious details of the circumstances in which relatives died and the whereabouts of their remains, which facilitates the grieving process. They may also find it satisfying to see society punish their tormentors, either with penal sanctions or at least symbolically. Some have been calmed by the remorse expressed by their torturers or by the killers of their relatives. For other victims, however, public disclosure of their suffering (about which their relatives often knew nothing) and the fact of recalling that past brings little relief. On the contrary, it causes serious psychological problems. The tribunals and truth commissions recognize this reality implicitly, since those which have the means to do so provide psychological support for victims in order to prevent them from breaking down during their testimony.

### *The effectiveness of public apologies*

Transitional justice attaches particular importance to apologies. The reason is simple: whenever judicial proceedings are excluded or those who are in power have had no responsibility for the crimes committed, the purpose of public expressions of regret is that the state should acknowledge its responsibility and thus prevent a repetition of those criminal practices.

The most emblematic case was that of German Chancellor Willy Brandt, who on 9 December 1970 knelt in respectful meditation at the monument to the Warsaw ghetto, thus prefiguring an era of public apologies. The novelty and forcefulness of this act on the part of an anti-Nazi veteran set a virtuous cycle in motion: through his gesture of repentance he took upon himself the crimes committed by others in order to offer an apology. In so doing he took part in a process to restore normal relations between the victims and Germany and thus contributed to Germany's symbolic re-entry into the concert of civilized nations. It is a process of virtuous triangulation, in which the expression of regret modifies the relationship between the person who expresses it, the victims, and the public, in this case the international community. That act of humility also brought a symbolic benefit for the person offering the apologies: his sacrificial position (since

38 Trudy de Ridder, *The Trauma of Testifying: Deponents' Difficult Healing Process*, Track Two, Vol. 6, Nos. 3 & 4, December 1997 <[http://ccrweb.ccr.uct.ac.za/archive/two/6\\_34/p30\\_deridder.html](http://ccrweb.ccr.uct.ac.za/archive/two/6_34/p30_deridder.html)> (visited October 2004).

39 Shaw, above note 30.



he was apologizing for acts which he had not himself committed) enhanced his moral prestige.

Inspired by this precedent and induced by the prevalent moralizing ideology of the post-cold-war era, expressions of regret have multiplied over the last few years. There have been so many that count has been lost of the number of heads of state and high-ranking officials who have apologized for crimes committed recently or centuries ago.

These apologies are now demanded by NGOs, which consider that expressions of regret help to consolidate the rule of law and to boost the confidence of citizens in institutions by marking a clear boundary between the “dark years” and the present time.<sup>40</sup> The effectiveness of such apologies is very relative, however. An apology can serve to purify, provided that it is not perceived by the society concerned as a routine, trivial gesture devoid of substance. This fundamental criteria distinguishes a sincere expression of regret from one that is perceived in the public domain as symbolically and politically charged. The apology expressed by President Chirac acknowledging for the first time the responsibility of the French state for the round-ups of the Jews during the Second World War had real impact. Conversely, President Bill Clinton’s apology for slavery and the slave trade, made outside the United States and moreover in an African country which historically was not directly concerned, had no impact whatsoever. Afro-Americans and the African countries affected by the transatlantic slave trade regarded it as a flimsy apology and scarcely took any notice. The inappropriateness of the location (Uganda) and the lack of precision by the addressee made it ineffective. The expression of regret, on the other hand, is ostensibly addressed in accordance with the billiard ball principle to certain victims, but is in fact destined for a different target group. The apology offered by UN Secretary-General Kofi Annan in 1999 for his responsibility in the failure to protect the populations of the former Yugoslavia and Rwanda was a case in point. The real purpose of those expressions of regret was not so much to convince the victims of the sincerity of the apology, as to “purify” the UN peacekeeping operations in the eyes of the international community and reinstate them. This objective was achieved with the real target public (the international community) but not with the target group for which the apology was in theory intended (former Yugoslavs and Rwandans).

Acts of repentance work according to various models. It is essential to identify how this dramatic art operates. What is the most appropriate setting? Which are the real target groups? Must the logic of triangulation be applied in order to reach them? The example of Willy Brandt shows that acts of repentance can play a part in pacifying societies.

40 To quote an example, the US organization Human Rights Watch asked the Moroccan authorities to “Acknowledge that grave human rights abuses in the period under study by the ERC [truth commission] were systematic and ordered at the highest levels of the state, and offer official statements of regret to the victims and their families”. “Morocco’s truth commission: Honoring past victims during an uncertain present” <<http://hrw.org/reports/2005/morocco1105/>> (last visited January 2006).

### *The effectiveness of reparations*

The establishment of truth and the stigmatization of the criminals are conceived as making amends to the victims. But in the past few years, over and above policies of forgiveness and punishment, emphasis has been laid on granting material compensation to the victims, who often live in conditions of extreme poverty. Unlike the ad hoc UN tribunals, the ICC has set up a voluntary fund for reparations to victims.

The money issue is intensely symbolic. First of all, it raises the question as to the kind of reparation, a term which itself is profoundly ambiguous.<sup>41</sup> What exactly is to be compensated? The loss of a relative? The suffering? The income lost as a result of illegal detention? The loss of material assets? Reparations carry a message: that of acknowledgement of the crime. There is a political dimension and a societal dimension at both the collective and the individual level.

In the case of Adenauer's Germany, reparations were the price of the country's return to normal. The United States had stipulated that the payment of reparations to the Hebrew state and to the survivors of the camps was a *sine qua non* for West German membership in the UN and NATO. The reparations paid to Israel were West Germany's admission ticket for joining the international community.

Alongside this political dimension there is also a societal dimension, which primarily concerns the victims. Some victims feel that such money cannot make good what is irreparable and cannot be accepted because it is blood money for the dead. Others consider, on the contrary, that the suffering of the past must entail some reparation, even if it can never bring back the years that have been lost. Thus, for many South Africans, the truth commission was based on a transaction: the perpetrators obtained amnesty, and the victims received reparations in exchange.<sup>42</sup> Besides, that was what the TRC had recommended, but the reparations offered by the authorities were meagre and belated.<sup>43</sup> Many former victims of apartheid felt that they had been cheated and began to resent the commission and the very idea of reconciliation.<sup>44</sup>

In addition to the individual attitudes of victims, there is a debate which involves society as a whole. For reparations are the fruit of negotiations, indicating that standards are changing and that a new balance is emerging within the society.

41 The concept of reparation is vague: it refers to a complex reality in which several operations often overlap and merge: restitution, indemnification, compensation and reparation. It is important to clarify the nature of the payment in order to prevent any use of it for demagogical purposes and to enable public opinion to judge the terms of this ethical-financial transaction in full knowledge of the facts.

42 Of the 7,112 perpetrators who requested amnesty, 849 were granted it. The others were never greatly disturbed.

43 The government did not begin paying compensation to victims until December 2003, more than five years after the TRC had presented its findings. A fund of 660 million rand (US\$100 million) was set aside to make one-off payments of 30,000 rand to 22,000 victims – considerably less than the fund of 3 billion rand recommended by the TRC.

44 The connection between two terms as ambiguous as “reparation” and “reconciliation” is itself problematic, as is demonstrated by the different attitudes adopted by the mothers and grandmothers of the Plaza de Mayo in Buenos Aires: some “want their hatred to remain intact”, seeing it as loyalty to their murdered children; others are more inclined to accept reparations, for example because of other ethical choices or out of financial necessity.

The crucial issue here is the nature of this ethical-political transaction. Just how acceptable are its terms? This question thus concerns not only the victims and governments involved but all of the various societies concerned.

The case of Switzerland clearly shows that the acceptability of this transaction is not a matter solely for the society whose members receive reparations but is also evaluated in the society that grants them. For example, in a referendum held in Switzerland, the majority of the Swiss population voted against the government's plan to sell some of the gold reserves of the Swiss National Bank in order to create a humanitarian fund, that would have served, *inter alia*, to make reparations for the policy of rejecting Jews at the Swiss borders during the Second World War. This plebiscite revealed a general truth: reparations are not merely a binary relationship between the party granting them and the receiving party, but by virtue of their symbolic power they involve and activate entire societies. In Israel, for instance, the tension created in one section of public opinion by the Ben Gurion government's announcement of an agreement on German reparations sparked violent demonstrations. So violent, in fact, that the security services set up a bodyguard for the Prime Minister, fearing for the first time ever an Israeli attempt to assassinate him.

In Indonesia, a government project was set up to grant compensation to victims on condition that they pardon the culprits. This transaction, which placed the victims in the morally shocking position of feeling that they were selling their conscience, was later abandoned. In Argentina, reparations were granted to victims at the same time as the so-called Punto Final (amnesty) laws were passed. In both cases, the *quid pro quo* for reparations was intended to be the release of the tormentors.

In the final analysis, the acceptability of the terms of this ethical-financial transaction depends on the choices made by society and victims. Depending on how they are interpreted, reparation payments will either bring tension into the process of societal normalization or, on the contrary, will contribute to it.

### *The process of building a common narrative*

The advocates of transitional justice highlight the need to write a common narration transcending introverted, identity-related accounts. In this regard the opening of archives, the creation of memorials and museums, the work of historians, the rewriting of school textbooks, the work of artists and so on play a major role.

In his book *Purifier et détruire*, Jacques Sémelin introduces the concept of "delusional rationality" to account for the process of de-bonding and de-civilization among human groups which creates an environment conducive to massacres and acts of genocide.<sup>45</sup> The logic of social reconstruction, on the other hand, aims to re-ritualize, re-humanize and re-civilize relations with

<sup>45</sup> Jacques Sémelin, *Purifier et détruire: Usages politiques des massacres et génocides*, Seuil, 2005, p. 87 (*Purify and Destroy: The Political Uses of Massacre and Genocide*, Hurst, April 2006).

others through a series of mechanisms. This process of upgrading norms can only be multidimensional (institutional, political, symbolic, artistic), and it is a continuous process. It also reflects a cultural dimension. In Mozambique, practically no memorials were built after the civil war that ended in 1992, since the traditional mechanisms of social reintegration were based on ritual and not on verbalization.

Remembrance is by definition a continuing process. It plays a part in transitional justice, but at the same time reflects what the mechanisms of that justice have already accomplished. As such, it is both an indicator in itself and a process providing information over time on the effectiveness of all the other transitional justice mechanisms. The rebuilding of the Mostar bridge linking the two communities, the determination of the widows and mothers of Srebrenica to rebury their relatives nearer to the place where they died, or again the writing of a school textbook on the Arab–Israeli conflict by both Israeli and Palestinian historians – all of this can soothe wounds but will never heal them completely. The challenge for these conflict-riven societies is to develop a symbolic bonding system without denying the past, mindful of the fact that memory is fortunately a dynamic process which also involves forgetting, and that each generation reinterprets the events of the past on its own.

## Conclusion

Since the end of the cold war, Western governments and NGOs have invested financially, politically and symbolically in the mechanisms of transitional justice – to the point where these mechanisms have gradually become a vector of globalization, seeking to stabilize, pacify and reassure entire populations.

These mechanisms have a long-term “re-civilizing” capacity, on condition that they do not become a set of tools used automatically in any context, whatever its specific individual nature. Because of the appeal they have for Western public opinion, transitional justice mechanisms have all too often been introduced by the international community, sometimes at great expense, without regard for the internal dynamics of the populations for which they were intended. In some cases the short term political benefits of media announcements have been treated as more important than the reality of local needs. Transitional justice mechanisms can play a crucial role in societies torn apart by the violence of conflict, but they must contribute effectively to the will of the local actors to take their destiny into their own hands by devising political and institutional safeguards to prevent a repeat of mass crimes.

It is essential to establish evaluation processes in order to better define the role of the international community, to understand the reasons for the dysfunctioning of transitional justice mechanisms when it occurs and to identify the potentialities of transitional justice for social transformation and democratization. Our intention here has thus been to create a set of criteria to that effect, using temporal categories and indicators. Unless there is transparency, and unless

monitoring procedures are introduced, transitional justice mechanisms may prove ineffective and become a convenient alibi for inertia, or even defeat the very purpose of social reconciliation, for which they have been created.